TRIAL EVIDENCE MANUAL

2025

COPYRIGHT © 2025 BY COLORADO DISTRICT ATTORNEYS' COUNCIL

NOTE FROM THE EDITOR

CDAC is proud to publish this 2025 Edition of the Trial Evidence Manual. This Manual is the product of hundreds of hours of work from CDAC and dozens of contributors. We hope you find it useful.

This Manual is intended to aid prosecutors in the courtroom during trial when legal issues arise and prosecutors have insufficient time to research and prepare. It is not intended to teach prosecutors the law or offer legal analysis. Nor is it intended to substitute for legal research such as reading statutes. Although the Manual contains authority, it is not itself an authority and should not be cited as such.

The Manual is organized into chapters and subchapters. The paragraphs contained in each subchapter are designed to simply and quickly communicate important law applicable to the topic. To make these paragraphs easier to read and understand, and to reduce the overall length and technicality of the Manual, CDAC has removed unnecessary internal citations, quotation marks, and introductory signals.

CDAC and its contributors have reviewed the status all of the law in this manual to ensure the authority contained in this edition is up-to-date and valid as of January of 2025. It is, however, possible that CDAC or one of its contributors have missed a new case on point or that the law has changed since this manual has been published. Sometimes, the consequences of new law is not yet fully understood. Accordingly, the Manual warns readers to consider older authority in light of the newer.

In addition to updating authority, the revisions in this edition were focused on improving clarity and readability, enforcing consistency, reducing redundancy, and remaining true to its limited purpose. As a result, you may find that certain chapters have been reorganized and certain sections removed from previous editions. A considerable amount of uncited commentary and analysis was removed or modified because this Manual was not intended to teach the law or serve as its own legal authority.

For the first time since this Manual's creation, CDAC has noted the names of any contributors at the end of each chapter. These contributors checked the current validity of the law and suggested additional edits to the 2019 edition. CDAC thanks each of these contributors for their incredible work.

Despite CDAC's best efforts, due to its size, the complexity of the material, and the time required to thoroughly review even a single chapter, the Manual may contain errors, substantive and otherwise. If you identify a significant error, please contact me using my email address below.

Not all cases and statutes are hyperlinked in this edition due to a change with Westlaw.

CDAC thanks for you using the Trial Evidence Manual and wishes you well in your trial practice.

Brad Turner
Editor, 2025 Trial Evidence Manual
Staff Attorney
Colorado District Attorneys' Council
Brad@cdac.state.co.us

COPYRIGHT © 2025 BY COLORADO DISTRICT ATTORNEYS' COUNCIL 1

NOTE FROM THE EDITOR 2

CHAPTER 1 34

AFFIRMATIVE DEFENSES 34

1.1 INTRODUCTION 35
A. Defenses Based in Statute and Case Law (not all are actual affirmative defenses) 35
B. New and Important Cases 37
C. Burden of Proof 39
1.2 CHOICE OF EVILS 39
A. Burden of Proof 39
B. Standard for Appellate Review 39
C. Rooted in Doctrine of Necessity 40
D. "Choice" Misnomer 40
E. Elements of the Defense 40
1. Threshold determination 40
F. Illustrative Cases 41
1. Civil disobedience 41
2. Religious "deprogramming" 42
3. Prison escapes 42
4. Traffic violations 43
5. Child custody cases 43
6. Economic crimes 44
1.3 CONSENT 44
A. Statute 44
1. Ratification by victim not a defense 44
2. Payment of restitution not a defense 45
3. Legal capacity required 45
B. Sexual Assault and Unlawful Sexual Contact Cases 45
1. Relation to submission 45
2. Submission induced by fear 46
1.4 DURESS 46
A. Statute 46
B. Elements of Defense 47
C. Threat of Imminent Danger Required 47
1.5 ENTRAPMENT 47
A. Statute 47
1. Statute sets forth a subjective standard 48
B. Elements of the Defense 48
1. Police methods v. police motives 49
2. Predisposition evidence obtained after initial contact with defendant 49
C. Illustrative Cases 50
1. Theft by receiving 50
2. Undercover drug transactions 50
3. Internet sting operations 51
1.6 INTOXICATION 51
A. Self-Induced or Voluntary Intoxication 51
1. Definition 51
2. Can negate specific-intent *mens rea* 52

3. Not a defense to general-intent crimes ... 53
4. Rule predicated on moral culpability of the defendant ... 53
5. Peculiar sensitivity of the defendant not a defense ... 54
C. Involuntary Intoxication ... 54
1. Prescription drugs ... 54
1.7 MISTAKE ... 55
A. Statute ... 55
1. Mistake of Fact (effect of ignorance or mistake upon culpability) ... 55
2. Mistake of Law (effect of ignorance or mistake upon credibility) ... 55
B. Factual or Legal Impossibility is Not a Defense to an Attempted Crime ... 56
C. Reasonable Belief Minor is Eighteen Years of Age or Older ... 56
D. Must be Aware of Protection Order ... 56
1.8 INDEPENDENT INTERVENING CAUSE ... 56
1.9 ABANDONMENT OR DISENGAGEMENT ... 58
A. Defense of Abandonment Available in Attempt Cases Only ... 58
B. Defense of Abandonment Not Available Once the Crime of Attempt is Complete ... 59
1.10 HEAT OF PASSION ... 59
A. Elements and Effect ... 59
B. When the Lessor-Included Offense is Available as a Jury Instruction ... 60
1.11 INSANITY ... 60
A. Elements of Defense ... 60
B. Statutes ... 61
C. Waiver of Privilege ... 61
D. Mental Slowness is Not a “Mental Disease or Defect” ... 61
E. Voluntary Intoxication Cannot be Used to Support an Insanity Defense ... 62
1.12 CORPORAL PUNISHMENT ... 63

CHAPTER 2 ... 64

ALIBI ... 64

2.1 INTRODUCTION ... 65
2.2 ALIBI NOT AN AFFIRMATIVE DEFENSE ... 65
A. Defendant Still Entitled to Alibi Instruction in Theory of the Defense ... 65
B. But Not When Covered by Other Instructions ... 65
C. Use of Alibi Notice as Prior Inconsistent Statement ... 65
2.3 NOTICE REQUIREMENT ... 66
A. Consequences of Untimely Disclosure ... 66
1. No Exclusion of Defendant’s Alibi Testimony ... 66
2. No automatic exclusion of alibi witnesses upon failure to comply with notice requirements—inquiry into “good cause” required ... 66
3. Defense Failure to Comply with Disclosure Requirements, Found to be Proper Basis for a Mistrial ... 67
B. Disclosure of Rebuttal Witnesses ... 67
Disclosure of Rebuttal Witnesses Merely Impeaching Credibility of Alibi Witnesses Not Required ... 67
C. Acceptance of Guilty Plea after the Filing of a Notice of Alibi Defense Requires Added Precaution ... 67
D. Late Disclosure of Alibi no Basis for Post-Conviction Relief ... 68

CHAPTER 3 ... 69

BILL OF PARTICULARS ... 69

3.1 INTRODUCTION ... 70
A. Statutory Exception ... 70

B. Standard of Review ... 70
C. Considerations ... 70
A. Bill of Particulars Not to be Used for Discovery ... 71
1. Time or Date of Offense ... 71
a. Specific incidents ... 72
B. Bill of Particulars Will Not Save a Defective Pleading ... 73
A. Broad Bill of Particulars Can Be Sufficient ... 73
B. Waiver of Defects in Bill of Particulars ... 74
C. In the Alternative Use of Unanimity Instruction ... 74
D. Bill of Particulars Can Bind Prosecution ... 74

CHAPTER 4 ... 75

CHARACTER EVIDENCE ... 75

4.1 ANALYTICAL FRAMEWORK ... 76
A. Elemental Character Rule ... 76
B. Propensity Evidence ... 76
C. Exceptions ... 76
D. Manner and Method of Proving Character ... 77
4.2 CHARACTER OF THE ACCUSED: C.R.E. 404 ... 77
A. C.R.E. 404(a)(1) ... 77
B. Analytical Framework ... 78
C. Evidence Limited to Pertinent Character Trait ... 78
D. Law Abidingness of the Defendant ... 78
E. Defendant's "Truth and Veracity" Not Pertinent Under C.R.E. 404(a) ... 79
F. Evidence of Defendant's Similar Transaction of Sexual Misconduct ... 80
4.3 RAPE SHIELD ... 80
A. Presumption of Irrelevance ... 81
B. Once Evidence Meets an Exception, it Must Then Meet the Other Rules of Evidence. ... 81
C. Procedural Requirements ... 81
1. Contents of the pretrial motion ... 82
2. Contents of the offer of proof ... 82
3. Contents of offer of proof when alleging that victim has history of false reporting ... 82
4. *In camera* hearing ... 83
D. Statute Does Not Deny Defendant's Right of Confrontation ... 83
E. Discovery of Rape-Shield materials ... 84
F. Foundation Required ... 84
G. Evidence Excepted From the Statute Not Automatically Admissible ... 85
1. Reputation for promiscuity precluded ... 85
2. Victim's testimony regarding lack of sexual activity although may be permitted under the rape shield statute, may be prohibited under C.R.E. 401, 402, and 403. ... 85
3. Evidence of prior sexual assault excludable ... 86
4. Evidence of consensual intercourse with another inadmissible when defense asserted is consent ... 87
5. Evidence of victim's alleged sexual fantasy and prior sexual relationship with the defendant admissible ... 87
6. Evidence of victim's sexual relationship with another relevant to issue of motive to lie ... 88
7. Evidence of prior sexual assaults on victim by alternate suspect ... 88
4.4 CHARACTER OF THE VICTIM: C.R.E. 404(A)(2) ... 88
A. C.R.E. 404(a)(2) ... 88
B. Character of the Victim in Assault and Self-defense Cases ... 88
1. "Bad acts" of the victim ... 88
2. Victim's character for peacefulness ... 90

4.5 METHODS OF PROVING CHARACTER: C.R.E. 405 ... 90
A. C.R.E. 405 ... 90
B. By Reputation or Opinion ... 90
1. Foundation for character testimony ... 90
a. Witness's knowledge as to reputation ... 90
i. Reputation v. rumor ... 91
ii. "Community" defined ... 91
b. Witness knowledge: opinion ... 91
c. Timeliness ... 92
C. Proof of Character by Specific Instances of Conduct: C.R.E. 405(b) ... 92
D. Cross Examination of Character Witnesses ... 93
1. Defendant's or witness character must be clearly put in issue ... 94
2. Examiner must have a good-faith basis for question and should determine admissibility *in camera* ... 94
3. Form of the question: reputation v. opinion testimony ... 94
4. Limiting Instructions ... 95
5. Extrinsic evidence of specific instances of conduct is generally prohibited ... 95
E. Rebutting Character Evidence ... 95
4.6 HABIT AND ROUTINE PRACTICE: C.R.E. 406 ... 96
A. General Habit and Routine Practice ... 96
4.7 ATTACKING CREDIBILITY OF A WITNESS: C.R.E. 608 ... 97
A. Attacking Credibility Generally ... 97
1. Prior Convictions ... 97
2. Specific instances of conduct ... 98
4. Extrinsic evidence prohibited if collateral matter; bias not a collateral matter ... 100
5. Notice to Court ... 100
6. Self-incrimination under C.R.E. 608 ... 101
B. Defendant as Witness ... 101
C. Evidence of Truthful Character ... 102
1. Contradiction by other testimony ... 102
2. Prior inconsistent statement ... 102
3. Theory of the case and opening statements ... 103
4. Opinion or Reputation ... 103
5. Bolstering ... 103
6. Witness's plea agreement ... 105
7. Jury Instructions ... 106

CHAPTER 5 ... 107

CIRCUMSTANTIAL EVIDENCE ... 107

5.1 DEFINITION AND STATUS ... 108
5.2 RELEVANCY AND CIRCUMSTANTIAL EVIDENCE ... 108
A. Admissibility ... 108
B. Illustrative Cases ... 108

CHAPTER 6 ... 113

CLOSING ARGUMENT ... 113

6.1 INTRODUCTION ... 114
6.2 SCOPE OF CLOSING ARGUMENTS ... 115
A. Scope of Closing Argument within Trial Court's Discretion ... 115
B. Standard of Appellate Review ... 115

1. Contemporaneous Objection: Review for Abuse of Discretion and Harmless Error 115
2. No Timely Objection Raised: Review for Plain Error 116
3. Impact of a Curative Instruction 116
6.3 COMMENTING ON THE LAW 117
A. Arguments on the Burden of Proof, "Beyond A Reasonable Doubt" 117
B. Comments on Law Not Contained in Instructions 118
1. Statutes 118
2. Other legal sources 118
3. Comments about lesser-included offenses 119
C. Misstatements of Law 120
D. Comment on Disallowed or Limited Purpose Evidence 121
1. Out of Court Statements Offered for Limited Non-Hearsay Purpose 121
6.4 EXPRESSION OF PERSONAL BELIEF OR OPINION 121
A. Personal Belief or Opinion on Credibility of Witnesses 121
1. Lies and lying 123
2. Personal beliefs or opinion of the particular prosecutor 124
3. Personal attacks on witnesses 125
6.5 ARGUING FACTS NOT IN EVIDENCE 125
A. Hypothetical Theories 125
B. Demeanor at Counsel Table 126
C. Permissible to Argue Facts of Common Knowledge 126
D. Misleading Statement of Facts 127
E. Comments on Subject Matters Excluded at Trial 128
F. Tailoring Arguments 128
6.6 INJECTING ISSUES BROADER THAN GUILT OR INNOCENCE 128
A. Placing the Jury in the "Shoes of the Victim" (AKA "The Golden Rule") 128
B. Commenting About the Impact on the Community 129
C. Comments Attacking the Character of the Defendant 130
D. Attacks Upon Defense Strategy, Defense Counsel, and Defense Witnesses 131
E. Injecting Issues Beyond Those Before the Jury for Consideration 132
F. Rhetoric Arousing Patriotic Passions 133
G. Rhetoric Injecting Racial Considerations 133
H. Use of Physical Evidence and Demonstrations 134
I. Pressuring Jurors 134
6.7 COMMENT ON THE EXERCISE OF CONSTITUTIONAL RIGHTS OF THE DEFENDANT 134
A. Comment on Defendant's Failure to Testify 134
1. Standard Generally 134
2. Direct or Indirect Comment on Failure to Testify (is Improper) 135
3. Proper to characterize the evidence as "uncontroverted" or "uncontradicted" 136
4. Comment on defendant's invocation of spousal privilege 136
B. Comment on the Defendant's Post-Arrest Silence 137
C. Comment on the Defendant's Pre-Arrest Silence 138
D. Comment on the Defendant's Failure to Present Evidence 138
E. Comment on Defendant's Exercise of Right to a Jury Trial 139
F. Comment on Defendant's Refusal to Submit to Non-Testimonial Evidence Request 139
G. Comments Regarding the Presumption of Innocence 140
6.8 RETALIATORY OR PROVOKED ARGUMENT 140
A. Examples of Retaliatory or Provoked Argument 140

CHAPTER 7 142

COMPLAINT AND INFORMATION ... **142**

7.1 INTRODUCTION ... *143*

7.2 APPLICABLE RULES OF CRIMINAL PROCEDURE ... *143*

7.3 APPLICABLE STATUTES ... *143*

7.4 FILING CHARGES ... *144*

A. Rules and Statutes ... 144

B. Filing of Charges is Within the Discretion of the Prosecutor ... 144

1. Whom to Charge ... 144

2. Nature and level of offense to be charged ... 144

a. Statutory exception ... 145

C. Filing Direct Information ... 145

1. Direct Filing Upon Dismissal in the county court ... 146

2. "Good Cause" Prerequisite for Direct Re-filing ... 146

a. Failure to properly subpoena a witness ... 146

D. Filing Information Rather than Indictment ... 147

E. Filing Information While Preliminary Hearing is Pending Filing ... 147

7.5 REQUISITES OF THE COMPLAINT/INFORMATION ... *147*

A. Rules and Statutes ... 147

1. The Felony Complaint: Crim. P. 3(a) ... 147

a. Sufficient to toll statute of limitations ... 147

2. The Information: Crim. P. 7(b) ... 147

a. Technical defects ... 148

b. Detail not required ... 149

B. Sufficiency of the Information is a Matter of Jurisdiction ... 149

C. Variance: Allegations and Proof ... 149

1. Variance as to time or date of offense ... 150

2. Variance in predicate felony for habitual-offender sentence-enhancer count ... 150

3. Variance impairing ability to defend ... 151

7.6 LANGUAGE AND FORM ... *151*

A. Sufficient to Charge Language of the Statute ... 151

1. Information must charge essential, jurisdictional elements ... 152

2. Indictment must allege specific act where language of statute is general ... 152

B. Pleading in the Conjunctive ... 153

C. Duplicitous Charges ... 153

1. Lesser-included offenses ... 153

D. Incorrect Statutory Reference ... 154

1. Exceptions in the statute ... 154

2. When crime of violence must be separately pleaded ... 155

3. Special offender circumstances must be charged in the information ... 155

7.7 CHALLENGING DEFECTS IN THE COMPLAINT, INFORMATION ... *155*

7.8 AMENDMENT TO THE COMPLAINT, INFORMATION ... *156*

A. Rule to be Construed Liberally ... 156

B. Determination of Form, Substance ... 156

1. Amendment as to form ... 156

a. Surplusage ... 157

2. Amendment after expiration of limitations period ... 157

a. Amendment after commencement of trial ... 157

3. Impact of jury instructions ... 158

7.9 CIVIL INFRACTIONS ... *159*

CHAPTER 8 .... **161**

CONFRONTATION **161**

8.1 INTRODUCTION *162*
8.2 OUT-OF-COURT STATEMENTS BARRED BY THE CONFRONTATION CLAUSE *163*
A. When is a Statement Testimonial? 163
B. Examples of Testimonial Statements 163
1. Statements to police (non-emergency) 163
2. Statements to other legal authorities 164
3. Guilty pleas 164
4. Documents prepared for trial 164
5. Lab reports 164
C. Examples of Non-Testimonial Statements 165
1. Non-hearsay statements (i.e. not offered for truth) 165
2. Ongoing emergency 165
3. Child welfare 165
4. Statements to medical providers 165
5. Statements to other non-law enforcement 165
6. Administrative and business records 166
7. Dying declarations (§ 13-25-119) 166
8. Defendant's statements 166
D. When the Defendant Has Had an Opportunity to Cross-Examine 167
8.3 DEFENDANT FORFEITING OR WAIVING THE RIGHT TO CONFRONT A WITNESS *167*
A. Forfeiture by Wrongdoing 167
1. Hearsay Exception 168
2. Unavailability 168
B. Waiver 168
1. Statutory waiver under § 16-3-309(5) no longer valid absent express waiver 168
2. Opening the door 169
8.4 OTHER NOTES ON THE RIGHT TO PHYSICALLY FACE A WITNESS *169*
A. Right to be Present in Courtroom 169
B. Facility Dogs Do Not Implicate Confrontation Rights 169
8.5 REQUIREMENTS FOR THE RIGHT TO CROSS EXAMINE *169*
A. Joint Trials of Co-Defendants (*Bruton* Analysis) 170
B. Other Improper Restrictions on Cross-Examination 171
C. Reasonable Restrictions on Cross-Examination 172

CHAPTER 9 .... **173**

CONTINUANCES **173**

9.1 STANDARD FOR GRANTING OR DENYING CONTINUANCES *174*
A. Generally within Discretion of Trial Court 174
1. Factors to be considered 174
2. Victim's position 174
3. Standard of appellate review 175
4. When charged to the defendant 175
9.2 GROUNDS FOR CONTINUANCE *175*
A. Absent Witness 175
B. Defense Failure to Subpoena Expert Witness 177
C. Defense Continuance Based on Being Unprepared 178

D. Continuance to Obtain Replacement Counsel ... 178
1. When Defendant's request for continuance does not implicate Sixth Amendment right to counsel of choice .. 180
2. Invocation of right to proceed *pro se* ... 181
3. Right to counsel vs. right to speedy trial ... 181
a. Withdrawal of counsel due to conflict of interest ... 181
E. Absence of Counsel ... 182
F. Information Obtained During or Just Before Trial ... 182
G. Additional Time to Obtain Evidence ... 183
H. Continuance of Sentencing Hearing ... 184

CHAPTER 10 ... 185

CORPUS DELECTI ... 185

CHAPTER 11 ... 188

REAL AND DEMONSTRATIVE EVIDENCE ... 188

11.1 REAL VS. DEMONSTRATIVE EVIDENCE ... 189
A. Real Evidence ... 189
B. Demonstrative Evidence ... 189
11.2 ADMISSIBILITY OF REAL EVIDENCE ... 189
A. Governing Rules of Evidence ... 189
1. Connection to the defendant, the victim, or the crime required ... 189
2. Circumstantial connection sufficient ... 190
a. Illustrative cases ... 190
B. Identification and Authentication Where Chain of Custody is Not Required ... 191
1. Pre-C.R.E. caselaw on identification of real evidence ... 192
2. Illustrative cases ... 192
C. Chain of Custody ... 192
1. When chain of custody is required ... 192
2. When chain of custody is not required ... 193
3. Sufficiency of chain of custody ... 193
a. Missing link ... 193
b. Weak link ... 193
4. Confusion as to chain of custody and the possibility of tampering ... 194
5. Instruction on chain of custody improper ... 194
6. Illustrative cases ... 194
11.3 PHOTOGRAPHS ... 195
A. Foundation ... 195
B. Relevancy ... 195
1. General rule ... 195
2. Admissibility within trial court's discretion ... 196
3. Murder, morgue, and autopsy photographs ... 197
4. Stipulations by defense does not preclude admissibility ... 198
C. Changed Conditions or Inaccuracies in Photographs ... 198
D. Posed Photographs ... 199
11.4 AUDIO AND VIDEO RECORDINGS ... 199
A. Audio Recordings ... 199
1. Foundation ... 199
2. Voice identification ... 199
3. Defects in recording ... 200
4. Use of transcripts with audio recordings ... 200

a. When accuracy of transcript disputed 200
B. Video Recordings 201
1. Jury's access to video recordings during deliberations 201
a. Judge must exercise discretion 201
b. Video recordings of defendant's statements 202
c. Video recordings of testimonial evidence 202
d. Crime-scene videos 203
e. Defendant's presence 204
2. Admissibility of videotaped statements of child victims 204
11.5 EMAILS, TEXT MESSAGES, CLOUD STORAGE, AND SOCIAL MEDIA 204
A. Facebook Messages 204
B. Text Messages 205
C. Emails 205
D. Dropbox and Cloud Storage 205
11.6 ADMISSIBILITY OF DEMONSTRATIVE EVIDENCE 206
A. Admissibility Generally 206
B. Diagrams, Models, and the Like 207
1. Models or facsimiles 207
2. Reenactments and simulations 208
3. Computer-Generated Animations 208
4. Miscellaneous diagrams, summaries, or models 209
C. Experiments 209
D. Jury's Access to Demonstrative Evidence During Deliberations 210

CHAPTER 12 211

DESTRUCTION OF EVIDENCE 211

12.1 INTRODUCTION 212
12.2 CONSTITUTIONAL STANDARD 212
A. Due Process Violation if Destruction was Done in "Bad Faith" 213
B. Failure to Preserve as "Suppression" 213
1. Duty to preserve exculpatory evidence 214
2. But no general duty to investigate 215
12.3 STATUTORY STANDARD 216
A. Admissibility of Laboratory Results: § 16-3-309 216
1. Small quantities of evidence 216
2. Leaving a sufficient sample for independent analysis 216
3. Good-faith standard on preserving or destroying evidence 216
B. Preservation of DNA Evidence: § 18-1-1103, et. seq. 216
1. Duty to preserve DNA evidence 216
2. Statute of limitations for uncharged felonies 217
3. Class 2 felonies and sex offenses 217
4. Felony convictions 217
5. *Greathouse* still applies 217
12.4 LOSS OR DESTRUCTION OF EVIDENCE 217
A. Vehicle in a Crash 217
B. "Lost Letter" 218
C. Physical Evidence 218
D. Failure to Obtain Evidence 219
E. Loss of Hair Sample 219
F. Failure to Take or Preserve Notes 220

G. Lab Results 220
H. Videotaped Interviews 221
I. Returned Evidence 221
J. Body-Worn Camera 221
12.5 REMEDIES WHERE LOSS OR DESTRUCTION OF EVIDENCE RESULTS IN A DENIAL OF DUE PROCESS 221
A. Applicable Rule 222
B. Within Discretion of Trial Court 222
1. Least-restrictive sanction favored 222

CHAPTER 13 223

DISCOVERY 223

13.1 INTRODUCTION 224
13.2 SEVEN KEY DISCOVERY PRINCIPLES 224
13.3 ANALYTICAL FRAMEWORK 225
13.4 COLORADO AND FEDERAL CONSTITUTIONAL STANDARDS 226
A. Exculpatory Evidence Withheld from the Defense: The "*Brady* Doctrine" 226
1. Impeachment evidence is exculpatory 226
B. The Prosecutor's Constitutional Duty to Disclose: Materiality of the Information 226
C. Role of the Court 227
D. Illustrative Cases: Exculpatory information Required to be Disclosed 227
1. False testimony 227
2. Alternate suspect evidence 227
E. Illustrative Cases: Immaterial information not Required to be Disclosed 227
13.5 GENERAL DISCLOSURE REQUIREMENTS: RULE 16 228
A. Prosecution's Disclosure Requirements 228
1. Automatic Disclosures 228
2. Timing of disclosures 233
3. Discretionary disclosures 234
a. Discretionary disclosure prior to the preliminary hearing 234
13.6 LIMITATIONS ON DISCOVERY; PRIVILEGED OR CONFIDENTIAL INFORMATION 234
A. Motion to Quash Subpoena 234
B. General Limitations on Discovery 236
C. Internal Affairs and Grievance Files 237
D. Attorney Work Product 237
E. Disclosure of Confidential Informants 238
1. General Rule: Qualified Privilege 238
2. Balancing test required 239
3. Illustrative cases 240
F. Privilege for Medical Psychological Records 240
1. Privileges are absolute 240
2. Waiver of privilege 241
3. Illustrative Cases 242
4. Statutory exception to physician-psychotherapist privilege: reports of child abuse 243
G. Social Services Records 244
H. School Records 245
13.7 SANCTIONS FOR DISOCOVERY VIOLATIONS 246
A. Least-Restrictive Sanction Favored 246
B. Dismissal 247
C. Suppression 249

D. Other Remedies 250
13.8 DEFENDANT'S DISCLOSURE OBLIGATIONS *250*
A. Sanctions for Defense Violations 251
13.9 POST-CONVICTION DISCOVERY *252*

CHAPTER 14 253

EXPERT AND OPINION TESTIMONY 253

14.1 INTRODUCTION *254*
A. Lay Opinion Analytical Framework 254
B. Expert Testimony Analytical Framework 254
14.2 LAY VS. EXPERT OPINION *255*
A. Police Officer Testimony 255
14.3 LAY OPINION *257*
A. Standard of Review 257
B. Foundation 257
1. Rationally based on perception of the witness 257
2. "Helpful" versus "necessary" standard for permitting lay opinion 258
3. C.R.E. 403 258
C. Lay Opinion as to Ultimate Issue 258
D. Lay-Opinion Testimony About Truthfulness under C.R.E. 608 259
E. Illustrative Cases by Topic 259
1. Age 259
2. Appearance 259
3. Body Language 259
4. Cell Tower Information 260
5. Controlled Substance Identification 260
6. Dangerous Instrument 260
7. Death 260
8. Condition of Evidence 260
9. Grooming 260
10. Handwriting 260
11. Identification 260
12. Interview Techniques 261
12. Intoxication 261
13. State of Mind 261
14. Necessity of Physical Force 261
15. Attempted Robbery 262
16. Sanity 262
17. Smell or Taste 262
18. Shoeprints 262
19. Speed 262
20. Value 263
14.4 EXPERT TESTIMONY *263*
A. Statute: C.R.E. 702 263
B. Analytical Framework—*Shreck* 263
C. Manner of Expert Testimony 264
D. Admissibility within Court's Discretion 265
E. Foundation 265
F. Foundational Objections 266
1. Subject matter 266

2. Appropriateness of subject matter 266
3. *Shreck* admissibility factors 266
4. Reliability of scientific principles 268
a. Reliability, not certainty 269
5. Reliable in application 270
6. Qualification of the witness 270
7. Usefulness and helpfulness 272
8. No *Shreck* hearing required 272
9. Generalized experts (AKA "Blind Experts") 273
10. Requirement of specific findings by trial court 274
G. Admissibility of the Basis Underlying an Expert's Opinion 275
1. Analytical framework 275
2. Rules 275
3. Personal observation as a basis for expert opinion 276
4. Facts presented at trial as a basis for expert opinion 276
5. The hypothetical question as a basis for expert testimony 276
6. Facts presented to the expert before trial as a basis for expert opinion 276
7. Facts or data reasonably relied upon by experts in a particular field as a basis for expert opinion 277
i. Hearsay considerations 278
8. Disclosure of facts or data underlying expert opinion 279
H. Cross Examination of Experts 279
1. Cross examination on basis of opinion 279
2. Cross-examination by the use of learned treatises 279
I. Expert Opinion on Ultimate Issues 280
J. Expert Opinion on Legal Conclusions Inadmissible 280
K. Defense Experts 282
1. Prosecutorial use of defense-retained experts during case-in-chief 282
2. Impeachment of defendant by statements made to defense-retained expert 282
3. Cross-examination of defense expert as shifting the burden of proof 282
4. Exclusion of Defendant's Expert 283
L. Expert Testimony About the Credibility or Truthfulness of a Witness 283
1. Expert testimony that witness is believable or truthful 283
2. Expert testimony about truthfulness after attack on veracity: C.R.E. 608 284
3. Testimony about a child's tendency to fabricate 285
4. Expert testimony about demeanor or general behavioral patterns 286
5. Assessment of credibility to explain officer's investigative techniques or decisions 287
M. Fingerprints 287
1. Admissibility relative to the number of points identified 287
2. Sufficiency of fingerprint evidence on motion for judgment of acquittal 288
3. Discovery considerations 288
N. Arguing Expert Evidence without Expert Testimony 288
O. Lack of Foundation for Expert Opinion 288
P. Endorsement of Expert 289
Q. Confrontation and Expert Testimony 289
R. Cumulative Experts 290
S. Testimony: Live vs. Video 290
T. Usurping the Factfinder's Role 291
U. Illustrative Cases by Topic 291
1. Absorption inhibition testing 291
2. Age of Victim 291
3. Alcohol testing 292

4. Arrest control and use of force 292
5. Arson 292
6. Battered woman syndrome 292
7. Blood pattern analysis 292
8. Blood testing 292
9. Brain injury 292
10. Burn pattern 293
11. Canine scent tracking 293
12. Child abuse—victim's behavior and disclosure barriers 293
13. Computers—dates and software programs 293
15. Cycle of violence 293
16. Demeanor of victim during law enforcement interview—Sexual Assault 293
17. DNA evidence 294
18. Domestic violence 294
19. Drug courier profile 294
20. Drug language, slang 294
21. Drug dealing paraphernalia 294
22. IP vs. ISP 294
23. Eyewitness identification 294
24. Fingerprints 295
25. Fire investigator 295
26. Forensic interviewer 295
27. Frame of reference or syndrome evidence 295
28. Gang evidence 295
29. GPS evidence 295
30. Hair and fiber analysis 296
31. Hair follicle analysis to determine cause of death 296
32. Heat of passion 296
33. Horizontal gaze nystagmus ("HGN") 296
34. Law 296
35. Marijuana 296
36. Mathematical calculation 296
37. Mental condition 296
38. "Overkill" evidence 297
39. Pathologist testimony 297
40. Pediatric nurse testimony 297
41. Polygraph examination 297
42. Rape-trauma syndrome 297
43. Securities law testimony 297
44. Sexual abuse diagnosis 298
45. Sexual assault—behavior of victim 298
46. Sexual assault—forensic interviewers 298
47. Sexual assault—percentage testimony 298
48. Sexual assault—medical examination 298
49. Sexual assault—grooming 298
50. Sex trafficking, commercial, pimping, prostitution 298
51. Shaken-baby syndrome 298
52. Shoe-print identification and comparison 299
53. State of mind 299
54. Toolmark identification 299
55. Vehicles and tools used to operate stolen vehicles 300

56. Voiceprint analysis ... 300

CHAPTER 15 ... 301

HEARSAY ... 301

15.1 INTRODUCTION ... 302
15.2 NOT HEARSAY UNDER C.R.E. 801(D) ... 302
A. Prior Inconsistent or Consistent Statements ... 302
B. Extrajudicial Identification ... 303
C. Statements by the Defendant ... 303
1. "Self-Serving Statements" of defendant ... 303
2. "Rule of completeness" ... 303
3. Defendant's identity may be established by circumstantial evidence ... 305
4. Must be the defendant's statement ... 305
5. Personal knowledge of the declarant not required ... 305
6. Factual voluntariness and consciousness of declarant ... 306
7. Attacking credibility of a hearsay statement ... 306
8. Illustrative examples ... 306
D. Adoptive Admissions ... 307
1. Evasive response ... 308
2. Silence in the face of accusation ... 308
3. Active conduct that demonstrates adoption of statements ... 308
4. Other parts of conversation—adoption of informant's statements ... 309
E. Co-conspirator Statements ... 309
F. Statements Not Admitted for Their Truth ... 310
1. Limiting Instruction ... 310
2. Imperatives or commands ... 310
3. Statements that are false that indicate coaching or changing of story ... 311
4. Context ... 311
5. "Verbal Acts" with independent legal consequence ... 311
6. Effect on the listener ... 312
a. Ensuing state of mind ... 312
b. Explaining subsequent conduct of hearer ... 313
7. Machine-generated statements ... 313
8. Victim's state of mind ... 314
9. Defendant's state of mind ... 314
10. Decedent's state of mind to negate claim of suicide ... 315
G. Language Translations ... 315
15.3 HEARSAY EXCEPTIONS UNDER C.R.E. 803 ... 316
A. Present Sense Impressions: C.R.E. 803(1) ... 316
1. Statement must be instinctive and spontaneous ... 316
B. Excited Utterances: C.R.E. 803(2) ... 317
1. Statement need not be contemporaneous with startling event or condition ... 317
2. Statements may be made in response to questions ... 318
3. Statement may relate to a past fact ... 318
4. The declarant must have had the capacity to observe the startling event or condition ... 319
5. Defendant's statements may be admissible as excited utterances ... 319
6. Excited utterances by bystanders ... 319
C. Statement of Then-Existing Mental, Emotional, or Physical Condition: C.R.E. 803(3) ... 320
1. State of mind of the victim in assault and homicide cases: relevancy requirement ... 320
2. Other illustrative cases ... 322

D. Statements Made for the Purposes of Medical Diagnosis or Treatment: C.R.E. 803(4) 322
1. Rationale of the exception 322
2. Statement must be necessary for diagnosis and treatment 323
3. Statements received as substantive evidence 323
4. No distinction between "treating" doctor and "non-treating" doctor 323
5. Limitation on fixing legal responsibility 324
6. Illustrative cases 324
E. Recorded Recollection and Refreshing Memory: C.R.E 803(5) and C.R.E. 612 325
1. Recorded recollection 325
2. Refreshing memory 325
F. Records of Regularly Conducted Activity (Business Records): C.R.E. 803(6) 326
G. Public Records and Reports: C.R.E. 803(8) 327
H. The Residual Hearsay Exceptions: C.R.E. 807 327
1. Trial court must make findings regarding five factors 328
a. Notice 328
b. Note on circumstantial guarantees of trustworthiness 328
c. Illustrative cases 328
15.4 HEARSAY EXCEPTIONS UNDER C.R.E. 804 330
A. Unavailability under C.R.E. 804 330
1. Inability to testify due to then-existing physical illness or infirmity 330
2. Inability to procure attendance by process or other reasonable means 331
B. Former Testimony 331
1. No use of preliminary hearing transcript 331
2. Constitutional implications 332
3. Depositions 332
C. Statements Against Interest 332
1. Unavailability of co-defendants 333
2. Statements offered to exculpate 333
a. Co-defendant exculpates the accused 334
b. Defendant's statement "exculpates" himself 334
3. Statements that inculpate defendant 334
15.5 EXCEPTIONS: CHILD HEARSAY 334
A. Constitutional Considerations 336
B. Admissibility of Statements 336
1. Statute is sole basis for admission if no traditional hearsay exception applies 336
2. Statement must provide sufficient safeguards of reliability 337
3. Availability of the child-declarant 337
a. Incompetency 338
b. Medical or emotional unavailability 338
4. Corroborative evidence 339
a. Examples of "corroboration" 339
C. Procedural Considerations 340
1. Standard of proof required 340
2. Notice requirement 340
3. Jury instruction 340
15.6 OTHER STATUTORY EXCEPTIONS 341
A. Dying Declarations 341
1. Consciousness of approaching death 341
2. Dying declaration in response to questions 341
B. Admissibility of Laboratory Reports 341
C. Proof of Retail Value 342

1. Statute does not violate right of confrontation ... 342
D. Forfeiture by Wrongdoing ... 343
E. Statements of Persons with Intellectual and Developmental Disabilities ... 343
15.7 EXPERT HEARSAY AS OPINION UNDER C.R.E. 703 ... 343

CHAPTER 16 ... 345

INSTRUCTIONS AND VERDICTS ... 345

16.1 LIMITING AND CAUTIONARY INSTRUCTIONS ... 346
A. Limiting Instructions ... 346
B. Colorado Rules of Evidence ... 347
C. COLJI-Crim. ... 348
D. Cautionary Instructions ... 348
1. Admission of Child Hearsay No Longer Requires Contemporaneous Instruction ... 348
16.2 INSTRUCTION FOR JURY DELIBERATIONS ... 348
A. Colorado Rules of Criminal Procedure ... 348
B. Purpose and Function of Instructions ... 349
C. Language and Form ... 349
1. In writing and viewed as a whole ... 349
2. Instructions on elements of offense ... 350
3. Language should be understandable ... 351
4. Instructions to be confined to facts and issues of the case ... 351
a. Excerpts from court opinions ... 351
5. Instructions should not emphasize particular portions of the evidence ... 352
6. Duty to correct instructions ... 352
D. Special Instructions on Credibility ... 353
1. Credibility of the defendant ... 353
2. Instruction on witnesses' motives ... 353
3. Child witnesses ... 353
4. Sexual assault victims ... 353
E. Jury Questions: Giving Additional Instructions during Deliberations ... 354
1. Court's obligation to clarify ... 354
2. Defense counsel must be consulted prior to responding to jury question ... 355
F. Defendant's Theory of the Case Instruction ... 356
1. Instruction must be in proper form and supported by evidence ... 356
2. Defendant's theory of the case instruction may be refused if it is covered by other instructions ... 357
3. Instructions should not merely emphasize particular evidence ... 358
4. Instruction must assert a theory and not merely reiterate the defendant's testimony ... 358
5. Instruction must be a correct statement of law ... 358
6. Court's obligation to assist defense counsel in framing a proper instruction ... 359
7. Clarification about effect of theory of the case instruction ... 360
G. Instructions on Lesser Offenses ... 360
1. Determination of lesser "included" offense: strict elements, subset, and single distinction tests ... 360
2. When a lesser included offense instruction may be given ... 361
a. Lesser included offenses in homicide cases ... 362
3. When prosecution is entitled to lesser included offense instruction ... 363
4. When prosecution is entitled to instruction on lesser, uncharged offense ... 364
5. Defendant's entitlement to lesser non-included offense instruction ... 364
a. Standard for submission ... 365
b. Defendant subject to punishment on original and lesser non-included charge ... 365
6. Prerequisite of acquittal of greater offense ... 365

16.4 OBJECTIONS TO INSTRUCTIONS AND PRESERVING THE RECORD 366
A. Failure to Object or Tender Alternative Instruction 366
B. The "Invited Error" Doctrine 367
16.5 SPECIFIC INSTRUCTIONS BY TOPIC 367
A. Affirmative Defenses 367
B. Burglary 367
C. Child Sexual Assault—Hearsay 367
D. Child Sexual Assault 367
E. Complicity 368
F. Defendant's "No Burden" Instruction 368
G. Eyewitness identification 368
H. Flight 369
1. Admissibility of flight evidence generally 369
a. Defendant may explain the reason for flight 369
2. Flight instruction 369
3. Flight instruction not favored 370
4. Where flight is not immediate 370
5. Flight during trial 371
I. Insanity and Impaired Mental Condition: Informational Instructions 371
1. Insanity 371
a. Jury to be advised of commitment procedures upon a finding of not guilty by reason of insanity 371
b. Jury also to be advised that defendant will never be retried upon finding of not guilty by reason of insanity 371
c. Clarification of "distinguishing right from wrong" 372
2. Impaired Mental Condition 372
a. Informational instruction required 372
J. Independent Intervening Cause 373
1. The "sensitive" victim 373
K. Intoxication 374
1. Voluntary intoxication 374
2. Involuntary intoxication 375
L. Kidnapping 375
M. Missing Witness 375
N. Multiple Theories 376
O. Presumption of Innocence 376
P. Proximate Cause 376
1. Application in vehicular homicide case 376
Q. Public Indecency 376
R. Reasonable Doubt 377
S. Recent Possession 377
1. Instruction creates a permissive inference 377
2. Exclusiveness of possession 378
3. Proof required that goods were stolen 378
T. Robbery 378
U. Statutory Offenses Not Specifying a Culpable Mental State 378
V. Theft 379
W. Unanimity Where Multiple Acts Involved 379
X. Voluntariness of Confession 380
16.6 DEADLOCKED JURY 380
16.7 VERDICT FORMS 381

16.8 INCONSISTENT VERDICTS ... *382*
16.9 MERGER ... *383*

CHAPTER 17 ... **385**

JOINDER AND SEVERANCE ... **385**

17.1 INTRODUCTION ... *386*
17.2 COMPULSORY JOINDER OF OFFENSES ... *386*
A. Applicable Statute and Rule ... 386
B. Purpose ... 387
C. Elements ... 387
1. Offenses committed in the "same judicial district" ... 388
2. Defendant must be subjected to a "subsequent prosecution" ... 388
3. The prosecutor must have knowledge of the several offenses at commencement of the prosecution ... 389
4. The several offenses must arise from the "same criminal episode" ... 390
a. Illustrative cases ... 392
b. Charges arising from the "same criminal episode" but prosecuted by different agencies ... 392
c. "Prosecution" by private parties ... 393
D. Waiver of Compulsory Joinder Provisions ... 393
17.3 PERMISSIVE JOINDER OF OFFENSES ... *394*
A. Applicable Rules: Permissive Joinder—Permissive and Mandatory Severance ... 396
1. Illustrative cases ... 397
17.4 SEVERANCE OF DEFENDANTS ... *398*
A. Applicable Statute and Rule ... 398
B. Confessions by Codefendants ... 398
C. Mandatory Severance of Defendants ... 399
1. Evidence admissible as to only one defendant: alternatives ... 400
a. Confession with references to moving defendant deleted ... 401
2. Caveats ... 401
Mandatory severance rule applicable only to evidence offered by the prosecution ... 401
a. Severance not required when references of defendant deleted from confession of co-defendant ... 401
b. Statements of co-defendants ... 401
c. Co-conspirators ... 401
D. Severance of Defendants ... 402
1. Factors to be considered ... 402
2. Antagonistic defenses ... 404
17.5 SEVERANCE OF OFFENSES ... *405*
A. Grounds ... 406
17.6 MOTION FOR SEVERANCE ... *407*
A. Timeliness and Waiver ... 408
B. Sufficiency of the Motion ... 408
17.7 MULTIPLICITY ... *409*
17.8 DUPLICITY ... *411*

CHAPTER 18 ... **413**

JOINT RESPONSIBILITY ... **413**

18.1 THEORIES OF JOINT RESPONSIBILITY ... *414*
18.2 COMPLICITY ... *414*
A. Complicity Defined ... 414

1. “Abets” includes “encourages” 414
2. Distinct from the crime of accessory 414
3. Distinct from the crime of conspiracy 415
B. Charging Considerations 415
1. Complicitor may be charged as principal 415
2. Principal need not be charged or named when charging complicitor 415
3. Election between theories of principal or complicitor 416
4. Complicity instruction should be given when evidence supports it 416
C. Proof Required Under Complicity Theory 416
1. Proof that principal committed a crime 420
a. Principal need not commit all of the requisite acts 420
b. To instruct on complicity, there must be some evidence that some other person committed all or part of the crime 420
c. Principal’s lack of mental capacity 421
d. Principal pleads guilty to lesser offense 421
e. Confession of principal 421
f. Principal’s hearsay statement 422
g. Co-defendant’s statements at joint trial of both principal and accomplice 422
2. Requirement that complicitor have knowledge of the principal’s intent to commit a crime 422
a. “Some” knowledge sufficient 423
b. Complicitor liability for strict liability crimes 423
3. Intent requirement under complicity statute 423
a. Acts performed “voluntarily” vs. acts performed “with intent” 423
D. Exemptions from Liability as a Complicitor 424
E. Sentencing Complicitor as Special Offender 424
F. *Apprendi* 424
18.3 ACCOMPLICES AS WITNESSES 425
A. Accomplices as Witnesses 425
B. Accomplice Status as a Witness Goes to Credibility 425
C. Instruction on Uncorroborated Testimony of an Accomplice 425
1. Trial court to initially weigh corroboration 425
2. Type and sufficiency of corroboration 426
D. Testimony by an Accomplice with a Criminal Record 426
1. Improper to elicit conviction or guilty plea 426
a. May be admissible for other purposes 426
18.4 ACCESSORY TO CRIME 427
A. Definition 427
B. Knowledge Requirement 428
1. “Some” knowledge sufficient 428
2. Mere silence is not sufficient 428
C. Complicity to Accessory 428
D. Jury Instructions 429
18.5 CONSPIRACY 429
A. Conspiracy Defined: Elements 429
1. Conspiracy requires substantive crime “Conspiracy to commit [crime]. . .” 430
2. “Overt act” is readily understandable 430
3. “Overt act” and unanimity 431
4. Charging considerations 431
5. Affirmative defense 431
B. Parties to Conspiracy 431
1. “Wharton Rule” 431

2. Government agents as co-conspirators 431
3. Corporate employees 432
4. Husband and wife 432
5. "Unknown" co-conspirators 432
6. Conspirator and complicitor 432
C. Single v. Multiple Conspiracies 432
1. Factors to be considered 432
2. "Wheel and hub" conspiracy 433
D. Admissibility of Acts and Declarations of Co-Conspirators 433
1. Admissibility generally 433
2. Hearsay considerations 434
a. Statements must be "during the course of" and "in furtherance of" the conspiracy 434
3. Acts or declarations of uncharged or "unknown" conspirators 434
4. Acts or declarations occurring before the defendant's involvement with the conspiracy or after completion of the object crime 435
a. Before defendant's involvement 435
b. After completion of the object crime 435
5. Requirement of proof of conspiracy as condition precedent to admission 435
a. Standard under the Colorado Rules of Evidence 436
b. Recommended procedure for determining admissibility 436
E. Effect of Acquittal on the Object Crime or of Co-Conspirators 436
1. Acquittal of object crime: the *Robles* rule 436
2. Acquittal of co-conspirators: the "rule of consistency" 437
3. Jury deadlock on object crime is not the same as acquittal 438
F. Sentencing: Conspiracy to Commit Crime of Violence is a Crime of Violence 438

CHAPTER 19 439

JURY SELECTION 439

19.1 INTRODUCTION 440
19.2 VOIR DIRE GENERALLY 440
A. Purpose of Voir Dire 440
B. Jury Selection and Service 440
C. Trial Court and Counsel's Participation 441
19.3 CHALLENGE FOR CAUSE 442
A. Grounds for Challenges for Cause 443
1. Section 16-10-103 443
This statute states that the court "shall sustain a challenge for cause" on one or more of the following 11 possible grounds: 443
2. Crim. P. 24(b) 446
3. Hardship or Inconvenience 447
B. Standard of Review: Abuse of Discretion 447
C. Illustrative Cases 447
D. Waiver of Challenges for Cause 450
1. Examples of Waiver: 451
E. Examples Where Denials of Challenges for Cause were Reversed Because Jurors Demonstrated Bias and Were not Rehabilitated 451
19.3 PEREMPTORY CHALLENGES 452
A. Peremptory Challenges Request that a Juror be Excused Without Need for Justification 452
B. Discriminatory Use of Peremptory Challenges 452
1. Three-step *Batson* analysis: *Batson v. Kentucky,* 476 U.S. 79 (1986) 453

2. Cases extending *Batson*: 453
3. Cases applying *Batson*: 454
4. Prohibiting Discrimination under § 13-71-104 455
a. Discrimination based on a juror's disability 455

CHAPTER 20 457

MISTRIAL 457

20.1 GENERAL PRINCIPLES 458
A. Granting or Denying Mistrial is within the Discretion of the Trial Court 458
1. Case-by-case determination 458
2. Mistrial incident is viewed in the context of the record as a whole 458
3. Trial court is in the best position to assess the impact of any irregularity on the jury 458
B. Standards of Review—Generally 459
1. Denial of defense motion 459
2. Mistrial declared over defense objection 459
20.2 DEFENDANT'S MOTION FOR MISTRIAL 460
A. Generally 460
B. Illustrative Cases 460
1. Testimony as to other criminal conduct 460
2. Inadmissible evidence 465
3. Discovery violations 467
4. Improper display of physical evidence 468
5. Miscellaneous circumstances 468
6. Reference to Gang Affiliation or Activity 471
7. Juror Misconduct 471
a. Substitution of alternate juror during deliberations 473
b. Consideration of extraneous information 473
c. Miscellaneous cases 475
8. Comment about defendant's refusal to speak with police 475
9. Displays of Emotion 476
a. Outbursts by the defendant 477
10. Burden shifting 477
11. Mischaracterization of evidence 478
12. Newly discovered evidence 478
13. Defendant's presence during trial 479
14. Partial Courtroom Closures 480
20.3 MISTRIAL OCCASIONED BY THE PROSECUTION OR COURT 480
A. Public Health Crisis 480
B. Double Jeopardy 481
1. When jeopardy attaches 481
2. Deadlocked Jury 482
3. Retrial 482
C. Mistrial Over the Objection of the Defense: The "Manifest Necessity" Doctrine 482
1. Policy considerations 482
2. General standards 483
3. Illustrative cases 483
a. Mistrial occasioned by jury deadlock 483
b. Other circumstances 485
c. Defense misconduct 486
D. Statutory Circumstances When Mistrial is Justified 486

E. Mistrial with the Acquiescence or Consent of the Defense 487
20.4 COMPUTATION OF SPEEDY TRIAL AFTER MISTRIAL 488

CHAPTER 21 490

MOTIVE 490

21.1 INTRODUCTION 491
21.2 ADMISSIBILITY OF MOTIVE EVIDENCE 491
A. Admissibility Generally 491
1. Evidence of motive not inadmissible merely because it is prejudicial or shows the commission of other crimes 492
2. Remoteness of motive evidence 492
B. Manner of Proof: Relevancy and Hearsay Considerations 493
1. Defendant's extrajudicial statements 493
a. Relevancy 493
b. Hearsay 493
2. Victim's extrajudicial statements 493
a. Relevancy 493
b. Hearsay 494
C. Illustrative Cases by Topic 494
1. Financial gain 494
2. Malice toward the victim of homicide or assault 494
a. Threats, assaults, ill-will 495
b. Husband or wife homicide 495
3. Jealously as motive 496
4. Revenge as motive 496
5. Avoiding arrest as a motive for assault on a peace officer 496
6. Avoiding presentation of evidence in civil suit 496
7. Eliminating identification witnesses 496
8. Gang affiliation 497
9. Motive in sexual assault cases 497
10. Miscellaneous 498
21.3 ABSENCE OF MOTIVE 498
A. Admissible to Rebut or Disprove Prosecution's Evidence of Motive 498
B. Not Basis for Granting Motion for Judgment of Acquittal 498
C. Instruction on Absence of Motive 499
21.4 EVIDENCE OF ANOTHER PERSON'S MOTIVE 499
A. Alternate Suspects 499
1. Illustrative Cases 499
B. Motive of Co-Defendant and Co-Conspirators 500

CHAPTER 22 502

MULTIPLE COUNTS FOR THE SAME ACT 502

22.1 INTRODUCTION 503
22.2 DOUBLE JEOPARDY IMPLICATIONS 503
A. Identical Evidence 503
1. Multiple victims 504
2. Mere possibility of jury relying on identical evidence 504
3. Time, place, location analysis 504
4. Different volitions 505

5. Common elements 505
6. Different acts 505
7. Transferred intent 506
8. Different legal theories for same conduct 506
B. Unit of Prosecution 507
C. Charging Possession and Distribution in Drug Cases 508
D. Multiple Acts Where Statutes May Require Consecutive Sentences 508
22.3 PRACTICAL IMPLICATIONS 509
A. Election of Counts is Discretionary 509
B. Alternatives to Requiring Prosecution to Elect 510
1. Concurrent sentences 510
2. Election by jury under appropriate instructions 510
C. Prosecutor May Charge Different Legal Theories for the Same Acts 510
22.4 ELECTION OF SPECIFIC ACT WHERE SINGLE COUNT IS BASED ON MULTIPLE ACTS 511
A. General Rule 511
B. Thomas Exception 511
C. Several Acts in a Single Transaction 512

CHAPTER 23 514

OPENING STATEMENT 514

23.1 INTRODUCTION 515
23.2 SCOPE AND CONTENT 515
A. Scope Within Trial Court's Discretion 515
B. Remarks Calculated to Invoke Bias or Prejudice Impermissible 515
C. Display or Preview of Admissible Evidence at the Court's Discretion 515
D. Commentary on Inadmissible Evidence is Impermissible 516
E. Commentary on Missing Evidence or Witness 516
F. Proper to Make Reasonable Inference from Admissible Evidence 516
G. Prosecutor May Not Offer Personal Opinion on Evidence or Guilt 517
H. Rhetoric Permissible When Not Prejudicial or Inflammatory 517
I. Opening Statement May Open the Door to Otherwise Inadmissible Evidence 519
23.3 WAIVER OF OPENING STATEMENT 519
A. Prosecutor has Discretion to Waive Opening Statement 519
B. Defense Opening Precluded When Defense Initially Reserves Opening and Then Presents No Evidence 519
23.4 VARIANCE BETWEEN OPENING AND EVIDENCE AT TRIAL 519

CHAPTER 24 521

OTHER ACTS EVIDENCE 521

24.1 INTRODUCTION 522
24.2 IDENTIFICATION OF OTHER-ACTS EVIDENCE 522
A. *Rojas* and the Abolition of *Res Gestae* 522
24.3 REGARDLESS OF THE CRIME CHARGED 525
A. "Other Acts" Under C.R.E. 404(b) 525
B. Admitting Other-Acts Evidence 526
1. The *Spoto* Admissibility Analysis 526
a. Probative value v. prejudicial effect 526
2. Notice and Particularity 527
3. Threshold Burden under C.R.E. 104(a) 527
4. No hearing required 528

5. Contemporaneous limiting jury instruction 528
4. Other considerations 529
a. Statute of limitations 529
b. Double Jeopardy 529
c. Effect of acquittal on other transaction 529
d. Other acts of third parties 529
C. Illustrative Cases 529
1. Burglary, theft, and robbery cases 530
2. Assault and homicide cases 531
3. Drug cases 534
a. Knowledge 534
b. Modus Operandi 534
4. Child abuse cases 535
a. Absence of accident 535
b. *Mens Rea* 535
5. Sexual assault cases 536
6. Other-crimes evidence in sanity proceedings 537
7. Other illustrative cases 537
a. Criminal impersonation 537
b. Escape 537
c. Testimony regarding DNA database 537
d. Gang Cases 538
D. Defensive Use of Other-Acts Evidence 538
E. Use of Other-Crimes Evidence in Rebuttal 540
A. The Statute 541
1. Factors to be considered 542
2. Not limited to incidents within the statute of limitations/remoteness 542
3. Not limited to prosecutions for sexual assault on a child 542
B. Illustrative Cases 543
1. Common plan, scheme, or design 543
2. Intent, Motive, or Lack of Mistake 544
3. Identity 545
4. Rebuttal 546
C. Defensive Use of § 16-10-301 Evidence 546
1. Prior act to rebut defense theory of fabrication 547
2. Rape Shield Statute 547
3. Sexual Orientation, Gender Identity, and Gender Expression Evidence and the so-called "Gay Panic Defense" 548
24.5 IN DOMESTIC VIOLENCE CASES: § 18-6-801.5 548
A. The Statute 548
B. Illustrative Cases 549

CHAPTER 25 551

PROPERTY CRIMES ISSUES 551

25.1 OWNERSHIP INVOLVING NON-CORPORATE VICTIMS 552
A. Victim May Be Actual Owner or One in Rightful Possession 552
1. Exceeding scope of bailment 552
2. Heirs 552
3. Power of Attorney 553
4. Application in robbery cases 553
5. Application in burglary cases 553

6. Application in criminal trespass cases 554
7. Application in embezzlement of public property cases 555
B. Theft From Multiple Owners May be Charged in One Count 555
25.2 OWNERSHIP INVOLVING CORPORATE OWNER OR VICTIMS 555
A. Theft from Co-Owners of Property 556
B. Proof of Corporate Existence 556
1. Competency of evidence 556
2. De facto corporate existence 556
25.3 ALLEGATION AND PROOF OF OWNERSHIP 556
A. Non-Corporate Victim 557
B. Corporate Victim 557
25.4 PROVING VALUE: THEFT 557
A. "Thing of Value" 557
B. Measure of Market Value 557
1. Fair or reasonable market value 557
a. Fair market value: retail goods 558
i. Wholesale cost 559
ii. Salvage value 559
iii. Replacement value 559
b. Fair market value: commercial instruments 559
2. "Illegal Market" value 560
3. "Street value" may be one of several means of establishing value 560
4. Intrinsic value: unusual items 560
C. Proof of Value 560
1. Cannot speculate 560
2. Owner's testimony as to value 561
a. Owner defined 561
b. Owner's testimony must be competent 561
3. Price tag sufficient to establish value 562
a. Hearsay 563
4. Expert may testify about value 563
5. Value in conspiracy to commit theft 563
6. Proof of value not established 563
25.5 PROVING VALUE: CRIMINAL MISCHIEF 563
25.6 MISCELLANEOUS 564
A. Intent to Permanently Deprive 564
B. Physical Control Over Property 564
C. Statute of Limitations 565
D. Theft by Deception 565
25.7 AGGREGATION 566

CHAPTER 26 567

SELF-DEFENSE 567

26.1 INTRODUCTION 568
26.2 DEFENSE OF PERSONS 568
A. Use of Non-deadly Force 568
B. Use of Deadly Physical Force 568
C. Objective Standard 569
D. Reasonable Belief 569

E. Threat Must be Imminent 570
F. Defendant May Act on Appearances: "Apparent Necessity" 570
G. No Duty to Retreat 571
1. Retreat is not required before using deadly physical force 571
2. Retreat is not required even if person is where he has no "right to be" 572
H. Circumstances Under Which Self-Defense is Not Available 572
1. Section § 18-1-704(3) 572
a. Provocation limitation 572
b. Initial aggressor 573
c. Combat by agreement 573
i. Termination of agreement 574
d. Felony murder 574
I. Burden of Proof 574
J. Jury Instructions 574
1. In general 574
2. No-retreat instruction 575
3. Abandonment instruction 576
4. Use of deadly weapon 576
5. Apparent necessity 576
K. Illustrative Cases 576
1. Heat of passion manslaughter 576
2. Recklessness, Criminal Negligence and Extreme Indifference Murder 577
3. "Battered woman syndrome" 577
4. Attempted sexual assault 577
5. Unreasonable or excessive force by police officers 578
6. Harassment 578
7. Miscellaneous cases 578
26.3 USE OF DEADLY FORCE AGAINST AN INTRUDER 579
A. Statute 579
1. Creates Immunity from Prosecution 579
2. Procedural considerations 580
3. Unlawful entry required 580
4. Requires entry of a dwelling 582
5. Statute does not include "remain unlawfully" 582
6. Belief must be objectively reasonable 582
26.4 DEFENSE OF PREMISES 583
A. Statute 583
B. Applicable to Unlawful Entries by Police Officers 583
26.5 DEFENSE OF PROPERTY 583
A. Statute 583
1. Physical force to prevent a crime 583
26.5 CHARACTER EVIDENCE IN SELF-DEFENSE CASES 584
A. Character Traits: C.R.E. 404(a) 584
1. Victim's Conduct Admitted to Show Defendant's State of Mind 584
a. Requirements for admissibility 584
b. Offer of proof sufficient for admissibility 585
c. Remoteness of prior violence 585
2. Victim's Prior Conduct to Show Victim's State of Mind 585
a. Victim's prior threats toward the defendant 586
b. Victim's fear of the defendant 586

3. Defendant's Prior Conduct to Show Defendant's State of Mind 586
26.7 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR PREVENTING AN ESCAPE 586
A. Peace Officer Use of Physical Force 587
B. Peace Officer Use of Deadly Force 587

CHAPTER 27 589

VENUE 589

27.1 PLACE OF TRIAL 590
A. Constitutional and Statutory Provisions 590
1. Particular applications 590
2. Prosecution permitted where act was committed or furthered 591
3. Designation of venue after indictment by state grand jury 591
B. Manner of Proof 592
1. Slight evidence sufficient 592
2. Offense near a boundary 593
C. Waiver 593
D. Illustrative Cases 593
27.2 CHANGE OF VENUE 594
A. Statutory Provisions 594
B. Inherent Authority of the Court to Change Venue 595
C. Change of Venue Due to Adverse Pretrial Publicity 595
1. When prejudice is presumed 596
2. Actual prejudice or hostility 596

CHAPTER 28 598

WITNESSES 598

28.1 COMPETENCY OF A WITNESS 599
A. Competency Hearing 599
1. Not required to be held outside the presence of the jury 599
a. Limiting instruction may be required 599
2. Illustrative Cases 599
a. Intoxication 599
b. Child witness 600
28.2 EXAMINATION OF A WITNESS 600
A. Rules and Statutes 600
B. Presentation of Witnesses 601
1. Mode and order of interrogation and presentation 601
2. Calling and recalling witnesses 601
a. Prosecutor has no obligation to call particular witnesses 602
b. Recalling witnesses for direct or cross-examination 602
c. Illustrative cases 602
3. Witnesses called by the court 602
a. Within trial court's discretion 603
b. Standard of review 603
c. Court may not be an advocate 603
4. Questions asked by the jury 603
C. Direct Examination 604
1. Use of leading questions 604
a. What constitutes a leading question 604

2. Permissible use of leading questions on direct examination 604
a. Child witnesses 604
b. Use of leading questions on direct is ultimately within the trial court's discretion 605
D. Cross-Examination 605
1. Defendant's right of confrontation 605
2. Scope of cross-examination 605
3. Broad latitude to show bias or motive to testify 606
4. Rational basis for the question is required 608
5. Cross-examination of the defendant 608
6. Character for truthfulness 609
E. Re-direct Examination 609
F. Rebuttal 610
1. Admission of rebuttal testimony is within trial court's discretion 610
2. No specific foundation requirement 610
3. Discovery considerations 611
4. Admissibility generally 611
a. Need not anticipate defense testimony 611
5. Scope of rebuttal 612
6. Rebuttal of collateral matters 612
7. Rebutting specific assertions of fact 612
8. Rebuttal evidence showing other crimes 612
G. Surrebuttal 613
1. Admission largely within the discretion of the trial court 613
2. Illustrative cases 613
28.3 IMPEACHMENT OF WITNESS 614
A. Prior Inconsistent Statements 614
1. Statute and Colorado Rules of Evidence 614
a. Section 16-10-201 is constitutional 615
b. Other relevant authorities 616
2. Prior inconsistent statements admissible for impeachment and substantive purposes under section 16-10-201 616
a. Foundation requirement 616
b. Exception to foundation requirement under C.R.E. 806 616
c. Prior statement must be attributable to the witness 617
d. Degree of inconsistency 617
e. Witness acknowledges the prior statement 617
f. Witness claims no recollection of statement 617
g. Recanting witness 618
h. Witness refuses to testify 618
i. Prior statements relating to collateral matters 619
j. Double hearsay issue 619
k. Other illustrative cases 619
3. Prior statements admissible for impeachment purposes only: C.R.E. 613 620
a. Foundation requirement 620
b. C.R.E. 613 applies for impeachment purposes only 620
c. Limiting instruction 620
d. Illustrative cases 620
i. Voluntary statement in violation of *Miranda* 621
ii. Silence in the wake of *Miranda* warning 621
iii. Guilty plea later withdrawn 621
iv. Statements made during sanity examination 622

4. Putting prior inconsistent statements into context: the "Rule of Completeness" ... 622
B. Prior Consistent Statements ... 622
1. Scope of prior consistent statements ... 623
a. Illustrative cases ... 624
2. Includes statements made before or after the alleged fabrication ... 624
3. Declarant must be subject to cross-examination ... 625
C. Prior Felony Conviction ... 625
1. Section 13-90-101 ... 625
a. Statute held constitutional ... 625
b. Application of statute not discretionary ... 626
2. Remoteness goes to weight ... 626
3. What constitutes a "felony conviction" for impeachment purposes ... 626
a. Nolo *contendere* plea ... 626
b. Juvenile conviction ... 626
c. Finality of conviction ... 627
d. Case pending appeal ... 627
e. Reclassification of felony ... 627
f. Expungement ... 627
g. Military convictions ... 627
4. Inquiry into felony conviction: procedure ... 628
a. Form of the question ... 628
5. Scope of inquiry into prior felony convictions ... 628
a. Inquiry re: probationary status ... 629
6. Validity of prior felony conviction ... 629
a. Timely ruling on validity required ... 629
b. Subject to harmless error analysis ... 630
7. Impeachment of a defendant charged with habitual criminal counts ... 630
8. Impeachment of accomplice ... 630
a. May be admissible for other purposes ... 630
b. Impeachment by a co-defendant ... 631
9. Impeachment via felony convictions when defendant elicits own hearsay statements ... 631
10. Limiting instruction ... 631
D. Character for Truthfulness under C.R.E. 608 ... 631
E. Impeaching with underlying facts for certain misdemeanor offenses ... 632
F. Impeachment by Showing Bias, Motive or Interest ... 633
1. Relevancy ... 634
2. Offer of proof required when relevancy is not clear ... 634
3. Pending charges against a witness: promise of leniency ... 635
a. Pending charges ... 635
b. Pending misdemeanor charges ... 635
i. Inquiry into potential penalties ... 636
d. Probationary status ... 636
e. Protected witness ... 637
4. Evidence of civil suit to show bias or motive ... 637
a. Victim's suit against the defendant ... 637
b. Defendant's suit against the victim ... 637
5. Evidence of gang affiliation to show bias ... 638
G. Impeachment That Shows Misconduct or Weakness of Character ... 638
1. Improper to impeach on irrelevant matters intended only to impugn character ... 638
a. Police officer conduct ... 638
2. Relevant evidence reflecting adversely on character ... 639

3. Where the defendant puts character-related matters in issue ... 639
H. Impeachment by Showing Mental Incapacity ... 640
1. Psychiatric examination of witness ... 640
I. Other Illustrative Cases ... 641
28.4 SEQUESTRATION OF WITNESS ... 641
A. Colorado Rules of Evidence ... 641
1. Sequestration is a matter of right ... 642
B. Purpose and Standard of Review ... 642
C. Applicability of the Rule ... 642
1. Scope of sequestration order ... 642
2. Rebuttal witnesses ... 643
3. Advisory witness ... 643
D. Sanctions for Violation of Sequestration ... 643
1. Within the discretion of the trial court ... 643
2. Factors to be considered ... 644
3. Nature of sanctions ... 644
4. Illustrative Cases ... 645
28.5 IMMUNITY OF WITNESS ... 645
A. Statutory Immunity ... 645
1. Distinction between “transactional” and “use” immunity ... 645
2. Present statute provides for “use” immunity only ... 646
3. Immunity available only upon request of the prosecution ... 646
4. Refusal to testify after grant of immunity ... 646
B. Non-statutory Immunity ... 646
1. Illustrative cases ... 647
28.6 PRIVILEGES ... 647
A. Statutory privileges identified in § 13-90-107 ... 647
1. Marital Privilege ... 647
a. Proof of common law marriage ... 648
2. Attorney-client privilege ... 649
3. Clergy member, minister, priest, and rabbi privilege ... 649
4. Physician, surgeon or registered professional nurse patient privilege ... 649
5. Public officer privilege ... 650
6. Public accountant-client privilege ... 650
7.Licensed psychologist, professional counselor, marriage and family therapist, social worker, unlicensed psychotherapist, and licensed addiction counselor patient privilege ... 650
8. Qualified interpreter privilege ... 651
9. Confidential intermediary privilege ... 651
11. Victim advocate-victim privilege ... 651
12. Limited parent-minor child privilege ... 651
13. Law enforcement or firefighter peer support team member privilege ... 651
B. Information obtained from dependency and neglect proceedings under section 19-3-207 ... 651
C. The Release of Education Records Under Section 22-1-123 ... 652
D. Mandatory Reporters of Child Abuse ... 653
E. Attorney Work Product ... 654
F. Waiver of Privileges ... 655
1. *In camera* review ... 655
2. Burden ... 655
3. Psychologist-Patient Privilege ... 655
a. Waiver by placing mental health in issue ... 655
b. Waiver by testimony ... 656

4. Victim Advocate-Victim Privilege 657
5. Physician-Patient Privilege 657
6. Marital privilege 657
7. Attorney-client privilege 657
a. Purpose of privilege 657
b. To prove waiver 657
8. Waiver in insanity and impaired mental condition cases 658
G. Illustrative Cases 658
1. Psychologist-patient privilege 658
2. Physician-patient privilege 659
3. Marital privilege 659
4. Attorney-client privilege 660
H. Privilege Against Self-Incrimination 661
1. Fifth Amendment 661
2. Compelling testimony 661
3. Sanity exams 661
4. Illustrative Cases 661

CHAPTER 1

AFFIRMATIVE DEFENSES

1. AFFIRMATIVE DEFENSES

1.1 INTRODUCTION

If a defendant raises an affirmative defense, the defendant is admitting the essential elements of the offense but claiming the defendant's actions are legally justified in a way that exempts them from or mitigates their criminal responsibility. *Pearson v. People*, 502 P.3d 1003 (Colo. 2022). In practice, when the defendant properly raises an affirmative defense, the prosecution must prove all of the essential elements of the offense plus the additional element that the defendant was not justified by a legally cognizable affirmative defense.

When the defense is that the defendant did not commit the crime, the defendant is likely raising a "traverse," not an affirmative defense. "There are, generally speaking, two types of defenses to criminal charges: (1) 'affirmative' defenses that admit the defendant's commission of the elements of the charged act, but seek to justify, excuse, or mitigate the commission of the act; and (2) 'traverses' that effectively refute the possibility that the defendant committed the charged act by negating an element of the act." *People v. Pickering*, 276 P.3d 553 (Colo. 2011).

Because an affirmative defense and a defense that negates an element, like a traverse, are mutually exclusive, a defendant must choose between raising an affirmative defense and other defenses, such as a traverse. *See Pearson*. "A defendant who presents evidence that negates one or more elements of the charged offense is not entitled to an affirmative defense instruction." *Id. See also People v. Taylor*, 296 P.3d 317 (Colo. App. 2012). The defendant may, however, be entitled to a traverse defense, such as the traverse version of self-defense. *See, e.g., Pearson.* This is why the Alibi defense is not an affirmative defense.

Practice Tip: Affirmative defenses should be considered early on in your prosecution. Depending on the defense or theory, you might be able to conduct further investigation that may defeat an affirmative defense.

A defendant is not entitled to have the trial court determine, before the close of the evidence, whether it would give an affirmative defense instruction so that the defendant can decide whether to testify or not. *People v. Williams*, 100 P.3d 565 (Colo. App. 2004).

A. Defenses Based in Statute and Case Law (not all are actual affirmative defenses)

Abandonment or renunciation in attempt cases: § 18-2-101(3). Defendant abandons their effort or attempts to stop others.

Age of Victim: § 18-1-503.5. A defense only in non-POT situations where victim was 15-17 and defendant reasonably believed the child was older than 18.

Age of Responsibility: § 18-1-801. The courts do not have jurisdiction over juveniles younger than 10. This is a subject matter jurisdiction argument, not a defense.

1. AFFIRMATIVE DEFENSES

Alternate Suspect: *People v. Dye*, 541 P.3d 1167 (Colo. 2024).

Administered or Distributed Opioid Antagonist: § 18-1-712. Establishes criminal immunity, not just an affirmative defense, to anyone who administers an opioid antagonist to someone the person reasonably believes to be overdosing. Now includes immunity for the person who distributed the opioid antagonist to the person who administers the antagonist when the receiving person "is in a position to assist the individual at risk of experiencing an opioid-related overdose."

Choices of evils: § 18-1-702. Defendant admits to the crime but alleges that the criminal act was a necessary measure to avoid a greater evil.

Consent: § 18-1-505. When a person authorizing or agreeing to a defendant's conduct cannot be a victim. Consent is often not a defense to criminal conduct.

Defense of persons, property and premises: §§ 18-1-703 through 18-1-706. Please see Self-Defense for a full discussion of all topics related to this affirmative defense.

Duress: § 18-1-708. Defendant acted out of a reasonable fear that an innocent person would be harmed—or worse.

Emergency justification defense in speeding cases: § 42-4-1101(9)(a); *People v. Dover*, 790 P.2d 834 (Colo. 1990); COLJI-Crim H:74.

Entrapment: § 18-1-709. Defendant was induced to act criminally by legal authorities.

Execution of a public duty: § 18-1-701. Conduct related to duties of public servants; private citizens assisting public servants; execution of legal process, military service or judgments or orders of the court.

Heat of passion: *People v. Harris*, 797 P.2d 816 (Colo. App. 1990). See, e.g., COLJI-Crim 3-2:07.Int. Uncontrollable rage, terror, or fury–especially when caused by victim. Must be reasonable under the circumstances.

Human Trafficking: § 18-7-201.3. Defendant must show that he was a victim of human trafficking. Now a defense to both labor trafficking and juvenile sex trafficking.

Impaired mental condition: § 18-1-803. When a person lacks the capacity to form the culpable mental state but is not legally insane. A catchall defense. Placement in C.R.S. is between Insanity and Intoxication.

Independent intervening cause: *People v. Saavedra-Rodriguez*, 971 P.2d 223 (Colo. 1998). IIC is "an act of an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and, thereby becomes the cause of the victim's injury."

Insanity: § 18-1-802. When a person is so diseased and defective at the time of the act that they were incapable of understanding the difference between right and wrong. Compare with incompetence, which is relevant only at time of criminal proceedings.

Involuntary intoxication: § 18-1-804. Versus voluntary or "self-induced" intoxication.

Justified physical force in child abuse cases: § 18-1-703; *People v. Taggart*, 621 P.2d 1375 (Colo. 1981) (rev'd on other grounds). Several detailed exceptions under the statute. Also prepare for nullification possibility.

Mistake of fact: § 18-1-504. Ignorance or mistake generally does not provide relief from criminal liability. Exceptions are codified.

Physical force arrest/escape: § 18-1-707. Addresses law enforcement's use of ketamine and chokeholds. Also look to this statute in situations when inmates are being transported for mental health and competency proceedings.

Report emergency drug/alcohol overdose: § 18-1-711. Very fact specific.

B. New and Important Cases

People v. Dye, 541 P.3d 1167 (Colo. 2024). The Colorado Supreme Court held that "any defense" in Crim. P. 16(II)(c) means any defense, not just any affirmative defense. It follows that the reference to "any defense" necessarily includes the alternate suspect defense; therefore, the alternate suspect defense must be endorsed before trial. These defenses must now be endorsed at least 35 days before a jury trial (7 days before a court trial).

People v. Mion, 544 P.3d 111 (Colo. App. 2023). The Court of Appeals held that the affirmative defense of involuntary intoxication is legally cognizable when (1) a defendant knowingly ingests what he believes to be a particular intoxicant; (2) in so doing, he unknowingly ingests a different intoxicant; and (3) it is the different intoxicant that deprives him of the capacity to conform his conduct to the requirements of the law. Because the trial court refused the defendant's requested involuntary intoxication instruction and the court could not conclude that the error was harmless beyond a reasonable doubt, judgment was reversed and case remanded for a new trial.

People v. Kelley, 530 P.3d 407 (Colo. 2023). The defendant's endorsement of the affirmative defense of involuntary intoxication impliedly waived her physician-patient privilege. The court emphasized that the scope of a defendant's waiver is limited to the medical records related to the defendant's endorsement of the affirmative defense of involuntary intoxication. That affirmative defense, by definition, plainly implicates a defendant's physical or mental condition: § 18-1-804(4) defines intoxication as "a disturbance of mental or physical capacities resulting from the introduction of any substance into the body." The court acknowledged its holding leaves a defendant with a difficult choice—whether to assert the affirmative defense of involuntary intoxication and disclose the defendant's medical records related to involuntary intoxication or, instead, to protect the defendant's physician-patient privilege by foregoing the affirmative defense.

People v. Gallegos, 535 P.3d 108 (Colo. App. 2023). A defendant can assert the felony-murder affirmative defense regardless of whether the defendant admits committing the predicate felony offense or an act underlying the predicate offense. The defendant's denial that he committed any

of the charged offenses did not preclude him from asserting the felony-murder affirmative defense, and defendant provided some evidence to support element of affirmative defense to felony murder.

People v. Oslund, 292 P.3d 1025 (Colo. App. 2012). The defense of property affirmative defense does not warrant a jury instruction where the evidence was sufficient to show that the defendant intended to kill, maim, or wound the victim. The court ruled that under *People v. Goedecke*, 730 P.2d 900 (Colo. App. 1986) "any assault in this matter took place after the theft had been accomplished." The court found that the theft of the defendant's belongings "had been completed once the items were taken."

People v. Taylor, 296 P. 3d 317 (Colo. App. 2012). An entrapment instruction is unwarranted when the defendant claims complete innocence. The defendant claimed that the Supreme Court ruling in *Brown* abolished all need to admit the elements before asserted an affirmative defense. Rejecting this argument, the Court of Appeals found that *Brown* applied only to lesser-included offenses. Affirmative defenses are not available to defendants claiming complete innocence.

People v. Lane, 343 P.3d 1019 (Colo. App. 2014). The trial court was not required to instruct the jury using murder defendant's proffered intoxication and deadly-force instruction, which provided that if the jury found "the defendant was intoxicated to such a degree that he did not intend to cause the death of [the victim], which is a required element of Deadly Physical Force, you should apply the principles of ordinary physical force self-defense rather than the principles of deadly physical force self-defense." The reasonable person standard required a defendant to appraise the situation as would a reasonable sober person, and thus evidence of voluntary intoxication was irrelevant to the issue of whether general, as opposed to deadly physical force, self-defense principles should apply. The Court of Appeals held the prosecution did not bear the burden of disproving self-defense with respect to the lesser offenses of reckless manslaughter and criminally negligent homicide during prosecution for second degree murder. Self-defense is not an affirmative defense to the lesser-included charges of manslaughter and criminally negligent homicide.

People v. McClelland, 350 P.3d 976 (Colo. App. 2015). There are two types of defenses in criminal cases: (1) "affirmative defenses" that admit the defendant's commission of the elements of the charged act but seek to justify, excuse, or mitigate the commission of the act, and (2) "traverses" that effectively refute the possibility that the defendant committed the charged act by negating an element of the act. When a defendant alleges an affirmative defense and presents some minimal evidence to support it, the trial court must instruct the jury that the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable. With respect to crimes requiring recklessness, criminal negligence, or extreme indifference, such as reckless manslaughter, self-defense is not an affirmative defense but rather an element-negating traverse. With respect to crimes requiring recklessness, criminal negligence, or extreme indifference, such as reckless manslaughter, a defendant is not entitled to a jury instruction on self-defense as an affirmative defense; this is because it is impossible for a defendant to act both recklessly and in self-defense.

C. Burden of Proof

The burden to raise the issue of an affirmative defense is initially on the defendant to present "some credible evidence" on that issue. § 18-1-407(1). In *People v. Saavedra-Rodriguez*, 971 P.2d 223 (Colo. 1998), the Colorado Supreme Court explained what this means, "[T]he quantum of evidence that must be offered by the defendant in order to be entitled to an instruction on a theory of defense is 'a scintilla of evidence.' 'Some credible evidence', an alternative statement of the 'scintilla of evidence' standard, is necessary to present an affirmative defense. It merely requires some evidence to support the defense."

Absent express statutory language to the contrary, "the threshold determination as to whether some credible evidence exists to support an affirmative defense is a matter of law for the court to decide." If the court determines there is no credible evidence in the record to support an affirmative defense, there is no issue of fact for the jury to decide. *People v. Hill*, 934 P.2d 821 (Colo. 1997); *see also People v. Fincham*, 799 P.2d 419 (Colo. App. 1990).

"[I]f there is credible evidence supporting the defense, the court must instruct the jury on the defense even if the supporting evidence consists of highly improbable testimony by the defendant." *People v. Bush*, 948 P.2d 16 (Colo. App. 1997); *see also Lybarger v. People*, 807 P.2d 570 (Colo. 1991). However, "a trial court is not required to give the jury an instruction defining an affirmative defense if proof of the elements of the charged offense necessarily requires disproof of the issue raised by the affirmative defense." *See Bush*.

If the statutory exception is included in the statute defining the elements of the offense, it is usually the burden of the prosecution to prove the exception does not apply. If, however, the exception is found is a separate clause or is clearly disconnected from the definition of the offense, it is the defendant's burden to claim it as an affirmative defense. *People v. Reed*, 932 P.2d 842 (Colo. App. 1996).

1.2 CHOICE OF EVILS

A. Burden of Proof

Andrews v. People, 800 P.2d 607 (Colo. 1990). "The choice of evils statute requires that the defendant establish that the crime committed was **necessary** to prevent an imminent injury. A sufficient offer of proof must therefore establish: (1) all other potentially viable and reasonable alternative actions were pursued, or shown to be futile, (2) the action taken had a **direct causal connection** with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm, and, (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur." *See also People v. Fontes,* 89 P.3d 484 (Colo. App. 2003).

B. Standard for Appellate Review

The trial court may refuse to give the choices of evil instruction if the defendant fails to comply with procedural requirements. A reviewing court must determine, as a matter of law, whether the defendant's offer of proof, considered in the light most favorable to the defendant, was substantial and sufficient to support the defense. *People v. Al–Yousif,* 206 P.3d 824 (Colo. App. 2006). A trial court commits reversible error if it improperly prohibits an affirmative defense because it has the effect of impermissibly lowering the prosecution's burden of proof. But if a defendant fails to request an affirmative defense instruction, review is limited to plain error. *Vega v. People*, 893 P.2d 107 (Colo. 1995); *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

C. Rooted in Doctrine of Necessity

People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990). Colorado's "choice of evils" statute is rooted in the common law doctrine of necessity. "Pursuant to that doctrine, conduct which would otherwise constitute a crime is justifiable and not criminal if the actor engages in such conduct, **under extraordinary circumstances**, out of necessity to prevent a greater harm from occurring."

People v. Roberts, 983 P.2d 11 (Colo. App. 1998). It is not necessary to also instruct on choice of evils doctrine if the jury was properly instructed on self-defense or defense of another.

People v. Fontes, 89 P.3d 484 (Colo. App. 2003). "Choice of evils is a statutory defense applicable when the alleged crimes were necessary as an emergency measure to avoid an imminent public or private injury that is about to occur by reason of a situation occasioned or developed through no conduct of the actor and which is of sufficient gravity to outweigh the criminal conduct."

D. "Choice" Misnomer

Andrews v. People, 800 P.2d 607 (Colo. 1990). "The choice of evils defense . . . does not arise from a 'choice' of several courses of action, but rather is based on a real emergency involving specific and imminent grave injury that presents the defendant with **no alternatives** other than the one taken."

E. Elements of the Defense

1. Threshold determination

Section 18-1-702(2) requires that, before the defense of choice of evils may be submitted to the jury, "**the court shall first rule as a matter of law** whether the claimed facts and circumstances would, if established, constitute a justification." In determining the legal sufficiency of the proffered evidence, the trial court must consider the evidence and rational inferences arising therefrom in the light most favorable to the proffering party. *See People v. Brandyberry,* 812 P.2d 674 (Colo. App. 1990).

Andrews v. People, 800 P.2d 607 (Colo. 1990). "The choice of evils statute requires that the defendant establish that the crime committed was **necessary** to prevent an imminent injury. A sufficient offer of proof must therefore establish: (1) all other potentially viable and reasonable

alternative actions were pursued, or shown to be futile, (2) the action taken had a **direct causal connection** with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm, and, (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur." *See also, People v. Fontes*, 89 P.3d 484 (Colo.App.2003).

People v. Fontes, 89 P.3d 484 (Colo. App. 2003). "Before instructing the jury on the choice of evils defense, the trial court must look at the evidence in the **light most favorable to the defendant** and determine whether the facts could justify the crimes charged."

People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006). "[T]he procedural requirements of § 18-1-702(2) do not require a pretrial determination by the court. The statute simply provides that ***before evidence of the defense is submitted to the jury***, 'the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.'"

a. Threatened harm must be imminent

People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990). "Evidence of a generalized fear of future injury is not sufficient to warrant the invocation of a choice of evils defense. The evidence must affirmatively demonstrate the existence of a **specific threat or likelihood of an imminent injury** necessitating the actor's conduct. Furthermore, if a **reasonable legal alternative** was available to defendants as a means to avoid the threatened injury they properly may be foreclosed from asserting a choice of evils defense. In addition, a defendant who seeks to assert a choice of evils defense must offer evidence that his conduct **did not exceed that reasonably necessary** to avoid the impending injury." *See also People v. Fontes*, 89 P.3d 484 (Colo. App. 2003).

People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990). The availability of the choice of evils defense is limited to those instances where the defendant's conduct is "necessary because of the sudden and unforeseen emergence of a situation requiring the actor's immediate action to prevent the occurrence of an imminently impending injury."

People v. Brante, 232 P.3d 204 (Colo. App. 2009). A defendant is not entitled to a choice of evils defense based on speculative fears because such fears do not rise to the level of an impending injury demanding immediate action.

F. Illustrative Cases

1. Civil disobedience

Andrews v. People, 800 P.2d 607 (Colo. 1990). In holding that protesters charged with obstructing a roadway at the Rocky Flats nuclear weapons plant were not entitled to assert a choice of evils defense, the Colorado Supreme Court recognized that "[n]o state has enacted legislation that makes the choice of evils defense available as a justification for behavior that attempts to bring about social and political change outside the democratic process." In this case, the defendants failed as a threshold matter to assert that other potentially viable and reasonable alternatives to their conduct

would have been futile or that their conduct was such as to terminate or prevent the harm they were asserting. Moreover, "[a]lthough the defendants' affidavits articulate the radiation hazards and the dangers of nuclear war associated with the operation of Rocky Flats [as the injury sought to be prevented], **these dangers are long-term and speculative, and thus insufficient to demonstrate that a specific, definite, and imminent injury is about to occur** . . . ."

2. Religious "deprogramming"

People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990). The defendants, charged with kidnapping a member of the Unification Church in an attempt to "deprogram" her, sought to justify their criminal acts on the grounds that the victim's continued affiliation with the Church threatened her ability to think and act freely and autonomously. In disapproving the submission of the choice of evils defense to the jury, the Court of Appeals held that the defendants' proffered evidence failed to establish that the victim suffered or was about to suffer any bodily injury or impairment as a result of her church affiliation, nor was there evidence suggesting that she was suffering from any psychological impairment sufficient to warrant invocation of the defense. "At best, the proffered evidence suggested only that the victim might suffer some future emotional, psychological, sociological, or economic harm if she continued as a member of the church." In so holding, the Court of Appeals recognized that the choice of evils defense "**is not available as an instrument for juror nullification of unpopular laws or for juror condonation of crimes committed against persons who espouse or adhere to unorthodox or unpopular ideas or causes that pose no threat of immediate injury.**"

3. Prison escapes

People v. Strock, 623 P.2d 42 (Colo. 1981). In *People v. Strock*, 600 P.2d 91 (Colo. App. 1979), a different case, the Court of Appeals recognized that the choice of evils defense is available in a prison escape situation **where the prisoner is motivated by a definite, specific, and imminent threat of death or substantial bodily injury**. The Court of Appeals found that, under the facts of the case, in which the defendant was attacked several nights prior to the escape, he was informed that a "contract" was out on his life, and where the night of the escape he and his cellmates received threatening notes, the defendant demonstrated a specific and imminent threat entitling him to a choice of evils instruction. However, the **Colorado Supreme Court reversed** the Court of Appeals' decision, **finding that the choice of evils defense was not available to this defendant because he failed to lay a proper foundation**. "The trial court, in considering the prosecution's objection to evidence relating to the choice of evils, invited defense counsel to lay the proper foundation. No foundation was laid and, as a result, no evidence was admitted for the purpose of showing choice of evils and no instruction was given to the jury. The evidence relating to threats and the defendant's reasons for escape was admitted to establish duress." The jury was instructed on duress. The Court found that defendant's rights were fully protected and that the jury was properly instructed.

a. Additional element required of reporting

People v. Handy, 603 P.2d 941 (Colo. 1979). The Colorado Supreme Court held that the defendant, while perhaps legitimately fearing retaliation from fellow inmates for his refusal to include them in an escape plan, nevertheless was not entitled to assert a choice of evils defense. In situations involving escape, in addition to the statutory requirements of choice of evils, "**[t]he escapee must immediately report the duress, or choice of evils, which he faced to the proper authorities when a position of safety is reached**."

People v. McKnight, 626 P.2d 678 (Colo. 1981). The defendant, who claimed he was forced to escape from the tension-filled environment of the state penitentiary or lose his sanity, was not entitled to assert a choice of evils defense. The Colorado Supreme Court held that "the normal conditions of confinement, as a matter of law, will not support a defense of choice of evils," particularly in a situation where the defendant made no effort to seek help through established, lawful channels.

4. Traffic violations

a. "Emergency" doctrine is an affirmative defense

People v. Dover, 790 P.2d 834 (Colo. 1990). The defendant, a lawyer who was charged with **speeding**, was found not guilty in a trial to the court. Although the county court found beyond a reasonable doubt that the defendant drove 80 miles per hour in a 55 mile per hour zone, it acquitted the defendant pursuant to the "emergency" provision of § 42-4-1001(8)(a), now § 42-4-1101(9)(a), concluding that the defendant's conduct was justified because he was late for a court hearing in Denver as a result of a late hearing in Summit County. In disapproving the verdict, the Colorado Supreme Court held that, because of the nearly identical language of the emergency provision and the choice of evils statute, the legislature intended the emergency provision to constitute an affirmative defense requiring the defendant to present some credible evidence as to a specific threat of injury and no reasonable alternative other than violation of the law. The Supreme Court concluded that the defendant failed, as a threshold matter, to present any evidence constituting an emergency, the type of injury he would suffer had he not violated the statute, that he was not the cause of the situation, or that his injuries would outweigh the consequences of his conduct.

5. Child custody cases

People v. Metcalf, 926 P.2d 133 (Colo. App. 1996). The defendant who had twice previously abducted his daughter from his former spouse, testified that he again abducted the child following weeks of surveillance on his former wife. At that time, he observed an instance in which the child was left in the custody of a male babysitter who yelled at the child to turn off her bedroom light and go to sleep. He thereafter abducted the child upon returning to his former wife's residence, observing a door to the residence to be ajar and finding the babysitter to be asleep. Although the defendant testified regarding his concern the effects of his former wife's lifestyle may have had upon the well-being of his daughter, he at no time notified the police or the department of social services regarding those concerns, nor did he ever seek custody of the child through legal

proceedings. In upholding the unavailability of a "choice of evils" defense in the subsequent kidnapping and violation of custody prosecution, the Court of Appeals concluded that the "defendant failed to establish that the situation on the evening he took the child posed such a **specific, definite, or imminent threat of harm or injury** to the child that he had **no choice** but to abduct her and remove her from the state."

People v. Mossmann, 17 P.3d 165 (Colo. App. 2000). The statements of two witnesses were admissible as non-hearsay because they were not offered to prove the truth of the matter asserted, but only to substantiate defendant's claim that he believed his daughter was being abused by his ex-wife and a man living with her in violation of a restraining order. This evidence together with other evidence presented at trial would have been sufficient for defendant's affirmative defense instruction. The trial court erred in excluding the statements and in failing to give the affirmative defense instruction, and its theory of the case instruction was an inadequate substitute for defendant's proposed instruction.

6. Economic crimes

People v. Fontes, 89 P.3d 484 (Colo. App. 2003). Defendant was convicted of forgery, criminal impersonation, and theft. "[E]conomic necessity alone cannot support a choice of crime. Although economic necessity may be an important issue at sentencing, a choice of evils defense cannot be based upon economic necessity. Further, Colorado law requires that the defendant show a direct causal connection between the action taken and the harm sought to be prevented. Here, the trial court properly ruled by implication that the causal link was absent."

1.3 CONSENT

A. Statute

Section 18-1-505: The consent of the victim is **not** a defense **unless** the consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense. When the offense charged causes or threatens to cause **bodily injury**, consent to such conduct is a defense only if the actual or threatened injury is not serious, or the conduct and injury are reasonably foreseeable hazards of joint participation in a lawful athletic competition, contest, or sport.

People v. Bush, 948 P.2d 16 (Colo. App. 1997). With respect to the charges of theft and unauthorized use of a financial transaction device, defendant asserted the affirmative defense of consent. The trial court did not err in rejecting defendant's proposed instruction on the affirmative defense because the jury's findings as to both charges were "fundamentally inconsistent with a finding that the [victim] consented to defendant's conduct."

1. Ratification by victim not a defense

People v. Lucero, 623 P.2d 424 (Colo. App. 1980). In holding in a forgery case that the trial court properly refused to permit the victim to testify that he did not wish to prosecute anyone and that he would pay for any goods which were unlawfully charged to his account with his credit card, the Court of Appeals stated the general rule that **subsequent ratification by the victim constitutes no defense to crime**. "We think the rule to be a sound one and expressly adopt it here. Its basis lies in the understanding that crime affects the overall security of the citizenry, not merely the interests of the immediate parties. Satisfaction of the latter does not imply preservation of the former." The Court also recognized the principle that the victim of a crime, not being a party to the case, has no control over it, and "[w]hile a victim's wishes occasionally may color the District Attorney's decision, manifestly they do not control it."

2. Payment of restitution not a defense

People v. Taylor, 655 P.2d 382 (Colo. 1982). In holding that the defendant's subsequent tender of $200 as partial payment for a check drawn for $759.86 on an account with insufficient funds did not negate the defendant's intent to defraud at the time of the initial transaction, the Colorado Supreme Court recognized that "**[t]he making of restitution in order to compensate a victim for a loss caused by the accused's past conduct is not a legal defense to a criminal charge based upon that conduct**."

3. Legal capacity required

People v. Metcalf, 926 P.2d 133 (Colo. App. 1996). In a prosecution for kidnapping and violation of custody in which a non-custodial parent abducted his five-year old daughter, the Court of Appeals held that "[a]s a matter of law, a minor child cannot consent to being taken by another. Rather, consent must be given by the individual who has legal custody of the child."

B. Sexual Assault and Unlawful Sexual Contact Cases

Consent within the context of sexual assault and unlawful sexual contact cases is defined in § 18-3-401(1.5) as "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act." Under the statute, a past or present relationship is not sufficient to constitute consent, and submission under the influence of fear likewise does not constitute consent. Section 18-3-408.5 provides that, upon the request of any party to a prosecution for sexual assault or unlawful sexual contact, the jury shall be **instructed** on the **definition** of consent as set forth in § 18-3-401(1.5).

1. Relation to submission

Dunton v. People, 898 P.2d 571 (Colo. 1995). "With the exception of subpart (e), [Colorado's] first degree sexual assault statute [§ 18-3-402(1)] prohibits conduct which by its very nature negates the existence of the victim's consent. The statute equates the victim's nonconsent with proof that the defendant has caused the victim's submission by force, by threat either of great harm or of retaliation, or by deception . . . Thus, except for subpart (e), **an independent showing of the**

defendant's awareness of nonconsent by the victim is unnecessary under the terms of the statute." *See also Platt v. People*, 201 P.3d 545 (Colo. 2009) (extending the same rationale to § 18-3-402(1)(h)).

People v. Williams, 899 P.2d 306 (Colo. App. 1995). The determination of whether a victim consented to sexual contact is directly relevant to the issue of submission to first- or second-degree sexual assault, since consensual contact necessarily negates the element of submission; "the victim cannot both consent to sexual contact and be made to submit against her will to such contact."

a. Separate instruction unnecessary

People v. Cruz, 923 P.2d 311 (Colo. App. 1996). In a prosecution for first-degree sexual assault in which the prosecution must prove submission through the actual application of physical force or physical violence, there is no requirement that the jury be separately instructed regarding the affirmative defense of consent pursuant to § 18-1-505(1), since the sexual assault statute itself essentially requires the prosecution to prove a lack of consent.

Platt v. People, 201 P.3d 545 (Colo. 2009). A defendant prosecuted under § 18-3-402(1)(h) is not permitted to present a defense of consent per se and is not entitled to a jury instruction concerning consent.

Practice Tip: Be sure to read § 18-3-408.5 and other jury instructions on consent, such as COLJI-Crim F:68, H:03, H:04, H:05.SP, to identify when a consent instruction is necessary. An instruction on the definition of consent given pursuant to that statute is not an affirmative defense, but rather acts only as a defense to the elements of the offense.

2. Submission induced by fear

People v. Braley, 879 P.2d 410 (Colo. App. 1993). Contrary to the assertion that the victim's failure to physically resist the sexual assault constituted sufficient evidence to support the affirmative defense of consent, the Court of Appeals recognized that the victim's failure to resist "was motivated by fear, and **submission induced by fear does not constitute consent**."

1.4 DURESS

A. Statute

Section 18-1-708: A person may not be convicted of an offense, other than a class 1 felony, based upon conduct in which he engaged at the direction of another person because of the use or threatened use of unlawful force upon him or upon another person, which force or threatened use thereof a reasonable person in his situation would have been unable to resist.

The statute precludes reliance on the defense where the defendant intentionally or recklessly **places themselves** in a situation where he would be subjected to such threatened or actual use of force. Moreover, while the defense of duress is **akin to the defense of choice of evils**, the statute

provides that the choice of evils defense is not available to a defendant **in addition to** the defense of duress **unless separate facts exist which warrant its application**. *People v. Handy*, 603 P.2d 941 (Colo. 1979).

B. Elements of Defense

To be entitled to an instruction on duress, the defendant must show: 1) an immediate threat of death or bodily injury; 2) a well-grounded fear that the threat will be carried out; and 3) no reasonable opportunity to escape the threatened harm. *People v. Speer*, 255 P.3d 1115 (Colo. 2011).

C. Threat of Imminent Danger Required

People v. Maes, 583 P.2d 942 (Colo. App. 1978). The defendant, a penitentiary inmate charged with possession of contraband, testified that he was holding a balloon of heroin for fellow inmates under threats that, if he refused to hold it for them, they would "hit" him, and if he reported the incident they would "have somebody from the outside do something to [his] wife and son." The Court of Appeals recognized that the defense is available only if the threat is "one of present, impending, and imminent use of force, and that a threat of future injury is not enough." The Court concluded, however, that the trial court improperly refused to instruct the jury on the defense of duress given the specific threats directed against the defendant and members of his family. In so holding, the Court of Appeals stated: "The question whether a threat is imminent is, in all but the clearest of cases, to be decided by the trier of fact after considering all of the surrounding circumstances, including the defendant's opportunity and ability to avoid the harm."

But see *Bailey v. People*, 630 P.2d 1062 (Colo. 1981). In a case in which undercover agents posed as east-coast "mafia" drug kingpins in order to purchase quantities of illegal drugs from the defendant, the fact that the agents intimated that they were receiving "pressure" from their "organizations" to obtain the narcotics and that their organization "takes care of snitches" was not sufficient to establish the defense of duress. "The defendants did not claim that the agents used actual force, nor did they infer from the agents' statements that they were in any immediate danger. The defense of duress is unavailable unless a defendant shows a specific and imminent threat of injury to his person under circumstances which leave him no reasonable alternative other than the violation of the law for which he stands charged; mere speculation that injury may occur is not sufficient."

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002) Evidence that defendant witnessed a drug-related homicide, the fact that the victim's sister feared that cooperating with police would jeopardize her safety and that people were killed at the victim's funeral, did not establish the defense of duress. There was no evidence of immediate, specific threat.

1.5 ENTRAPMENT

A. Statute

1. AFFIRMATIVE DEFENSES

Section 18-1-709: The commission of acts which would otherwise constitute an offense is not criminal if the defendant engaged in the proscribed conduct **because he was induced to do so by a law enforcement official** or other person acting under his direction, seeking to obtain evidence for the purpose of prosecution, and **the methods used to obtain that evidence were such as to create a substantial risk that the acts would be committed by a person who, but for such inducement, would not have conceived of or engaged in conduct of the sort induced**. Merely affording a person an opportunity to commit an offense is not entrapment even though representations or inducements calculated to overcome the offender's fear of detection are used.

Entrapment is an affirmative defense. *People v. Sprouse*, 983 P 2.d 771, 775 (Colo. 1999); *People v. Hendrickson*, 45 P.3d 786, 790 (Colo. App. 2001); People v. Grizzle, 140 P.3d 224 (Colo. App. 2006).

Some defendants who maintain their innocence are not automatically barred from seeking jury instructions on a lesser-included offense or on a related, voluntary-intoxication defense. These instructions remain available provided there is a rational basis for them. "[L]ike a lesser included offense instruction, a voluntary intoxication instruction is not precluded by a defendant's testimony denying involvement in the offense. But, as with a lesser included offense instruction, a defendant's inconsistent testimony may result in lack of an evidentiary basis for such an instruction." *People v. Brown*, 218 P.3d 733 (Colo. App. 2009).

People v. Taylor, 296 P.3d 317 (Colo. App. 2012). An entrapment instruction is unwarranted where the defendant claims complete innocence. Affirmative defenses are not available to defendants claiming complete innocence and the inconsistent defense of entrapment.

1. Statute sets forth a subjective standard

Bailey v. People, 630 P.2d 1062 (Colo. 1981). An objective test for entrapment would focus on the propriety of the methods used by police as measured by generalized standards, and not on the character or propensities of an individual defendant. A subjective test is concerned with the state of mind of a particular defendant and does not set general standards for police conduct. **Colorado's statute adheres to a subjective test for entrapment**, in which the defendant's predisposition to commit crime, rather than the conduct of the law enforcement agent, is the dispositive factor. *See also* *People v. Sprouse*, 983 P.2d 771 (Colo. 1999).

B. Elements of the Defense

Evans v. People, 706 P.2d 795 (Colo. 1985). The Colorado Supreme Court articulated the following elements to establish the defense of entrapment:

(1) the defendant must be a person who, but for the inducement offered, would not have conceived of or engaged in conduct of the sort induced;
(2) the defendant must in fact have engaged in the proscribed conduct because he was induced to do so by a law enforcement official or other person acting under his direction, seeking

to obtain evidence for the purpose of prosecution, and not as a result of the defendant's own predisposition;

(3) the methods used to obtain such evidence must have been such as to create a substantial risk that this particular defendant would engage in the sort of conduct induced; and

(4) the methods used must have been more persuasive than merely affording the defendant an opportunity to commit an offense, even when such an opportunity was coupled with representations or inducements calculated to overcome the defendant's fear of detection.

Thus, although the Court in *Bailey* stated that the defendant's predisposition is the "dispositive" factor, under the statute predisposition and inducement are actually "inextricably interwoven" within the various elements. "Thus, **the existence of any predisposition on the part of the defendant must be determined first, then the extent of any such predisposition must be considered in relation to the character of the inducements to determine whether the second and third elements have been satisfied**. That is, in considering element 2, it is necessary that the inducements, and not any predisposition of the defendant, in fact caused the defendant's prohibited conduct . . . Evaluation of element 3 requires that the nature of the inducements be considered in relation to the degree of the defendant's predisposition to determine whether the methods used created a substantial risk that the defendant would engage in the proscribed conduct."

People v. Grizzle, 140 P.3d 224 (Colo. App. 2006). "A defendant must admit to having engaged in the proscribed conduct to be entitled to an entrapment instruction, however, he or she need not plead guilty in order to assert an entrapment defense."

1. Police methods v. police motives

Vega v. People, 893 P.2d 107 (Colo. 1995). In affirming the trial court's determination in an importation of narcotics case that evidence of internal DEA incentive programs for obtaining drug convictions is irrelevant to the defense of entrapment, the Colorado Supreme Court held that while **police methods are relevant** to the defense of entrapment, **police motives are not relevant** since they bear no relation to the subjective state of mind of the defendant. "In this case we agree that evidence of internal DEA incentives for obtaining drug convictions may have demonstrated DEA agents' motives for inducing the defendant to import cocaine to Colorado. However, under the entrapment statute, only the actual methods that they employed are relevant to [the defendant's] defense." *See also* *People v. Aponte*, 867 P.2d 183 (Colo. App. 1993).

2. Predisposition evidence obtained after initial contact with defendant

People v. Sprouse, 983 P.2d 771 (Colo. 1999). **Courts may rely upon evidence obtained after the government's initial contact with the defendant, so long as such evidence is relevant to the defendant's state of mind as it existed prior to the government's suggestion of the crime**." The Colorado Supreme Court noted that the "enthusiasm with which a defendant responds to the government's suggestion to commit a crime is sometimes the most telling evidence of his or her state of mind just prior to being contacted by the government," and that a "demonstrable lack of

reluctance" to the government's suggestion weighs heavily in favor of finding that defendant was predisposed to commit a crime.

C. Illustrative Cases

1. Theft by receiving

People v. Williams, 654 P.2d 319 (Colo. App. 1982). The Court of Appeals held that the defense of entrapment was not established on a theft by receiving charge, even though the undercover officers made the initial contact with the defendant, where those officers merely afforded the defendant an opportunity to commit the offense and the defendant expressed a willingness to make additional purchases for the officers in the future. "In a theft by receiving prosecution, an examination is made of the circumstances surrounding the sale to see whether the officers merely afforded the defendant the opportunity to commit the theft or whether the defendant had been improperly induced to do something he otherwise would not have done."

2. Undercover drug transactions

People v. Bucher, 511 P.2d 895 (Colo. 1973). In rejecting the defendant's assertion that entrapment occurred as a matter of law when an undercover police agent produced $11,000 in cash and offered to purchase drugs, the Colorado Supreme Court stated: "It is common knowledge that the nature of illicit drug traffic is such that the laws could not be enforced without undercover agents. The drug laws have forced the market place for illicit drugs underground, where sales are effected by stealth by those who reap financial gain at the cost of the drug victim and society. Without undercover agents, it would be virtually impossible to prosecute those who cause the sale and distribution of illicit drugs."

People v. Lee, 506 P.2d 136 (Colo. 1973). "The defense of entrapment was never intended to be an escape hatch for those who mistakenly sell narcotics to a police officer. When a person who has narcotics for sale is ready, willing, and able to effect a sale with no more than ordinary persuasion, he has not been entrapped and must suffer the consequences for dispensing or selling narcotics."

But see *Evans v. People*, 706 P.2d 795 (Colo. 1985). Testimony, if believed by the factfinder, that an undercover agent repeatedly requested defendants to procure LSD so that they could make money to pay their gas bill, despite the defendants' refusals, and thereafter offered to supply them with a vehicle and "front money" to effect the transaction, and later made repeated phone calls to the defendants' home to reiterate the request, would be sufficient to constitute the defense of entrapment.

a. Not applicable to sentence enhancers

Vega v. People, 893 P.2d 107 (Colo. 1995). The plain language of Colorado's entrapment statute limits application of the defense to the commission of acts that would constitute a substantive criminal offense, as distinguished from statutory provisions that enhance the punishment for a criminal offense. As such, entrapment may not be asserted as a defense to the **special offender**

provisions of § 18-18-407 (now § 18-18-107), since that statute is best characterized as a sentencing enhancing provision rather than a substantive criminal offense.

3. Internet sting operations

People v. Grizzle, 140 P.3d 224 (Colo. App. 2006). Because defendant did not admit to all the elements of the offense of attempted sexual assault on a child or enticement of a child, he was not entitled to assert the affirmative defense of entrapment. ***But see*** *People v. Brown*, 218 P.3d 733, 735 (Colo. App. 2009), aff'd, 239 P.3d 764 (Colo. 2010) (holding that "(1) a claim of innocence does not disentitle a defendant to a lesser included offense instruction; but (2) it was not error on these facts to deny lesser included offense or voluntary intoxication instructions."

1.6 INTOXICATION

Involuntary intoxication is an affirmative defense. A person is involuntarily intoxicated when he or she takes a substance pursuant to medical advice, does not know that he or she is ingesting an intoxicant, or ingests a substance which is not known to be an intoxicating substance. § 18-1-804(3). "Involuntary intoxication is a complete defense to all crimes." *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

To submit the affirmative defense of involuntary intoxication to the jury a defendant must offer proof of (1) the introduction of the substance into the body; (2) which was not known to be, or the defendant did not know could act as an intoxicant, or which was taken pursuant to medical advice; (3) that caused a disturbance of mental or physical capacities; and (4) resulted in a lack of capacity to conform his conduct to law. *People v. Garcia*, 113 P.3d 775 (Colo. 2005); *People v. Vothm*, 312 P.3d 144 (Colo. 2013).

Voluntary **intoxication** is not an affirmative defense, although it may be relevant when arguing lack of specific intent. "[A] defendant may introduce evidence of voluntary, self-induced intoxication to 'negative the existence' of specific intent." *People v. Stone*, 471 P.3d 1148 (Colo. App. 2020). For example, first-degree murder (after deliberation) is a specific-intent crime. A person commits the crime of murder in the first-degree if, "after deliberation and with the intent to cause the death of a person," he causes the death of that person. § 18–3–102(1).

A. Self-Induced or Voluntary Intoxication

1. Definition

Section 18-1-804(5) defines self-induced intoxication as a disturbance of mental or physical capacities caused by substances knowingly introduced into the body, which the defendant knows or ought to know have the tendency to cause the resulting disturbance. *See also Hendershott v. People,* 653 P.2d 385 (Colo. 1982).

People v. Mion, 544 P.3d 111 (Colo. App. 2023). In a prosecution for robbery and other offenses, the defendant's allegation that he knowingly consumed marijuana but was unaware that it

contained a stimulant that deprived him of the capacity to conform his conduct to the requirements of the law was a defense cognizable under the involuntary intoxication statute. Debilitating intoxication was self-induced only when it was caused by a particular intoxicant that the defendant knowingly introduced or allowed to be introduced into his body.

2. Can negate specific-intent *mens rea*

People v. Harlan, 8 P.3d 448 (Colo. 2000). In this capital case, the Colorado Supreme Court addressed *sua sponte* whether defendant was entitled to have his voluntary intoxication defense presented to the jury as an affirmative defense, which the trial court had done at defendant's request and without objection by the prosecution. The Court held that "**voluntary intoxication, evidence of which is introduced to negate the specific intent element of the charged offense, does not constitute an affirmative defense under section 18-1-804**." Here, defendant claimed he was voluntarily intoxicated, did not intend to kill the victim, and did not deliberate prior to killing the victim. The Court found such claim fell squarely under § 18-1-804(1), which by its plain meaning, "is an **evidentiary rule** permitting the introduction of evidence of voluntary intoxication to negate the requisite specific intent of the charged offense." Defendant would have been entitled to an instruction setting forth the affirmative defense of intoxication only if, pursuant to § 18-1-804(3), he had "introduced evidence suggesting he was unable to conform his conduct to the requirements of the law due to intoxication that was **not self-induced**," and defendant did not introduce such evidence.

People v. Quintana, 996 P.2d 146 (Colo. App. 1998). Defendant claimed the trial court erred by **instructing the jury on voluntary intoxication over his objection**, arguing that the court "interfered with his tactical decision not to pursue intoxication as a defense." The Court of Appeals noted that voluntary intoxication is not an affirmative defense to a crime, but is used only to negate specific intent when that intent is an element of the crime charged. Though defendant presented no evidence concerning the quantity of alcohol he drank that night, he offered some evidence he was intoxicated at the time of the offense, and evidence that he had a "serious alcohol problem" and frequently suffered blackouts causing memory loss. The Court of Appeals held that because defendant's evidence allowed the jury to infer that he was so intoxicated the night of the crime that "he lacked the ability to form specific intent to commit the offense," it was proper to instruct the jury on the legal effect of voluntary intoxication on the element of intent.

But see *People v. Williams,* 961 P.2d 533 (Colo. App. 1997) (*rev'd on other grounds*). The trial court did not commit plain error by failing to instruct jury *sua sponte* on intoxication, despite evidence the defendant was intoxicated at the time of crimes, where defendant's theory was he did not commit crimes and his failure to tender intoxication instructions may have been based on tactical decision by counsel.

***Quintana Caveat*: ** Based on the *Harlan* Court's holding that "intoxication is not an affirmative defense," the Court disapproved of *Quintana* to the extent that it held otherwise. *People v. Harlan,* 8 P.3d 448 (Colo. 2000).

People v. Miller, 113 P.3d 743 (Colo. 2005). "[E]vidence of voluntary intoxication is admissible to counter the specific intent element of first-degree murder. 'After deliberation' and 'intent' are two distinct elements, which together constitute the specific intent mental state of first-degree murder." *See also People v. Versteeg*, 165 P.3d 760 (Colo. App. 2006).

People v. O'Connell, 134 P.3d 460 (Colo. App. 2005). Although the specified mens rea for sexual assault on a child is "knowingly," the actual culpable mental state required for the commission of sexual assault on a child is the **knowing touching that is specifically intended** to be for the purposes of sexual arousal, gratification, or abuse. Sexual assault on a child is therefore not a general intent crime but rather a specific intent crime. As such, "intoxication is relevant to the issue of whether the defendant could have formed the requisite specific intent for sexual assault on a child."

3. Not a defense to general-intent crimes

People v. DelGuidice, 606 P.2d 840 (Colo. 1979). In holding that the defendant was not entitled to assert intoxication as a defense to the crime of **second-degree murder**, the Colorado Supreme Court stated the statutory and common law rule that evidence of voluntary intoxication is incompetent to disprove general intent when that mental state is an element of the offense. *See also People v. Vanrees*, 80 P.3d 840 (Colo. App. 2003) (*rev'd on other grounds*).

a. No defense to negate commission of "voluntary act"

People v. Huskey, 624 P.2d 899 (Colo. App. 1980). The defendant, charged with knowingly obtaining or exercising control over the motor vehicle of another, asserted that he was too intoxicated at the time of the offense to be capable of either "knowingly" or "voluntarily" obtaining or exercising such control. In rejecting his claim, the Court of Appeals held that § 18-1-804 applies "not only to the mental state of a defendant in general intent crimes but is also applicable in the analysis of a 'voluntary act' as that phrase is used in the definition of criminal liability in § 18-1-502."

4. Rule predicated on moral culpability of the defendant

Hendershott v. People, 653 P.2d 385 (Colo. 1982). "The concept of self-induced intoxication, by definition, requires that the defendant be aware at the outset that the substance he is about to ingest may affect his mental faculties . . . Also, because the intoxication must be 'self-induced,' the defendant necessarily must have had the conscious ability to prevent this temporary incapacity from coming into being at all. **Self-induced intoxication, therefore, by its very nature involves a degree of moral culpability . . . .** Thus, when a defendant chooses to knowingly introduce intoxicants into his body to the point of becoming temporarily impaired in his powers of perception, judgment and control, the policy enunciated in DelGuidice prohibits him from utilizing his intoxication as a defense to crimes requiring the mens rea of 'knowingly,' 'willfully,' 'recklessly,' or 'with criminal negligence.'"

5. Peculiar sensitivity of the defendant not a defense

People v. Matthews, 717 P.2d 970 (Colo. App. 1985). The defendant suffered from **alcohol idiosyncratic intoxication**, a rare condition which, he claimed, did not constitute self-induced intoxication and, therefore, negates the mental state of a general intent crime. In rejecting the claim, the Court of Appeals stated, "[t]he fact that the result of the ingestion of alcohol may be more severe in one person [than] in another because of an idiosyncratic pathology does not make the ingestion involuntary . . . . **Pathological intoxication is nonetheless voluntary, and does not constitute a defense to a general intent crime**."

C. Involuntary Intoxication

"Involuntary intoxication is a complete defense to all crimes." *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008). To submit the affirmative defense of involuntary intoxication to the jury, a defendant must offer proof of 1) the introduction of the substance into the body; 2) which was not known to be, or the defendant did not know could act as an intoxicant, or which was taken pursuant to medical advice; 3) that caused a disturbance of mental or physical capacities; and 4) resulted in a lack of capacity to conform his conduct to law. *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

A virus is not a "substance" that results in involuntary intoxication under section 18–1–804. *People v. Voth*, 312 P.3d 144 (Colo. 2013).

1. Prescription drugs

People v. Turner, 680 P.2d 1290 (Colo. App. 1983). The defendant asserted that he mistakenly consumed an overdose of a prescribed drug for the treatment of migraine headaches and, although he knew from experience that the drug might make him sleepy, he was not aware of the intoxicating consequences of ingesting excessive dosages or that such dosages might prevent him from conforming his conduct to the requirements of the law. On appeal, the Court of Appeals recognized that such testimony, while meager, was sufficient to raise the affirmative defense of involuntary intoxication which, if not disproved by the prosecution, constitutes a **complete defense** if such intoxication results in the defendant's lacking the capacity to conform his conduct to the law. "**Generally, a prescription will serve to place a patient on notice that an excessive dose will impair his faculties**. Therefore, where no controverting evidence is presented, a trial court would be correct in finding that excessive use of a prescription drug constituted voluntary intoxication. However, here the defendant testified that he had not been warned of the consequences of ingesting excessive doses of Fiorinal . . . . This evidence consisted of something more than an unsupported assertion, and could serve to establish the defense if believed by the jury. Therefore, it constitutes sufficient credible evidence to submit the defense to the jury."

2. Drug addiction

Tacorante v. People, 624 P.2d 1324 (Colo. 1981). The Colorado Supreme Court held that the trial court properly refused to give the defendant's requested instruction on involuntary intoxication,

where the only evidence supporting such a defense was that the defendant was a long-time heroin addict with a greatly diminished capacity to refrain from using heroin, and was under the influence at the time of the robbery. "Inability to refrain from drug use does not warrant an involuntary intoxication instruction without further evidence that the intoxication was involuntary and that it impaired the defendant's capacity to abstain from the conduct proscribed by the substantive statute under which he had been charged. **Mere addiction is not sufficient to render the injection of heroin involuntary or unknowing**."

1.7 MISTAKE

A. Statute

1. Mistake of Fact (effect of ignorance or mistake upon culpability)

Section 18-1-504(1): A person is not relieved from criminal liability because of action based upon a mistaken belief of fact unless "**it negatives the existence of a particular mental state essential to commission of the offense**."

People v. Borrego, 738 P.2d 59 (Colo. App. 1987). The defendant was charged with criminal impersonation for giving a police officer a fictitious name after being contacted for urinating in public, even though there was no such municipal crime where the conduct and arrest took place. He asserted that, since he was mistaken in believing that he had committed a chargeable offense, his conviction was a nullity because he gained no benefit from criminal impersonation. In rejecting the defendant's argument, the Court of Appeals recognized that "[i]f the defendant does every act within his power to commit an offense, and would have committed the completed offense if the facts had been as he believed them to be, then he may not escape criminal liability."

People v. Bush, 948 P.2d 16 (Colo. App. 1997). Refusal to give defendant's tendered affirmative defense instruction on asserted mistaken belief of fact related to controlled substances charges was not error where relevant mental state was correctly defined and jury's finding necessarily repudiated claim that defendant acted under mistaken belief of fact.

2. Mistake of Law (effect of ignorance or mistake upon credibility)

Section 18-1-504(2): A person is not relieved of criminal liability for conduct merely "because he engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense," unless the conduct is permitted by one or more of the following: (a) a binding statute or ordinance; (b) an administrative regulation, order, or other such grant of official permission; or (c) an official written interpretation of the statute or law or regulation promulgated by an appropriate agency charged or empowered to administer, enforce or interpret the statute, law, or other authority.

People v. Holmes, 959 P.2d 406 (Colo. 1998). "[I]gnorance of the law or mistake of law is no defense to criminal prosecution," but that rule is limited by constitutional demands of due process

which require "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly". *See also People v. Summers*, 208 P.3d 251 (Colo. 2009) (describing the rule of lenity, where "ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant," is a rule of last resort).

B. Factual or Legal Impossibility is Not a Defense to an Attempted Crime

People v. Darr, 551 P.2d 735 (Colo. App. 1976). The defendant was charged with attempted theft for receiving articles valued at $100 or more, even though those articles were not in fact stolen. In disapproving the trial court's ruling that the defendant had acted under a mistake of fact and was therefore entitled to acquittal as a matter of law, the Court of Appeals concluded that **the fact that the commission of the offense was legally impossible did not, of itself, constitute a defense to an attempt crime**. The holding, however, would not preclude the defendant from raising the defense of general mistake of fact by alleging that he **never believed** the goods to be stolen.

C. Reasonable Belief Minor is Eighteen Years of Age or Older

Section 18-1-503.5(1): "If the criminality of conduct depends on a child's being younger than eighteen years of age and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older." Under §§ 18-1-503.5(2) and (3), there is no similar affirmative defense if the criminality of conduct depends on the child being younger than fifteen years of age.

People v. Maloy, 465 P.3d 146 (Colo. App. 2020). Affirmative defense of reasonable mistake of age was unavailable in trial for pimping a child, keeping a place of prostitution, and inducement of child prostitution, although generally applicable statute allowed for mistake of age defense if criminality of conduct depended on child being younger than 18 years of age and the child was younger than 18 but was in fact at least 15 years of age. The more specific statute prohibited mistake of age defense for child prostitution crimes.

D. Must be Aware of Protection Order

People v. Coleby, 34 P.3d 422 (Colo. 2001). As to **protection orders**, the Colorado Supreme Court held "that section 18–6–803.5 is not a strict liability crime requiring no culpable mental state. Instead, applying section 18–1–503(4), we conclude that the culpable mental state of 'knowingly' applies to the first, conduct, element of the crime, as well as to the second element of the statute, which is satisfied either by personal service or actual knowledge, because no clear intent to limit the application of the mental state of knowingly clearly appears."

1.8 INDEPENDENT INTERVENING CAUSE

People v. Reynolds, 252 P.3d 1128 (Colo. App. 2010). "To destroy the causal connection, the intervening cause must be conduct in which the defendant did not participate. Thus, when a later event contributes to the outcome, but would not have occurred but for the defendant's own

conduct, the later event is not independent of the defendant's conduct and does not operate to relieve the defendant of liability. The other act must also be unforeseeable . . . . ." In this case, the defendant's theory was that his driving conduct apparently so angered the 4Runner driver that he intentionally collided with defendant's Jeep. "Even if the jury accepted defendant's descriptions of his own conduct and that of the 4Runner as true, and even if we assume the 4Runner driver's actions were grossly negligent and not foreseeable, the conduct of the 4Runner driver would not have been an independent event and would not have broken the chain of events that began with defendant's admitted conduct and ended when the 4Runner and the northbound vehicle collided and the drivers of those vehicles died. Thus, there was no evidence upon which the jury could have concluded that defendant was not a participant in the final collision."

People v. Calvaresi, 534 P.2d 316 (Colo. 1975). "[M]ere negligence on the part of the attending physician does not constitute a defense. '(N)egligence, unfortunately, is entirely too frequent a human conduct to be considered 'abnormal.' We hold, however, that gross negligence is abnormal human behavior, would not be reasonably foreseeable, and would constitute a defense, if, but for that gross negligence, death would not have resulted."

***Practice Tip*:** To prepare for an Independent Intervening Cause argument, read the case-law for examples of what qualifies as "gross negligence" versus simple negligence. Defendants often argue the victim's acts of simple negligence, such as speeding or not wearing a seatbelt, constitute independent intervening causes that negate the defendant's guilt when, under the caselaw, such acts by themselves do not.

People v. Saavedra-Rodriguez, 971 P.2d 223 (Colo. 1998). "An independent intervening cause is an act of an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and, thereby becomes the cause of the victim's injury." Here, after stabbing the victim, defendant was charged with second degree murder and sought to raise an independent intervening cause defense based on the **doctor's care of the victim**. The trial court did not allow such defense, finding that "a defendant is entitled to an intervening cause instruction only if the improper medical care is a cause 'but for which death would not have occurred.'" The Court of Appeals reversed, finding that whether the doctor's care "amounted to gross negligence constituting an intervening cause should have gone to the jury." But the Colorado Supreme Court agreed with the trial court and reversed the Court of Appeals, holding that "improper medical treatment does not relieve the defendant of liability for the death of the victim unless the treatment is grossly negligent and death probably would not have otherwise occurred." Here the treatment did not contribute to the victim's death but merely failed to prevent it.

People v. Stewart, 55 P.3d 107 (Colo. 2002) (commonly referred to as "*Stewart II*" because it overturned *Stewart I*). The Colorado Supreme Court held that "an intervening cause instruction as to the second-degree assault would have been incorrect because the facts of the case do not implicate an intervening cause." The Court found that the Defendant was a participant to the event. The Court found that even if the victim "had without warning, jumped on the front quarter panel

of Stewart's vehicle, and even if it deemed such conduct grossly negligent, [Victim's] act would not constitute a 'break' in the causal chain launched by Stewart's misconduct . . . . The act of driving forward, and running over [Victim's] head, was the *actus reas* for which Steward was convicted . . . . [Victim's] prior act of jumping on the car did not cause Stewart's subsequent act of driving over [Victim's] head. Steward drove forward of his own volition . . . . Moreover, for an independent intervening cause to relieve the defendant of liability, he must not have been a participant to the event. In this case, [Victim's] alleged leap came after [Victim] brushed up against Stewart's car and after their ensuing verbal altercation. Thus, this is not a case in which the defendant fairly can be characterized as a non-participant."

People v. Lopez, 97 P.3d 277 (Colo. App. 2004). Defendant was convicted of reckless vehicular homicide. Victim turning left in front of the defendant may have been a misjudgment but not such an extreme departure from the ordinary standard of care that it constituted gross negligence. The defendant was therefore not entitled to an instruction on independent intervening cause.

Auman v. People, 109 P.3d 647 (Colo. 2005). Defendant was not entitled to an instruction on independent intervening cause because the defendant did not establish that the victim's death would not have occurred absent the alleged intervening causes. Also, the claimed intervening acts must occur after the defendant's actions to be intervening causes. Causes that occur before the defendant's acts cannot intervene.

People v. Marquez, 107 P.3d 993 (Colo. App. 2004). "A defendant seeking an intervening cause instruction must present some credible evidence to support the defense." Here, the defendant was not entitled to an instruction because there was no evidence that the victim did anything more than a simple act of negligence by backing out of her driveway, and the defendant failed to make an offer of proof that would have substantiated his theory of independent intervening cause.

People v. Lopez, 97 P.3d 277 (Colo. App. 2004). There must be a scintilla of evidence to support the defense before submitting it to the jury.

1.9 ABANDONMENT OR DISENGAGEMENT

People v. Nicholas, 950 P.2d 634 (Colo. App. 1997) (*rev'd on other grounds*). The trial court did not err by refusing to instruct the jury on the affirmative defense of abandonment pursuant to § 18-2-101(3), where nothing in the record indicated a "voluntary renunciation of an intent to commit the charged crimes."

People v. Lucas, 992 P.2d 619 (Colo. App. 1999) (*overruled on other grounds*). Defendant failed to present evidence as to each element of the affirmative defense to felony murder of disengagement from the underlying offense, and uncontroverted evidence negated the existence of non-engagement under § 18-3-102(2). He was thus not entitled to an affirmative defense instruction.

A. Defense of Abandonment Available in Attempt Cases Only

People v. Scialabba, 55 P.3d 207 (Colo. App. 2002). Defendant was not entitled to assert the affirmative defense of abandonment because the affirmative defense of abandonment in § 18-2-101(3) only applies to the charge under that section, specifically to criminal attempt. "[G]enerally a defendant cannot abandon a completed crime. However, the General Assembly has the prerogative to formulate and limit affirmative defenses. [T]he statute makes abandonment an affirmative defense to the inchoate crime of criminal attempt."

B. Defense of Abandonment Not Available Once the Crime of Attempt is Complete

People v. Gandiaga, 70 P.3d 523 (Colo. App. 2003). Defendant was convicted of attempted first-degree murder and second-degree kidnapping. He and two other men kidnapped the victim. Defendant ordered one of his cohorts to kill the victim. The man put a gun to the victim's head and pulled the trigger. The rifle malfunctioned. "Here, the evidence relied upon by defendant demonstrates a reluctance to kill the victim and possibly an abandonment of an earlier, discrete opportunity to kill him. However, that evidence does not place in dispute the evidence that the victim escaped only after one of defendant's cohorts, at defendant's command, pointed the gun at the victim's head, pulled the trigger, and the gun malfunctioned. Under these circumstances, we conclude the defense of abandonment was unavailable to the defendant as a matter of law."

People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010). A defendant is not entitled to an instruction on abandonment where the defendant has put in motion forces that he or she is powerless to stop. In this case, defendant fled the scene of the crime after stabbing the victim six times and demanding money. Having already injured the victim, it was too late for him to claim he abandoned the crimes.

1.10 HEAT OF PASSION

A. Elements and Effect

Unlike other defenses, Heat of Passion is a mitigator, not a full defense to the criminal conduct. Rather than excuse the conduct, Heat of Passion permits the defendant to be convicted of a lower-level offense. There are many lessor versions of offenses as a result of Heat of Passion. Like lessor-include offenses, the lower Heat of Passion version of an offense can be charged or made available for the jury's consideration if the defendant requests and instruction and meets the minimal threshold.

For Assault in the First-Degree, for example, a defendant acts upon a provoked and sudden heat of passion only if they committed all the essential elements of Assault in the First-Degree and:

- the act causing the injury was performed upon a sudden heat of passion,
- caused by a serious and highly provoking act of the intended victim,
- affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and

- between the provocation and the assault, there was an insufficient interval of time for the voice of reason and humanity to be heard.

§ 18-3-202(2)(b).

Assault in the First Degree is a class three felony. *Id.* It is, however, a class 5 felony if it was committed in a sudden heat of passion. § 18-3-202(2)(a).

B. When the Lessor-Included Offense is Available as a Jury Instruction

People v. Harris, 797 P.2d 816 (Colo. App. 1990). "[O]nce defendant introduces some **credible** evidence that the crime was committed under a heat of passion, the burden shifts to the prosecution to demonstrate the non-existence of circumstances justifying the heat of passion defense."

People v. Tardiff, 433 P.3d 60 (Colo. App. 2017). When determining whether a heat-of-passion instruction is warranted, the reviewing court looks at the evidence in the light most favorable to the defendant. An instruction is warranted whenever a defendant shows some supporting evidence—regardless of how incredible, unreasonable, improbable, or slight it may be—to establish each factor of heat of passion. ***But see*** *People v. Ramirez*, 56 P.3d 89 (Colo. 2002) ("there was no evidence that entitled the defendant to an instruction on heat of passion, let alone a verdict to that effect," because the victim's refusal to marry the defendant was legally insufficient "to excite an irresistible urge in a reasonable person to murder the victim.")

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). In this case, the trial court did not err in not submitting the heat-of-passion provocation issue to the jury because, "the submission of the issue to the jury would have been inconsistent with defendant's position at trial, namely, that she was not the attacker and would have had no motive to attack the victim" and the victim's affair had ended months earlier. As pertinent here, a heat-of-passion provocation instruction was warranted only if some evidence tended to establish that (1) the assault was performed upon a sudden heat of passion (2) caused by a serious and highly provoking act of the intended victim, (3) which was sufficient to excite an irresistible passion in a reasonable person, and (4) between the provocation and the assault, an insufficient interval of time passed for the voice of reason and humanity to be heard."

1.11 INSANITY

A. Elements of Defense

An insanity defense may be raised only by entering a specific plea of not guilty by reason of insanity at the time of arraignment. To establish insanity, the defendant must show that 1) the defendant is so diseased or defective in mind at the time of the act; 2) as a result of a severely abnormal mental condition; 3) that grossly and demonstrably impairs the defendant's perception or understanding of reality; 4) that the defendant is incapable of distinguishing right from wrong with respect to the act committed. *People v. Garcia*, 113 P.3d 775 (Colo. 2005).

People v. Voth, 312 P.3d 144, 153 (Colo. 2013). "[T]he affirmative defense of insanity under section 16–8–101.5 is available to a defendant who experiences a temporary bout of insanity so long as he or she was insane at the time of the alleged crime and meets the other requirements under sections 16–8–101 to –114."

B. Statutes

Section 16-8-101.5(1) defines a legally insane person as a "person who is so diseased or defective in the mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act . . . or . . . who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state, this is an essential element of the crime charged." "Mental disease or defect" is defined in § 16-8-101.5(2)(b).

Section 16-8-103(1.5)(a): The defense of insanity may only be raised by a specific plea entered at the time of arraignment; except that the court, for good cause shown, may permit the plea to be entered at any time prior to trial. The form of the plea shall be: 'Not guilty by reason of insanity', and it must be pleaded orally either by the defendant or by the defendant's counsel. The plea of not guilty by reason of insanity includes the plea of not guilty.

Section 16-8-105(2) provides that "[e]very person is presumed to be sane; but, once any evidence of insanity is introduced, the people have the burden of proving sanity beyond a reasonable doubt."

People v. Vanrees, 125 P.3d 403 (Colo. 2005). "Although insanity pleas, including those based upon an impaired mental condition theory, must comply with these statutory pleading requirements, there is nothing within Colorado's statutory insanity framework to indicate that our General Assembly intended to create an 'all or nothing' insanity defense that applies in all cases where the defendant presents evidence challenging the culpable mental state element of the crime charged."

People v. Vanrees, 125 P.3d 403 (Colo. 2005). "This statute envisions three possible jury findings in a unitary trial: (1) a jury could find a defendant insane pursuant to the insanity statute; (2) a jury could find that the defendant suffered from an impaired mental condition pursuant to the insanity statute; (3) if the defendant is neither insane nor mentally impaired, then the jury must decide the defendant's guilty on the merits . . . which of course includes the required culpable mental state."

C. Waiver of Privilege

Section 16-8-103.6(2)(a): A defendant who asserts the affirmative defense of insanity places the defendant's mental condition at issue, and therefore, waives any claim of confidentiality or privilege as to records or communications regarding such condition.

D. Mental Slowness is Not a "Mental Disease or Defect"

People v. Vanrees, 80 P.3d 840 (Colo. App. 2003) (*rev'd on other grounds*). "A plea of insanity is waived if it is not specifically pleaded at the time of arraignment or, upon a showing of good

cause, prior to trial." (See § 16-8-103(1.5)(a). (2009)). "**However, if a defendant's 'mental slowness' does not rise to the level of insanity or impaired mental condition, he or she is not required to plead such a defense in order to present evidence regarding that mental condition as it bears on *mens rea*.**"

People v. Vanrees, 125 P.3d 403 (Colo. 2005). "Mental slowness does not fit the statutory definition of 'mental disease or defect' unless 'mental slowness' rises to the level of a 'severely abnormal mental condition that grossly and demonstrably impairs a person's perception or understanding of reality.'" (citing § 16-8-105.5(2)(b)).

People v. Requejo, 919 P.2d 874 (Colo. App. 1996). Defendant offered proof that he was mildly mentally retarded, though, competent, sane and not mentally ill. The Court of Appeals held that he could introduce evidence that he was a "slow thinker" to show that he did not possess the required culpable mental state. Defendant was not required to comply with the pleading requirements of the insanity statute. The Court distinguished impaired mental condition from mental slowness, "if a defendant's condition of mind is so abnormal as to render him incapable of accurately comprehending his surrounding circumstances, he or she is required to plead the statutory [insanity-impaired mental condition] . . . ."

People v. Vanrees, 125 P.3d 403 (Colo. 2005). "We conclude that evidence of mental slowness in this case does not meet the threshold requirements of the affirmative defense of impaired mental condition and that the defendant may introduce relevant evidence of his mental slowness to counter or to contest factually whether he formed the culpable mental state of the crimes charged."

E. Voluntary Intoxication Cannot be Used to Support an Insanity Defense

People v. Grant, 174 P.3d 798 (Colo. App. 2007). "A defendant may not assert that he was insane because of a mental state contracted through the voluntary use of intoxicants." *See* § 16-8-101.5(2)(b).

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). Defendant appealed his conviction for first-degree murder. Defendant claimed that the trial court improperly excluded evidence that defendant suffered from poly-drug abuse disorder, and at the time of the offense, he was intoxicated on cocaine which exacerbated his multiple chronic mental illnesses, rendering him temporarily insane. The Court of Appeals held that trial court did not abuse its discretion in excluding the evidence because the proposed testimony of defendant's experts did not include that the effects of the long-term drug use in conjunction with his mental illnesses rendered him incapable of distinguishing right from wrong. Defendant also asserted that the trial court erred in rejecting his request to assert involuntary intoxication as an affirmative defense. He argued that "some credible evidence exist[ed] to support the proposition that his illness affected his capacity to know and appreciate the long-term effects of intoxicants." The Court held that "involuntary intoxication is '**not self-induced**'…[A]ddiction is not sufficient to render drug use involuntary or unknowing so as to give rise to the defense of involuntary intoxication." (citing § 18-1-804(3)).

1. AFFIRMATIVE DEFENSES

1.12 CORPORAL PUNISHMENT

Section 18-1-703: The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: (a) A parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person, and a teacher or other person entrusted with the care and supervision of a minor, may use **reasonable and appropriate physical force** upon the minor or incompetent person when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor or incompetent person.

The statute addresses parents, guardians, common carrier managers, to avoid suicide or serious bodily injury, a doctor, nurse, other care providers.

People v. Taggart, 621 P.2d 1375 (Colo. 1981) (*rev'd on other grounds*). "The use of reasonable and appropriate physical force is an affirmative defense to the crime of child abuse when it is employed by one entrusted with the care of a child for the purpose of maintaining discipline."

* * *

2025 Contributions by Rob Zentner
Senior Trial Deputy District Attorney
21st Judicial District Attorney's Office

CHAPTER 2

ALIBI

2. ALIBI

2.1 INTRODUCTION

The defense of an "alibi" is an assertion that the defendant was at a place other than at the scene of the crime at the time of its occurrence. Consequently, the defense involves an assertion of physical circumstances by which it is impossible for the accused to have committed the crime. An alibi defense requires proof by the defendant that the defendant was unavailable to commit the offense because he was not present at the time and place where the crime was committed. *People v. Woertman,* 804 P.2d 188 (Colo. 1991). *See also People v. Whitman,* 205 P.3d 371 (Colo. App. 2007).

2.2 ALIBI NOT AN AFFIRMATIVE DEFENSE

People v. Huckleberry, 768 P.2d 1235 (Colo. 1989). An alibi defense essentially denies that the defendant committed the act charged, while an affirmative defense acknowledges the commission of the act charged but seeks to justify, excuse, or mitigate it. The defense of alibi does not require proof or disproof of factual issues beyond those necessary to establish the offense charged, but rather emphasizes the significance of the prosecution's burden in every criminal case to prove the defendant's presence at the scene of the offense and his personal responsibility for the prohibited conduct. The trial court therefore properly denied the special instruction for allocating the burden of proof to the prosecution to disprove the affirmative defense when raised by the defendant.

A. Defendant Still Entitled to Alibi Instruction in Theory of the Defense

People v. Nunez, 841 P.2d 261 (Colo. 1992). Although the trial court properly rejected defendant's theory of defense instruction on alibi as an improper statement of the law, it committed reversible error in failing to cooperate with defense counsel to prepare a proper instruction where there was sufficient evidence to justify an instruction on alibi and it was not covered by other instructions.

B. But Not When Covered by Other Instructions

People v. Banks, 804 P.2d 203 (Colo. App. 1990). Trial court properly denied defendant's tendered theory of the case instruction that "he was nowhere near the location of the crime at the time of its commission," where he failed to provide notice of alibi pursuant to § 16-7-102 and Crim. P. 16(II)(d), and his theory of misidentification was covered by other instructions.

People v. Merklin, 80 P.3d 921 (Colo. App. 2003). Trial court did not err in refusal to give defense theory of the case instruction where first sentence merely denied the charge, second sentence asserting an alibi was not supported by evidence at trial, and defendant was not precluded from presenting his theory of the case during closing argument.

C. Use of Alibi Notice as Prior Inconsistent Statement

People v. Lowe, 969 P.2d 746 (Colo. App. 1998). "Notice of alibi is admissible as a prior inconsistent statement when a defendant testifies at trial in a manner inconsistent with such notice." Such use does not violate Crim. P. 16(II)(d), nor the defendant's Fifth Amendment right against self-incrimination.

2.3 NOTICE REQUIREMENT

Section 16-7-102 and Crim. P. 16(II)(d) both require a defendant intending to introduce evidence of an alibi to notify the prosecution as soon as practicable but not later than 35 days before trial. The notice must be in writing and specify the place the defendant claims to have been at the time of the offense and the names and addresses of witnesses the defendant will call to support the defense of alibi. The prosecution is thereafter required to notify the defendant of the names and addresses of any additional witnesses who will be called to refute the alibi defense. The statute and rule also restrict the defendant varying from the alibi "unless the court is satisfied upon good cause shown that such evidence should be admitted."

A. Consequences of Untimely Disclosure

1. No Exclusion of Defendant's Alibi Testimony

The rule requiring disclosure of alibi witnesses, and the exclusion sanction contained therein, does not apply when the accused exercises his constitutional right to testify and presents alibi testimony. *People v. Hampton*, 696 P.2d 765 (Colo. 1985).

***Practice Tip*: While a defendant may not be prevented from presenting an alibi during his own testimony without a voluntary, knowing, and intentional waiver of his right to testify, *see People Curtis*, 681 P.2d 504 (Colo. 1984), the decision to present or withdraw an alibi defense through witnesses **other than the defendant** is a strategic and tactical decision within the exclusive province of defense counsel. *People v. Tackett*, 742 P.2d 957 (Colo. App. 1987).

2. No automatic exclusion of alibi witnesses upon failure to comply with notice requirements—inquiry into "good cause" required

While the sanction of exclusion remains largely a matter of judicial discretion, the exercise of that discretion must be **properly informed by an adequate inquiry** into and consideration of the circumstances underlying the defendant's noncompliance and the effect of the exclusion sanction on both the prosecution and the defense. In determining whether there is good cause to admit the defendant's undisclosed alibi evidence the following **factors** are pertinent: (1) the reason for and the degree of culpability associated with the failure to timely respond to the prosecutor's specification of time and place; (2) whether and to what extent the nondisclosure prejudiced the prosecution's opportunity to effectively prepare for trial; (3) whether events occurring subsequent to the defendant's noncompliance mitigated the prejudice to the prosecution; (4) whether there was a reasonable and less drastic alternative to the preclusion of alibi evidence; and (5) any other

relevant factors arising out of the circumstances of the case. The trial court should **identify on the record** those factors which it considers critical to its ultimate determination that there is or is not good cause to permit the undisclosed alibi evidence. *People v. Hampton*, 696 P.2d 765 (Colo. 1985).

3. Defense Failure to Comply with Disclosure Requirements, Found to be Proper Basis for a Mistrial

A defendant may not elicit alibi evidence, absent good cause, without first complying with the alibi disclosure requirements of Crim. P. 16 (II)(d). After applying the factors of *Hampton*, it was a proper exercise of discretion in granting prosecution's request for a mistrial, when the defendant elicited alibi testimony without complying with disclosure requirements of the Rule. *People v. Jackson*, 474 P.3d 60 (Colo. App. 2018), affirmed (as to other issues) 472 P.3d 553 (Colo. App. 2019).

B. Disclosure of Rebuttal Witnesses

Section 16-7-102 requires the prosecution to disclose the names and addresses of any witnesses that will be called in rebuttal of the testimony of the defendant's alibi witnesses, and provides for **exclusion** of such rebuttal evidence upon noncompliance with the reciprocal disclosure obligation. The law and criminal rule further provides for the exclusion of evidence by either the prosecution or defense that is inconsistent with the specification statement unless for good cause shown and upon just terms permits the specification statement to be amended.

Disclosure of Rebuttal Witnesses Merely Impeaching Credibility of Alibi Witnesses Not Required

People v. Muniz, 622 P.2d 100 (Colo. App. 1980). The defendant, having complied with disclosure of alibi requirements, called two alibi witnesses at trial. The trial court thereafter permitted the prosecution to call a rebuttal witness, whose identity had not been disclosed under the reciprocal disclosure provisions. Admission of the rebuttal evidence was upheld as not violating the prosecution's reciprocal disclosure obligations, inasmuch as the "rebuttal" witness was not called to directly rebut or contradict the alibi but rather was introduced to **impeach the credibility** of the two alibi witnesses. The endorsement was accordingly governed by Crim. P. 7(d) which makes late endorsement of witnesses discretionary with the trial court. There was no abuse of discretion in allowing the rebuttal where the court called a recess and permitted defense counsel to interview the witness before she testified. Crim. P. 7(d) was repealed September 4, 1997; however, the state of the law remains the same.

C. Acceptance of Guilty Plea after the Filing of a Notice of Alibi Defense Requires Added Precaution

2. ALIBI

People v. Sandoval, 535 P.2d 1120 (Colo. 1975). In ordering the defendant's guilty plea to be vacated, the court held that where a defendant has filed a notice of an alibi defense, the trial court must assiduously adhere to the requirements of Rule 11 and make a **detailed inquiry** to determine that the defendant knew that by making a guilty plea he was asserting that his alibi defense was baseless.

D. Late Disclosure of Alibi no Basis for Post-Conviction Relief

DeBaca v. District Court, 431 P.2d 763 (Colo. 1967). Petitioner could not raise defense of alibi for the first time in a post-conviction petition under Crim. P. 35(b).

* * *

2025 Contributions by Doyle Baker

Senior Deputy District Attorney

4th Judicial District

CHAPTER 3

BILL OF PARTICULARS

3. BILL OF PARTICULARS

3.1 INTRODUCTION

Crim. R. 7(g) permits a court, upon motion, to direct the prosecution to file a bill of particulars. The motion must be made **within 10 days after arraignment**, or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time "subject to such conditions as justice requires." The rule does not define "Bill of Particulars" or state what must be included in one to be sufficient.

3.2 GRANTING BILL OF PARTICULARS IS DISCRETIONARY

"The law is well settled that it is within the trial court's discretion to grant or deny motions for bill of particulars, and its action will not be disturbed on writ of error in the absence of an abuse of discretion." *Balltrip v. People*, 401 P.2d 259 (Colo. 1965). *See also People v. Atencio,* 780 P.2d 46 (Colo. App. 1989).

A. Statutory Exception

Colorado's **theft statute** provides that it is sufficient to allege in the indictment or information that "on or about a day certain, the defendant committed the crime of theft by unlawfully taking a thing or things of value of a person or persons named in the indictment or information. **The prosecuting attorney shall at the request of the defendant provide a bill of particulars.**" § 18-4-401(6).

B. Standard of Review

Kogan v. People, 756 P.2d 945 (Colo. 1988) (*rev'd on other grounds*). In a typical case in which a trial court has denied or granted an order for a bill of particulars, the issue on appeal is whether the trial court abused its discretion. The standard of review remains the same whether the court denies a motion for a bill of particulars or grants the motion subject to limitation, *i.e.,* "[w]hether the bill of particulars as produced sufficiently informs the defendant of the particular charges at issue so that he is given a fair opportunity to properly prepare his defense."

People v. Laurson, 15 P.3d 791 (Colo. App. 2000). The trial court properly denied defendant's motion for a bill of particulars because he possessed the essential information to procure witnesses, prepare his defense, and avoid surprise based upon the (1) charging document, (2) preliminary hearing, and (3) discovery provided to him.

C. Considerations

People v. District Court, 603 P.2d 127 (Colo. 1979). The Colorado Supreme Court has traditionally **approved** orders requiring the prosecution to provide bills of particular where the

charges are **broad in scope**, involving a **number of people** and acts allegedly committed over a **long period of time**.

But see *Balltrip v. People*, 401 P.2d 259 (Colo. 1965). There is no abuse of discretion in denying a motion for a bill of particulars where the information sufficiently advises the defendant of the charge he is to meet.

3.3 PURPOSE OF BILL OF PARTICULARS

Kogan v. People, 756 P.2d 945 (Colo. 1988) (*rev'd on other grounds*). "The purpose of a bill of particulars is to **enable the defendant to properly prepare his defense** in a case where the indictment, although sufficient to advise the defendant of the charges against him, is nonetheless so indefinite in its statement of a particular charge that it does not afford the defendant a fair opportunity to procure witnesses and prepare for trial, especially through the avoidance of prejudicial surprise . . . . A bill of particulars can also provide **protection against a subsequent prosecution for the same offense**." *See also* *Erickson v. People*, 951 P.2d 919 (Colo. 1998); *People v. Pineda*, 40 P.3d 60 (Colo.App.2001); *People v. Quintano*, 81 P.3d 1093 (Colo. App. 2003).

People v. Pineda, 40 P.3d 60 (Colo. App. 2001). "Where the defendant can obtain adequate information through the charging document, preliminary hearing, and discovery process, a bill of particulars is not necessary."

A. Bill of Particulars Not to be Used for Discovery

Balltrip v. People, 401 P.2d 259 (Colo. 1965). The basic purpose of a bill of particulars is to define more specifically the offense charged, and not to disclose in detail the evidence upon which the prosecution expects to rely. *See also* *Erickson v. People*, 951 P.2d 919 (Colo. 1998).

Kogan v. People, 756 P.2d 945 (Colo. 1988) (*rev'd on other grounds*). The defendant is not necessarily entitled to receive all of the information requested in a bill of particulars. "A motion for bill of particulars will be denied which calls for **conclusions of law** or the **legal theories** behind the prosecution's case, or which seeks to obtain **discovery** of the evidence upon which the prosecution will rely at trial." *See also* *People v. District Court*, 603 P.2d 127 (Colo. 1979) (proper to limit bill of particulars to exclude matters more properly subject to discovery proceedings).

1. Time or Date of Offense

Woertman v. People, 804 P.2d 188 (Colo. 1991). In a case in which alibi was not a viable defense, the 55-day time period set forth in a bill of particulars, combined with a description of the overt acts alleged, enabled the defendant to properly prepare his defense and sufficiently advised him of the charges against him. Further specification of the precise date of the offense in the bill of particulars was therefore not required. "**When time is not a material element of the offense, the**

precise time at which the offense is charged to have been committed is not material, and is therefore not required in a bill of particulars." This is especially true where the defendant has not shown how the defense is prejudiced by the refusal of the court to order the prosecution to furnish more exact information with respect to dates. *See also* *Roelker v. People*, 804 P.2d 1336 (Colo. 1991).

But see *Kogan v. People*, 756 P.2d 945 (Colo. 1988) (*rev'd on other grounds*). Bill of particulars setting forth general descriptions of the overt acts which allegedly occurred over a period of from 6 weeks to 9 months was insufficient. "If . . . information about the time when the alleged crime was committed is necessary to enable the defendant to prepare his defense or to guard against a subsequent prosecution for the same offense, such information must be provided [in a bill of particulars]." ***But see*** *Erickson v. People*, 951 P.2d 919 (Colo. 1998).

Erickson v. People, 951 P.2d 919 (Colo. 1998). "Contrary to our holding in *Kogan*, we find that the bill of particulars in the present case was sufficient. Although the bill of particulars offered by the prosecution was broad, this lack of specificity reflected the general nature of the prosecution's evidence and put the defense on notice that the trial would essentially come down to a credibility determination. Because the evidence presented at trial was no more specific than the information in the bill of particulars, petitioner's ability to prepare a defense was not hampered by withheld information or prejudicial surprise." The Court went on to distinguish *Kogan* by stating, "[i]dentification of the particular room, class and period of time might have been of important assistance to the defendant in seeking to impeach the testimony of the victims or to identify defense witnesses. In contrast, the incidents at issue in the present case occurred with only the defendant and one or both of the victims present."

a. Specific incidents

People v. Graham, 876 P.2d 68 (Colo. App. 1994). In a sexual assault on a child prosecution where the victim was 10-years old when the assaults began and who was able to provide specific details about the sexual contact that occurred over a four-year period, the bill of particulars outlining with some specificity the incidents of sexual assault was sufficient even though it did not relate in any detail the specific dates of the assaults. "Because defendant was provided with the specific incidents upon which the prosecution would rely and was given the general time frame within which the assaults occurred, we conclude that the bill of particulars was sufficient here."

Erickson v. People, 951 P.2d 919 (Colo. 1998). "In cases involving multiple crimes committed over a long period of time, the trial court may grant the motion for a bill of particulars but limit its scope." However, the Colorado Supreme Court noted two practical problems in cases of prolonged **child sexual abuse**: the victims often have "difficulty recollecting, reconstructing, and identifying the specific incidents and dates," and it is "unreasonable to require exactitude from any victim, child or adult, in crimes involving repeated instances of abuse occurring over a prolonged period of time." The Court also noted that courts in other jurisdictions have recognized these

problems and "relaxed specificity requirements in order to facilitate prosecution of those accused of sexually assaulting children over extended periods of time."

People v. Quintano, 81 P.3d 1093 (Colo. App. 2003). "In ruling on a request for a bill of particulars, the trial court should consider whether the requested information is necessary for the defendant to prepare his defense or to protect against subsequent prosecution." Defendant was charged with five counts of sexual assault on a child, all committed on the same date. The trial court denied defendant's motion for a bill of particulars that requested identification of the "precise nature of the sexual contact charged" in each count, the number of sexual acts on which each charge was based, the name of witnesses, and the "precise times and locations corresponding to the sexual acts that are alleged to have occurred." Defendant argued that the trial court erred in denying his motion. The Court of Appeals held, "the record does not support defendant's assertion that he was unaware until trial that he would be required to present a defense against multiple instances of sexual misconduct as distinguished from one continuous act. Nor did the trial court's denial of his motion for a bill of particulars result in his being forced to rely on a 'defense of general denial' or deprive him of his ability to 'investigate further' and to 'determine if there were other witnesses.'" ***But see*** *Woellhaf v. People, 105 P.3d 209 (Colo. 2005)* ("Here, neither the counts, nor the evidence, provide any basis to determine whether the types of sexual contact occurred in one place at one time or in separate places and times.").

B. Bill of Particulars Will Not Save a Defective Pleading

Wright v. People, 91 P.2d 499 (Colo. 1939). "It is fundamental that a defendant can be tried only on the charge contained in the indictment, and not for any other offense. A bill of particulars is not a part of an indictment or information, nor an amendment thereto. The sole purpose of the bill of particulars is to give the adverse party information which the pleadings, by reason of their generality, do not give . . . **It cannot change the offense charged nor in any way aid an indictment fundamentally bad**, although it may remove an objection upon the ground of uncertainty."

People v. Williams, 984 P.2d 56 (Colo. 1999). "While a bill of particulars cannot cure a fundamental error in a charging document, **it can remedy a defect in form** resulting from indefiniteness or lack of specificity that may hinder trial preparations." To determine whether prejudice resulted from a defect in form, when additional specificity could have been supplied by a bill of particulars at defendant's request, the court considers the surrounding circumstances.

3.4 SUFFICIENCY OF BILL OF PARTICULARS

A. Broad Bill of Particulars Can Be Sufficient

Erickson v. People, 951 P.2d 919 (Colo. 1998). In a case involving prolonged child sexual abuse, Court found that, although the bill of particulars here was broad, it was sufficient; the "lack of

specificity reflected the general nature of the prosecution's evidence and put the defense on notice that the trial would essentially come down to a credibility determination." *See also People v. Whitman*, 205 P.3d 371 (Colo. App. 2007).

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). In a case of felony murder predicated on burglary of the victim's home, defendant objected to the bill of particulars because it did not identify the item or items that he intended to steal. The Court of Appeals agreed with the trial court that there was no burden on the prosecution to identify the precise items he intended to steal. It found the prosecution had disclosed in its bill of particulars that it would attempt to prove intent to commit theft, and ruled that defendant was sufficiently apprised of the offense against him.

B. Waiver of Defects in Bill of Particulars

Crim. P. 12(b)(2) requires that defense raise defects in the indictment or information (other than jurisdiction) by motion within 21 days of arraignment. Failure to present any such defense or objection constitutes a waiver of it, but the court for cause shown may grant relief from the waiver.

C. In the Alternative Use of Unanimity Instruction

People v. Quintano, 81 P.3d 1093 (Colo. App. 2003). Defendant argued that a "bill of particulars was necessary to protect him from being prosecuted again for the same acts and that the trial court's denial of his motion violated the prohibition against double jeopardy." "When evidence of several acts is presented at trial, any one of which would constitute the basis for the single offense charged, the prosecution may be compelled to select the act or acts on which that charge is based. Such an election enables the defendant to prepare a defense to each specific charge, and it ensures that some jurors do not convict on one act and others on a different act. In the alternative, if the court does not require the prosecution to designate the specific act upon which the single charge is based, it must give the jurors a unanimity instruction by which they are told that either they must agree upon a specific act as supporting the charge, or they must all agree that all the incidents referred to in the evidence occurred . . . . However, such an alternative instruction is not appropriate if, as here, the defendant is charged with more than one offense and evidence of more than one incident is introduced . . . . [U]nless the prosecution and the court identify the specific incident upon which each separate charge is based, the defendant's right to be protected against being placed in double jeopardy is implicated." *See also Thomas v. People*, 803 P.2d 144 (Colo. 1990).

D. Bill of Particulars Can Bind Prosecution

People v. Chirinos-Raudales, 491 P.3d 538 (Colo. App. 2021). When the parties, the pleadings, the evidence, and the instructions, *including a Bill of Particulars*, all treated an incident as a single act or series of acts rather than separate, distinct acts, then two convictions for that single incident are based on identical evidence and must be sentenced concurrently under § 18-1-408.

CHAPTER 4

CHARACTER EVIDENCE

4. CHARACTER EVIDENCE

4.1 ANALYTICAL FRAMEWORK

Character is the reputation and opinions others have about the traits of a person and the other acts and habits of that person. Introduction of charact evidence requires the following analysis:

1. Elemental Character Rule. C.R.E. 405(b).
2. Propensity evidence excluded. C.R.E. 404(a), (b).
3. Exceptions
   i. Character trait of the accused or victim in a criminal trial. C.R.E. 404(a).
   ii. Character of testifying witness. C.R.E. 404(a), 607, 608, 610, § 13-90-101.
   iii. Other-act evidence. C.R.E. 404(b).
   iv. Habit or routine practice. C.R.E. 406.
   v. Rape shield. § 18-3-407.
   vi. Prior sexual misconduct of the defendant. § 16-10-301.
4. Manner and method of proving character. C.R.E. 405.

A. Elemental Character Rule

C.R.E. 405(b) references, without stating, the Elemental Character Rule. The Elemental Character Rule states that where the character or a trait of character is an essential element of a charge, claim, or defense, proof may be made of specific instances as well as by opinion or reputation evidence. The rule is most often seen in self-defense cases as to the reasonableness of the defendant's actions and reasonableness of the amount of force used. Limitations are placed on the Elemental Character Rule by § 16-10-301, other sexual conduct of the defendant, and §18-3-407 (Rape Shield).

People v Miller, 981 P.2d 654 (1998). To determine whether a character trait is an essential element of a charge or defense, the inquiry is whether proof, or failure of proof, of the character trait by itself actually satisfies an element of the charge, claim, or defense. If not, then character is not essential.

B. Propensity Evidence

C.R.E. 404(a) sets forth the basic principle that character evidence is generally not admissible to prove circumstantially that a person acted in conformity with a given character trait on a particular occasion.

C. Exceptions

The exceptions to the general rule are set forth in subsections C.R.E. 404(a)(1), C.R.E. 404(a)(2), and C.R.E. 404(a)(3) (and C.R.E. 608), relating respectively to the character of the accused, the victim, and other witnesses.

D. Manner and Method of Proving Character

While the admissibility of character evidence is governed by C.R.E. 404, the manner or method of proving character is governed by C.R.E. 405, which permits reputation testimony or testimony in the form of an opinion regarding the person's character. Character may also be proven under C.R.E. 405 by evidence of specific instances of conduct, but this form of proof is limited primarily to cases in which character or a trait of character is an essential element of a charge, claim or defense.

Under the Rules, the prosecution may not introduce evidence relating to the character of either the accused or the victim in the first instance, except in a homicide case to rebut evidence that the victim was the initial aggressor. However, once the defense has introduced evidence of the character of either the accused or the victim, the prosecution may produce character evidence to rebut the same. On cross-examination of a character witness, inquiry into relevant specific instances of conduct may be permitted under C.R.E. 405(a). The examiner must have a good faith basis for the inquiry and will be bound by the witness's answer.

Evidence of a witness's truthful character is admissible only after that witness' character for truthfulness has been attacked by opinion or reputation evidence or otherwise. *See* C.R.E. 608(a)(2). The trial court has discretion to permit cross-examination into specific instances of conduct relative to truthfulness or untruthfulness, but the examiner must have a good faith basis for the inquiry and will be bound by the witness's answer. C.R.E. 608 also protects the witness from self-incrimination when examined with respect to matters which relate only to credibility.

The admissibility and presentation of character evidence is subject to limitation by other rules. Most pertinent are C.R.E. 403 (exclusion of relevant evidence on grounds of prejudice, confusion or waste of time), and C.R.E. 611(a)(3) (protection of witnesses from harassment or undue embarrassment).

People v. Segovia, 196 P.3d 1126 (Colo. 2008). "Both C.R.E. 404(b) and C.R.E. 608(b) permit admission of evidence that would otherwise be considered inadmissible character evidence for limited purposes. C.R.E. 404(b) prohibits the use of evidence to show a person acted in conformity with a certain character, but does not preclude use of that evidence for other purposes. C.R.E. 404(b) does not address the use of evidence for impeachment. In contrast, C.R.E. 608(b) governs evidence used to impeach a witness' credibility. Thus, evidence of specific acts used solely for impeachment is governed by C.R.E. 608(b), rather than C.R.E. 404(b)."

4.2 CHARACTER OF THE ACCUSED: C.R.E. 404

A. C.R.E. 404(a)(1)

4. CHARACTER EVIDENCE

Although evidence of a person's character or a trait of character is not admissible for the purposes of proving that the person acted in conformity with that character or character trait on a particular occasion, evidence of a pertinent character trait is admissible by the accused, or by the prosecution to rebut the same.

B. Analytical Framework

Analytical framework of C.R.E. 404(a)(1), (2):

- what is the pertinent character trait at issue;
- who is the proponent of the evidence (defendant or prosecution);
- what is the proper method of introduction (opinion/reputation or specific instances).

C. Evidence Limited to Pertinent Character Trait

Montes-Rodriguez, 219 P.3d 340 (Colo. App. 2010). The defendant's character for truth and veracity was pertinent to the charge of assuming a false or fictitious identity or capacity. In this case, exclusion was not error where the defendant admitted to being in possession of a social security number that was not his.

People v. Garcia, 964 P.2d 619 (Colo. App. 1998) (*rev'd on other grounds*). Where defendant was charged with child abuse resulting in death, the court properly admitted under C.R.E. 404(a)(1) a neighbor's testimony that on one occasion when her car would not start, defendant shook the steering wheel, kicked the tires, hit the hood, and yelled at her boyfriend to rebut the character trait of peacefulness set forth by defendant during cross-examination of prosecution witnesses.

D. Law Abidingness of the Defendant

The character trait of "lawabidingness" is always in issue in a criminal case. The defendant may put on opinion or reputation evidence as a general character trait. However, if the defendant puts on evidence, the prosecution may rebut the trait with evidence of specific instances of times when the defendant violated the law. This opens the door to all manner of breaking the law and does not necessarily have to have resulted in a conviction. This trait is rarely used by the defense because it permits the prosecution to go into specific instances.

People v. Marsh, 396 P.3d 1 (Colo. App. 2011) (affirmed other issues *Marsh v People*, 389 P.3d 100 (Colo. 2017)). The defendant's character for being law-abiding is a pertinent character trait in a criminal prosecution when introduced by the defendant. In this case, the defendant sought to call his two granddaughters to testify that he had not sexually assaulted them. The trial court held that such testimony would open the door to the prosecution's use of the defendant's prior convictions. The appellate court held that the evidence was equivalent to general law-abidingness that would

open the door to the defendant's prior sexual assault conviction. Character for being "law-abiding" can be rebutted by specific instances of unlawful conduct.

Caution with People v. Marsh: Although this case seems to say that specific instances of the defendant's refraining from sexually assaulting his other granddaughters is equivalent to general law-abidingness, the case does not do the analysis as a general principle but rather holds, assuming the evidence is admissible under C.R.E. 404(a), that it opens the door to the impeachment.

People v. Miller, 890 P.2d 84 (Colo. 1995). A defendant's law-abiding character is always a pertinent trait in a criminal prosecution. The evidence is limited to reputation or opinion. That the defendant was never convicted of a criminal offense is not admissible because absence of a criminal conviction does not necessarily demonstrate a defendant's law-abiding character.

Compare with People v. Goldfuss, 98 P.3d 935 (Colo. App. 2004). [D]efendant attempted to establish, through his own testimony and through cross-examination of the victim, that he had never been convicted of a criminal offense. The Court found that this was not a pertinent trait under C.R.E. 404(a)(1). The Court concluded that the absence of a criminal conviction does not necessarily demonstrate a defendant's law-abiding behavior.

E. Defendant's "Truth and Veracity" Not Pertinent Under C.R.E. 404(a)

United States v. Jackson, 588 F.2d 1046 (5th Cir. 1979). In a case of conspiracy to distribute heroin, evidence of the defendant's "truth and veracity" was properly excluded. In rejecting the defendant's assertion that an accused may always introduce evidence of his veracity to support his credibility, the court stated that not all criminal indictments impugn the defendant's truthfulness and veracity. "Since evidence of the trait of truthfulness is not pertinent to the criminal charges of conspiracy to distribute heroin or possession of heroin, C.R.E. 404 forbids its introduction as circumstantial evidence of innocence of those crimes."

People v. Miller, 890 P.2d 84 (Colo. 1995). The Colorado Supreme Court held that the introduction of evidence of truthful character under C.R.E. 404(a)(1) is not automatic once the defendant choses to testify at trial. The Court recognized the distinction between evidence of a defendant's law-abiding character, which is generally admissible, and evidence of a character trait for truthfulness which is not necessarily admissible. Truthfulness is a *pertinent* trait under C.R.E. 404(a)(1) only if that trait is involved" in the offense charged. The Rules afford the defendant two methods of introducing character evidence at trial. A defendant can seek to introduce character evidence pursuant to C.R.E. 404(a)(1), where that character evidence is 'pertinent' to the crime charged, *i.e.,* there is some nexus between the proffered character trait and the crime charged, and a defendant can proffer evidence of truthful character pursuant to C.R.E. 608 *after* the defendant has testified and his character for truthfulness had been attacked by opinion or reputation evidence or otherwise. "[U]nder C.R.E. 608, questioning of a defendant's credibility while on the witness stand does not necessarily constitute an attack on that defendant's character for truthfulness for purposes

of introducing character evidence for truthfulness under C.R.E. 608(a)(2). Whether a witness's character is attacked will always depend on the circumstances of a particular case."

***Practice Tip*:** This section deals with the character of the accused as it relates to the crime charged. When a defendant testifies, however, he is treated like any other witness with respect to his character for truth and veracity.

F. Evidence of Defendant's Similar Transaction of Sexual Misconduct

Section 16-10-301 provides for the admissibility of other acts by the defendant to prove the commission of sexual assault for any purpose other than propensity. Those other purposes include consent or recent fabrication; showing of a common plan, scheme, design, or modus operandi; motive, opportunity, intent, preparation; or any other purpose which is relevant.

There is a procedure the prosecution must follow for admissibility. Those include:

a. Advising the trial court and defendant of the purpose;
b. Based upon an offer of proof, the trial court must determine by a preponderance of evidence whether the other act occurred and whether it is being offered for a proper purpose;
c. If admitted, the trial court shall instruct the jury as to the limited purpose; and use the words "other act or transaction" and not "other offense," "other crime," or similar terms.

People v Conyac, 361 P.3d 1005 (Colo. App. 2014). That § 16-10-301 statute has inconsistencies with the rape-shield statute does not render the statute fundamentally unfair or a violation of equal protection.

4.3 RAPE SHIELD

The admissibility of other sexual acts by a victim or witness *in any type of case* is subject to the special protections of Colorado's Rape-Shield statute, § 18-3-407, as well as to the general provisions of C.R.E. 403, 404, and 405 to the extent that they are inconsistent with the statute. *See* C.R.E. 1101(e) and 405(b).

Generally, the statute prohibits the introduction of any evidence of a victim's prior sexual activity at trial unless the defendant can establish, through pre-trial notice and hearing, that those activities are relevant to a defense and not prejudicial to the victim. *See generally* § 18-3-407.

The Rape-Shield statute was amended in July of 2024. The revised statute now:

1. Prohibits evidence of the victim or witness's clothing or hairstyle as evidence of consent to sexual contact, intrusion, and penetration. Allows the introduction of this evidence for a purpose other than consent, *e.g.*, clothing for DNA, state of item, change during the assault, etc.

2. Enhances the burden of proof on the party moving to admit evidence under Rape Shield to include a C.R.E. 403 analysis, and now requires a judge to consider "unfair invasion of" the victim or witness's privacy when determining whether to admit the proffered evidence.
3. Removes the presumptive admission of evidence of a victim's sexual history with the defendant. It now requires motions in those scenarios.
4. Defines "false reporting" as "at least one prior incident of false reporting of unlawful sexual behavior that is demonstrably false or false in fact" under a preponderance of the evidence standard.

People v. Harris, 43 P.3d 221 (Colo. 2002). Although the rules of evidence generally favor the admission of evidence, the rape shield statute established a presumption that evidence relating to a rape victim's sexual conduct is irrelevant to the proceedings.

Caution Below**:** You should consider the following sections and caselaw in light of the 2024 amendments to the Rape-Shield statute. Some caselaw previously listed in this section has been removed because the 2024 amendments moot the holdings.

A. Presumption of Irrelevance

Section 18-3-407(1) establishes a presumption of irrelevancy of a victim's or a witness's prior or subsequent sexual conduct except when the evidence of sexual activity showing the source or origin of semen, pregnancy, disease, or any other such evidence of sexual intercourse is or offered to establish that the act charged was not committed by the defendant.

B. Once Evidence Meets an Exception, it Must Then Meet the Other Rules of Evidence.

People v. Harris, 43 P.3d 221 (Colo. 2002). Evidence coming within one of these provisions is not automatically admissible. It remains subject to the usual rules of evidence.

C. Procedural Requirements

If a party seeks to admit evidence that is presumptively irrelevant under the Rape-Shield statute, they must comply with the specific procedural requirements outlined under § 18-3-407(2), including filing a written motion at least **35 days prior to trial** with an affidavit attached that contains an **offer of proof** sufficient to overcome the presumption of irrelevance "that is not substantially outweighed by the presumptive unfair prejudice, confusion of the issues, misleading of the jury, or unfair invasion of the privacy of the victim or witness." This is then followed by an ***in camera*** **hearing when necessary**.

People v. Cuellar, 530 P.3d 1236 (Colo. App. 2023). The Court found that the defendant's motion was untimely because § 18-3-407(2)(a) requires the written motion to be filed at least 35 days prior to trial unless good cause is shown for a late filing.

4. CHARACTER EVIDENCE

People v. Williamson, 249 P.3d 801 (Colo. 2011). The Court held that where the prior acts of the victim were acts of solicitation for prostitution, the trial court was required to hold a pretrial evidentiary hearing under the Rape-Shield statute.

Pierson v. People, 279 P.3d 1217 (Colo. 2012). A pre-trial motion and *in camera* review are not required outside the presence of the jury where (1) the prior sexual conduct involved the same actor (this part of the holding no longer valid given the 2024 amendments) or (2) with regard to "evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were not committed by the defendant."

1. Contents of the pretrial motion

Pierson v. People, 279 P.3d 1217 (Colo. 2012). In a case where the defendant's pre-trial motion "can hardly be described as a model of clarity," defense counsel made no clear distinction between a history of false reporting and alternate source evidence. The motion must state that the moving party has an offer of proof of the relevancy and materiality of evidence of specific instances of the victim's or witnesses prior or subsequent sexual conduct, or opinion evidence of the victim's or witness's sexual conduct, or reputation evidence of the victim's or witness's sexual conduct, or evidence that the victim or witness has a history of false reporting of sexual assaults that is proposed to be presented."

2. Contents of the offer of proof

People v. Weiss, 133 P.3d 1180 (Colo. 2006). An "offer of proof" typically states: (1) what the anticipated testimony of the witness would be if the witness were permitted to testify concerning the matter at issue; (2) the purpose and relevance of the testimony sought to be introduced; and (3) all the facts necessary to establish the testimony's admissibility.

3. Contents of offer of proof when alleging that victim has history of false reporting

People v. Buckner, 509 P.3d 452, 466 (Colo. App. 2022). The defense alleged two specific occasions and supported the motion with an affidavit. The trial court denied a hearing, finding the motion and affidavit did not sufficiently alleged false reporting. The Court held that the reporting does not have to be made to law enforcement or other authorities to constitute a report. "Reporting" includes a written or spoken description of a situation. In determining whether to hold a hearing, the facts may be disputed or may lead to other reasonable inferences—even if the facts are only circumstantial, they were sufficient to require a hearing.

People v Marx, 467 P.3d 1196 (Colo. App. 2019). The trial court committed error by not conducting a hearing on alleged history of false reporting of sexual assaults. The trial court confounded the preponderance of evidence standard by requiring the defendant to prove by "an incredibly high hurdle."

People v. Weiss, 133 P.3d 1180 (Colo. 2006). Defense must articulate facts which, if show that the alleged victim made multiple prior or subsequent reports of sexual assault that *were in fact false* (after the 2024 amendments, the defendant must now prove the prior false report was "demonstrably false" or "false in fact"). An allegation that charges were not brought as a result of these sexual assault reports is insufficient as a matter of law to warrant the trial court convening an evidentiary hearing.

4. *In camera* hearing

People v. Weiss, 133 P.3d 1180 (Colo. 2006). "Only if the prosecution stipulates to the facts contained in the offer of proof may the court rule on the motion based upon the offer of proof without an evidentiary hearing."

D. Statute Does Not Deny Defendant's Right of Confrontation

People in the Interest of D.F.A.E., 482 P.3d 489 (Colo. App. 2020). There is a confrontation violation only if the trial court effectively bars the defendant from meaningfully testing evidence central to establishing his guilt. The defendant here was not deprived of his constitutional right to confrontation where the court prohibited cross-examination of the victim concerning her communication with other boys that she wanted to lose her virginity.

People v. McKenna, 585 P.2d 275 (Colo. 1978). In rejecting the assertion that the Rape-Shield statute violated the defendant's right of confrontation, the Colorado Supreme Court recognized that the statute specifically provides a means by which the defendant may make a formal offer of proof, and that a full *in camera* hearing may be held to determine whether the proffered evidence is relevant. "Thus, rather than completely denying the defendant's rights in order to protect the victim's privacy interest, the statute strikes a balance by conditioning admission of evidence of the victim's sexual history on the defendant's preliminary showing that it is relevant. It involves no denial of the defendant's right to confront his accuser for there is no constitutional right to introduce irrelevant and highly inflammatory evidence."

People v. Gholston, 26 P.3d 1 (Colo. App. 2000). The Rape-Shield statute properly applied and the defendant's inability to cross-examine victim regarding victim's prior sexual assault did not violate defendant's right of confrontation.

People v. Melillo, 25 P.3d 769 (Colo. 2001). Reversing the decision of the Court of Appeals, the Colorado Supreme Court held that the trial court acted within its discretion by excluding a portion of defendant's oral statement explaining his actions with regard to the incident charged, where that portion of the statement referenced the victim's prior sexual abuse. The Court held that neither the 'opening the door' concept nor the rule of completeness establish in and of themselves the admissibility of the proffered evidence; defendant must still make an offer of proof as to the relevance of the evidence. Where defendant offered nothing more than an assertion that the evidence was relevant, the offer of proof as to the probative value of the proffered portion of the

statement was insufficient under the rape shield statute. The proffered evidence also posed a high risk of prejudice to the victim.

E. Discovery of Rape-Shield materials

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012). It was an abuse of discretion to refuse to conduct an *in camera* review of social services records when the defense and prosecution jointly requested *in camera* review of the records because the mother of the victim indicated that the records contained evidence of prior allegations of sexual assault; there are exceptions to the confidentiality of social services records.

F. Foundation Required

People v. Martinez, 634 P.2d 26 (Colo. 1981). The Colorado Supreme Court held that evidence of a sexual assault victim's consensual sexual intercourse with someone other than the defendant within the 24-hour period immediately before the alleged assault may be relevant to the victim's credibility because it relates to the origin of semen in her vaginal tract. "It is, [however], essential that an accused lay a proper foundation for the introduction of the evidence of the prosecutrix' prior sex act. If a defendant can show that the presence of the live sperm could have been the result of a specific previous act of sexual intercourse, evidence of such an act is admissible. Here, however, the defendant's offer of proof was minimal which may be another reason for the court's ruling excluding the evidence." *See People v. Harris,* 43 P.3d 221(Colo. 2002); *People v. Prentiss*, 172 P.3d 917 (Colo. App. 2006).

People v. Meis, 837 P.2d 258 (Colo. App. 1992). Defendant's offer of proof that following the sexual assault, and shortly before the victim reported the assault to the police, she had run away with a young man, without an indication that she had engaged in sexual conduct during that period, had no probative value regarding the issue of the victim's motivation for accusing the defendant of the assault.

People ex rel. K.N., 977 P.2d 868 (Colo. 1999). Defendant did not overcome the statutory presumption of the Rape-Shield act that the victim's sexual history is irrelevant to a determination of whether the victim consented to the sexual contact. His offer of proof was insufficient as a matter of law because it failed to indicate any relevancy between the proffered testimony, evidence of the [victim's] sexual history, and the issue of consent.

People v. Weiss, 133 P.3d 1180 (Colo. 2006). [D]efendant's offer of proof was insufficient as a matter of law under the statute to warrant the trial court convening an *in camera* evidentiary hearing pursuant to subsection 18-3-407(2)(c)." An allegation that charges were not brought as a result of other sexual assault allegations is insufficient as a matter of law to warrant the trial court convening an evidentiary hearing.

People v. Prentiss, 172 P.3d 917 (Colo. App. 2006). "[I]f proper foundation is laid-presumably before trial, but at least outside the presence of the jury-the defendant should be given a reasonable opportunity to inquire whether a young victim was sexually active with other persons in a manner that could have caused her hymeneal injury." In this case, however, "there was no evidence suggesting the victim had engaged in prior sexual activity with anyone."

G. Evidence Excepted From the Statute Not Automatically Admissible

People in the Interest of D.F.A.E., 482 P.3d 489 (Colo. App. 2020). The trial court did not abuse its discretion by prohibiting the defense from introducing evidence that the victim was "seeking to lose her virginity" with other boys. The trial court was properly concerned about the relevance of the information and the unfair prejudice is contained.

People v. Garcia, 179 P.3d 250 (Colo. App. 2007). The evidence that is excepted from the Rape-Shield Statute is not automatically admissible. The "trial court must apply C.R.E. 403 to balance the probative value of the proffered evidence against any possible unfair prejudice." Evidence must be both material and relevant to be admissible. Evidence excepted from the Rape-Shield statute is relevant if it supports the defendant's claim of innocence (citing *People v. Martinez,* 634 P.2d 26 (Colo. 1981)). The 2024 amendments to Rape-Shield now require the defendant to overcome a presumption of prejudice too.

1. Reputation for promiscuity precluded

People v. Williamson, 249 P.3d 801 (Colo. 2011). Solicitation for prostitution was protected sexual conduct under the Rape-Shield statute.

People v. Moreno, 739 P.2d 866 (Colo. App. 1987). The trial court properly excluded testimony that the victim of a sexual assault was known to be promiscuous, where there was no showing that the defendant knew anything about the victim's reputation or sexual conduct, and the court was offered nothing upon which it could find that such evidence was relevant to the defendant's state of mind, his lack of intent, or his perception that the victim had consented to his advances.

But see *People v. Cobb,* 962 P.2d 944 (Colo. 1998). Evidence was not inadmissible under either C.R.E. 404(b) or rape shield statute simply because it might indirectly cause finder of fact to make inference concerning victim's prior sexual conduct. Here, evidence of prior incident did not show victim having sexual encounter of any kind, even though jury conceivably might have inferred she was engaged in act of prostitution.

2. Victim's testimony regarding lack of sexual activity although may be permitted under the rape shield statute, may be prohibited under C.R.E. 401, 402, and 403.

People v. Johnson, 671 P.2d 1017 (Colo. App. 1983). The sexual assault victim was properly permitted to testify that she had been a virgin prior to the sexual assault. The basic purpose of the

Rape-Shield statute is to protect rape and sexual assault victims from humiliating public 'fishing expeditions' into their past sexual conduct, without a showing that such evidence would be relevant to some issue in the pending case. It does not specifically prohibit the victim from testifying as to the *lack* of prior sexual activity.

Fletcher v. People, 179 P.3d 969 (Colo. 2007). The Court did not address whether this evidence is permissible under the Rape-Shield statute, but rather focused on the admissibility of this evidence under the Rules of Evidence. The Court found that under C.R.E. 403 evidence of victim's virginity should have been excluded. To be probative, evidence of previous sexual activity must have occurred close enough in time to the alleged assault so that the injury from that previous experience would not have otherwise healed. Evidence of sexual activity or lack of sexual activity dating so far back that an injury would not still exist is too remote to be probative of the source of the victim's vaginal tear." ***"[W]e hold that rules 401, 402, and 403 bar the admission of the victim's testimony regarding her virginity in this case . . . ."*** *See also People v. Prentiss*, 172 P.3d 917 (Colo. App. 2006).

3. Evidence of prior sexual assault excludable

People v Cuellar, 530 P.3d 1236 (Colo. App. 2023). The defendant sought to admit the fact of the victim's having been sexually assaulted before to explain his inconsistent statement that he did not have sexual contact with the victim because he was afraid of being falsely accused. The trial and appellate courts held that the presumption of irrelevance was not overcome.

People v Sims, 457 P.3d 719 (Colo. App. 2019). Evidence that the victim of a 1994 murder was "prostituting herself for drugs" in 1993 was excluded. The defendant suggested that he had consensual sex with the victim shortly before the murder. The defense claimed that the consensual incidents suggested the source of DNA. The victim's roommate in 1993 could only say that the defendant was a drug dealer for the victim. The Court held that the testimony was not relevant and that the trial court did not abuse its discretion.

People v. Aldrich, 849 P.2d 821 (Colo. App. 1992). The Rape-Shield statute applies to nonconsensual, as well as consensual, sexual contact, and therefore the trial court did not err in excluding defense evidence that one of the child sexual assault victims had been previously victimized even though the procedural requirements of the statute had not been complied with. *See People v. Kyle,* 111 P.3d 491 (Colo. App. 2004).

But see *People v. Hawkins,* 728 P.2d 385 (Colo. App. 1986). The defendant sought exclusion of testimony concerning a prior assault on the victim by her uncle on grounds that *the prosecution* had failed to move its admission pursuant to the Rape-Shield statute. In holding the testimony to be admissible, the Court of Appeals stated that "[t]he purpose of the rape shield statute is to protect victims from public humiliation regarding their past sexual conduct. However, the evidence of the prior assault was offered to explain why the victim delayed in reporting defendant's conduct: Her

prior allegation concerning an assault by her uncle had been disbelieved by her parents and she was punished for speaking out. This evidence was relevant for the purposes for which it was offered, and we find no indication that the General Assembly intended the rape shield statute to apply to exclude it."

4. Evidence of consensual intercourse with another inadmissible when defense asserted is consent

People v. Harris, 43 P.3d 221 (Colo. 2002). Defendant was convicted of first-degree sexual assault. Defendant's defense was consent. During the trial, defendant sought to admit evidence that the victim engaged in sexual intercourse with another four days prior to the rape to explain that the vaginal abrasion may have been caused by the consensual intercourse, and not the defendant. The Court held that this evidence was properly excluded under the Rape-Shield statute because "such prior sexual relations evidence would have shown only that [Defendant] may not have caused the abrasion, and it would not, and logically could not, have shown whether [the victim] consented to her sexual encounter with [defendant]." "Thus, in light of [defendant's] defense of consent and Nurse Larkins testimony that consensual intercourse could have caused the abrasion, evidence that [the victim] had consensual intercourse with her boyfriend[,] is not logically relevant to whether [the defendant] committed sexual assault."

But see *People v. Martinez,* 634 P.2d 26 (Colo. 1981). The Court distinguished the facts in *Harris* from those this case stating that, here, the defendant did not claim that he did not have sex with the victim. Instead, he claimed that another partner caused her vaginal trauma and that fact, by faulty inference, proved that her intercourse with the defendant was consensual. Unlike *Martinez*, the mere fact that another sexual partner was a potential, or even the actual source of the victim's abrasion, was not evidence that defendant did not commit the act charged.

5. Evidence of victim's alleged sexual fantasy and prior sexual relationship with the defendant admissible

People v. Garcia, 179 P.3d 250 (Colo. App. 2007). "[E]vidence of the victim's alleged rape fantasy, including her statements to defendant concerning the fantasy, is material and relevant, and should have been admitted." "[T]he victim's statements to defendant regarding a rape fantasy do not constitute evidence of sexual conduct for purposes of the statute," and therefore should not have been excluded under the rape shield statute. Additionally, the victim's alleged statement, "if we could do it the way I like to do it, my favorite fantasy" was material and relevant as it related to consent, and therefore should have been admitted. Evidence of the defendant's and victim's prior sexual relationship should have been admitted because that evidence was material and relevant.

People v. Weiss, 133 P.3d 1180 (Colo. 2006). Before a court can admit evidence of prior reports of sexual assault made by the victim, the court must find that the prior reports were *in fact* false.

6. Evidence of victim's sexual relationship with another relevant to issue of motive to lie

People v. Owens, 183 P.3d 568 (Colo. App. 2007). Trial court denied defendant's motion to introduce evidence of a sexual relationship between the alleged victim and the male friend. Defendant argued that this evidence was relevant to show a motive to lie on the part of the victim. The Court of Appeals held that this evidence falls within an exception listed in the Rape-Shield statute and was improperly excluded as the evidence was "relevant to a material issue in the case, namely, the *victim's motive to lie*."

***Practice Tip*:** The Court was careful to qualify their holding, stating that the existence of a past or present romantic or sexual relationship between an alleged victim and a third party does not automatically open the door to inquiry or introduction of evidence about that relationship in sex assault cases.

7. Evidence of prior sexual assaults on victim by alternate suspect

People v. Salazar, 272 P.3d 1067 (Colo. 2012). The defendant sought to admit evidence that the victim's grandfather, who was also the defendant's wife's father, had sexually assaulted the wife when she was the same age as the victim in a similar manner. The defense in the case was identification. The grandfather resided in the home where the defendant was alleged to have sexually assaulted the victim. The trial court admitted the evidence after considering the Rape-Shield statute, C.R.E. 404(b), and C.R.E. 403. The Supreme Court found that the trial court erred because (1) the alleged acts by the grandfather were not relevant because to permit alternate suspect information there must be some act directly connecting the suspect with the crime; (2) that any relevance was predicated upon an inference of propensity; and (3) that the acts were all sexual assaults but were not distinctive.

4.4 CHARACTER OF THE VICTIM: C.R.E. 404(A)(2)

A. C.R.E. 404(a)(2)

C.R.E. 404(a)(2) permits the admission of evidence of a pertinent trait of character of the victim when offered by the accused, or by the prosecution to rebut the same.

Evidence of the victim's character for peacefulness may also be admissible when offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

People v. Jones, 743 P.2d 44 (Colo. App. 1987). Testimony of victim's good work record was inadmissible where defendant presented no evidence of the victim's character.

B. Character of the Victim in Assault and Self-defense Cases

1. "Bad acts" of the victim

4. CHARACTER EVIDENCE

People v Toro-Ospina, 535 P.3d 132 (Colo. App. 2023). The defendant, who was charged with menacing and firing a deadly weapon, sought to introduce testimony that he had seen the victim participating in drug deals. The defendant argued that because drug dealing was associated with potential violence the evidence supported his theory that he acted reasonably in self-defense. The Court held that the inference from drug transaction to violence to the defendant's legitimate self-defense was a "leap too far."

People v. Jones, 675 P.2d 9 (Colo. 1984). In holding that evidence of the victim's prior acts of violence that were unknown to the defendant at the time of the alleged assault was inadmissible, the Colorado Supreme Court reiterated its holding in *People v. Ferrell*, 613 P.2d 324 (Colo. 1980), that **evidence of prior violent acts by the victim is admissible only if the defendant knew of the victim's prior violence at the time of the offense**. The Court recognized that evidence of a victim's character trait for violence is legally relevant to the issue of self-defense because the inference that the victim was the initial aggressor is made more probable with the evidence than without it. Thus, when character of the victim is directly in issue as an essential element of a crime, claim, or defense, evidence may be presented in all available forms, including specific acts or instances of conduct. In this case, however, the defendant was unaware of the victim's prior acts of violence, and the alleged character trait was therefore not an essential element of the claim of self-defense. "If, of course, [the victim's] prior acts of violence had been known to the defendant at the time of the offense in question, then they would have been admissible as direct evidence of an essential element of self- defense, namely, the reasonableness of the defendant's belief in the imminent use of unlawful physical force against him. The defendant, however, was admittedly without knowledge of these prior acts of violence at the time of the offense, and, consequently, they were offered only as circumstantial evidence that [the victim] was the initial aggressor. Under these circumstances, proof of [the victim's] character or character trait for violence must be confined to reputation or opinion testimony only."

People v. Ibarra, 849 P.2d 33 (Colo. 1993). **In absence of prior knowledge** by defendant, evidence of prior acts of harassment by victim against others is not relevant to defendant's claims of self-defense and defense of property; such evidence is admissible in form of reputation or opinion testimony only.

People v. Smith, 848 P.2d 365 (Colo. 1993). Evidence of victim's prior abusive acts was properly excluded in absence of claim of self-defense.

People v. Lucero, 714 P.2d 498 (Colo. App. 1985). Evidence of prior violent acts by victim is admissible as direct evidence of essential element of self-defense, *i.e.,* reasonableness of defendant's belief in imminent use of unlawful physical force against him, but only if defendant knew of victim's prior violence at time of offense.

i. Timeliness

As a foundational matter, the defendant must not only establish knowledge of a victim's specific acts of violence, but also that such acts either occurred, or the defendant became aware of their occurrence, within a reasonable time of the use of force in self-defense. *See People v. Smith*, 848 P.2d 365 (Colo. 1993).

2. Victim's character for peacefulness

People v. Baca, 852 P.2d 1302 (Colo. App. 1992). The introduction, without objection, of evidence regarding the victim's character for peacefulness, before the defendant had presented any evidence that the victim was the initial aggressor, did not amount to plain error in light of the defendant's opening statement and cross-examination of the coroner implying that the victim was the initial aggressor.

4.5 METHODS OF PROVING CHARACTER: C.R.E. 405

A. C.R.E. 405

When evidence of character is admissible, C.R.E. 405 permits character evidence to be admitted in two primary ways:

a. Reputation or opinion; and
b. Relevant specific instances of conduct;
    - on cross-examination of a character witness; or
    - in cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof, except as limited by § 18-3-407 (Rape-Shield) and § 16-10-301 (a defendant's prior instances of sexual misconduct).

B. By Reputation or Opinion

C.R.E. 405(a)'s allowance of opinion testimony represents a departure from prior case law, which had limited proof of character to reputation testimony only. *See People v. Sexton*, 555 P.2d 1151 (Colo. 1976). This change is a recognition of the fact that reputation testimony has often been opinion testimony in disguise. *See* Advisory Committee's Note to Federal Rule 405(a).

1. Foundation for character testimony

C.R.E. 405(a) contains no specific foundation requirements for the giving of reputation or opinion testimony. The sufficiency of such foundation is within the sound discretion of the trial court. *People v. Holmes*, 553 P.2d 786 (Colo. 1976).

The following cases, however, provide some general guidelines:

a. Witness's knowledge as to reputation

4. CHARACTER EVIDENCE

United States v. Nace, 561 F.2d 763 (9th Cir. 1977). **Reputation** testimony requires that the witness have an **adequate opportunity**, based on community contacts, to ascertain the reputation in question. **Two months of occasional business dealings is insufficient**. *See* United States v. Salazar, 425 F.2d 1284 (9th Cir. 1970).

i. Reputation v. rumor

People v. Erickson, 883 P.2d 511 (Colo. App. 1994). Reputation evidence is distinguishable from inadmissible rumor testimony insofar as: (1) the witness is qualified to speak with authority regarding the reputation within the relevant community; (2) the opinion expressed is held generally within the relevant community; and (3) the character trait expressed represents the definite and final formulation of opinion in that community.

ii. "Community" defined

C.R.E. 803(21) provides an exception to evidence of reputation as hearsay, permitting "reputation of a person's character among his associates or in the community."

People v. Ayala, 919 P.2d 831 (Colo. App. 1995). In holding that the trial court improperly admitted a police officer's testimony regarding an informant's reputation for truthfulness that was based solely upon the officer's association with the witness as an informant, the Court of Appeals recognized that the criminal justice system is not a recognized or general community" upon which such an opinion may be based. While a community" may encompass a person's **neighborhood, work, or social community**, [an] informants association with . . . police organizations did not form a sufficient community upon which reputation testimony, which is general and established in nature, may be based."

b. Witness knowledge: opinion

Government of Virgin Islands v. Petersen, 553 F.2d 324 (3rd Cir. 1977). Opinion testimony as to character should be based on one's acquaintance with, and observations of a person, over a period of time sufficient to form an opinion as to that person's character. *See also* C.R.E. 701 (requiring lay opinions to be rationally based on perception of witness); C.R.E. 608.

Honey v. People, 713 P.2d 1300 (Colo. 1986). In deciding whether to admit an opinion as to a witness's credibility, a court may consider how well the witness knows the witness to be impeached and under what circumstances the witness giving the opinion knew the witness to be impeached." C.R.E. 608(a) also imposes no requirement that a witness who gives an opinion as to character have a long-term acquaintance or any minimum period of acquaintance with the witness to be impeached.

People v. Marx, 467 P.3d 1196 (Colo. App. 2019). The defense wanted the defendant, a neighbor of the victim, to testify to the victim's untruthful character. The foundation for the defendant's

knowledge related to (1) the victim's behavior on one occasion towards the neighbor's dogs; (2) had not seen the victim for many years and the defendant died she was a "liar" although he called her untruthful, deceitful, and manipulative; and (3) the victim's response that she was "doing nothing" when confronted about her misbehavior. The Court held that the foundation for admitting evidence of untruthfulness was lacking.

c. Timeliness

Testimony as to a pertinent character trait should refer to the time of the alleged crime or a reasonable time before. For example, in, *Lutz v. People*, 293 P.2d 646 (Colo. 1956), testimony as to the defendant's good reputation four years prior to the crime was properly excluded. "The limit of time which would make such evidence too remote, hence inadmissible, cannot be fixed definitely and each case must of necessity depend on its own facts and circumstances, the matter resting in the sound discretion of the trial court."

People v. Borrelli, 624 P.2d 900 (Colo. App. 1980). Not abuse of discretion to exclude testimony of key prosecution witness's poor reputation for truth and veracity dating back two years prior to trial.

People v. Mossmann, 17 P.3d 165 (Colo. App. 2000). In a violation of custody case, the trial court did not err by excluding evidence of defendant's ex-wife's fitness as a parent two years earlier because of the remoteness and marginal relevance of the evidence.

C. Proof of Character by Specific Instances of Conduct: C.R.E. 405(b)

C.R.E. 405(b) provides that, except as limited by § 16-10-301 and § 18- 3-407, proof of character may be offered through specific instances of conduct in cases where character or a trait of character of a person is an essential element of a charge, claim or defense.

The Advisory Committee's Note to Federal Rule 405 (which is identical to C.R.E. 405 except for the statutory limitations) states that "[o]f the three methods of proving character [opinion, reputation, specific instances of conduct] provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of searching inquiry."

People v. Jones, 675 P.2d 9 (Colo. 1984). When character is directly in issue as essential element to crime, claim or defense, evidence may be presented in all available forms, including specific instances of conduct; otherwise, proof of character is limited to opinion and reputation testimony).

People v. Miller, 981 P.2d 654 (Colo. App. 1998). Even if victim's sexual orientation was relevant and admissible under C.R.E. 404(a)(2), it was inadmissible under C.R.E. 405(b) because neither

evidence of specific instances of victim's prior conduct nor victim's alleged homosexuality constituted an essential element of defendant's self-defense claim that use of deadly physical force was justified because he was acting to prevent sexual assault.

D. Cross Examination of Character Witnesses

Under C.R.E. 405(a), when a witness has given reputation or opinion testimony concerning the character of the accused or victim, the trial court may permit cross-examination into relevant specific instances of conduct which may be **inconsistent** with the witness's testimony.

People v. Pratt, 759 P.2d 676 (Colo. 1988). The defendant, the primary owner and director of a nursing home charged as an accessory to third degree assault by a staff member, presented character witnesses who testified as to the defendant's reputation for truth and veracity as well as the respect afforded her within her profession. On appeal, the Colorado Supreme Court held that the prosecution's cross-examination of the character witnesses as to alleged wrongful retention of funds from patients and Medicaid by the nursing home was improper, as it was not related to the witnesses' testimony concerning the defendant's personal reputation. **When a defendant puts her character in issue by offering testimony as to her good reputation or opinion testimony concerning her character, the prosecution's cross-examination is limited to relevant specific instances of conduct.** Relevant specific instances of conduct are instances related to the character trait put in issue."

People v. Mershon, 844 P.2d 1240 (Colo. App. 1992) (*rev'd in part on other grounds*). Defense questions of a character witness concerning defendant's propensity to sell drugs, together with the witness's response that such activity was out of character" for the defendant, necessarily put the defendant's character at issue and opened the door for the prosecution to inquire of the witness whether he was aware of the defendant's prior drug convictions.

People v. Lucero, 677 P.2d 370 (Colo. App. 1983). Following direct testimony by defense character witness that on the night of the assault the defendant was drunk and just like usual . . . "a happy-go-lucky guy," the prosecution was properly permitted to cross-examine the witness concerning the defendant's past drinking habits. *See also People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991).

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). Defendant was convicted of sexual assault on a child. Defendant claimed that the trial court abused its discretion in ruling that the defendant's suppression hearing testimony, in which he admitted having sexual contact with the victim, could be admitted at trial to impeach the defendant's sister's opinion regarding his character; specifically that it was such that he would not have committed a sexual assault. "We conclude that the trial court properly balanced defendant's Fourth, Fifth, and Sixth Amendment rights in ruling that this suppression testimony could be used at trial to impeach his sister's opinion regarding his character."

4. CHARACTER EVIDENCE

1. Defendant's or witness character must be clearly put in issue

A defendant in a criminal case has a right to be tried on the crime charged, and evidence of matters tending to disparage his character is generally inadmissible. *See People v. Pratt*, 759 P.2d 676 (Colo.1988); *Gill v. People,* 339 P.2d 1000 (Colo. 1959). Thus, before cross-examination as to specific instances of bad character is permitted under C.R.E. 405(a), the defendant must clearly and expressly put his character in issue by introducing evidence of good character. A defendant does not put his character in issue by merely testifying as to his personal history. *See Martin v. People*, 162 P.2d 597 (Colo. 1945).

People v. Deroulet, 22 P.3d 939 (Colo. App. 2000) (*rev'd on other grounds*). After defense witnesses testified concerning defendant's non-violent character, the trial court improperly allowed a prosecution witness to testify about the violent character *of the defense witnesses* because their character had not been put in issue.

***Practice Tip*:** Character-impugning cross-examination may be permitted on other grounds, such as when the defendant testifies incorrectly as to a character-related matter such as understating an arrest record. *See People v. Mejia*, 534 P.2d 779 (Colo. 1975). In addition, evidence that is otherwise relevant is not necessarily excluded merely because it reflects adversely on the defendant's character. *See Candelaria v. People*, 493 P.2d 355 (Colo. 1972); *Hamilton v. People*, 287 P. 651 (Colo. 1930).

2. Examiner must have a good-faith basis for question and should determine admissibility *in camera*

People v. Pratt, 759 P.2d 676 (Colo. 1988). The prosecutor improperly cross-examined defense character witnesses as to whether they knew the defendant's nursing home had wrongfully withheld monies from patients or Medicaid, and that nursing home staff had tied a patient upright in a chair every evening, when there was no good-faith basis in fact for such lines of cross-examination.

People v. Futamata, 343 P.2d 1058 (Colo. 1959). Prior to permitting cross-examination of defense character witnesses concerning reports of incidents of misconduct, the trial court should conduct a preliminary inquiry out of the presence of the jury so as to insure (a) that the alleged misconduct is actual; (b) that is reasonably likely that it was the subject of the rumor in the community, (c) that it is not too remote and that it was of the same character as the act on trial."

3. Form of the question: reputation v. opinion testimony

Prior to the adoption of Colorado Rules of Evidence, the introduction of character evidence was limited to testimony as to a person's **reputation** in the community for a given character trait. Since the reputation witness was essentially relating what had been heard about the person, cross-

examination into specific instances of conduct inconsistent with that reputation was limited to whether the witness had heard of a given incident.

Although the distinction is of slight practical significance, the Colorado Committee's Practice Comment to C.R.E. 405 notes that it may be more appropriate to use "**have you heard"** questions when directed to **reputation** testimony, and "**do you know"** questions in situations in which a witness has given an **opinion** as to character.

4. Limiting Instructions

When cross-examination is permitted into a specific instance of conduct under C.R.E. 405(a) or 608(b), the jury should be instructed at that time as to the limited purpose of the inquiry. *People v. Futamata*, 343 P.2d 1058 (Colo. 1959); *see also* C.R.E. 105.

People v. Cook, 197 P.3d 269 (Colo. App. 2008). As to child pornography, a limiting instruction was not required because the evidence went to the pattern of abuse charged, which is clearly an exception to the requirement of a limiting instruction [pursuant to § 16-10-301(5)]."

5. Extrinsic evidence of specific instances of conduct is generally prohibited

United States v. Benedetto, 571 F.2d 1246 (2nd Cir. 1978). "[W]hile a character witness may be asked on cross-examination about 'specific instances of conduct' such acts may not be proved by extrinsic evidence of the sort offered here." *See also* *People v. Kreiter*, 782 P.2d 803 (Colo. App. 1989). However, "once a witness . . . testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case."

Benedetto follows the general rule in Colorado that a witness may not be impeached as to collateral matters by the use of extrinsic evidence. *See* *People v. Abbott*, 690 P.2d 1263 (Colo. 1984); *People v. Cole*, 654 P.2d 830 (Colo. 1982). Evidence pertaining to **bias** of a witness, however, **is not** a collateral matter. *People v. Taylor*, 545 P.2d 703 (Colo. 1976). Moreover, extrinsic evidence of a collateral matter may be admissible under **C.R.E. 607** to rebut direct statements of fact. *See, e.g., Benedetto*.

E. Rebutting Character Evidence

Under C.R.E. 404(a)(1), the prosecution may not introduce character evidence in the first instance except in a homicide case to rebut evidence that the victim was the initial aggressor. Once the defendant introduces character testimony, however, the prosecution may offer evidence regarding the same character trait in rebuttal. In most cases, such rebuttal evidence would be limited to reputation or opinion testimony under C.R.E. 405(a). When the defendant has been permitted to present character evidence by specific instances of conduct under C.R.E. 405(b) [character an

essential element], however, then logically, the prosecution's rebuttal evidence should be permitted to take the same form. *See* *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983)

People v. Clark, 547 P.2d 267 (Colo. App. 1975). The defendant, charged with burglary and sexual assault, called two character witnesses who testified that he had several admirable character traits which were inconsistent with his committing the crimes charged. In rebuttal, the prosecution called a medical doctor with training in psychiatry who testified that rapists do not have any common characteristics, and that a person of the defendant's character was capable of committing a violent rape. In rejecting the contention that rebuttal evidence is limited to bad character, the court stated that "[t]he obvious purpose in eliciting testimony to show defendant's good character was to raise the inference that he would not commit a violent rape. The doctor's testimony merely tended to rebut the inference by showing that in the doctor's opinion there was no correlation between an individual's character and his propensity to commit violent acts. Since it is proper for the People to present testimony of bad character in response to evidence of good character offered by the defendant . . . we conclude that **it is also proper to offer testimony to rebut the inferences to be derived from defendant's character evidence**."

4.6 HABIT AND ROUTINE PRACTICE: C.R.E. 406

A. General Habit and Routine Practice

C.R.E. 406 provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

People v. T.R., 860 P.2d 559 (Colo. App. 1993). "Character" encompasses a generalized description of general traits or tendencies, while "habit" pertains to a person's regular response to a particular and repeated situation**. "**Thus, while evidence that the victim drove through the intersection every day and any cautions she habitually took while proceeding through this intersection were properly admitted as habit; testimony that she was a 'cautious driver' is character evidence and must be treated under C.R.E. 404, rather than C.R.E. 406."

Bloskas v. Murray, 618 P.2d 719 (Colo. App. 1982). It may be considered more probable that a person has done what they have been in the habit of doing, rather than acting outside of the norm.

People v. Trujillo, 369 P.3d 693 (Colo. App. 2015). The victim properly testified that "I never gave anybody my credit card" as habit evidence. "Yet, while it is possible to infer from this testimony that the resident had a careful and guarded character with respect to her debit card, the prosecution did not offer the testimony as character evidence. The prosecution did not elicit, and the resident did not give, a generalized description of her disposition or a general trait, such as

carefulness or guardedness. Instead, the resident described her regular response to the situation of needing people to buy things for her—her habit was to never give them her debit card. Thus, we conclude that this testimony was habit evidence, not character evidence, and that the trial court did not abuse its discretion in admitting it."

McCormick on Evidence § 195, at 1080-81 (7th ed. 2-13). A habit "denotes one's regular response to a repeated situation" and "is the person's regular practice of responding to a particular kind of situation with a specific type of conduct.".

4.7 ATTACKING CREDIBILITY OF A WITNESS: C.R.E. 608

A. Attacking Credibility Generally

C.R.E. 608(a) provides that the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation testimony, provided that (1) the evidence refers only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. *See People v. Holmes*, 553 P.2d 786 (Colo. 1976); *People v. Taylor*, 545 P.2d 703 (Colo. 1976).

Under C.R.E. 608(a), evidence of a witness's character for veracity is limited to reputation or opinion testimony. Specific instances of conduct may not be proved by extrinsic evidence, but within the limitations of C.R.E. 608(b) may be inquired into on cross-examination.

Cross-examination itself is insufficient to admit a witness's character for truthfulness under C.R.E. 608(a). The trigger for truthfulness character is an attack on the truthfulness by opinion or by reputation or "otherwise." For truthful character to be admissible, questioning of the witness "must do more than attack the truthfulness of the witness's testimony, it must attack his general propensity to tell the truth." Evidence of bias, interest, or contradiction not sufficient to support an attack. In *People v Serra*, 361 P.3d 1122 (Colo. App. 2015), for example, the Court found that defense's cross was not an attack on the witness's character for truthfulness.

People v Heredia-Cobos, 415 P.3d 860 (Colo. App. 2017). C.R.E. 608 does not allow a witness to testify that another witness was telling the truth on a specific occasion.

People v Short, 425 P.3d 1208 (Colo. App. 2018). Testimony that a victim "normally would not lie about something like [the charged offense]," violates C.R.E. 608.

The defense may, however, open the door to credibility by suggesting that the witness has been coached. *People v Heredia-Cobos*, 415 P.3d 860 (Colo. App. 2017).

1. Prior Convictions

4. CHARACTER EVIDENCE

Section 13-90-101 states: "in every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness."

People v. Wood, 230 P.3d 1223 (Colo. App. 2009). Three prior misdemeanor convictions for prostitution were not admissible to impeach the victim's girlfriend in the defendant's manslaughter trial.

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). The scope of questioning regarding a prior felony conviction is generally limited to the name, nature and date of the offense. Detailed questions as to the facts underlying the prior offense are improper unless relevant for impeachment purposes. *See also* *People v. Cooper*, 950 P.2d 620 (Colo. App. 1997) (*rev'd on other grounds*).

People v. McKeel, 246 P.3d 638, 641 (Colo. 2010). The constitutional right to testify does not include a right to foreclose impeachment by evidence of a prior conviction even where a defendant chooses not to testify out of fear that a jury will infer a propensity to commit the crime from prior conviction evidence.

COLJI issued the following jury instruction when the credibility of a witness has been attacked through proof of a conviction for a felony:

D:06 CONVICTION OF FELONY—WITNESS OR DEFENDANT

> The credibility of a witness may be challenged by showing that the witness has been convicted of a felony. A previous felony conviction is one factor you may consider in determining the credibility of a witness. It is up to you to determine what weight, if any, is to be given to such a conviction.
>
> [The credibility of statements made by a person who did not testify in court may be challenged by showing that the person has been convicted of a felony. A previous conviction is one factor that you may consider in determining the credibility of that person. You must determine the weight to be given to any prior conviction when considering the credibility of that person's statement.]
>
> [The defendant is to be tried for the crime charged in this case, and no other. You may consider testimony of a previous conviction only in determining the credibility of the defendant as a witness, and for no other purpose. When the defendant testifies, his [her] credibility is to be determined in the same manner as any other witness.]

2. Specific instances of conduct

C.R.E. 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness other than conviction of crime as provided in 13-90-101, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

People v. Segovia, 196 P.3d 1126 (Colo. 2008). The Court held that "the trial court erred in finding evidence of a prior instance of shoplifting inadmissible pursuant to C.R.E. 608(b). Based on what occurred during the trial, there was no manifest necessity to declare a mistrial. Accordingly, the Double Jeopardy Clause prohibits retrial of the defendant." We hold that **shoplifting** is a specific instance of conduct that is probative of truthfulness pursuant to C.R.E. 608(b)…[However] our holding in no way suggests a misdemeanor *conviction* for shoplifting is probative of truthfulness. Rather, only the underlying circumstances surrounding that act are admissible pursuant to C.R.E. 608(b)."

People v. Armstrong, 704 P.2d 877 (Colo. App. 1985). The trial court properly permitted cross-examination of a defense witness concerning the circumstances surrounding her **prior misdemeanor conviction for making a false police report,** because the evidence related to a prior instance when the witness had lied to protect the defendant and therefore was probative of truthfulness or untruthfulness.

Compare with People v. Saldana, 670 P.2d 14 (Colo. App. 1983). Cross-examination of an undercover officer's **past use of marijuana** was properly precluded inasmuch as there was no showing that the proffered testimony would be probative of truthfulness or untruthfulness.

People v Sauser, 490 P.3d 1018 (Colo. App. 2020). The defendant on cross-examination was asked whether he lied to law enforcement by giving them a false name. At a bench conference, the defense indicated that the defendant would claim his privilege against self-incrimination because the case concerning the false name was still pending. Neither the prosecution nor the defense may benefit from a witness' assertion of the privilege. Although the trial court abused its discretion in permitting the question, the error was deemed harmless.

People v. Wood, 230 P.3d 1223 (Colo. App. 2009). Prior convictions for prostitution were not specific acts admissible under C.R.E. 608(b) because they are not probative of a person's character for truthfulness.

A trial court may limit the amount of impeachment examination and may exclude proper impeachment on C.R.E. 403 grounds. See, e.g. *People v. Campos,* 2015 COA 47 (Colo. App. 2014) (using a false social security number may be probative, but the trial court had already permitted

extensive impeachment); People v. Lane, 343 P.3d 1019 (Colo. App. 2014) (defense sought to impeach by forgery of ninety receipts, trial court excluded on C.R.E. 403 grounds); *People v. Wilson, 2014 COA 114* (Colo. App. 2014) ("the trial court should exclude evidence that has little bearing on credibility, places undue emphasis on collateral matters, or has the potential to confuse the jury.").

In a civil case, the Court of Appeals held that the failure to file income tax returns for several years, not just a single year, was admissible as specific acts probative of truthfulness. *Leaf v. Beihoffer, 338 P.3d 1136* (Colo. App. 2014).

McGill v DIA Airport Parking LLC, 2016 COA 165 (civil). When determining whether other instances of untruthfulness are admissible, courts consider the nature of the conduct rather than any elemental test. Where a person takes property from another for his own benefit the behavior is untruthful and dishonest. The facts of a twenty-year-old check fraud conviction was admissible for impeachment.

3. Good-faith basis for specific instances

As in the case of cross-examination of character witnesses under C.R.E. 405(a), the examiner inquiring into specific instances of conduct under C.R.E. 608(b) must have a good-faith basis for the question.

4. Extrinsic evidence prohibited if collateral matter; bias not a collateral matter

C.R.E. 608(b) expressly prohibits proof of specific instances of conduct by extrinsic evidence. The rule is consistent with the longstanding doctrine that a witness may not be impeached by extrinsic evidence as to a collateral matter. *See United States v. Herzberg*, 558 F.2d 1219 (5th Cir. 1977). Extrinsic evidence is **not excluded** by C.R.E. 608(b), however, **when it is offered to show the witness's motive to testify falsely**. *See United States v. James*, 609 F.2d 36 (2nd Cir. 1979) (holding that extrinsic evidence that witness lied about having been granted immunity on another case was not excluded under C.R.E. 608(b); fact he had not been given immunity showed motive to testify falsely).

Although C.R.E. 608(b) states that the other act may not be proven by extrinsic evidence, the Colorado appellate courts have adopted a **"specific contradiction doctrine."** In *People v. Thomas,* 345 P.3d 959 (Colo. App. 2014), the court held that where the defendant denies the C.R.E. 608(b) act, extrinsic evidence may be introduced. The testimony of a defendant can open the door to admit extrinsic evidence. "This open-door approach has been justified on the ground that the defendant should not be permitted to engage in perjury, mislead the trier of fact, and then shield herself from impeachment by asserting the collateral matter doctrine."

5. Notice to Court

"While it is prudent for counsel to seek a preliminary ruling as to the admissibility of a specific instance of conduct, C.R.E. 608(b) does not require notice to the court or opposing counsel in this case." *People v. Segovia,* 196 P.3d 1126 (Colo. 2008).

But see *People v. Pratt*, 759 P.2d 676 (Colo. 1988). The Court held that a prosecutor must obtain a favorable ruling from the trial court before cross-examining a character witness concerning other acts of the defendant.

6. Self-incrimination under C.R.E. 608

C.R.E. 608(b) provides that the giving of testimony, whether by an accused or any other witness, does not waive the privilege against self-incrimination when examined on matters relating solely to credibility.

The Advisory Committee's Note to Federal Rule 608(b) recognizes that the Rule rejects the doctrine that past criminal acts relevant to credibility may be inquired into on cross-examination in disregard of the privilege against self-incrimination. "While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity."

B. Defendant as Witness

When a defendant testifies, the defendant puts the defendant's credibility in issue, and the defendant's testimony is subject to the same rules of impeachment cross-examination and rebuttal as any other witness. Thus, although an accused who testifies on the accused's own behalf does not thereby place their own general character in issue, the accused does subject themselves to an attack on their credibility in the same manner as any other witness. *See People v. Tippett*, 733 P.2d 1183 (Colo.1987).

People v. Sasson, 628 P.2d 120 (Colo. App. 1980). While evidence of prior misconduct, including misdemeanor convictions, may be admitted to attack veracity of specific testimony by defendant, impeachment of defendant may not be accomplished by attacking general character of witness. When a defendant chooses not to testify, his credibility may not be attacked. *McRae v. People*, 281 P.2d 153 (Colo. 1955) (*rev'd on other grounds*).

People v. Harding, 104 P.3d 881 (Colo. 2005). The trial court in this case improperly advised the Defendant that if he testified, the jury could consider his felony conviction as it bears on [his] *characte*r" instead of his *credibility*. The Court held that the trial court's advisement was deficient and a misstatement of the law and as such the defendant could not voluntarily and intelligently waive his right to testify. The sole reason to limit the evidentiary use of a prior conviction to impeachment only is to prevent the jury from using this evidence to make prohibited character

inferences. Without this distinction about the use of a prior conviction, the jury could infer the present guilt of a witness who is also the accused because he previously committed a bad act." "[A] witness's credibility represents the believability or truthfulness of his testimony . . . . Character, on the other hand, concerns the substantive proof that a witness will act in a particular way on a particular occasion."

People v. Romero, 197 P.3d 302 (Colo. App. 2008). Defendant was convicted of escape. At the trial, the prosecution impeached the defendant by cross-examining him about his prior experiences on work release to show that he was familiar with the procedures for release from county jail. The Court of Appeals held that this evidence was admissible as impeachment evidence and further met the requirements under C.R.E. 404(b).

C. Evidence of Truthful Character

C.R.E. 608(a) permits evidence of a witness' truthful character only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

1. Contradiction by other testimony

People v. Wheatley, 805 P.2d 1148 (Colo. App. 1990). "Cross-examination pointing out how the defendant's testimony is inconsistent with the testimony of other witnesses does not constitute an attack upon his character for truthfulness . . . . Rather, something more than the contradiction of the witness' testimony must have occurred for there to be an attack of the witness' character . . . ."

See also *People v. Koon,* 724 P.2d 1367 (Colo. App. 1986) (concerning testimony that witness was a habitual liar); *People v. Koon,* 713 P.2d 410 (Colo. App. 1985) (holding that cross-examination established witness's untruthfulness on other occasions).

People v. Hall, 107 P.3d 1073 (Colo. App. 2004). There is a difference between impeachment by contradiction and the impeachment technique set forth in C.R.E. 608(b). Impeachment by contradiction involves whether a witness is testifying truthfully in this case. Impeachment under C.R.E. 608(b) concerns whether the witness has a character for being truthful. In this case the trial court committed harmless error in excluding the testimony elicited by defense which was impeachment by contradiction, and therefore permissible and not subject to the limitations of C.R.E. 608(b).

2. Prior inconsistent statement

Tevlin v. People, 715 P.2d 338 (Colo. 1986). In a prosecution for child abuse, the defense inquired into prior inconsistent statements of the victim as to the identity of the person who inflicted his injuries, inasmuch as the victim had once stated that both his mother and father had inflicted the injuries but later said that only his father had done so. The prosecution thereafter elicited testimony from a social worker that he believed the victim was truthful in his report that his father had abused

him. In holding the testimony to be improper evidence of truthful character, the Colorado Supreme Court stated that "[t]he expert's opinion failed to refer to the witness's general character for truthfulness and instead went to the witness's truthfulness on a specific occasion. Moreover, there is insufficient evidence that the victim's character for truthfulness had been directly attacked by the defense to allow evidence in direct examination that the victim was telling the truth. Since requirements for introducing such evidence were not met in this case, the expert's opinion was not properly admissible under C.R.E. 608."

3. Theory of the case and opening statements

People v. Davis, 312 P.3d 193 (Colo. App. 2012). The Court held that a defendant "opened the door" to credibility issues by the content of opening statement. "A party who raises a subject in an opening statement opens the door to admission of evidence on the same subject by the opposing party."

People v. Exline, 775 P.2d 48 (Colo. App. 1988). The defendant's claim during opening statement and through cross-examination that the victim confused her current claim of abuse with documented prior abuses, that she was in a frail emotional state, and was susceptible to suggestions that she had been abused by the defendant on prior occasions, constituted an attack on the victim's credibility such as to permit evidence as to the victim's character for truthfulness.

4. Opinion or Reputation

C.R.E. 608(a) provides that the credibility of a witness may be attacked or supported by opinion or reputation evidence. Opinion evidence is governed by C.R.E. 701. A lay opinion must be rationally based on perception, helpful to the factfinder, and not an expert opinion

People v. Davis, 312 P.3d 193 (Colo. App. 2012). The trial court erred in failing to admit C.R.E. 608(a) evidence; the defense attorney asked "in your opinion, your sister is someone who doesn't lie?"

Davis v. People, 310 P.3d 58 (Colo. 2013). A witness may be asked about the credibility of the witness for the sole purpose of providing context for interrogation tactics and investigative decisions without running afoul of the general rule that a testifying witness cannot comment on another witness's truthfulness.

5. Bolstering

People v Coughlin, 304 P.3d 575 (Colo. App. 2011). An attorney improperly bolsters a witness's testimony by implying that the testimony is corroborated by evidence known to the attorney but not the jury. An attorney improperly vouches for a witness's credibility by indicating a personal belief in the witness's credibility.

4. CHARACTER EVIDENCE

People v. Bridges, 410 P.3d 512 (Colo. App. 2014). The appellate court held that it was improper for the forensic interviewer to opine that the children sexual assault victims had not been coached or guided. Testimony concerning credibility is admissible if it explains or provides context to explain the manner or conduct of the interview or if it assists the factfinder in assessing credibility.

Liggett v. People, 135 P.3d 725 (Colo. 2006). "C.R.E. 608 evidence is not permitted to establish whether a witness testified truthfully on the witness stand or whether he or she was truthful on a particular occasion. The admission of testimony that another witness or the defendant is or was being truthful or untruthful on a particular occasion is properly excluded, whereas the more general evidence of a witness's character for truthfulness or untruthfulness may be admitted under limited exceptions where the probative value of the testimony merits an exception to the rule."

People v. Hall, 107 P.3d 1073 (Colo. App. 2004). It was reversible error for police officer to testify about the credibility of the child witnesses where the case turned entirely on the credibility of the child witnesses.

Liggett v. People, 135 P.3d 725 (Colo. 2006). Were they lying' questions are categorically improper." Questions regarding whether another witness was mistaken" are also improper.

People v. Hall, 107 P.3d 1073 (Colo. App. 2004). Opinion testimony by a police officer that two witnesses seemed sincere" was improper.

People v. Renfro, 117 P.3d 43 (Colo. App. 2004). When the detective was asked about why he didn't conduct further investigation, he stated that he had witness statements that he believed to be "rock solid." Defendant contended that this testimony was inadmissible bolstering. The Court held that, "[t]he 'rock solid witness statements' testimony related to the witnesses' truthfulness on a specific occasion, and thus, the requirements for admission of opinion and reputation evidence of character under C.R.E. 608(a) were not met. Nevertheless, defendant's cross-examination opened the door, enabling [the detective] to rebut the inference that he was lying to defendant when he said that he had 'overwhelming evidence' against him."

People v. Collins, 491 P.3d 438 (Colo. App., 2021). It was improper for the therapist to testify that it would be uncommon for a child to lie about having experienced sexual assault. The testimony amounted to improper bolstering of the child's credibility.

People In Interest of J.R., 495 P.3d 346 (Colo. App., 2021). The doctor's testimony that the victim suffered from sexual abuse based only upon the victim's statement was the equivalent of stating that the victim was credible. While an expert may testify to the general characteristics and behavior of sexual abuse victims, an expert may not testify that the victim is credible or telling the truth on a particular occasion.

People v. Relaford, 409 P.3d 490 (Colo. App. 2016). The Court held that the therapist's testimony that she had not encountered any circumstances in 30-year career in which children had lied about sexual abuse was improper testimony that improperly bolstered the children's credibility. *See also People v. Battigalli-Ansell*, 492 P.3d 376 (Colo. App. 2021); *People v Gillispie*, 767 P.2d 778 (Colo. App. 1988).

People v. Eppens, 979 P.2d 14 (Colo. 1999). It is well established that C.R.E. 608(a)(1) does not permit a witness to offer an opinion that a child was telling the truth on the specific occasion that the child reported a particular sexual assault by a defendant." Because truth is virtually synonymous with sincerity, the social worker's testimony that she found the child to be sincere was tantamount to testimony that she found the child to be truthful and, thus, impermissible character testimony. *See also People v. Cook*, 197 P.3d 269 (Colo. App. 2008).

People v. Wittrein, 198 P.3d 1237 (Colo. App. 2008). Expert witness's testimony that she could not imagine a child of victim's age fabricating a story like hers "was improper because it was an opinion that the child was telling the truth on the specific occasion that she reported being assaulted by defendant." This, in conjunction with other errors warranted reversal. However, experts' testimony in response to questioning as to whether victim's statements were consistent with her medical diagnoses was admissible. The experts did not give their subjective opinion as to the veracity of the victim. The Court stated, "[w]e decline to find that 'consistency' is synonymous with 'sincerity' or 'truth'.".

People v. Cook, 197 P.3d 269 (Colo. App. 2008). Juror submitted question to officer, asking: "During your investigation of sexual abuse, the possibility of false accusations exists. How do you test this possibility during your investigations?" The officer's response included several statements that she believed the victims were credible. The prosecution then followed up with questions directly relating to the credibility of the child victims. The Court held that the jury question and answers so undermined the fundamental fairness of the trial itself, as the question was clearly asking for the officer's opinion of the minor victims' credibility and the investigating officer expressly stated several times that she thought the victims were credible.

Venalonzo v People, 388 P.3d 868 (Colo. 2017). Witnesses cannot testify that another **person was telling the truth on a particular occasion**. The rule applies to both direct and indirect implications of a child's truthfulness. The Court held that testimony by the forensic interviewer and the mother both improperly bolstered the credibility of the child victim.

6. Witness's plea agreement

People v. Couglin, 304 P.3d 575 (Colo. App. 2011) (exchange between the prosecutor and witness regarding witness's understanding of his plea agreement and his obligation to testify truthfully, was not impermissible vouching because prosecutor did not express a personal opinion about the

witness's credibility, did not appear to possess information unavailable to jury, and the questioning merely fleshed out witness's understanding of what it meant to tell the truth).

7. Jury Instructions

When cross-examination is permitted into a specific instance of conduct under C.R.E. 405(a) or 608(b), the jury should be instructed at that time as to the limited purpose of the inquiry. *People v. Futamata*, 343 P.2d 1058 (Colo. 1959).

COLJI D:07 REPUTATION FOR TRUTH AND VERACITY

The credibility of a witness may be discredited or supported by testimony about his [her] reputation for truthfulness or by the opinion of another witness. It is entirely your decision to determine what weight shall be given such testimony.

* * *

2025 Contributions by Dan Edwards
Adjunct Professor, Sturm College of Law
Retired Senior Assistant Attorney General
Colorado Attorney General's Office

CHAPTER 5

CIRCUMSTANTIAL EVIDENCE

5. CIRCUMSTANTIAL EVIDENCE

5.1 DEFINITION AND STATUS

People v. Bennett, 515 P.2d 466 (Colo. 1973). The Colorado Supreme Court rejected, for the purpose of a motion for judgment of acquittal, the "outmoded and confusing" requirement that the prosecution's evidence, when only circumstantial, must exclude every reasonable hypothesis of innocence. The Court adopted the "substantial evidence" test for a motion for judgment of acquittal, whether the case is based on circumstantial evidence, direct evidence, or a combination. The substantial evidence test thereby **affords circumstantial and direct evidence the same status**. It requires the trial court to consider all the evidence in the light most favorable to the prosecution and to determine whether or not there is substantial and sufficient evidence to support a conclusion by a reasonable mind that the defendant is guilty of the offense charged beyond a reasonable doubt.

***Practice Tip*: The Court in *Bennett* also approved **COLJI-Crim. 4:1**, which recognizes that circumstantial evidence is to be accorded the same evidentiary weight as direct evidence. This instruction can now be found in COLJI-Crim. D:01.**

5.2 RELEVANCY AND CIRCUMSTANTIAL EVIDENCE

The determination of the relevancy of circumstantial evidence must necessarily be determined on a case-by-case basis, in accordance with the standards of relevancy set forth in C.R.E. 401-403.

A. Admissibility

Militello v. People, 37 P.2d 527 (Colo. 1934). In upholding the admission of certain evidence in a circumstantial arson case, the Colorado Supreme Court stated: "A case of circumstantial evidence . . . [by] its very nature implies the weaving of a fabric of known facts, which, often infinitesimal or immaterial, or even prejudicial when considered alone, become important only as they are tied to others, and when so tied lead to inevitable conclusions as to facts in issue . . . ."

See also *Hamilton v. People,* 465 P.2d 394 (Colo. 1970); *Corbett v. People*, 387 P.2d 409 (Colo. 1963) (*rev'd on other grounds*).

B. Illustrative Cases

Taylor v. People, 723 P.2d 131 (Colo. 1986). The Colorado Supreme Court found sufficient evidence to uphold the defendant's conviction for the first-degree murder of his wife in a largely circumstantial case, where the defendant moved in with another woman shortly before the murder, made inconsistent statements regarding his attempts to locate his wife after her disappearance, and where evidence recovered at the crime scene bore similarities to items recovered at the defendant's house.

5. CIRCUMSTANTIAL EVIDENCE

People v. District Court of Colorado's Seventeenth Judicial Dist., 926 P.2d 567 (Colo. 1996). The trial court erred in refusing to bind the case over on the charge of first-degree murder where the circumstances surrounding the victim's death, such as the length of the struggle between the victim and defendant and the movement of the struggle from the living room to the kitchen, "permit the reasonable inference that [defendant] had adequate time for the exercise of reflection and judgment concerning the fatal act."

People v. Parsons, 15 P.3d 799 (Colo. App. 2000). Upholding proof of deliberation through circumstantial or indirect evidence in first-degree murder case.

People v. Webster, 987 P.2d 836 (Colo. App. 1998). Circumstantial evidence is almost always required to prove deliberation and intent to kill; evidence of manner and method of killing or attempted killing may be sufficient to support inference of necessary intention and deliberation.

People v. Tafoya, 833 P.2d 841 (Colo. App. 1992). The defendant's conviction for burglary was based on sufficient circumstantial evidence. Evidence established that at about midnight, the defendant and his brother parked their car two blocks from the gas station in question, and shortly after they left the car police officers heard breaking glass, and found the glass door of the garage to be broken and the defendant's brother inside. Shortly thereafter, another officer saw the defendant running 50 to 75 yards from the gas station and dropped to the ground when the officer shined his light on him. The defendant's footprints in the snow were discovered coming from the direction of the gas station.

People v. Pennese, 830 P.2d 1085 (Colo. App. 1991). In a prosecution for first-degree assault, there was sufficient evidence for the jury to conclude that the victim was assaulted with a bat, where a witness saw the defendant strike the victim in the shoulder with a bat, and later saw the defendant's arm moving a bat up and down in a "chopping" motion and the treating physician testified that the victim's brain injury could have been caused by either a fist or a bat.

People v. Walters, 821 P.2d 887 (Colo. App. 1991). Although the victim did not testify at trial, the Court of Appeals concluded that there was sufficient evidence of sexual penetration in a first-degree sexual assault prosecution, where testimony established that the victim was screaming for approximately 20 minutes before the police arrived, and upon their arrival the victim and the defendant were found partially clothed and the defendant's penis was covered with what tests showed to be saliva.

People v. Parga, 964 P.2d 571 (Colo. App. 1998). On retrial for felony driving after revocation prohibited, jury should be allowed to consider defendant's record of traffic offenses as circumstantial evidence suggesting defendant had actual knowledge his license had been revoked as a habitual traffic offender.

5. CIRCUMSTANTIAL EVIDENCE

People v. Espinoza, 989 P.2d 178 (Colo. App. 1999). A conviction for conspiracy to commit first-degree arson must be supported by evidence that defendant "acted knowingly and destroyed or damaged any building of another without the consent of the other person or entity." The jury could have inferred lack of consent from the circumstantial evidence that defendant owed a large amount of money to the prior owner and was still making payments to him.

People v. Osborne, 973 P.2d 666 (Colo. App. 1998). Evidence that defendant had detailed knowledge of events surrounding the kidnapping and sexual assault and that defendant sent threatening letters to the victim and her daughter warning them of his plans, as well as a letter to defendant's friend that defendant "had the most perfect revenge" and evidence that defendant indicated to people he knew the identity of the perpetrator, was sufficient to support defendant's conspiracy conviction.

People v. Miralda, 981 P.2d 676 (Colo. App. 1999). Absent intent to defraud, mere possession of a forged instrument will not sustain a conviction of possession of a forged instrument. Extrinsic circumstances may be considered as evidence of intent, such a defendant's status or the manner of possession or use made of the forged instrument. But the following circumstances were not sufficient to support an inference of intent: defendant possessed a forged INS resident alien card with an accurate photograph and description of him; defendant handed the INS card to the officer upon demand; and defendant possessed a false social security card. There was no evidence that defendant was not a legal resident; if he were a legal resident, the forged INS card could not have been used to misrepresent any fact.

People v. Martinez, 74 P.3d 316 (Colo. 2003). Defendant was convicted of first-degree murder of an infant child. "[I]ntent may be shown by circumstantial evidence such as the serious nature of the injuries; admissions by the perpetrator; a failure to seek medical care; indicators of prior injuries suggesting repeated abuse; the brutality of the attack; the disparity of the size and strength between the victim and the perpetrator; the defendant's lack of remorse and efforts to avoid detection; the concealment of the victim's body; and finally motive."

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). Defendant was convicted of sexual assault of a physically helpless victim. "[T]he victim's testimony describing the soreness of his anus, the counselor's testimony that both defendant and victim were naked from the waist down, and defendant's statement that 'it was consensual' were sufficient circumstantial evidence to prove that penetration occurred."

People v. Scearce, 87 P.3d 228 (Colo. App. 2003). Defendant was convicted of conspiracy to commit aggravated robbery. "To establish a conspiracy, there need only be circumstantial evidence indicating that the conspirators, by their acts, pursued the same objective, with a view toward attainment of that same objective." *People v. Flowers*, 128 P.3d 285 (Colo. App. 2005) (conspiracy to distribute).

5. CIRCUMSTANTIAL EVIDENCE

People v. Atencio, 140 P.3d 73 (Colo. App. 2005). "A conviction for unlawful possession of a controlled substance may be predicated on circumstantial evidence. The controlled substance need not be found on the person of the defendant, as long as it is found in a place under his or her dominion and control. However, where a person is not in exclusive possession of the premises in which drugs are found, such an inference *may not be drawn unless there are statements or other circumstances tending to buttress the inference of possession.* In this case, there were four pieces of circumstantial evidence to buttress the inference that defendant knowingly possessed the controlled substances: defendant fled from the officers; the baggies of methamphetamine and cocaine were found in the place where defendant's flight was interrupted; the baggies were warmer than the night air; and the baggies had not been in that location shortly before the defendant was apprehended there."

People v. Yeadon, 468 P.3d 50 (Colo. App. 2018). Holding that there was sufficient evidence to convict the defendant of possession of methamphetamine in a vehicle because the defendant was the driver of the vehicle based on his DNA on the deployed airbag after the vehicle crashed, the driver's seat was in direct proximity to the visible baggie of methamphetamine in the driver's side door compartment, the driver seat was in close proximity to the scale found on the front passenger seat, and the defendant fled from the accident.

People v. Martinez, 165 P.3d 907 (Colo. App. 2007). Defendant was convicted of sexual exploitation of children, unlawful manufacture of a controlled substance, and unlawful possession of a controlled substance. Although there was no direct evidence that defendant was manufacturing methamphetamine, police seized numerous items of evidence indicative of methamphetamine manufacturing. There was sufficient evidence to support the guilty verdict. Although there was no direct evidence that defendant viewed or obtained the child pornography, there was sufficient circumstantial evidence to sustain the guilty verdict.

People v. Greenlee, 200 P.3d 363 (Colo. 2009). Defendant was convicted of second-degree murder with the use of a deadly weapon. The prosecution was permitted to introduce evidence at trial that the defendant made statements about his plan to kill a woman and hid the body in a remote area two months before shooting the victim and hiding her body. The Court held that although his words are "not direct evidence of his state of mind, his statements are circumstantial evidence that he formed the necessary mental state to commit the charged offense," and therefore, this evidence is relevant and admissible, especially when this evidence is coupled with the evidence of defendant's statements in a letter written several months after the shooting.

People v. Lawrence, 2019 COA 84 (June 27, 2019). Evidence of a defendant's intent is usually only proved by relying on circumstantial evidence, and "the finder of fact may properly infer the intent to commit theft from the defendant's conduct and the circumstances of the offense." Evidence as to element "intent to permanently deprive" did show conflicts in favor of defense, however, mere conflicts did not make circumstantial evidence insufficient.

5. CIRCUMSTANTIAL EVIDENCE

People v. Donald, 461 P.3d 4 (2020). The defendant's knowledge of a bail condition was proven by circumstantial evidence of the bondsperson filling out and signing defendant's appearance bond; the bondsperson's employer posting the bond on the defendant's behalf; the inference that if the defendant signed the paperwork, he would have done so with the deputies at the jail; and the inference that "[o]nly on an accident" by the jail would someone be released without signing the paperwork.

People In Interest of J.O., 517 P.3d 1259 (Colo. App. 2022). Whether a juvenile acted with "the purpose of sexual gratification" must be determined on a case-by-case basis. "[T]here must be . . . evidence of the juvenile's sexual purpose beyond the sexual contact itself—for example, removing clothing, heavy breathing, placing the victim's hand on the accused's genitals, an erection, other observable signs of arousal, the relationship of the parties, sexually explicit comments, coercing or deceiving the victim to obtain cooperation, attempting to avoid detection, or instructing the victim not to disclose the occurrence. These examples are not exhaustive. And the presence of one or a combination of these facts may or may not be sufficient, when considered with the totality of the evidence, to establish that a juvenile acted for the purpose of sexual gratification in a given case."

CHAPTER 6

CLOSING ARGUMENT

6. CLOSING ARGUMENT

6.1 INTRODUCTION

The Colorado Supreme Court has long recognized that misconduct by a prosecuting attorney in closing argument may be grounds for reversing a conviction. The heightened judicial scrutiny of a prosecutor's comments during closing argument stems, in part, from the "systemic belief that a prosecutor, while an advocate, is also a public servant whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990) (citations and quotations omitted). The Court has also acknowledged that, given the "mantle of authority" placed upon a prosecutor as a representative of the State, prosecutorial misconduct is "particularly dangerous" because of its likely influence on the jury. *Id.*

Colorado courts frequently cite and rely upon the **American Bar Association Standards for Criminal Justice Relating to the Prosecution Function and The Defense Function**, particularly in the context of reviewing the propriety of comments made during closing argument.

Section 3-5.8 of those standards prohibits prosecutors from:

- intentionally misstating the evidence or misleading the jury as to the inferences it may draw;
- expressing personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant;
- making arguments calculated to inflame the passions or prejudices of the jury;
- making an argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Standard 4-7.8 includes the same restrictions on closing arguments by defense counsel, albeit stated in a slightly different order and wording. It also states that defense counsel should not urge jurors to disregard the law: "Defense counsel should not argue to the jury that the jury should not follow its oath to consider the evidence and follow the law." Standard 4-7.8(d).

The **Colorado Rules of Professional Conduct** set forth essentially the same prohibitions as the ABA Standards:

> A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . . ."

C.R.P.C. 3.4(e).

6. CLOSING ARGUMENT

6.2 SCOPE OF CLOSING ARGUMENTS

As noted by the Colorado Supreme Court, "while the line between permissible and impermissible argument may be somewhat thin and occasionally obscure, the controlling principle is not. Final argument must be confined to the evidence admitted at trial, the inferences that can reasonably and fairly be drawn therefrom, and the instructions of law submitted to the jury . . . . Prosecutors who deviate from this principle jeopardize the validity of any ensuing conviction." *People v. DeHerrera*, 697 P.2d 734 (Colo. 1985). *See also* *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005).

People v. Garner, 439 P.3d 4 (Colo. App. 2015). Prosecutors have wide latitude to address strengths and significance of evidence as well inferences that may be drawn.

People v. Vialpando, 512 P.3d 106 (Colo. 2022). A prosecutor may highlight facts in evidence and draw reasonable inferences. In doing so, a prosecutor is permitted to use "oratorical embellishment" and "metaphoric nuance."

People v. Ortega, 370 P.3d 181 (Colo. App. 2015). A prosecutor may not urge jurors to convict in order to protect community values, preserve civil order, or deter future lawbreaking. If the comment is isolated, however, the error may be harmless.

A. Scope of Closing Argument within Trial Court's Discretion

People v. Moody, 676 P.2d 691 (Colo. 1984). The scope of final argument rests in the sound discretion of the trial court, and its rulings thereon will not be disturbed by an appellate court in the absence of a gross abuse of discretion resulting in prejudice and denial of justice.

B. Standard of Appellate Review

People v. Constant, 645 P.2d 843 (Colo. 1982). To determine whether the prosecutor's closing argument is improper, the remarks complained of must be reviewed in the light of the evidence which is before the jury. Such a determination depends upon the nature of the comment and on whether the jury's attention has been directed to something which it is not entitled to consider**.**

People v. Brooks, 950 P.2d 649 (Colo. App. 1997). Claims of improper argument must be evaluated in context of evidence and argument as a whole, including defendant's "opening salvo"."

1. Contemporaneous Objection: Review for Abuse of Discretion and Harmless Error

People v. Constant, 645 P.2d 843 (Colo. 1982). When an alleged error consists of prosecutorial misconduct during closing argument and a proper mistrial objection is made by the defense and

preserved at the trial court level, a new trial is required only if the trial court abused its discretion in denying the motion.

People v. Sauser, 490 P.3d 1018, (Colo. App. 2020). Where a defendant objected to a prosecutor's improper statements that did not raise a constitutional issue, the proper standard of review is harmless error. Under this standard, reversal is required only if the error affects the substantial rights of the parties by substantially influencing the verdict or affecting the fairness of the trial.

People v. Samson, 302 P.3d 311 (Colo. App. 2012). Under a harmless error standard, reversal is required unless "there is no reasonable probability that it contributed to the defendant's conviction." *Crider v. People*, 186 P.3d 39 (Colo. 2008).

2. No Timely Objection Raised: Review for Plain Error

Wilson v. People, 743 P.2d 415 (Colo. 1987). When no contemporaneous objection is made to an asserted error or defect, appellate review is limited to determining whether the error rises to the level of plain error. *See* Crim. P. 52(b). "The appropriate standard for plain-error review is whether an appellate court, after reviewing the entire record, can say 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 judgment of conviction." *People v. Constant*, 645 P.2d 843 (Colo. 1982). Prosecutorial misconduct during a closing argument amounts to plain error only where there is a substantial likelihood that it affected the verdict or deprived defendant of a fair trial. "Unless a prosecutor's misconduct is flagrant or glaringly or tremendously improper, it is not plain error under Crim. P. 52(b) where no objection to the behavior was raised."

People v. Williams, 996 P.2d 237 (Colo. App. 1999). "In assessing a plain-error claim of prosecutorial misconduct in summation, we are to take into account defense counsel's 'opening salvo' that preceded the challenged remark."

3. Impact of a Curative Instruction

People v. Carrier, 791 P.2d 1204 (Colo. App. 1990). While "discouraging" comments that have a tendency to mislead the jury in its deliberations, the Court of Appeals held that, in view of a curative instruction given by the district court, a prosecutor's improper argument did not constitute reversible error: "[a] curative instruction is generally sufficient to overcome an error, and an instruction is inadequate only when a comment is so prejudicial that, but for the comment, the jury might not have found the defendant guilty."

People v. Roy, 723 P.2d 1345 (Colo. 1986). While certain comments by prosecutor exceeded bounds of propriety, they were inconsequential in light of evidence as a whole and given court's curative instructions, which the jury is presumed to have followed, so reversal is not required.

6. CLOSING ARGUMENT

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). 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 the defendant's conviction.

6.3 COMMENTING ON THE LAW

It is the duty of the trial court to instruct the jury on all matters of law to be properly considered by it in the determination of the cause. *Owen v. People*, 195 P.2d 953 (Colo. 1948). While it is permissible for counsel to comment on the instructions, *see* Crim.P.30, it is improper to misstate or misinterpret the law, argue law not contained in the instructions, or to suggest to the jury that any of the instructions should be disregarded.

A. Arguments on the Burden of Proof, "Beyond A Reasonable Doubt"

Tibbels v. People, 501 P.3d 792 (Colo. 2022). Prosecutors should avoid the use of "everyday illustrations" to explain the concept of "beyond a reasonable doubt." Colorado appellate courts have repeatedly reversed convictions when trial courts' comments misstated or "trivialized" the burden of proof by employing "everyday illustrations" of the concept. In *Tibbels*, the Supreme Court commented: "attempts by trial courts to define 'reasonable doubt' in ways beyond the long-established pattern instructions do not often clarify the term," and "trial courts must guard against defining 'reasonable doubt' in a way that allows the jury to convict on a lesser showing than due process requires." Prosecutors' comments can be deemed equally problematic by appellate courts. "The U.S. Supreme Court has cautioned that further attempts by courts or parties to define 'reasonable doubt' do not provide clarity." *Johnson v. People*, 436 P.3d 529 (Colo. 2019).

People v. Van Meter, 421 P.3d 1222 (Colo. App. 2018). Prosecutor made an analogy between the concept of reasonable doubt and a jigsaw puzzle with missing pieces by showing the jury an iconic photo of the space shuttle with one third of the pieces missing. The analogy was deemed improper: "[b]y using the iconic and easily recognizable space shuttle image, the prosecutor 'invite[d] the jury to jump to a conclusion about [the] defendant's guilt.'" "The prosecutor's use of a two-thirds completed puzzle analogy also improperly quantified the burden of proof, even where the prosecutor did not undertake to quantify the number or percentage of missing pieces."

People v. Sauser, 490 P.3d 1018 (Colo. App. 2020); *People v. Camarigg*, 488 P.3d 267 (Colo. App. 2017). Puzzle analogies can be problematic if they (1) "quantify the concept of reasonable doubt"; (2) "inappropriately trivialize the state's burden"; (3) "equate the burden of proof to an everyday choice"; or (4) "use iconic images, which invite the jury to jump to a conclusion about a defendant's guilt." **Puzzle analogies, like everyday illustrations of "reasonable doubt," are best avoided.**

People v. Vialpando, 512 P.3d 106 (Colo. 2022). While it did not reverse on this basis, the Colorado Supreme Court warned against the use of analogies to explain the burden of proof: "Turning first to the prosecutor's illustrations of reasonable doubt, we ask whether they prejudiced the defendant. The [Court of Appeals] majority stated that the prosecutor's references to the American flag and the gameshow trivialized reasonable doubt and lowered the burden of proof by making it seem easy to ascertain. We recognize that analogies like these are perilous and unhelpful."

People v. McBride, 228 P.3d 216 (Colo. App. 2009). The prosecutor stated "that as defendant 'sits here today, he sits here in front of you a guilty man. The presumption of innocence that we had when we started the case is gone.' He told jurors not to begin their deliberations at 'not guilty' because, 'you're about 10 miles from not guilty before you even start deliberating.' These arguments were flawed because a defendant 'retains a presumption of innocence throughout the trial process.' This presumption remains until after a jury returns a guilty verdict."

People v. Esquivel-Alaniz, 985 P.2d 22 (Colo. App. 1999). Ruling on specific facts, a prosecutor's comment in closing that defendant has same subpoena power as People was permissible and did not shift burden of proof.

People v. Marioneaux, 618 P.2d 678 (Colo. App. 1980). Prosecutor could properly respond to defense arguments about failure to investigate the defense theory by pointing out the defense's ability to present evidence. "Where, as here, defense counsel has raised the issue of the prosecutor's failure to call witnesses to develop a certain theory, the prosecutor may properly point out that the defense also may produce such evidence."

B. Comments on Law Not Contained in Instructions

1. Statutes

Owen v. People, 195 P.2d 953 (Colo. 1948). It was "wholly improper" for the prosecutor in closing argument to read to the jury from statutes which were considered necessary for a consideration of the issues, but which were not included in the instructions.

People v. Rodriguez, 794 P.2d 965 (Colo. 1990). It was not improper during the penalty phase of a capital murder trial for the prosecutor to display a "big blue book" containing the criminal laws of the state, to inform the jurors that the instructions came from that book, and to urge the jurors not to make up their own rules but rather "go by the book," where the prosecutor did not attempt to read from the book he was holding and he referred to the law as contained in the court's instructions.

2. Other legal sources

People v. Alvarez, 530 P.2d 506 (Colo. 1975). The district court properly refused to permit defense counsel in closing argument to read from a law review article relating to the vagaries of eyewitness identification testimony when no such evidence had been presented before the jury. To allow such argument would have "substituted the writer [of the article] for the judge and usurped the trial court's duty to instruct on the law."

3. Comments about lesser-included offenses

People v. Graham, 590 P.2d 511 (Colo. App. 1978). The prosecutor's remarks in closing argument which repeatedly called into question the correctness of the court's instructions on theft as a lesser-included offense of aggravated robbery, were improper even though the defendant was not entitled to the lesser-included instruction.

People v. Carrier, 791 P.2d 1204 (Colo. App. 1990). Prosecutor improperly commented on the fact that the defense requested and received several lesser-included offense instructions, although the impropriety did not require reversal in light of the court's curative instruction.

People v. McMinn, 412 P.3d 551 (Colo. App. 2013) It was improper for the prosecutor to argue that the defense had requested instructions on lesser-included offenses in hopes that jurors would "compromise."

People v. Sepeda, 581 P.2d 723 (Colo. 1978). The prosecutor's closing argument in a homicide case suggesting to the jury that it acquit the defendant rather than find him guilty of the "little thing" of criminally negligent homicide was characterized by the Colorado Supreme Court as "ill advised," though not reversible error since the prosecutor did not misstate or misinterpret the law to the jury.

People v. Foster, 971 P.2d 1082 (Colo. App. 1998). It was proper argument for a prosecutor to refer to third degree assault as a "lesser offense" without commenting on which party requested it. "[A] review of the remark in context reveals that the reference to third degree assault as 'one of the lesser offenses here,' was followed by a list of objective facts that the jury had to find to convict defendant of that offense."

People v. Garcia, 826 P.2d 1259 (Colo. 1992). During closing argument in a homicide case, the prosecutor pointed out the inconsistency between the defendant's theory that an intruder committed the homicide and the district court's manslaughter instruction by stating, "[s]o while defense counsel stands before you and tries to get that horse called intruder home to you, I want you to think about a few things. If the issue is identity, then why have you been instructed on lesser included offenses?" The Colorado Supreme Court held that the argument was proper because it called for a reasonable inference based upon the comparison of the evidence supporting the defendant's theory of defense and an inconsistent instruction.

People v. Liggett, 114 P.3d 85 (Colo. App. 2005), *aff'd*, 135 P.3d 725 (Colo. 2006). A prosecutor's comment on the lack of evidence confirming a defendant's theory of the case is permissible and does not shift the burden of proof. "During closing, the prosecution questioned defendant's claim that the check was written by his employer pursuant to a written employment agreement. The prosecution stated: '[W]here is this employment agreement? . . . Well, Judge, we don't have that employment agreement here. There's no evidence that that agreement was ever subpoenaed, was ever asked for by the defense.'"

C. Misstatements of Law

People v. Rowe, 318 P.3d 57 (Colo. App. 2012). "It is improper for counsel to misstate or misinterpret the law during closing argument."

People v. Monroe, 468 P.3d 1273 (Colo. 2020). Because there is no duty to retreat before using physical force in self-defense, a prosecutor may not comment on a defendant's ability to retreat: "[N]o appellate court in Colorado (at least in a published opinion) has permitted argument regarding an unused avenue of retreat, even if offered only to attack the reasonableness of a defendant's use of force. And we decline to do so today." Conviction reversed.

People v. Cuellar, 530 P.3d 1236 (Colo. App. 2023). The prosecutor misstated the law by arguing that the jury could not acquit the defendant unless it believed that the victim "fabricated this whole entire thing, that she lied about this whole [thing]." Jurors could question the victim's credibility for other reasons or believe the victim's testimony only in part. "[T]he jury could have believed her testimony on some, but not all, of the elements of the offense of sexual assault and still acquitted [the defendant]."

Perez v. People, 351 P.3d 397 (Colo. 2015). The court admitted 404(b) evidence of prior conduct for the limited purpose of showing intent as to one of three counts. "[T]he prosecutor, in both his opening statement and closing argument, suggested that [Defendant's] incidents with [the victim] were evidence of a pattern of behavior that included the sexual conduct required for all three counts. And because the prosecutor asked the jury to consider the unfairly prejudicial evidence of [Defendant's] character during opening statements, through [the victim's] testimony, and during closing arguments, this evidence permeated all aspects of the trial and increased the likelihood that the 404(b) evidence substantially influenced the jury to convict [Defendant] on the remaining two counts." Convictions vacated.

People v. Shields, 701 P.2d 133 (Colo. App. 1985). The prosecutor improperly misstated the law of complicity during closing argument, but such comment did not require reversal given that it was an isolated remark, the prosecutor otherwise stated the complicity theory correctly, and the jury was properly instructed on all of the elements of complicity.

People v. Wilson, 972 P.2d 701 (Colo. App. 1998). Prosecutor's brief rebuttal remark about jury nullification did not require reversal or further instruction.

People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). "Here, the prosecutor made several statements during voir dire and one statement during summation defining 'after deliberation' as 'one thought following another.' This definition is not proper."

People v. McBride, 228 P.3d 216 (Colo. App. 2009). Prosecutor argued that a driver's single-second decision to drive through a yellow light analogy was equivalent to the first degree murder requirement that the murder have been done "after deliberation." "By obliterating any distinction between intentional and deliberative acts, the one-second-yellow-light argument contradicted Colorado law requiring that some 'appreciable length of time must have elapsed to allow deliberation, reflection and judgment…The one-second-deliberation argument was arguably even more, but plainly no less, improper than the discredited one-thought-follows-another argument. It is not self-evident that one thought ever could follow another in the space of just a second. But assuming separate thoughts could follow in so evanescent a time, one second or thinking could never amount to deliberation under settled Colorado law." Conviction for attempted first degree murder reversed.

D. Comment on Disallowed or Limited Purpose Evidence

1. Out of Court Statements Offered for Limited Non-Hearsay Purpose

People v. Smalley, 369 P.3d 737 (Colo. App. 2015). When evidence is admitted for a limited purpose, a prosecutor cannot suggest that jurors consider the evidence for wider purposes. Here, hearsay evidence was admitted only for a non-hearsay purpose, and the prosecutor properly argued the non-hearsay purpose in most instances. However, in one instance, the prosecutor asked the jury to consider the hearsay evidence for its truth, which was improper. There was no contemporaneous objection, and the improper comment did not amount to plain error.

6.4 EXPRESSION OF PERSONAL BELIEF OR OPINION

Although fair comment in closing argument includes remarks as to how well and in what manner a witness measures up to the test of credibility, *see People v. Constant,* 645 P.2d 843 (Colo. 1982), the controlling case law and the ABA Standards prohibit counsel from expressing personal belief or opinion as to the truth or falsity of any testimony or evidence, or the guilt or innocence of the defendant.

A. Personal Belief or Opinion on Credibility of Witnesses

Stout v. People, 464 P.2d 872 (Colo. 1970). Improper to describe rape victims as "good and fine girls."

6. CLOSING ARGUMENT

People v. Gutierrez, 622 P.2d 547 (Colo. 1981). Improper to suggest that, to discount the testimony of prosecution witnesses, the jury must find they lied so convincingly that they "faked out the policemen" and that all prosecution witnesses were successful throughout the case in "fooling or convincing people who deal in these types of things all the time," as such comments suggest that the prosecution and the police were persuaded that the prosecution's witnesses were credible.

People v. Wright, 511 P.2d 460 (Colo. 1973). Improper for prosecutor to comment on his own honesty and integrity as an elected public official, and to vouch for the veracity of prosecution witnesses.

People v. Smith, 685 P.2d 786 (Colo. App. 1984). Improper for prosecutor to state during closing argument, "[t]he case here rests largely on who you believe. I believe Mrs. Camp."

People v. Gillis, 883 P.2d 554 (Colo. App. 1994). The district court did not abuse its discretion in refusing to declare a mistrial following the prosecutor's suggestion during closing argument that it would be a "travesty" if the co-defendant (who pleaded guilty prior to trial and testified against the defendant), who "is the honest person" who "felt compelled to remain honest" by testifying, would end up being "the only one" serving a sentence for the charged offense. The Court of Appeals recognized that the offending comments were few in number and brief in the context of a lengthy summation and the prejudicial effect was minimized by the district court's prompt instruction to disregard them.

People v. McGill, 548 P.2d 600 (Colo. 1976) (*rev'd on other grounds*). The prosecutor's comment, "we feel from all the evidence that we have more than established the defendant's guilt on all these counts," was held to properly express the proposition that the evidence was sufficient to support a conviction and did not constitute an expression of personal opinion regarding the guilt of the defendant.

People v. Brooks, 950 P.2d 649 (Colo. App. 1997). Where defense closing characterized officers' statements before and during the trial as "lies," it was not improper for the prosecutor to respond that the officers told the "truth."

But see *People v. Raehal*, 971 P.2d 256 (Colo. App. 1998). Prosecutor's comment on rebuttal that child victims were "not lying" and told the "truth" was improper but not plain error.

People v. Fears, 962 P.2d 272 (Colo. App. 1997). The prosecutor did not "vouch" for the witnesses' credibility by speaking in the first person during the rebuttal closing.

People v. Williams, 961 P.2d 533 (Colo. App. 1997) (*rev'd on other grounds*). By using the words "my victim," "your victim," and "your witnesses" in closing, the prosecutor did not improperly express a personal opinion as to credibility.

6. CLOSING ARGUMENT

People v. Clark, 214 P.3d 531 (Colo. App. 2009). "A prosecutor's use of the phrase 'I submit' is not necessarily impermissible personal opinion. Here, the phrase was used in obvious comment on defendant's veracity. However, unlike a direct accusation of lying, these statements did not have the 'same degree of rhetorical power to necessarily imply that they [were] the personal opinion of the prosecutor" (citing *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005)).

People v. Clark, 214 P.3d 531 (Colo. App. 2009). Prosecutor told the jury during rebuttal closing that "they should imagine themselves sitting at home and listening to a friend tell them a story about a rape that had occurred . . . . We conclude that the prosecutor's use of the analogy was not improper. The details of the analogy closely paralleled the evidence adduced at trial . . . . Although this particular approach clearly constituted commentary on the defendant's veracity, it was not a clear statement of the prosecutor's personal opinion."

People v. Doubleday, 369 P.3d 595 (Colo. App. 2012) *rev'd on other grounds,* 364 P.3d 193 (Colo. 2016). A prosecutor may argue from reasonable inferences anchored in the facts in evidence about the truthfulness of a witness' testimony, including the defendant's testimony. Comments are proper about the lack of evidence in support of the defendant's theory of the case.

1. Lies and lying

Wend v. People, 235 P.3d 1089 (Colo. 2010). A prosecutor cannot say any witness or defendant "lied" when the person testified or made statements to police. "[A] prosecutor acts improperly when using any form of the word 'lie' in reference to a witness's or defendant's veracity." Synonyms such as "fabricated," etc., are also improper. *People v. Serra*, 361 P.3d 1122 (Colo. App. 2015) ("Although the terms 'BS' and 'deceit' are not forms of the word 'lie,' they are similarly inflammatory terms. . . ."). Instead, prosecutors should focus arguments on "credibility" of testimony. *People v. Alengi*, 114 P.3d 11 (Colo. App. 2004), *aff'd*, 148 P.3d 154 (Colo. 2006) (calling prosecution witnesses "truthful" while referring to their "credibility" and calling defendant's testimony "incredible" were proper comments).

People v. McBride, 228 P.3d 216 (Colo. App. 2009). "If one thing is settled in Colorado [ ] it is that prosecutors may not accuse defendant of having 'lied.'" "The prosecutor's repeated accusations that the defense had 'lied' were plainly improper under settled Colorado law. Indeed, these arguments here were more flagrantly wrong than those condemned in prior Colorado cases because the prosecutor based the 'liar' accusations not just on defendant's own statements but also on legitimate opening statements and cross-examinations by the defense attorney."

Wilson v. People, 743 P.2d 415 (Colo. 1987). The prosecutor's repeated comments during closing argument that the defendant and defense witnesses lied during their trial testimony constituted impermissible expressions of personal opinion as to the veracity of witnesses and, because the comments were neither invited by defense argument or few in number and momentary in length, required reversal of the defendant's conviction.

People v. Trujillo, 624 P.2d 924 (Colo. App. 1980). Prosecutor's repeated used of word "lies" and the like in closing argument in reference both to defendant's pretrial statement and trial testimony constituted reversible error.

But see *People v. Salter*, 717 P.2d 976 (Colo. App. 1985). Characterization of defendant's testimony as "lies," when isolated and few in number, though improper, does not constitute reversible error where the district court reminded the jury that statements of counsel are not evidence and that it was to base its verdict on the evidence. *See People v. Swanson*, 638 P.2d 45 (Colo. 1981).

People v. Herr, 868 P.2d 1121 (Colo. App. 1993) Prosecutor's remark that defendant "lied" during his testimony and isolated reference to defendant's friend's familiarity with cocaine, though improper, does not mandate reversal of conviction.

People v. Herrera, 1 P.3d 234 (Colo. App. 1999). Prosecutor's remark in closing that defendant was lying was improper but not plain error.

Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005). During closing argument, the prosecutor said that the defendant and other defense witnesses lied, testified untruthfully, or made up their stories. "Some words or analogies by their very nature resonate more powerfully in the heart and minds of the jury. They evoke strong reactions in jurors and take them down a path towards a conviction where the evidence does not necessarily lead. The word 'lie' is such a strong expression that it necessarily reflects the personal opinion of the speaker. When spoken by the State's representative in the courtroom, the word 'lie' has the dangerous potential of swaying the jury from their duty to determine the accused's guilt or innocence on the evidence properly presented at trial." However, the use of the phrases "not truthful" or "not telling the truth" "do not have the same power to necessarily imply that they are the personal opinion of the prosecutor." The Court still disapproved of the prosecutor using this terminology. Prosecutor's remark that the defendant and his friends "made up their stories was an improper statement of personal opinion."

People v. Welsh, 176 P.3d 781 (Colo. App. 2007). Improper for prosecutor to refer to defendant as an "obsessive liar."

2. Personal beliefs or opinion of the particular prosecutor

People v. Rodriguez, 794 P.2d 965 (Colo. 1990). "A prosecutor may not tell the jury that of all the cases that have come before him, this is one of the very worst; such an argument is irrelevant and has the possibility of being unfairly prejudicial." Prosecutor's comments that the defendant's conduct "is rarely seen in Colorado" and that the case involved "all sorts of things that make the crime worse than your average first-degree murder" did not refer to his opinions and superior personal knowledge in the first person, but were nevertheless objectionable.

People v. Loscutoff, 661 P.2d 274 (Colo. 1983). Prosecutor's statement that his experience has shown him that issues of present case are not "vast" constituted improper statement of personal opinion but did not require reversal.

Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005). Prosecutor stated, "[t]here is a screening process for charging cases, and it takes a lot more than somebody saying that person did it. It takes the type of evidence that we have here. At least that." This was improper because "it both hints that additional evidence supporting guilt exists and reveals the personal opinion of the prosecutor . . . . Prosecutorial remarks of personal knowledge, combined with the power and prestige inexorably linked with the office may encourage a juror to rely on the prosecution's allegation that unadmitted evidence supports a conviction."

3. Personal attacks on witnesses

People v. McBride, 228 P.3d 216 (Colo. App. 2009). "The prosecution made repeated personal attacks on a defense expert who relied on crime scene evidence to opine that the shooting had occurred differently than the victim had testified. The prosecutor said the 'hired gun expert' had 'to come up with something' and experts 'aren't going to just admit to you that they made this up,' but 'that's exactly what happened. Either he made it up or he didn't look at the evidence.' He said the expert was 'full of it, full of it,' and his testimony was 'garbage.' While prosecutors may challenge defense experts' biases, methods, and conclusions, they may not resort to unfairly 'prejudicial comments denigrating the expert.'"

Compare with People v. Sommers, 200 P.3d 1089 (Colo. App. 2008). "[T]he prosecutor pointed out the prospect that the expert was biased because he had been paid, but the prosecution did not make any reference to the expert's pay or bias in opening statement or closing argument. Although the prosecution impeached the expert as permitted by law, it made no prejudicial comments denigrating the expert."

6.5 ARGUING FACTS NOT IN EVIDENCE

It is improper to state facts or argue propositions or theories in closing argument that are wholly unsupported by evidence admitted at trial. However, it is permissible to argue all reasonable inferences which may be drawn from the facts in evidence. *See People v. Moody*, 676 P.2d 691 (Colo. 1984).

A. Hypothetical Theories

People v. Lundy, 533 P.2d 920 (Colo. 1975). The district court properly sustained the prosecutor's objection to a defense closing argument which suggested that the defendant found the stolen money, the weapon, and the clothing that was in his possession at the time of his arrest; where the physical evidence was directly tied to the robbery and no evidentiary basis existed to support the

argument that the articles had been abandoned by the person who actually committed the robbery and were later found by the defendant. "A jury should restrict its deliberations to the evidence presented in the course of the trial and should not be guided by defense counsel's flights of fancy."

People v. Sepeda, 581 P.2d 723 (Colo. 1978). It was "clearly improper" in a homicide case for the prosecutor to suggest in closing argument that the defendant might have had to load the clip-magazine with bullets before inserting the clip into the murder weapon where no evidence existed in support of that theory.

Hervey v. People, 495 P.2d 204 (Colo. 1972). The prosecutor improperly argued that the victim in a homicide case was murdered by a "poverty-stricken" defendant where the theory of the robbery was wholly speculative and unsupported by the evidence. "[I]t was unprofessional conduct on the part of the prosecution to ask questions and to make statements which implied the existence of a factual predicate which he knows he could not support with evidence."

B. Demeanor at Counsel Table

People v. Constant, 645 P.2d 843 (Colo. 1982). The prosecutor's remarks during closing regarding the fact that the defendant was laughing during the testimony of the victim in a sexual assault prosecution, although referring to a matter not in evidence, did not constitute plain error where the defendant testified at trial and his demeanor was argued only as evidence of his credibility. A prosecutor can argue reasonable inferences to be drawn from a witness's demeanor when testifying, and even though demeanor is not evidence, juries are instructed to consider it when evaluating a witness's credibility. Of consequence in the decision was the fact that the defendant actually testified at trial, and no contemporaneous objection was raised by the defense to the prosecutor's comments.

People v. Walters, 148 P.3d 331 (Colo. App. 2006). In closing, prosecutor said, "Did anybody see the defendant when [the victim] was leaving the courtroom crying? Did any of you? And ask your fellow jurors if [they] saw him laugh and smile when she left. Because I saw it." Defendant testified during the trial and therefore put his credibility in issue. "[B]ecause the victim's and defendant's testimony about the events conflicted, it was permissible for the prosecutor to contrast the credibility of the two and to comment on defendant's demeanor in relation to his credibility." However, it was improper for the prosecutor to attest to what he saw because by doing this, he "injected the prosecutor's credibility into the jury's consideration of defendant's demeanor."

People v. Thames, 467 P.3d 1181 (Colo. App. 2019). The prosecutor's comments about the defendant's statements and demeanor during a recorded interview were proper. "The prosecutor urged the jurors to recall [the defendant's] 'total lack of reaction' and 'cool' demeanor, and not his silence in responding to the officers' questions, in the video the jurors had seen."

C. Permissible to Argue Facts of Common Knowledge

People v. Marin, 686 P.2d 1351 (Colo. App. 1983). The prosecutor's suggestion in closing argument that the jurors rely upon their own experience with guns did not improperly urge the consideration of matters outside the record. The jury's very function is to use its "common sense and experience" in evaluating the evidence, and it is therefore proper to ask jurors to draw any reasonable inferences based on their own common experiences from the evidence.

People v. Welsh, 176 P.3d 781 (Colo. App. 2007). The prosecutor's comment on the absence of a suicide note was a permissible reference to the absence of evidence to support defendant's contention that she was intending to kill herself.

People v. Strozzi, 712 P.2d 1100 (Colo. App. 1985). In response to the defense attorney's insinuation that an accomplice's case had been plea bargained in exchange for testimony against the defendant, the prosecutor properly reminded the jury in rebuttal closing that there was no evidence to support that insinuation and explained that it was not unusual to plea bargain cases in a county where 5,000 cases are filed each year because every case cannot be tried. "Comment on facts not in evidence is unprofessional conduct only if such facts are not matters of common public knowledge . . . . Here, the prosecutor's explanation of the reason for plea bargaining was of common knowledge and was neither improper nor prejudicial."

People v. Motley, 498 P.2d 339 (Colo. 1972). In response to defense counsel's argument on the issue of the length of the defendant's hair at the time of the robbery, the prosecutor improperly stated in rebuttal that it was not uncommon for G.I.'s with short haircuts to be wearing wigs, inasmuch as such a statement was not supported by the evidence and was not a matter of common public knowledge.

D. Misleading Statement of Facts

People v. Arzabala, 317 P.3d 1196 (Colo. App. 2012). Prosecutor's analogy of the many pieces of evidence to a game of Jenga was found to be a fair comment to the jury to consider all of the evidence and was not improper.

People v. Fierro, 651 P.2d 416 (Colo. App. 1982). It is improper and reversible error for the prosecutor to assert that defendant's contention he had turned into the police three additional stolen articles was a fabrication when the prosecutor in fact knew that the articles had been surrendered and were in the possession of the District Attorney.

People v. Hastings, 983 P.2d 78 (Colo. App. 1998). Prosecutor's closing remark that defendant gave victim drugs to induce her to stay was beyond scope of evidence, but did not amount to plain error.

People v. Evans, 987 P.2d 845 (Colo. App. 1998) (*rev'd on other grounds*). To the extent prosecutor's argument suggesting defense "agreed" there was no provoked passion was incorrect or misleading, it was not so prejudicial that mistrial was required.

People v. Geisendorfer, 991 P.2d 308 (Colo. App. 1999). Inaccurate statement in closing that defendant conceded he pointed gun at victim was small part of argument and court's instructions sufficient to correct misimpression.

E. Comments on Subject Matters Excluded at Trial

People v. Oliver, 745 P.2d 222 (Colo. 1987). In closing, the prosecutor improperly commented on the defendant's association with a witness, who the prosecutor asserted was a homosexual, even though an objection had been sustained during trial to a question identifying the witness as a homosexual. "When the court has sustained an objection to a question, no inference can be drawn. In this case, though the court sustained the objection to the question before it was answered, the prosecutor nevertheless argued that an inference could be drawn from the defendant's association with [the witness]. The prosecutor, in effect, was improperly testifying and arguing law that went beyond the evidence and instructions."

F. Tailoring Arguments

Martinez v. People, 244 P.3d 135 (Colo. 2010). **A prosecutor may not argue that a defendant "tailored" his testimony to fit other witnesses unless there are specific facts supporting the argument.** Prosecutors are prohibited from making generic tailoring arguments: "[w]hether tailoring arguments fall within these general principles of proper argument depends on whether the tailoring argument is generic or specific. Generic tailoring arguments occur when the prosecution attacks the defendant's credibility by simply drawing the jury's attention to the defendant's presence at trial and his resultant opportunity to tailor his testimony. . . . In contrast, tailoring arguments are considered specific when the prosecutor cites to an evidentiary basis in the record."

6.6 INJECTING ISSUES BROADER THAN GUILT OR INNOCENCE

A prosecutor should not use arguments that are calculated to inflame the passions or prejudices of the jury. The ABA Standards further provide that the prosecutor "should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law . . . ." ABA Standards for Criminal Justice 3-5.8(c) and (d).

A. Placing the Jury in the "Shoes of the Victim" (AKA "The Golden Rule")

People v. Manyik, 383 P.3d 77 (Colo. App. 2016). It was improper for the prosecutor to "channel" a homicide victim by narrating the crime in first person from the deceased victim's point of view: "I can hear sirens arriving . . . . I'm still barely alive . . . ," etc. The Court of Appeals considered the comments similar to a "golden rule" argument calculated to "inflame the passions of prejudice of the jury."

People v. Yachik, 469 P.3d 582 (Colo. App. 2020). The prosecutor made improper comments when he argued that the defendant was trying to "groom" the jury, analogizing the defense to common behaviors of adult perpetrators of sexual abuse. "Essentially, the prosecutor argued that, if the jury believed defendant, it was only because he had succeeded in grooming them. Who among us, after all, wants to be accused of being controlled and groomed by a criminal defendant on trial?"

People v. DeHerrera, 697 P.2d 734 (Colo. 1985). The prosecutor's statement that he hoped "none of you [jurors] ever get put in the position of officers Mooney or Gonzales of having someone [drive] at you with their cars at a high rate of speed" was improper as an oblique appeal to the jury's sympathy for the victims of the defendant's conduct.

People v. Bowring, 902 P.2d 911 (Colo. App. 1995). The prosecutor's statement in closing argument to "imagine, if you can, what it would be like to be fourteen years old sitting on a witness stand," though improper, did not require reversal in light of the trial court's admonitions.

People v. Woods, 931 P.2d 530 (Colo. App. 1996). The prosecutor's characterization of defendant's relationship with the victim as a "cycle of violence" and subsequent statement, "[I]t's embarrassing to be a victim of violence," did not rise to the level of inflaming the passions of the jury.

People v. James, 981 P.2d 637 (Colo. App. 1998). Though improper for prosecutor to ask jurors to place themselves in victim's position, "What are you supposed to do . . . ?" was rhetorical question that "referred not to the jurors, but to any person who found himself or herself in the victim's circumstances." The question might have been irrelevant here, but not improper.

B. Commenting About the Impact on the Community

People v. Randell, 297 P.3d 989 (Colo. App. 2012). In a tax fraud case, prosecutor's comments arguing the defendant "stole from" the jury and spent their money were improper, but was not cause for reversal as it was not a true "golden rule" argument where jurors were invited to put themselves in the victim's place.

Wilson v. People, 743 P.2d 415 (Colo. 1987). Court states in dicta that prosecutor ended his argument by improperly appealing to the jury when he said: "I ask you to consider the community as a whole. What does the community want when there are so many people sitting here watching

day after day? They want what the prosecution wants, ladies and gentlemen. They want a verdict in this case of guilty."

People v. Fernandez, 687 P.2d 502 (Colo. App. 1984). Comment on effect of victim's death on her family and community held to be improper.

People v. James, 981 P.2d 637 (Colo. App. 1998). Remark that "violence had now found the community" may have been improper but did not warrant mistrial.

But see *People v. Coit*, 961 P.2d 524 (Colo. App. 1997). Prosecutor's rebuttal request to return guilty verdicts "on behalf of the people of the State of Colorado, and particularly on behalf of those in that group for whom the memory of [the victim] endures" did no more than humanize victim.

People v. Williams, 996 P.2d 237 (Colo. App. 1999). Use of phrase "send a message" in rebuttal not improper in response to defense argument, and prosecutor urged jury to decide case on evidence.

C. Comments Attacking the Character of the Defendant

People v. Mason, 643 P.2d 745 (Colo. 1982). Prosecutor's reference to defendant during closing argument as a "con man" was an improper expression of the prosecutor's personal belief and a statement calculated to appeal to the prejudices of the jury. "We emphasize here that the prosecutor's references to the defendant as a 'con man' were improper and indicate either a misplaced zeal to win the case or an ignorance of the elemental principles of trial protocol." *See also* *People v. Liggett*, 114 P.3d 85 (Colo. App. 2005).

People v. Dunlap, 975 P.2d 723 (Colo. 1999). During closing argument in the penalty phase of this capital case, it was improper for the prosecutor to compare defendant to Crazy Horse and paint the image of defendant "waiving the scalps of the victims in his hands." The comments were, however, harmless beyond a reasonable doubt when viewed in the context of the entire record.

People v. Martinez, 657 P.2d 967 (Colo. App. 1982). Indirect reference to defendant as "goon" held improper as calculated to appeal to prejudice or mislead jury.

People v. Holloway, 973 P.2d 721 (Colo. App. 1998). Based on evidence and in context of argument, trial court acted within its discretion by overruling defendant's objection and denying mistrial motion when in closing prosecutor referred to defendant as "gang-banging, drug dealing, gun toting menace to society."

People v. Hastings, 983 P.2d 78 (Colo. App. 1998). Prosecutor's description of defendant's apartment as "flophouse" during closing just "oratorical embellishment."

6. CLOSING ARGUMENT

People v. Williams, 996 P.2d 237 (Colo. App. 1999). In closing argument, prosecutor's suggestion that defendant would commit more drug sales if acquitted was proper inference from evidence. Reference to drug dealing as defendant's "job" was a proper inference from evidence. It was improper to refer to defendant by first name, but the prosecutor did so only once. It was not improper to say drug dealing "immoral" and "wrong" as well as illegal.

People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999). Rebuttal remarks, including that defendant "liked the money," did not deprive defendant of fair trial.

People v. Marion, 941 P.2d 287 (Colo. App. 1996). Prosecutor should have avoided comments during closing argument that parts of defendant's testimony were "all a crock" and that "none of that happened . . . that's all it was, a story, make-believe." Such argument, however, did not amount to plain error requiring reversal.

People v. McBride, 228 P.3d 216 (Colo. App. 2009). "We do not hold that calling a defendant a 'coward' is always error, much less obvious error. Prosecutors should avoid 'pejoratives' that amount to no more than 'name calling . . .' What makes the 'coward' arguments plainly wrong here is that they grossly misused evidence admitted for a limited purpose."

Practice Tip: Although it is improper to propound argument **calculated** to appeal to the passions or prejudices of the jury, descriptive words or phrases which represent conclusions fairly deduced from the evidence which are not calculated to inflame the racial, religious, ethnic, political, economic or other prejudices of the jury are permissible. *See People v. Marin*, 686 P.2d 1351 (Colo. App. 1983) (holding that the use of adjectives during closing argument in homicide case such as "cruel," "senseless," and "brutal" constituted proper comment on evidence). ***But see*** *People v. Wallace*, 97 P.3d 262 (Colo. App. 2004) (court did not condone prosecutor's rhetoric but did not find reversible error).

D. Attacks Upon Defense Strategy, Defense Counsel, and Defense Witnesses

People v. Serra, 361 P.3d 1122 (Colo. App. 2015). References to defense counsel's diversionary tactics and that defense counsel "did not have courage to ask victim about prior testimony" are improper because they denigrate defense counsel.

People v. Garcia, 296 P.3d 285 (Colo. App. 2012). The court found that "a prosecutor may not argue that a Defendant in a sexual assault case unfairly seeks to bolster his case by using his female attorney to blame the female victims for the Defendant's conduct." Although improper argument, the court did not find reversal was required.

People v. Yachik, 469 P.3d 582 (Colo. App. 2020). The prosecutor made improper comments when the prosecutor argued that the defendant was trying to "groom" the jury, analogizing the defense to common behaviors of adult perpetrators of sexual abuse. "Essentially, the prosecutor argued that, if the jury believed defendant, it was only because he had succeeded in grooming

them. Who among us, after all, wants to be accused of being controlled and groomed by a criminal defendant on trial?"

People v. Douglas, 296 P.3d 234 (Colo. App. 2012). Prosecutor's comments in rebuttal close regarding defense counsel's arguments as ridiculous were not improper as they were a direct response to defendant's theory of the case.

People v. Carter, 402 P.3d 480 (Colo. App. 2015). Prosecutor commented on defense closing: "[i]t's clear that both sides were accusing the other of trying to distract you with stuff. And I submit to you that there are red herrings that they've thrown out there, hoping you'll follow them," were made in context of drawing jury's focus to relevant evidence and not intended to denigrate opposing counsel and therefore are not improper.

People v. Saiz, 923 P.2d 197 (Colo. App. 1995). Prosecutor's reference during closing argument to defense counsel's "speech making," "belittling of witnesses," and courtroom antics as being akin to those of "an overwrought circus barker," in addition to comments describing defense experts as "hired witnesses" and "expensive experts," although improper, did not amount to cumulative misconduct constituting reversible error when considered within the context of the lengthy, emotional trial and the curative instructions provided by the court.

People v. Avila, 944 P.2d 673 (Colo. App. 1997). "[T]o insinuate that defendant had 'bought' an expert to testify in his favor might well be an extreme and inappropriate comment," but the trial court's failure to strike the remarks *sua sponte* did not so undermine the fundamental fairness of the trial as to require reversal.

People v. Foster, 971 P.2d 1082 (Colo. App. 1998). When the prosecutor stated in rebuttal that defendant's argument was "ridiculous," the trial court sustained defendant's objection and instructed the jury to disregard the remark. The court acted within its discretion by allowing the prosecutor to rephrase his comment to say that the argument was "without merit."

People v. Webster, 987 P.2d 836 (Colo. App. 1998). Remarks in closing that defense examination of three witnesses was "designed to confuse" the jury was fair and proper comment on defendant's characterization of the facts and theory of the case.

People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999). Characterization of the defense as "blowing smoke" in rebuttal was not an improper comment on defense counsel's belief in the merits of the case.

E. Injecting Issues Beyond Those Before the Jury for Consideration

People v. Nardine, 409 P.3d 441 (Colo. App. 2016). It was prosecutorial misconduct for prosecutor to argue that: "[i]n every single case in which an act [sic] risk victim comes to police and said, look how I was abused by this defendant, look what this man did to me. And it becomes

an issue for the defense to say she's mentally ill. She has hallucinations, she has flashbacks, she has nightmares, she has—then it seems like automatically, everything they say can't be trusted. And the perpetrators get away with it."

People v. Garcia, 690 P.2d 869 (Colo. App. 1984). The defense attorney was properly prohibited from arguing the state's failure to prove motive.

F. Rhetoric Arousing Patriotic Passions

Harris v. People, 888 P.2d 259 (Colo. 1995). "The prosecutor's repeated characterizations of Harris as a thug and a bully who, like Saddam Hussein, needed punishment were not calculated to direct the jury to relevant evidence supporting a conviction." In holding that the prosecutor's comments were not only improper but constituted plain error mandating reversal, the Colorado Supreme Court concluded that such argument improperly encouraged the jurors to "employ their patriotic passions in evaluating the evidence" and to determine the defendant's guilt or innocence on the basis of bias or prejudice rather than on the evidence presented at trial. The Court recognized that "[t]here is of course no bright line separating permissible oratorical embellishment and impermissible oratorical excess," nor need one "abandon effective debate techniques or eschew metaphoric nuance in accepting the restrictions inherent in the prosecutorial function." However, "in view of the prosecutor's repeated remarks, the temporal context of this trial, and the critical role of witness credibility in this case, we conclude that there is a substantial likelihood that the prosecutor's improper comments impermissibly prejudiced the defendant's right to have his guilt determined by an impartial jury applying applicable legal standards to facts found on an objective evaluation of the evidence."

People v. Coit, 961 P.2d 524 (Colo. App. 1997). Prosecutor's rebuttal request, "on behalf of the people of the State of Colorado, and particularly on behalf of those in that group for whom the memory of [the victim] endures," to return guilty verdicts based on evidence and "inescapable truth" which flows from it merely humanized victim and did not amount to "patriotic zealotry" or "impermissible oratorical excess."

G. Rhetoric Injecting Racial Considerations

People v. Robinson, 454 P.3d 229 (2019). In an opening statement, the prosecutor noted the victim's "pasty white" skin tone, and she emphasized twice that defendant was an African American of "dark" complexion. The prosecutor then stated that the jury would hear evidence that a witness saw "a dark penis going into a white body," and added, "That's how graphic she could see." The prosecutor might have been explaining the witness's ability to perceive, but the prosecutor never directly explained the relevance. The Colorado Supreme Court held it was improper argument. "[I]t is not difficult to discern that when a prosecutor injects racial considerations into a trial, the risk of unfair prejudice rises dramatically. Indeed, the fact that racial considerations were introduced here, in the context of alleged sex crimes, made the risk of

prejudice particularly acute, given the history of racial prejudice in this country." It was not reversible "plain error" on these facts, but that was a "close question." "[T]he prosecutor's repeated references to race arguably violated a settled legal principle because courts have routinely found error when a prosecutor has referred to the defendant's race when race was not a legitimate area of inquiry and when the prosecutor repeatedly emphasized the race of those involved."

H. Use of Physical Evidence and Demonstrations

People v. Harris, 914 P.2d 434 (Colo. App. 1995). In response to the defense contention during closing argument that the victim did not feel threatened by the defendant's knife, the prosecutor on rebuttal close picked up the knife, stood approximately ten feet from the jury box, and asked, "Is this threatening enough to you?" In finding no impropriety in the prosecutor's statements, the Court of Appeals stated: "[c]ontrary to the defendant's assertions that these remarks and actions were inflammatory, we conclude that the analogy and the demonstrative use of the exhibit here were reasonable, albeit perhaps somewhat flamboyant, responses to the arguments raised by defense counsel. Further, the record supports the trial court's finding that the prosecutor neither lunged nor swung the knife at the jury."

I. Pressuring Jurors

People v. McBride, 228 P.3d 216 (Colo. App. 2009). Prosecutor stated "do justice for other strangers," presumably referring to the victim and her family. "Prosecutors may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim."

6.7 COMMENT ON THE EXERCISE OF CONSTITUTIONAL RIGHTS OF THE DEFENDANT

Colorado appellate courts have repeatedly held that a defendant cannot be penalized for exercising his or her constitutional rights, and that prohibition extends to comments made by the prosecution during closing argument. Errors impacting the constitutional rights of a defendant are subject to heightened appellate scrutiny. That is, "if the asserted error is of constitutional dimension, reversal is required unless the [reviewing] court is convinced that the error was harmless beyond a reasonable doubt." *People v. Rodgers*, 756 P.2d 980 (Colo. 1988).

A. Comment on Defendant's Failure to Testify

1. Standard Generally

People v. Todd, 538 P.2d 433 (Colo. 1975). Factors which have entered into the determination of whether the prosecution's argument constituted fair comment or an unconstitutional reference to the failure of the accused to testify have been: "(1) whether the comment referred specifically to the defendant's failure to take the stand or rebut the evidence against him. (2) Whether the trial judge, after objection was made, gave a cautionary instruction to the jury to disregard the

comments or the remarks relating to the failure of the accused to testify. (3) Whether the prosecutorial comments were aggravated or repetitive. (4) Whether the defendant was the only person who could refute the evidence which caused the comments to be directly pointed at the accused."

Martinez v. People, 425 P.2d 299 (Colo. 1967). "[A]ny direct, or even indirect, statement concerning a defendant's failure to testify in a criminal proceeding may well constitute reversible error." "[T]he 'true test' is whether the comment, in context, was calculated or intended to direct the attention of the jury to the defendant's neglect or failure to exercise his right to testify in his own behalf." Court concludes the statements are proper if they "were not calculated to point up, nor did they in fact point out, that [the defendant] had failed to testify in his own behalf. On the contrary they were only intended as general comment on the fact that the evidence adduced by the People was uncontradicted."

2. Direct or Indirect Comment on Failure to Testify (is Improper)

Montoya v. People, 457 P.2d 397 (Colo.1969). Prosecutor's comment that the only person who can relate what was going on in the defendant's mind was the defendant, and suggestion to the jury that "you are asked to decide what went on in [the defendant's] mind without hearing it from the very person, the only person who really knows," held to constitute an unconstitutional direct reference to the defendant's exercise of his privilege against self-incrimination.

Howard-Walker v. People, 443 P.3d 1007 (2019). When discussing the still unknown whereabouts of the stolen items, the prosecutor remarked that "there is only one person in this room that could tell you where all of those items are now, and he won't." In making this comment, the prosecutor infringed upon the defendant's Fifth Amendment rights.

Kurtz v. People, 494 P.2d 97 (Colo. 1972) (*rev'd on other grounds*). In response to defense counsel's closing argument stating that the defendant (who did not testify) "stood by and came into this courtroom and told you that he was not guilty," the prosecutor stated in rebuttal that neither he nor the jury had heard a word from the defendant. Although the prosecutor's statement was held to have "stepped beyond the bounds of proper advocacy," the comment did not constitute reversible error given the trial court's cautionary instruction and the fact that, in this case, the rebuttal was "invited" by the defense.

People v. Rivera, 968 P.2d 1061 (Colo. App. 1997). Prosecutor's remarks in closing that defendant had confessed to two people but not to police amounted to improper comment on defendant's right to remain silent, but no reversible error where brief remarks followed by curative instruction.

People v. Fears, 962 P.2d 272 (Colo. App. 1997). Any prejudice from prosecutor's ambiguous remarks in rebuttal that did not directly refer to defendant's decision not to testify was adequately

prevented by admonishing prosecutor to clarify he was responding to defendant's argument and instructing jury to consider remarks in that context.

Compare with People v. Keener, 559 P.2d 243 (Colo. App. 1977). Prosecutor's statement in closing argument that "some of the questions should be answered for you in the argument of the defense," and the statement on rebuttal that "I raised some questions, challenged them to be answered . . . . I don't think they were answered," did not constitute comments on the failure of the defendant to testify.

People v. Marin, 686 P.2d 1351 (Colo. App. 1983). An honest statement by the prosecution that it has failed to present a witness who can give direct evidence on a particular point, such as the fact of the defendant's deliberation, but that the jury may rely on circumstantial evidence on that point because mental states are "very difficult to prove" does not amount to a comment on the defendant's right not to testify.

People v. Coit, 961 P.2d 524 (Colo. App. 1997). Prosecutor's remark in closing that defendant never produced the nine alibi witnesses about which she told the police in a taped interview was not improper comment on her failure to testify.

Young v. People, 488 P.2d 567 (Colo. 1971). Although it is improper to comment on defendant's failure to testify, where defendant does testify, the prosecution may comment on the failure of that testimony to deny or explain incriminating facts already in evidence.

People v. Gibson, 203 P.3d 571 (Colo. App. 2008). "A prosecutor may not argue that a defendant's silence implies that he or she is guilty. However, the prosecutor is entitled to comment on the absence of evidence to support a defendant's contentions. The test for whether a prosecutor's argument constitutes a comment on the defendant's failure to testify is whether the comment directs the jury's attention to the defendant's silence as a means of implying guilt." *See also People v. Welsh*, 176 P.3d 781 (Colo. App. 2007).

3. Proper to characterize the evidence as "uncontroverted" or "uncontradicted"

Comments characterizing the prosecution's evidence as being "uncontroverted" or "uncontradicted" have been held as not directing the jury's attention to the defendant's failure to testify. *See People v. Todd*, 538 P.2d 433 (Colo. 1975); *Martinez v. People*, 425 P.2d 299 (Colo. 1967).

4. Comment on defendant's invocation of spousal privilege

People v. Harris, 762 P.2d 651 (Colo. 1988). Prosecutor improperly commented on several occasions regarding the fact that the defendant's wife did not testify and corroborate his theory of defense after the defendant had invoked the principle of spousal privilege. "[T]he defendant had an absolute right not to call his wife, and not to permit her to testify. Permitting commentary on

the defendant's invocation of that right is no less damaging to the privilege than allowing remarks alluding to an accused's invocation of the Fifth Amendment."

B. Comment on the Defendant's Post-Arrest Silence

People v. Burnell, 459 P.3d 736 (Colo. App. 2019). It is well established that **the prosecution may not refer to a defendant's exercise of his Fifth Amendment right to remain silent in the face of accusation**. But not every reference to a defendant's exercise of the right to remain silent requires reversal. Reversal is only required where the prosecutor's comment on the defendant's exercise of the right creates an inference of guilt or where the prosecutor argues that the defendant's silence constituted an implied admission of guilt. In *Burnell*, an instruction that directed the jury to disregard the comment was sufficient to cure prejudice from the brief and isolated comment on defendant's exercise of his Fifth Amendment right.

People v. Castro, 521 P.3d 1035 (Colo. App. 2022). Trial court's erred by allowing the prosecutor to cross-examination and comment on the defendant's post-arrest silence. "The prosecutor's comments sought to use [the defendant's] post-arrest silence to impeach his testimony and indirectly imply his guilt. The prosecutor implied in his cross-examination that an innocent person would have talked with the police sooner and in more detail. And during closing argument, the prosecutor said that [the defendant] 'had a story' and he was 'going to stick to it,' implying that [the defendant] lied during his testimony."

People v. Ortega, 597 P.2d 1034 (Colo. 1979). A defendant's theory at trial was that he and a friend removed tools from a truck for safekeeping, not theft. On both closing argument and rebuttal argument, the prosecutor argued that the defendant did not tell the sheriff that he was merely safeguarding the tools, and the defendant would have said so if that had been the case. The conviction was reversed because the prosecutor's argument, which had the effect of creating an inference of guilt by reference to the defendant's silence during custodial interrogation, effectively penalized the defendant for exercising his constitutional privilege.

People v. Cuellar, 530 P.3d 1236 (Colo. App. 2023). During an interrogation, the defendant first made statements and then invoked his right to remain silent. The trial court allowed the prosecution to present evidence that the defendant "asked for a lawyer" during questioning and never "reached out" to the detective to explain further. The trial court erred when it allowed the prosecutor to comment that the defendant had "asked for a lawyer." The evidence and comments were improper comment on the right to remain silent, but reversal was not required under the circumstances: "The prosecutor, officer, and detective did not say that [the defendant's] silence reflected guilt." It would have been proper for the prosecutor to "highlight the inconsistencies" between the defendant's prior statements and his claims at trial.

People v. Hardiway, 874 P.2d 425 (Colo. App. 1993). In a forgery prosecution where the defendant briefly spoke with police but then invoked her right to silence, the prosecution was

permitted at trial to cross-examine and then comment during closing argument on the defendant's trial testimony that detailed a more elaborate version of events than originally provided to police. In reversing the defendant's conviction, the Court of Appeals acknowledged that, while impeachment by means of a defendant's post-arrest silence following a *Miranda* advisement violates due process, "a different rule applies if a defendant makes a post-*Miranda* statement and then testifies at trial to a different version of events. Under those circumstances, the prosecution may cross-examine the defendant on inconsistencies between the two statements. And, the prosecution may also cross-examine the defendant on omissions in the first statement insofar as such omissions are inconsistent with the defendant's testimony at trial." In determining whether prior omissions are "inconsistent" with the testimony at trial, a court must ascertain whether the omission conflicts with the later testimony as opposed to merely augmenting the statements that were already provided. The Court of Appeals concluded that the defendant's more elaborate trial testimony here simply augmented her initial statement and that the prosecutor's comments regarding the details omitted from her prior statement deprived the defendant of a fair trial, requiring reversal of the conviction.

People v. Thames, 467 P.3d 1181 (Colo. App. 2019). The prosecutor's comments about the defendant's statements and demeanor during a recorded interview were proper. "The prosecutor urged the jurors to recall [the defendant's] 'total lack of reaction' and 'cool' demeanor, and not his silence in responding to the officers' questions, in the video the jurors had seen."

People v. Quintana, 996 P.2d 146 (Colo. App. 1998) (*rev'd on other grounds*). Brief comment during closing on defendant's post-arrest silence did not substantially influence verdict or affect fairness of trial. The denial of mistrial motion was within court's discretion.

People v. Moran, 983 P.2d 143 (Colo. App. 1999). The prosecution's reference in closing to properly admitted evidence of omissions from defendant's statements at time of arrest was not improper comment on defendant's post-arrest silence.

C. Comment on the Defendant's Pre-Arrest Silence

People v. Coleman, 422 P.3d 629 (Colo. App. 2018). Although a testifying defendant's pre-arrest silence can be used to impeach, neither the United States Supreme Court nor the Colorado Supreme Court has decided whether the Fifth Amendment prohibits use of pre-arrest silence as substantive evidence of guilt. *See* *Salinas v. Texas*, 570 U.S. 178 (2013) (finding it was "unnecessary" to decide whether pre-arrest silence could be used against defendant because the defendant did not expressly invoke the right); *People v. Welsh*, 80 P.3d 296 (Colo. 2003) (holding that the defendant's pre-arrest silence was irrelevant on the specific facts presented and declining to decide whether use of pre-arrest silence is generally violative of the Fifth Amendment). Federal appellate courts as well as divisions of the Colorado Court of Appeals are split on this issue.

D. Comment on the Defendant's Failure to Present Evidence

People v. Gibbons, 397 P.3d 1100 (Colo. App. 2011), *aff'd on other grounds* 328 P.3d 95 (Colo. 2014). Prosecutor's comments regarding the defendant's lack of proof of ownership documents for stolen trailer and jet ski and evidence regarding defendant's knowledge they were stolen constituted a proper argument on reasonable inferences that could be drawn from the circumstantial evidence of defendant's state of mind and were comments on evidence and not a suggestion that the defendant had the burden to disprove an element of the crime.

People v. Medina, 545 P.2d 702 (Colo. 1976). In closing, after reminding the jury that he had the burden of proof, the prosecutor questioned why defendant had failed to produce certain witnesses if defendant's story were true. The Colorado Supreme Court held that such argument was fair comment and stated, "[w]hile it is improper to comment intentionally on a defendant's failure to testify, it is permissible to comment on the lack of evidence confirming defendant's theory of the case."

People v. Marioneaux, 618 P.2d 678 (Colo. App. 1980). Where defense counsel has raised the issue of the prosecutor's failure to call witnesses to develop a certain theory, the prosecutor may properly point out that the defense also may produce such evidence.

People v. Willis, 708 P.2d 125 (Colo. App. 1985). Nothing objectionable in prosecutor's accurate comment that defendant, as well as prosecution, has subpoena powers.

E. Comment on Defendant's Exercise of Right to a Jury Trial

People v. Rodgers, 756 P.2d 980 (Colo. 1988). "Because a defendant's constitutional right to remain silent cannot be used against him to draw an inference of guilt, it follows that a defendant's exercise of his constitutional right to a trial by jury cannot be used against him to create an inference of guilt. By analogy, therefore, it is impermissible for a prosecutor to make comments 'which ha[ve] the effect of creating an inference of guilt by reference' to the defendant's exercise of his right to a trial by jury."

F. Comment on Defendant's Refusal to Submit to Non-Testimonial Evidence Request

People v. Larson, 782 P.2d 840 (Colo. App. 1989). Prosecutor's comments regarding defendant's refusal to submit to a trace-metal detection test did not constitute reversible error. "Where the prosecution's desire to obtain non-testimonial evidence directly relates to a substantive count, comments on a defendant's refusal to comply are proper . . . . Thus, the fact-finder is justified in drawing an inference of guilt from a defendant's refusal to comply with a lawful request to provide non-testimonial evidence."

People v. Buckner, 509 P.3d 452 (Colo. App. 2022). It was improper for the prosecutor to ask the jury to consider the defendant's refusal to consent to a voluntary buccal swab. **A defendant's refusal to consent to a warrantless search may not be used by the prosecution—either**

through the introduction of evidence or by explicit comment—to imply the defendant's guilt of a crime. While the prosecution may comment on non-cooperation with a court order or search warrant, it is improper for a prosecutor to suggest an inference of guilt based on the defendant's refusal to consent to a warrantless search when the defendant had the right to refuse.

G. Comments Regarding the Presumption of Innocence

People v. Ujaama, 302 P.3d 296 (Colo. App. 2012). Prosecutor's comments that the defendant's presumption of innocence was shattered by the weight of the evidence found to impermissibly undermine the presumption. The court did not however find the comment so flagrant or improper as to constitute plain error.

People v. Estes, 296 P.3d 189 (Colo. App. 2012). Prosecutor's comments that defendant's "cloak" of presumption of innocence was now gone was found to be improper. "A defendant retains a presumption of innocence throughout the trial process."

People v. McBride, 228 P.3d 216 (Colo. App. 2009). The court found that the prosecution's comments wrongly suggested the jury need no longer presume the defendant innocent as it deliberated, but yet was not sufficiently prejudicial to warrant a reversal in light of other instructions and the overwhelming amount of evidence.

People v. Atkins, 844 P.2d 1196 (Colo. App. 1992) (*rev'd on other grounds*). The prosecutor's reference to the concept that all persons who have been convicted of crimes initially were clothed with the presumption of innocence, considered in context, did not depreciate the value of that presumption. It simply emphasized that the presumption may be overcome by the weight of the evidence. The comment was therefore not improper.

6.8 RETALIATORY OR PROVOKED ARGUMENT

While otherwise improper arguments or comments are not rendered proper by the fact that they are made in response to an argument from the other side, courts as a general rule are less likely to find prejudice where an improper argument has been "provoked" or "invited." "Although the 'invited response' rule does not provide a prosecutor with a license to make otherwise improper remarks in summation, a reviewing court in assessing a plain error claim of prosecutorial misconduct in summation must not only weigh the impact of the prosecutor's remarks on the trial but also must take into account defense counsel's opening salvo." *See* *Wilson v. People*, 743 P.2d 415 (Colo. 1987). *See also* *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990).

People v. Marquantte, 923 P.2d 180 (Colo. App. 1995). The prosecutor is afforded considerable latitude in replying to an argument made by opposing counsel.

A. Examples of Retaliatory or Provoked Argument

6. CLOSING ARGUMENT

People v. Loscutoff, 661 P.2d 274 (Colo. 1983). In closing argument, defense counsel remarked that two other people present in the house did not testify and asked the jury to ponder why. In rebuttal, the prosecution responded by stating that perhaps these individuals did not appear in court because of fear of the defendant. On appeal, statements of both counsel were held to be inappropriate as misleading the jury as to inferences it could properly draw. However, the statement of the prosecution did not constitute reversible error because it was clear that, in context, the prosecution was responding to an argument raised by defense counsel.

People v. Elliston, 508 P.2d 379 (Colo. 1973). Defense counsel referred in closing argument to a piece of paper containing a date, questioning whether it existed and, if it did exist, where it was since it had not been introduced into evidence. In rebuttal, the prosecutor stated that the defense counsel knew where the paper was, and that it had been offered in evidence in the previous trial. On appeal, the prosecution's statement was held not to warrant a mistrial in that it was provoked by, and in retaliation to, defense counsel's statement.

People v. Esquivel-Alaniz, 985 P.2d 22 (Colo. App. 1999). "Haven't we as a society taken this conspiracy stuff a little too far?" was the response to defense closing argument portraying defendant as victim of government conspiracy. The comment might be overstated, but it was not so improper as to warrant new trial.

Practice Tip: Although, under some circumstances, an improper statement by the prosecution may not warrant reversal because it was "provoked" or "invited" by the defense closing argument, clearly improper argument concerning the defendant's exercise of his constitutional rights, even if made in response to defense argument, constitute grounds for reversal. *See, e.g.*, *People v. Ortega*, 597 P.2d 1034 (Colo. 1979).

* * *

2025 Contributions by Mike Whitney
Senior Deputy District Attorney
17th Judicial District

CHAPTER 7

COMPLAINT AND INFORMATION

7. COMPLAINT AND INFORMATION

7.1 INTRODUCTION

The requirements governing the preparation and filing of the felony complaint and information are largely set forth by the Colorado Rules of Criminal Procedure and the various statutory provisions of Title 16, Article 5, of the Colorado Revised Statutes. The annotations to these rules and statutes provide an abundant source of authority on virtually all aspects of the subject. This section addresses some of the more common issues which arise in connection with the complaint and information, particularly at the district court level.

7.2 APPLICABLE RULES OF CRIMINAL PROCEDURE

The following Rules of Criminal Procedure are applicable, in whole or in part, to the felony complaint and information:

Crim. P. 3: The Felony Complaint

Crim. P. 4: Warrant or Summons Upon Felony Complaint

Crim. P. 4.1: County Court Procedure

Crim. P. 5: Preliminary Proceedings

Crim. P. 7: The Indictment and the Information

Crim. P. 8: Joinder of Offenses and Defendants

Crim. P. 9: Warrant or Summons Upon Indictment or Information

Crim. P. 12: Pleadings, Motions Before Trial, Defenses, and Objections

Crim. P. 13: Trial Together of Indictments, Informations, Complaints, Summons and Complaints

Crim. P. 14: Relief from Prejudicial Joinder

Crim. P. 48: Dismissal

7.3 APPLICABLE STATUTES

The following statutes are applicable, in whole or in part, to the felony complaint and information:

§ 16-5-101: Commencement of Prosecution

§ 16-5-202: Requisites of Information - Form

§ 16-5-203: Furnishing Witnesses' Names

§ 16-5-205: Information – Authority to File – Indictments – Warrants and Summons

§ 16-5-208: Information Not Filed – Reasons

§ 16-5-209: Judge May Require Prosecution

§ 16-5-401: Limitation for Commencing Criminal Proceedings and Juvenile Delinquency Proceedings (Statute of Limitations)

§ 16-10-202: Variance in Complaint

§ 18-1-408: Prosecution of Multiple Counts for Same Act

7.4 FILING CHARGES

A. Rules and Statutes

The authority of the prosecuting attorney to file an information is set forth in § 16-5-205, which also provides procedures for requesting a warrant upon filing an information or felony complaint. **Crim. P. 4** and § 18-1-408(2) require the prosecution to file by separate counts in a single prosecution all known offenses upon which it elects to proceed if they are based on the same act or series of acts arising from the same criminal episode. *See also* **Crim. P. 8**. Relief from prejudicial joinder of offenses or defendants is governed by **Crim. P. 14**. *See generally* Joinder and Severance.

B. Filing of Charges is Within the Discretion of the Prosecutor

1. Whom to Charge

People v. MacFarland, 540 P.2d 1073 (Colo. 1975). The defendant was not denied equal protection because other parties to the crime were allowed to negotiate a plea bargain and were granted immunity for their testimony against the defendant. The Colorado Supreme Court stated that "**[i]n determining whom to prosecute for a criminal activity and on what charge, a prosecutor has wide discretion**. The conscious exercise of selectivity in the enforcement of laws is not in itself a constitutional violation. Equal protection is not denied absent a showing that a prosecutor has exercised a policy of selectivity based upon an unjustifiable standard such as race, religion or any other arbitrary classification."

2. Nature and level of offense to be charged

People v. James, 497 P.2d 1256 (Colo. 1972). The fact that the defendant engaged in conduct which could have been prosecuted as a **misdemeanor** (fraudulent use of a credit card) did not preclude a **felony** prosecution under the forgery statute. The Supreme Court stated that **where a**

single transaction may give rise to the violation of more than one statute, it is a proper function of the prosecutor to determine under which of the statutes the cases are to be prosecuted. Further, the enactment of a specific criminal statute (fraudulent use of a credit card) does not preclude prosecution under a general criminal statute (forgery) unless a legislative intent to limit the prosecution to the special statute is shown. ***But see***, *People v. Rojas*, 490 P.3d 391 (Colo. App. 2018) ("[T]he prosecution is barred from prosecuting under a general criminal statute when the legislature evinces a clear intent to limit prosecution to a more specific statute.") (citing *People v. Smith*, 938 P.2d 111 (Colo. 1997)).

People v. Davis, 218 P.3d 718 (Colo. App. 2008) (overruled on other grounds). Defendant could be charged with the felony offense of contributing to the delinquency of a minor for providing alcohol to a minor (now a misdemeanor), rather than under the liquor code, which made similar misconduct a misdemeanor, because the General Assembly intended that liquor code prohibition of providing alcohol to minors could be prosecuted under criminal code as contributing to delinquency of a minor.

People v. Wentling, 409 P.3d 411 (Colo. App. 2015). Attempted motor vehicle theft and criminal trespass have different elements. It is therefore permissible for the legislature to prescribe different penalties for similar conduct, for the prosecution to charge both, and for the trial court to sentence the defendant to the harsher of the two possible sentences.

a. Statutory exception

Section 16-5-209 authorizes a district court of competent jurisdiction, upon affidavit which alleges the commission of a crime and the **unjustified refusal** of the district attorney to prosecute any person for the crime, to require the district attorney to appear and explain the refusal to prosecute. If, after a hearing, the court finds that the refusal to prosecute was **arbitrary or capricious and without reasonable excuse**, it may order the District Attorney to file information and prosecute the case or appoint a special prosecutor to do so.

Practice Tip: An order by a district court for the District Attorney to explain the District Attorney's refusal to prosecute does not shift the burden of proof to the prosecutor. The party challenging the District Attorney's charging decision must overcome the strong presumption that the prosecutor acted in accordance with the law, and must prove by clear and convincing evidence that the prosecutor's decision was arbitrary or capricious and without reasonable excuse. The statute does not permit a court to substitute its judgment or discretion for that of the prosecutor. *See* *Sandoval v. Farish*, 675 P.2d 300 (Colo. 1984); *Landis v. Farish*, 674 P.2d 957 (Colo. 1984); *J.S. v. Chambers,* 226 P.3d 1193 (Colo. App. 2009).

C. Filing Direct Information

Crim. P. 7(c) permits the prosecution to file a direct information in the district court if:

1. the prosecutor obtains the consent of the court having trial jurisdiction and no complaint was filed against the defendant in the county court pursuant to Crim. P. 5; or
2. either a preliminary hearing was held and the court found probable cause did not exist or the case was dismissed without a preliminary hearing being held; or
3. the prosecutor obtains the consent of the court having trial jurisdiction and the complaint upon which the preliminary hearing was held and the other records in the case have not been delivered to the clerk of the proper trial court.

1. Direct Filing Upon Dismissal in the county court

People v. Stokes, 812 P.2d 712 (Colo. App. 1991). Filing a direct information after dismissal in a county court under Crim. P. 7(c)(2) requires the district court**'s consent**, which implies an exercise of its discretion.

People v. Noline, 917 P.2d 1256 (Colo. 1996). After the county court dismisses a felony complaint, in addition to filing information directly in district court subject to that court's approval, the prosecutor may appeal the county court's ruling or present the matter to the grand jury for indictment.

2. "Good Cause" Prerequisite for Direct Re-filing

People v. Stokes, 812 P.2d 712 (Colo. App. 1991). "If the prosecution seeks to file a direct information in the district court after a county court has dismissed the case for lack of probable cause, the information shall be accompanied by a written statement from the prosecutor alleging facts which establish that **evidence exists which for good cause was not presented** by the prosecutor at the preliminary hearing, Crim. P. 7(c)(2). The **prosecutor's belief that the county court erred in its finding of no probable cause does not constitute good cause for refiling.** Crim. P. 5(a)(4)(IV).

a. Failure to properly subpoena a witness

People v. Stanchieff, 862 P.2d 988 (Colo. App. 1993). When an investigating detective failed to appear for the preliminary hearing and after the county court denied a motion for continuance, the prosecution continued with the hearing by presenting only one witness who failed to establish the defendant's identity. Following dismissal for lack of probable cause, the district court permitted re-filing by direct information based upon the prosecutor's statement that a subpoena had been mailed to the detective but was not received by her because she was on vacation at the time it had arrived. In reversing a defendant's conviction, the Court of Appeals held that the district court **abused its discretion in permitting the direct filing** because the procedures utilized by the prosecution to secure the attendance of the critical witness did not amount to "due diligence." Proper service was not effected upon the witness by mailing the subpoena, *see* Crim. P. 17(d), and no action was instituted to otherwise confirm that the subpoena was actually received by her. The court further disapproved thereafter proceedings with a preliminary hearing for the sole purpose

of preserving the option of re-filing the case by direct information, holding that such action did not confirm that the subpoena was actually received by her. The Court of Appeals held that such action did not constitute good cause for the direct filing under Crim. P. 7(c).

D. Filing Information Rather than Indictment

Losavio v. Kikel, 529 P.2d 306 (Colo. 1975). Ordinarily the prosecution should proceed by information rather than an indictment.

Dresner v. County Court, 540 P.2d 1085 (Colo. 1975). The prosecution has the authority to file a complaint or a direct information charging offenses which are of a higher grade than those which were returned by the grand jury in a true bill which was never filed in the district court.

E. Filing Information While Preliminary Hearing is Pending Filing

Schwader v. District Court, 474 P.2d 607 (Colo. 1970). The prosecution has authority to file a case by direct information in district court even though a preliminary hearing in the county court is pending in the same case. The effect of doing so is to divest County Court of jurisdiction over the pending matter.

7.5 REQUISITES OF THE COMPLAINT/INFORMATION

A. Rules and Statutes

1. The Felony Complaint: Crim. P. 3(a)

"The felony complaint shall be a written statement of the essential facts constituting the offense charged, signed by the prosecutor and filed in the court having jurisdiction over the offense charged."

a. Sufficient to toll statute of limitations

Higgins v. People, 868 P.2d 371 (Colo. 1994). The Colorado Supreme Court held that the **filing of a felony complaint is sufficient to toll the statute of limitations** even though the statute defining the limitations periods refers to tolling as being accomplished by the filing of an "indictment, information, or *complaint*." [*See* § 16-5-401(1)(a)]. A plain reading of the definitions of "complaint" and "felony complaint" supports a construction that integrates the two terms for purposes of the statute of limitations. The Court reasoned that, "[i]ndeed, if there is any difference [between the two terms], it is that a **felony complaint requires more information** than a complaint. We fail to see why a complaint is sufficient to toll the statute of limitations, but a felony complaint, which requires more information, as well as a sworn oath, would be insufficient to toll the statute of limitations."

2. The Information: Crim. P. 7(b)

7. COMPLAINT AND INFORMATION

> (1) An information shall be a written statement signed by the prosecutor and filed in the court having jurisdiction over the offense charged, alleging that a person committed the criminal offense described therein.
>
> (2) **Requisites of the Information.** The information shall be deemed technically sufficient and correct if it can be understood therefrom:
>
> (I) That it is presented by the person authorized by law to prosecute the offense;
>
> (II) That the defendant is identified therein, either by name or by the defendant's patterned chemical structure of genetic information, or described as a person whose name is unknown to the informant;
>
> (III) That the offense was committed within the jurisdiction of the court, or is triable therein;
>
> (IV) That the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon conviction.

See also § 16-5-202, which sets forth virtually the same requisites as Crim. P. 7(b)(2).

Wilson v. People, 708 P.2d 792 (Colo. 1985). An information is legally sufficient if sets forth the charges filed with sufficient particularity to permit the defendant to **prepare an adequate defense** and to **protect the defendant from further prosecution for the same offense**. An information must describe the offense charged with such a degree of certainty that a court may pronounce judgment upon conviction. *See also* *People v. Chavez*, 730 P.2d 321 (Colo. 1986); *People v. Melillo*, 25 P.3d 769 (Colo. 2001); *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004); *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005)

People v. Salyer, 80 P.3d 831 (Colo. App. 2003). "Ordinarily, an information need only answer the questions of 'who, what, where, and how.'"

a. Technical defects

People v. Albo, 575 P.2d 427 (Colo. 1978). The Supreme Court rejected the defendant's contention that an information charging first-degree sexual assault was insufficient because it did not specify whom the threatened extreme pain was to be inflicted. "Technical defects in an information do not require reversal unless the substantial rights of the defendant are prejudiced."

People v. Strock, 252 P.3d 1148 (Colo. App. 2010). The Court of Appeals held that because the defendant failed to show that he was prejudiced by the information's inaccurate names and dates of convictions of the predicate felonies in habitual counts or that he did not have adequate notice of the underlying offenses to enable him to prepare a defense, there was no error.

b. Detail not required

Howe v. People, 496 P.2d 1040 (Colo. 1972). An information need not plead an offense in such detail as to be self-sufficient as a bar to further prosecution for the same offense. The judgment constitutes the bar, and the extent of the judgment may be determined from an examination of the record as a whole.

B. Sufficiency of the Information is a Matter of Jurisdiction

People v. Garner, 530 P.2d 496 (Colo. 1975). The Supreme Court held that where a jury verdict on a rape count was set aside for failure of the information to charge the defendant with a crime, **no jeopardy attached** as a result of the prosecution. "This court has consistently held that jeopardy does not attach if the information is insufficient in form and substance to sustain a conviction. The sufficiency of an information is a matter of jurisdiction."

People v. Edebohls, 944 P.2d 552 (Colo. App. 1996). An indictment was legally sufficient to confer jurisdiction where it gave defendant notice of crime allegedly committed and defined with sufficient particularity acts which formed basis for crime)

People v. Madison, 176 P.3d 793 (Colo. App. 2007). Holding that although objections to the form of an information are waived if not raised before trial, a substantive defect may be raised at any time in the proceedings because it is jurisdictional in nature.

Practice Tip: **Crim. P. 12(b)(2)** provides that lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noted by the court at any time during the proceeding. *See also* **Crim. P. 34** (stating that the court shall arrest judgment if charging document does not charge an offense, or if court was without jurisdiction of offense charged).

C. Variance: Allegations and Proof

Section 16-10-202 provides that any variance between the charging document and proof offered at trial to prove the allegations is not grounds for acquittal of the defendant. "No indictment, information, felony complaint, or complaint shall be deemed insufficient nor shall the trial, judgment, or other proceedings thereon be reversed or affected by any defect which does not tend to prejudice the substantial rights of the defendant on the merits."

"A variance occurs when the charge contained in an indictment differs from the charge of which the defendant is convicted." *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010).

"A *simple* variance occurs when the charging terms are unchanged but the evidence 'proves facts materially different from those alleged' in the indictment." A simple variance does not warrant reversal where the defendant is unable to show that "he was unaware of essential facts in

connection with the charges against him, that he would have challenged the prosecution's case differently, or that he would have produced different evidence in his defense." *Id*.

"A variance that broadens an indictment is a *constructive amendment*. Such an amendment occurs when an essential element of the charged offense is changed, altering the substance of the indictment." "A constructive amendment between the indictment and the charge of which a defendant is convicted is reversible per se because it subjects a defendant to the risk of conviction for an offense not originally charged in the indictment." *Id.*

1. Variance as to time or date of offense

Marn v. People, 486 P.2d 424 (Colo. 1971). Although an information may be required to specify a date on which the offense occurred, it is not material allegation. "[T]he date of the offense was not a material allegation of the information and therefore the charge is sufficiently proved if the evidence shows the crime occurred at any time [within the statute of limitations] . . . ."

People v. Salyer, 80 P.3d 831 (Colo. App. 2003). Defendant argued that "the time allegation in the information was not sufficient to provide him with adequate notice of the charged offense." The date alleged in the information was "on and before February 14, 2000." The Court held, "because a specific date is not an element of the crime of possessing marijuana not with intent to distribute, here any indefiniteness regarding time was a matter of form, which did not deprive the court of jurisdiction and would not warrant reversal absent substantial prejudice to the defendant."

People v. Bolton, 859 P.2d 303 (Colo. App. 1993). Under the facts of this case, the jury was properly instructed that the exact dates alleged in the information need not be proven provided the evidence establishes that the charged acts were committed within the applicable statute of limitations, because each of the two counts charged were based upon separate incidents that were supported by independent evidence. The instruction has been disapproved only in cases where "there is a single charge, the evidence discloses several transactions, and the prosecution has made no election as to which transaction it is relying upon."

People v. Young, 923 P.2d 145 (Colo. App. 1995) (citing *People v. Adler*, 629 P.2d 569 (Colo. 1981)). Such a variance "is not fatal, absent a showing that the defendant was impaired in his defense to the charge at trial or in his ability to plead the judgment as a bar to a subsequent proceeding."

2. Variance in predicate felony for habitual-offender sentence-enhancer count

Campbell v. People, 464 P.3d 759 (2020). Amending the complaint after the commencement of trial to correct the specific name of the predicate felony for a habitual-offender count was a simple variance that did not prejudice the defendant; the prosecution had proven the charged case number, jurisdiction, and date of the prior felony; the defendant was on notice from the discovery that the

pleading erroneously misnamed the felony; and defendant could not explain how an incorrect label on his prior felony conviction would have changed his defense.

3. Variance impairing ability to defend

People v. Vasallo-Hernandez, 939 P.2d 440 (Colo. App. 1995). In a criminal impersonation prosecution where the defendant initially provided a false name during a traffic stop for driving under the influence of alcohol (DUI) and two days later signed bond papers identifying himself under a second fictitious identity, it was reversible error to refuse a defense instruction prohibiting the jury from basing its verdict on the subsequent conduct, even though the offense was charged as occurring "on or about" the date of the original DUI stop. The Court of Appeals held that a variance between the date of the offense alleged in the information and the date proven at trial is **reversible error if the defendant demonstrates that the variance impaired his ability to defend against the charge**. During trial, the defendant consistently sought to defend the criminal impersonation charge by asserting his intoxication at the time of the DUI stop; the evidence indisputably established that he was sober two days later when he again provided fictitious information. "Accordingly, because defendant only defended against the charge as it related to one of the two dates for which he may have been convicted, he was prejudiced such that the variance was reversible error."

People v. Lopez, 140 P.3d 106 (Colo. App. 2005). The prosecution presented evidence at trial that the defendant failed to register as a sex-offender on dates subsequent to those charged in the information. The prosecution argued in closing that this evidence was sufficient to support the charge. The court determined that a new trial was warranted because "evidence of [the defendant's] conduct on occasions other than the day charged in the information impaired his ability to defend against the charge, and prejudiced him in preparing and presenting his defense."

Compare with People v. Price, 240 P.3d 557 (Colo. App. 2010). In contrast to *Lopez*, the court held that "the evidence presented to the jury, the jury instructions, and the verdict form encompassed a date range *within* the date range of the original and amended charging documents. Unlike in *Lopez*, the evidence presented did not indicate, and the People did not argue, that [the defendant] committed the sexual assaults on 'occasions other than the day charged in the information.' Consequently, [the defendant] has not established he was prejudiced in preparing or presenting a defense due to any variance between the charges and the evidence at trial."

7.6 LANGUAGE AND FORM

A. Sufficient to Charge Language of the Statute

Gallegos v. People, 444 P.2d 267 (Colo. 1968). The Colorado Supreme Court concluded that the information, which substantially followed the language of the burglary statute, was legally sufficient. "The information against these defendants apprises them clearly and properly that they were charged with the crime of burglary. An information is sufficient if it advises a defendant of

the charge he is facing so that he can adequately defend against it. This court has also held that an information is sufficient if **the charge is in the language of the statute**. However, **an information need not follow the exact wording of the statute**."

People v. Hoefer, 961 P.2d 563 (Colo. App. 1998). An information charging sexual assault on child as part of pattern of sexual abuse and alleging unlawful sexual contact over period of time necessarily alleged predicate offense of sexual assault on child.

1. Information must charge essential, jurisdictional elements

Cervantes v. People, 715 P.2d 783 (Colo. 1986). "An information need not follow the exact wording of the statute that defines the offense charged in the information. An information, however, that fails to charge an essential element of an offense is defective. The sufficiency of an information is a matter of jurisdiction, so any conviction based on an information requiring major amendment is void."

People v. Williams, 984 P.2d 56 (Colo. 1999). An information that fails to allege an essential element of an offense is substantively defective; the essential element requirement is satisfied if the language of the charge tracks the statutory language.

***Practice Tip*: Defects in an information may be cured by timely amendment. *See People v. Bowen*, 658 P.2d 269 (Colo. 1983) (trial court has jurisdiction to amend information alleging a time frame beyond the statute of limitations); *People v. Washam*, 413 P.3d 1261 (Colo. 2018) ("an amendment of form that occurs after the start of trial is permissible as long as the amendment does not charge additional or different offenses or prejudice the defendant's substantial rights.")

2. Indictment must allege specific act where language of statute is general

People v. Edebohls, 944 P.2d 552 (Colo. App. 1996). Where a statute uses general terms to define an offense, the indictment must allege which of defendant's acts and conduct are deemed to have violated the statute ("The sufficiency of the indictment is measured by substance, not form.").

People v. Tucker, 631 P.2d 162 (Colo. 1981). Holding that an indictment should have been dismissed as vague because it did not allege how the embezzlement was accomplished.

Compare with People v. Gallegos, 260 P.3d 15 (Colo. App. 2010). The Court of Appeals held that the indictment sufficiently identified the act upon which the extortion charge was based, and "any uncertainty in this regard was eliminated by the bill of particulars, which stated that [the defendant] threatened to transfer the victim to another jail away from his family if he refused to perform construction work on [the defendant's] home. This sufficiently identified an act upon which the extortion charge was based, gave [the defendant] adequate notice to prepare a defense, and protected him from being prosecuted twice for the same offense." However, the Court found that

the indictment was insufficient because it did not allege that [the defendant] made a substantial threat to confine or restrain the victim, a necessary factual element of extortion.

B. Pleading in the Conjunctive

Espinoza v. People, 349 P.2d 689 (Colo. 1960). Where the **several means** by which a crime may be committed is set forth in the statute in the disjunctive ("or"), it is proper to plead the crime in the conjunctive ("and") and prove it in the disjunctive.

Cortez v. People, 394 P.2d 346 (Colo. 1964). Where the statute is divided into **subsections** describing various ways in which the crime may be committed (in this case, rape by force and violence or rape by threat of great bodily harm), it is proper to allege in one count of the information the various ways of committing the crime in the conjunctive.

C. Duplicitous Charges

Leyba v. People, 481 P.2d 417 (Colo. 1971). "Duplicity in an indictment [information] means the **charging of two or more separate and distinct offenses in one count** . . . ." In upholding an indictment alleging that the defendant "did make an assault upon" the victim and "did rob, seize, steal, take and carry away" her purse, the Colorado Supreme Court distinguished the improper duplicitous charge from a proper charge alleging a single offense which may be committed in various ways.

See also § 18-1-408(2), which requires that all offenses upon which the district attorney elects to proceed must be prosecuted by **separate counts** in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode.

People v. Wester-Gravelle, 465 P.3d 570 (2020). Complaint alleging one count of forgery for multiple acts of forgery was proper and not inherently duplicitous. Further, it was not plain error for the judge to not give a modified unanimity instruction when, at trial, the prosecution treated the acts as a single criminal transaction and the standard unanimity instruction instructed the jury that their decision must be unanimous as to "all parts of it."

1. Lesser-included offenses

"An uncharged offense may be submitted to the jury over the defendant's objection if either (1) the uncharged offense is a lesser included offense of the charged offense, or (2) the offense as charged gives fair notice to the defendant that he may be required to defend against the uncharged offense." *People v. Garcia*, 940 P.2d 357 (Colo. 1997); *People v. Loyas*, 259 P.3d 505 (Colo. App. 2010).

People v. Cooke, 525 P.2d 426 (Colo. 1974). The information charging the defendant with possession with intent to sell narcotic drugs was sufficient to advise him to be prepared to defend on the lesser included offense of possession of narcotic drugs, and the statute (which was

substantially identical to § 18-1-408(2)) did not require alleging the lesser-included offense by separate count. "The second thrust of the statute is duplicitous charges. Thus, the statute does not provide that all offenses upon which the prosecution desires to proceed must be alleged, but rather that all offenses which the district attorney does allege must be alleged in separate counts. The concern of the legislature in enacting the statute was not an insufficient number of charges, but rather duplicitous charges which charge in the same count two or more separate offenses."

People v. Loyas, 259 P.3d 505 (Colo. App. 2010) (overruled on other grounds). Information charging sexual assault sufficiently advised defendant that he must defend against the lesser-included offense of unlawful sexual contact. "Likewise, the information here provided fair notice to defendant that he could be required to defend against a burglary charge predicated on the lesser sexual offense." It was not error to submit a burglary verdict form identifying the lesser included offense unlawful sexual contact as the predicate offense of burglary because "the exact nature of the predicate offense is not material to a burglary conviction."

D. Incorrect Statutory Reference

People v. Bergstrom, 544 P.2d 396 (Colo. 1975). "Technical defects do not justify a reversal unless they prejudice the substantial rights of the accused. We have thus held that **the statutory reference in the information under which the accused is charged is immaterial to the validity of the information;** its incorrect citation is not ground for reversal, absent substantial prejudice." *See also People v. Bernabei*, 979 P.2d 26 (Colo. App. 1998).

But see *Sawyer v. People*, 478 P.2d 672 (Colo. 1970). The defendant was improperly convicted of "second degree manslaughter" (a non-existent crime), upon an information containing language from the murder statute and language from a proviso in the manslaughter statute. "**When an indictment or information specifically states, as it does here, that a particular statute has been violated, that statement becomes a material allegation.**"

1. Exceptions in the statute

Salazar v. People, 384 P.2d 725 (Colo. 1963). In a prosecution for possession of marijuana (seeds) where the statute defining the drug "cannabis" excluded seeds which were incapable of germination, the Colorado Supreme Court held that the prosecution was required to prove that the seeds in question were in fact capable of germination. The Court acknowledged that the defendant has the burden of proving that he is within an exception or proviso in a statute creating an offense, except where the terms of the exception or proviso are part of the description of the offense. In this case, the court held that the terms of the proviso were a part of the description of the offense.

NOTE: Although the sufficiency of the information was not at issue in *Salazar*, the case suggests that the better practice is to plead in the negative exceptions which are part of the description of the offense. The ultimate test of the sufficiency of the information, however, is whether it advised

the defendant of the charges such that an adequate defense can be mounted and provide protection against further prosecution for the same offense.

2. When crime of violence must be separately pleaded

People v. Banks, 9 P.3d 1125 (Colo. 2000). When the "statute defining the offense does not prescribe crime of violence sentencing for the offense, the prosecution must meet the pleading and proof requirements of [18-1.3-406] in order for the defendant to be sentenced for a crime of violence."

People v. Zamora, 13 P.3d 813 (Colo. App. 2000). If juvenile over age 14 is charged with *per se* crime of violence under § 18-1.3-406, prosecution may charge defendant by directly filing information in district court without charging separate crime of violence pursuant to § 18-1.3-406(3).

People v. Palmer, 433 P.3d 107 (Colo. App. 2018). "Because the [crime of violence] amendment changed the essence of the first-degree arson charge, we cannot say that the original information adequately advised [the defendant] of the charges that she ultimately had to defend against at trial. Going into trial, she was on notice that she needed to defend against a charge of first-degree arson, but once the information was amended, she had to defend against a charge that, while similar, carried an increased penalty and included an additional element. Those changes were substantive changes to the information that needed to have been made, if at all, before trial."

3. Special offender circumstances must be charged in the information

People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999). The special offender statute, § 18-18-407(1), lists "extraordinary aggravating circumstances" which, if proven, subject the offender to an enhanced sentence for a felony drug conviction. Special offender circumstances must be charged in the information and the finder of fact must make a special finding beyond a reasonable doubt as to the existence of those circumstances.

7.7 CHALLENGING DEFECTS IN THE COMPLAINT, INFORMATION

Crim. P. 12(b) requires that non-jurisdictional objections based on defects in the information or complaint must be made only by motion filed within twenty-one days following arraignment. Failure to present such defense or objection constitutes a waiver, but the court for cause may grant relief from the waiver.

People v. Wester-Gravelle, 465 P.3d 570 (2020). Complaint alleging one count of forgery for multiple acts of forgery was proper and not inherently duplicitous. Defendant did not, therefore, waive her objection to the trial judge refusing to give a modified unanimity instruction as a result of the defendant not objecting to the complaint within twenty-one days under Crim. P. 12(b). The

judge's later refusal to issue a modified unanimity instruction at trial did not render the complaint retroactively defective.

7.8 AMENDMENT TO THE COMPLAINT, INFORMATION

Amendment of a complaint or information is governed by Crim. P. 7(e), which permits amendment as to **form or substance at any time prior to trial**, or **as to form** at any time **before the verdict if no additional or different** offense is charged and if the defendant's substantial rights are not prejudiced.

A. Rule to be Construed Liberally

Cervantes v. People, 715 P.2d 783 (Colo. 1986). "Crim. P. 7(e) is to be construed liberally to avoid the dismissal of cases for technical irregularities in an information that can be cured through amendment."

People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006). Trial court did not abuse its discretion in permitting the prosecution to amend the robbery count the day before trial. Specifically, the prosecution sought to amend the listed "things of value."

B. Determination of Form, Substance

Cervantes v. People, 715 P.2d 783 (Colo. 1986). Unlike the analysis in evaluating the sufficiency of a particular count alleged in an information, which is restricted to the four corners of that count, in determining whether an information as a whole so adequately advises a defendant of charges against him such that an amendment can be considered one of form, rather than substance, the information may be considered in light of the surrounding circumstances.

1. Amendment as to form

Maraggos v. People, 486 P.2d 1 (Colo. 1971). The trial court properly permitted the prosecution to amend a burglary information immediately prior to trial to include the element of specific intent, and to permit further amendment at the close of the People's case by changing the name of the victim-owner of the building, "The amendment **does not charge an additional or different offense**. **It does not change the description, location or name of the business**. It merely changes the name of the owner of the building and does not go to the essence of the charge. Such amendment is one of form rather than substance. It may be permitted any time prior to the verdict."

People v. Martinez, 18 P.3d 831 (Colo. App. 2000). Addition of habitual criminal counts did not affect substance of offense charged, and court complied with application procedures set forth in Crim. P. 6.8.

Compare with People v. Johnson, 644 P.2d 34 (Colo. App. 1980). Where amended information would charge different and more serious offenses than that originally charged, amendment is one of substance which should not be permitted.

a. Surplusage

People v. Marion, 514 P.2d 327 (Colo. 1973). It was permissible for the trial court to grant a motion to amend the information during jury selection over objection to change the statutory reference and to delete language relating to the age of the victim and her marital status in an assault to commit rape case. "The deletions which were made did not change the substance of the charges, but only eliminated surplus language in the information to avoid confusion."

See also **Crim. P. 7(f)**, which permits the court, on motion of either party, to strike surplusage from the information or indictment.

2. Amendment after expiration of limitations period

Higgins v. People, 868 P.2d 371 (Colo. 1994). An amendment to a felony complaint identifying three additional witnesses who were not named in the original complaint was not time-barred, even though it was filed after the expiration of the statute of limitations because the amendment simply remedied an insufficient list of victims in the original complaint. The Court recognized that the determination of whether an amendment filed after the limitations period is valid or time-barred **depends upon whether the amendment charges a new or additional offense or merely corrects a defect or insufficiency in the original charging document.** "In a situation where the amendment simply remedied an insufficient list of victims in the original complaint, the defendant suffers no prejudice; therefore, the amendment relates back to the date of the original filing and is not barred by the statute of limitations."

a. Amendment after commencement of trial

People v. Metcalf, 926 P.2d 133 (Colo. App. 1996). In a violation of custody case that was filed after the expiration of the three-year statute of limitations period, the prosecution was correctly permitted to amend the information after the close of the evidence to include an allegation that the defendant improperly absented himself from the state as the basis for establishing the tolling of the limitations period. The Court of Appeals recognized that although an information that alleges an offense date that is barred by the statute of limitations must specifically allege one or more of the statutory exceptions to the limitation period, such a defect may be remedied by an appropriate amendment**.** [*See Bustamante v. District Court*, 329 P.2d 1013 (Colo. 1958) (*rev'd on other grounds*); *People v. Bowen*, 658 P.2d 269 (Colo. 1983).] However, upon the **commencement of trial an amendment to the information is permissible only if it is one of form and not substance**. Since the amendment here did not change the nature of the offense or impair the defendant's ability to present a defense but simply remedied an insufficiency in the original

complaint, the amendment constituted a change in form, particularly given that "the date of the offense was not a material element of the offense, was not an issue at trial and the amendment did not involve an altered accusation or require a different defense strategy from the one the defendant had chosen under the initial information."

Fisher v. People, 471 P.3d 1082 (2020). The Court did not need to engage in a form or substance analysis because under Crim. P. 7(e), amendments to form after the commencement of trial are not permissible if the amendment prejudices the defendant. Here, the defendant was prejudiced because the amendment expanded the date range of the offense beyond his anticipated alibi defense. That prejudiced the defendant because it prevented him from, among other things, finding an alibi or supporting witnesses for that additional date range prior to the trial. The Court also refused to engage in an analysis of how much the defendant was prejudiced, noting that Crim. P. 7(e) states only that the amendment is impermissible if it "prejudices" the defendant. The Court distinguished this case from *Washam*, where the Court had held that an amendment after the commence of trial narrowing the date range of the offense did not prejudice the defendant because the defendant was always on notice that he had to defend against the amended time range, and narrowing the date range would have only inured to his defense's benefit.

3. Impact of jury instructions

People v. Valdez, 946 P.2d 491 (Colo. App. 1997) (*rev'd on other grounds*). Jury instructions stating that the victim of attempted theft was an at-risk adult was not a variance from the information where the information's designation of the offense identified the victim as an "at-risk adult" and throughout the trial the prosecutor demonstrated the intent to prosecute a crime with an at-risk victim, defendant had notice of prosecutor's theory and his defense was applicable to the offense as stated in the jury instructions. "[A] technical defect in an information does not require reversal unless the defendant's substantial rights are prejudiced. Defendants are entitled to reversal only if they are prejudiced, surprised, or hampered in preparing and presenting their defenses."

People v. Williams, 23 P.3d 1229 (Colo. App. 2000). "Generally, a lesser non-included offense instruction may be given only if there is evidence to support it and the defendant requests it or consents to it. When such an instruction is requested, the information is thereby deemed to be amended to include that charge. However, the prosecution may also be entitled to an instruction on a lesser non-included offense if the defendant has proper notice of that offense."

People v. Rodriguez, 914 P.2d 230 (Colo. 1996). Defendant claimed the jury instruction defining "sexual penetration" unconstitutionally expanded on the sexual assault charged because instruction included possible qualifying acts not specifically charged in the information. The Court found that the instruction did not impermissibly amend the charges: The elements of the charge were sufficiently alleged in the information and specification of the particular manner of the assault represented evidentiary details the information need not state; sexual assault can be committed only a limited number of ways and the information referred defendant to the correct statutory cite

for clarification; any variance between the facts in the information and those on which the court instructed the jury concerned the same incident, defendant, victim, and accomplice; the added modes of sexual penetration did not change the applicable statute, sentence, or level of offense; and the record indicated no prejudice to defendant. *See also People v. Pahl*, 169 P.3d 169 (Colo. App. 2006).

But see *People v. Deutsch*, 471 P.3d 1266 (Colo. App. 2020). Citing *Rodriguez* but holding that a jury instruction accurately restating the extortion statute constituted a constructive amendment to the charges because the charges specified that the extortion was accomplished by making a substantial threat to cause economic hardship and the instructions additional options constructively added additional elements to what was originally charged.

People v. Madden, 87 P.3d 153 (Colo. App. 2003), *rev'd,* 111 P.3d 452 (Colo. 2005). Defendant argued that the use of a jury instruction defining a variety of ways to commit third-degree sexual assault was different from the charge offense and was an improper constructive amendment. The Court of Appeals agreed: "(V)ariances between the crime charged and the crime instructed upon or convicted of that charge an essential element of the charged offense and alter the substance of the charging instrument are considered unconstitutional constructive amendments to the information." However, the Colorado Supreme Court in *People v. Madden*, 111 P.3d 452 (Colo. 2005) reversed the Court of Appeals decision. The Court held that the "description of attempted third degree sexual assault provided by the information was sufficient to allow [Defendant] to prepare a defense against the offense as described in the jury instructions."

Compare with People v. Petschow, 119 P.3d 495 (Colo. App. 2004). Defendant was charged with aggravated motor vehicle theft on the basis that he retained possession or control for more than 24 hours. The jury instruction, however, allowed the jury to convict if the defendant retained possession for more than 24 hours or if the "defendant used the motor vehicle in the commission of another crime, other than a traffic offense." The Court held that "(t)he instruction at issue here not only defined the offense stated in the charging document but also incorporated an alternative element that defined an uncharged crime . . . [B]ecause the constructive amendments added an uncharged crime, they were not merely technically changes; they were substantive and prejudicial."

7.9 CIVIL INFRACTIONS

In 2021, the legislature passed S.B. 21-271, changing the charge level of many crimes and introducing civil infractions. Civil infractions are civil matters. § 16-2.3-101(1). Civil infractions are issued by peace officers as either "penalty assessments" under § 16-2.3-102 (like a traffic ticket) or a summons and complaint pursuant to § 16-2.3-103. The district attorney may enter a civil infraction case for the limited purpose of negotiating a plea or referring the matter to pre-trial diversion, but cannot represent the state in civil infraction hearings. § 16-2.3-105(3). These

hearings are conducted by the county judge or magistrate and do not include the district attorney. *Id.*

CHAPTER 8

CONFRONTATION

8. CONFRONTATION

8.1 INTRODUCTION

"The United States Supreme Court has identified two types of confrontation clause protections afforded the defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *People v. Turner*, 109 P.3d 639 (Colo. 2005). The right to physically face witnesses means that a witness's out of court statements may be barred by the confrontation clause if the requirements of confrontation are not met. *Crawford v. Washington,* 541 U.S. 36 (2004).

Confrontation is generally understood as a trial right. The Colorado Supreme Court, however, has declined to rule categorically that a defendant never has confrontation rights outside of trial, deciding instead that any confrontation rights are flexible enough to accommodate remote testimony when required by the circumstances. *People v. Hernandez*, 488 P.3d 1055 (Colo. 2021) ("[W]hile the Confrontation Clause reflects a preference for face-to-face confrontation, this preference must occasionally give way to considerations of public policy and the necessities of the case. And the right may be satisfied without face-to-face confrontation where denial of such confrontation is necessary to further an important public policy and where the testimony's reliability is otherwise assured."). The Court of Appeals has held, for example, that a defendant has no right to confront witnesses in pretrial suppression hearing, probation revocation proceedings, or sentencing hearings. *People v. Felder*, 129 P3d 1072 (Colo. App. 2005) (pretrial suppression); *People v. Turley*, 109 P.3d 1025 (Colo. App. 2004) (probation revocation); *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005) (sentencing hearings).

The Confrontation Clause is used to prohibit prosecutors from admitting "testimonial statements" of a witness unless the witness is present at trial and subject to the defendant's cross-examination. *Crawford*. But not every out-of-court statement by a witness is "testimonial." In *Crawford*, the United States Supreme Court expressly declined to define the full breadth of what qualifies as testimonial. It did, however, state that "core" testimonial statements included:

1. *ex parte* in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
2. extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
3. statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and
4. police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at a former trial.

Id. at 51-52.

Later, in *Davis v. Washington*, the Supreme Court clarified its standard for what qualifies as a testimonial statement to a police officer, declaring that a statement is testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 547 U.S. 813, 822 (2006). In *Davis*, the Court held that a domestic violence victim's statements during her emergency 911 call to police requesting help were not testimonial because her primary purpose in calling 911 and making the statements was to seek immediate help, not to "prove past events potentially relevant to later criminal prosecution." *Id.* at 814.

Recently, the Colorado Supreme Court explicitly adopted the *Davis* holding for Colorado's confrontation clause. *Nicholls v. People*, 396 P.3d 675, 682 (Colo. 2017).

Practice Tip**:** Even if a statement is not barred by the Confrontation Clause, to be admitted at trial it must still be admissible under the Rules of Evidence. This means it must be either be non-hearsay or admissible as a hearsay exception. For this analysis, *see* Hearsay. If the statement constitutes hearsay and no hearsay exception applies, consider residual hearsay under C.R.E. 807.

Be aware that Colorado law used to have an additional requirement that a statement, whether testimonial or not, bear "indicia of reliability" to satisfy confrontation, but *People v. Fry* and *Nicholls v. People* changed that. 92 P.3d 970 (Colo. 2004); 396 P.3d 675 (Colo. 2017). Now the Colorado rule is the same as the federal rule. Older cases may discuss this Colorado-specific test that no longer applies.

8.2 OUT-OF-COURT STATEMENTS BARRED BY THE CONFRONTATION CLAUSE

A statement of an unavailable witness is ***inadmissible*** under the federal and Colorado Confrontation Clauses if it is testimonial in character and the defendant has not had an opportunity to cross-examine the statement. *Crawford v. Washington,* 541 U.S. 36 (2004); *Nicholls v. People*, 396 P.3d 675 (Colo. 2017).

A. When is a Statement Testimonial?

A statement is testimonial when its "primary purpose … is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813 (2006). This "primary purpose" test requires the court to consider all of the relevant circumstances, including whether there is an emergency, the formality or informality of the situation, the circumstances of the declarant, and the person to whom the statement was made. *Ohio v. Clark*, 576 U.S. 237 (2015). "[T]he question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* (citing *Michigan v. Bryant*, 562 U.S. 344 (2011)).

B. Examples of Testimonial Statements

1. Statements to police (non-emergency)

1. "When circumstances objectively indicate that the primary purpose of the interrogation is either to elicit statements that establish or prove past events, or to elicit statements that are potentially relevant to a later criminal prosecution." *Raile v. People,* 148 P.3d 126 (Colo. 2006).
2. Statement of crime victims to responding officers when there was no immediate threat. *Arteaga-Lansaw v. People*, 159 P.3d 107 (Colo. 2007); *People v. Trevizo,* 181 P.3d 375 (Colo. App. 2007); *Raile v. People,* 148 P.3d 126 (Colo. 2006).
3. Child victim's videotaped statements to police. *People v. Vigil*, 127 P.3d 916 (Colo. 2006); *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. App. 2004).
4. Victim's handwritten note given to police by cousin. *People v. McFee*, 412 P.3d 848 (Colo. App. 2016).
5. Statements during formal interrogation. *People v. Hagos*, 250 P.3d 596 (Colo. App. 2009).

2. Statements to other legal authorities

1. Statements in an attorney regulation complaint. *People v. Cohen*, 440 P.3d 1256 (Colo. App. 2019).

3. Guilty pleas

1) Transcript of third-party's plea allocution. *Hemphill v. New York*, 595 U.S. 140 (2022).
2) Admission of co-defendant in plea agreement. *People v. Couillard*, 131 P.3d 1146 (Colo. App. 2005).

4. Documents prepared for trial

1) Affidavit stating the value of a trailer for theft charge. *People v. Jaeb*, 434 P.3d 785 (Colo. App. 2018).
2) Certification stating that the defendant's blood was drawn by venipuncture and signed by EMT. *People v. Barry,* 349 P.3d 1139 (Colo. App. 2015).
3) Autopsy report in criminal investigation. *People v. Merrit*, 411 P.3d 102 (Colo. App. 2014).

5. Lab reports

To satisfy confrontation requirements, the trial witness for introducing lab results must have some personal involvement in the testing. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *People v. Williams*, 183 P.3d 577 (Colo. App. 2007). This can be a reviewer or supervisor who independently reviewed the data and determined that the initial results are accurate. *Marshall v. People*, 309 P.3d 943 (Colo. 2013); *People v. Jiron*, 490 P.3d 612 (Colo. App. 2020) (rev'd on other grounds); *People v. Fuerst*, 488 P.3d 454 (Colo. App. 2019); *People v. Medrano-Bustamante*, 412 P.3d 581 (Colo. App. 2013); *People v. Hill*, 228 P.3d 171 (Colo. App. 2009).

The U.S. Supreme Court found in a fractured opinion that a DNA expert's testimony about lab results obtained by a non-testifying analyst did not violate the confrontation clause. *Williams v. Illinois*, 567 U.S. 50 (2012). Given the absence of a majority opinion in *Willams*, and the Colorado Supreme Court opinion in *Marshall*, the best course, if a DNA analyst in unavailable, is to present testimony from a witness who personally reviewed the data and verified the analyst's work. See *Campbell v. People*, 464 P.3d 759 (Colo. 2020).

C. Examples of Non-Testimonial Statements

1. Non-hearsay statements (i.e. not offered for truth)

1) "The Confrontation Clause does not bar the admission of testimonial statements for purposes other than proving the truth of the matter asserted." *People v. Martinez,* 224 P.3d 1026 (Colo. App. 2009). *See also Crawford v. Washington*, 541 U.S. 36 (2004); *People v. Brown*, 510 P.3d 579 (Colo. App. 2022); *People v. Barajas*, 497 P.3d 1078 (Colo. App. 2021); *People v. Robinson*, 226 P.3d 1145 (Colo. App. 2009); *People v. Isom*, 140 P.3d 100 (Colo. App. 2005).
2) Statements offered for their falsity. *People v. Godinez*, 457 P.3d 77 (Colo. App 2018).

2. Ongoing emergency

a) Statements to 911 operator seeking emergency assistance. *Davis v. Washington*, 547 U.S. 813 (2006).
b) Gunshot victim identifying shooter. *Michigan v. Bryant*, 562 U.S. 344 (2011)**.**
c) Victim stabbed in the neck to responding officer. *People v. King*, 121 P.3d 234 (Colo. App. 2005).
d) Background statements of unidentified declarant in 911 call seeking help. *People v. Cevallos-Acosta*, 140 P.3d 116 (Colo. App. 2005).

3. Child welfare

1) Child's statements about abuse to case worker and police officer during welfare check. *People v. Phillips,* 315 P.3d 136 (Colo. App. 2012).

4. Statements to medical providers

2) Child's statements about sexual abuse to physician. *People v. Vigil,* 127 P.3d 916 (Colo. 2006).
3) Sex assault victim's statements to triage nurse and emergency room doctor. *People v. Jones*, 313 P.3d 626 (Colo. App. 2011) (rev'd on other grounds).

5. Statements to other non-law enforcement

(1) Allegations of child abuse by a 3-year-old to his teacher. *Ohio v. Clark*, 576 U.S. 237 (2015).
(2) Statements of defendant to cellmate. *Nicholls v. People*, 396 P.3d 675 (Colo. 2017).
(3) Child's statements about sexual abuse to parent. *People v. Vigil,* 127 P.3d 916 (Colo. 2006).
(4) Victim's statements to friends at work and while getting her hair done. *People v. Draper*, 501 P.3d 262 (Colo. App. 2021) (overruled on other grounds).
(5) Victim's statements to defendant overheard by defendant's sister. *People v. Johnson*, 487 P.3d 1166 (Colo. App. 2019).
(6) Child's statements about abuse to school employees. *People v. Phillips,* 315 P.3d 136 (Colo. App. 2012).
(7) Victim's statement of fear to boyfriend and others. *People v. Robles*, 302 P.3d 269 (Colo. App. 2011).
(8) Pre-arrest statements by co-conspirator to undercover police officer. *People v. Villano,* 181 P.3d 1225 (Colo. App. 2008).
(9) Statements to manager about threatening phone calls received on the job. *People v. Garrison*, 109 P.3d 1009 (Colo. App. 2004).
(10) Co-defendant's statements made to accomplice. *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001).

6. Administrative and business records

- Return of service for a protection order. *People v. Garcia*, 479 P.3d 905 (Colo. 2021).
- Data from ride share company. *People v. Quillen*, 530 P.3d 1253 (Colo. App. 2023).
- Intoxilyzer 9000 "working order" certificate. *People v. Ambrose*, 506 P.3d 57 (Colo. App. 2021).
- Phone records. *People v. Ortega,* 405 P.3d 346 (Colo. App. 2016).
- Booking reports and mittimus. *People v. Warrick*, 284 P.3d 139 (Colo. App. 2011).
- DOC documents for habitual charges. *People v. Davis*, 296 P.3d 219 (Colo. App. 2012); *People v. Moore*, 321 P.3d 510 (Colo. App. 2010); *People v. Shreck*, 107 P.3d 1048 (Colo. App. 2004).
- Proofs of service contained in a driving record. *People v. Espinoza*, 195 P.3d 1122 (Colo. App. 2008).

7. Dying declarations (§ 13-25-119)

- Dying declarations are technically admissible without confrontation because they are an "exception" to the confrontation clause. *People v. Cockrell*, 488 P.3d 278 (Colo. App. 2017).

8. Defendant's statements

- The defendant's own statements do not implicate his confrontation rights. *People v. Tran*, 469 P.3d 568 (Colo. App. 2020); *People v. Sparks*, 434 P.3d 713 (Colo App. 2018).

D. When the Defendant Has Had an Opportunity to Cross-Examine

If the witness testifies at trial, the defendant has an opportunity to cross-examine the witness, and there is no confrontation issue with admitting prior out-of-court statements. *People v. Argomaniz-Ramirez,* 102 P.3d 1015 (Colo. 2004), People v. Alemayehu, 494 P.3d 98 (Colo. App. 2021); *People v. Ujaama*, 302 P.3d 296 (Colo. App. 2012), *People v. Mullins*, 104 P.3d 299 (Colo. App. 2004), *People v. Gookins*, 111 P.3d 525 (Colo. App. 2004).

This is true even if the witness testifies to a lack of memory. *People v. Leverton*, 405 P.3d 402 (Colo. App. 2017)*; People v. Candelaria*, 107 P.3d 1080 (Colo. App. 2004) (rev'd on other grounds).

Testimonial statements given at a prior trial are admissible without violating confrontation because of the prior opportunity to cross-examine. *Hardy v. Cross*, 565 U.S. 65 (2011). However, the opportunity for cross-examination at preliminary hearings and other limited-scope hearings does not satisfy the requirements of confrontation. *People v. Fry*, 92 P.3d 970 (Colo. 2004); *People v. Hagos*, 250 P.3d 596 (Colo. App. 2009).

Closed-circuit testimony pursuant to § 16-10-402 (child witnesses) can provide sufficient opportunity for cross-examination to satisfy confrontation requirements. *Maryland v. Craig*, 497 U.S. 836 (1990); *People v. Ujaama*, 302 P.3d 296 (Colo. App. 2012)*; People v. Phillips,* 315 P.3d 136 (Colo. App. 2012). Video depositions taken pursuant to § 18-6.5-103.5 (deposition of at risk adults) can also provide sufficient opportunity for cross-examination to satisfy confrontation. *People v. Hebert*, 411 P.3d 201 (Colo. App. 2016).

8.3 DEFENDANT FORFEITING OR WAIVING THE RIGHT TO CONFRONT A WITNESS

A. Forfeiture by Wrongdoing

A defendant can forfeit the right to confront a witness if he acts to prevent a witness from testifying. The Colorado Supreme Court described the test for forfeiture by wrongdoing in *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007). The trial court must find by a preponderance of the evidence that "(1) a witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to deprive the criminal justice system of the evidence." *Id.* These findings should be based on a pre-trial evidentiary hearing.

Killing a witness with the motive to silence him establishes forfeiture by wrongdoing. *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007); *Pena v. People*, 173 P.3d 1107 (Colo. 2007); *People v. Moore*, 117 P.3d 1 (Colo. App. 2004). However, in *People v. Moreno*, 160 P.3d 242 (Colo. 2007),

the Court held that sexually abusing a child did not in itself establish wrongdoing with the intent to silence the child.

The defendant's action procuring the unavailability of a witness need not be criminal, and the action need not be targeted at any pending legal proceeding, so forfeiture can be based on actions taken before charges are filed. *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007). Jail calls showing attempts to influence the witness can establish forfeiture by wrongdoing. *People v. Jackson,* 474 P.3d 60 (Colo. App. 2018). Preventing testimony need only be part of the defendant's purpose. *Id.*

1. Hearsay Exception

Section 13-25-139 provides a hearsay exception that is co-extensive with the forfeiture by wrongdoing doctrine announced in *Vasquez*, so if the facts establish forfeiture, no additional hearsay analysis is required to admit the out-of-court statements at trial.

2. Unavailability

For purposes of *Vasquez*, C.R.E. 804(a)(5) provides a template for establishing that a witness is unavailable because the prosecution "has been unable to procure his attendance by process or other reasonable means."

Hardy v. Cross, 565 U.S. 65 (2011). "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes, and the issuance of a subpoena may do little good if a sexual assault witness is so fearful of an assailant that she is willing to risk his acquittal by failing to testify at trial. [W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising."

B. Waiver

1. Statutory waiver under § 16-3-309(5) no longer valid absent express waiver

Section § 16-3-309(5) states that any criminalistics laboratory technician who conducts any portion of laboratory testing must be called as a witness so long as the defendant requests so at least 14 days before trial. Historically, the defendant's failure to demand these witnesses pursuant to this statute, in accordance with the statute, waived the defendant's confrontation right to cross-examine any unrequested witness at trial. *Cropper v. People*, 251 P.3d 434 (Colo. 2011); *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007); *People v. Martinez*, 254 P.3d 1198 (Colo. App. 2011) (holding statute also applies to private labs); *People v. Cruthers*, 124 P.3d 887 (Colo. App. 2005). In *Phillips v. People*, however, the Colorado Supreme Court held the defendant cannot inadvertently waive the 6th amendment right to confront a witness. 443 P.3d 1016, 1026 (Colo. 2019). Thus, despite the statutory language, even when the defendant does not timely comply with this statute, absent an explicit waiver by the defendant, the defendant can nevertheless demand pursuant to the confrontation clause the presence of these witness at trial.

2. Opening the door

A defendant can waive the right to confront a declarant by questioning another witness about the declarant's testimonial statements in cross-examination. *People v. Merritt*, 2014 COA 124 (Colo. App. 2014); *People v. Rogers*, 317 P.3d 1280 (Colo. App. 2012).

8.4 OTHER NOTES ON THE RIGHT TO PHYSICALLY FACE A WITNESS

A. Right to be Present in Courtroom

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *People v. Hernandez*, 488 P.3d 1055 (Colo. 2021) (quoting *Illinois v. Allen*, 397 U.S. 337 (1970)).

The right to be present is not absolute. "A defendant has the right to be present whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. In other words, the defendant's presence is only required to the extent that a fair and just hearing would be thwarted by his absence." *Zoll v. People*, 425 P.3d 1120 (Colo. 2018). "A defendant may waive the right to be present at critical stages of criminal proceedings. But defense counsel cannot waive this right on the defendant's behalf." *Id.* This waiver may be implied by the defendant's behavior: "the Confrontation Clause will not bar a defendant's removal from a courtroom if, despite repeated warnings, he insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Hemphill v. New York,* 595 U.S. 140 (2022) (quoting *Illinois v. Allen*, 397 U.S. 337 (1970)).

The Court of Appeals in *People v. Aldridge* held that the right to be present was violated when the defendant was excluded from the courtroom and required to watch child witness testimony from the judge's chambers outside the presence of the jury. 446 P.3d 897 (Colo. App. 2018). Note: § 16-10-402 permits a child to testify in a different room while the defendant remains in the courtroom with the jury.

People v. Boykins suggested that the confrontation clause includes the right to have a jury observe the defendant's demeanor while other witnesses are testifying. 140 P3d 87 (Colo. App. 2005). But *People v. Garcia* concluded that right, if it exists, yields to "considerations of public policy and the necessities of the case" when COVID precautions required awkward seating arrangements for jurors. 527 P.3d 410 (Colo. App. 2022).

B. Facility Dogs Do Not Implicate Confrontation Rights

A witness's use of a facility dog does not implicate a defendant's confrontation rights. *People v. Collins,* 491 P.3d 438 (Colo. App. 2021).

8.5 REQUIREMENTS FOR THE RIGHT TO CROSS EXAMINE

8. CONFRONTATION

The Confrontation Clause also guarantees the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308 (1974) ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.")

However, a trial court has wide latitude to place reasonable limits on cross examination based on other concerns like harassment, prejudice, confusion of the issues, witness safety, or interrogation which is repetitive or only marginally relevant. *People v. Lopez*, 401 P.3d 103 (Colo. App. 2016). "The question in determining whether a restriction on cross-examination runs afoul of the constitutional right of confrontation is whether a reasonable jury might have received a significantly different impression of a witness's credibility had the court not erroneously excluded otherwise appropriate evidence." *People v. Dunham*, 381 P.3d 415 (Colo. App. 2016) (citation omitted).

A. Joint Trials of Co-Defendants (*Bruton* Analysis)

Bruton held that at a joint trial, the testimonial confession of a co-defendant that expressly inculpate the defendant are inadmissible against the defendant when the co-defendant does not testify pursuant to their 5th Amendment right against self-incrimination, because that makes the co-defendant unavailable for cross-examination, thus violating the defendant's 6th Amendment right to confront *witnesses against them*. (*Emphasis added*). *See Bruton v. United States,* 391 U.S. 123, 137 (1968). The Court held that a limiting hearsay instruction given by the trial court did not cure the prejudice to the defendant because it still did not enable to the defendant to cross-examine the non-testifying co-defendant about that co-defendant's accusations against the defendant in the confession. *See id.*

This was summarized in *Bruton* by reference to Federal Rules of Criminal Procedure Advisory Committee explanation of Rule 14, which permits severance of a trial when a defendant would be prejudiced by joinder of two defendants for the same trial:

> A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice.

Id. at 132.

Not all statements of a co-defendant, however, trigger *Bruton*. *Bruton* made clear its ruling was premised on only those statements by a co-defendant that would, if admitted, violate the defendant's right to confrontation under *Crawford*:

> We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

Id. at 126. (emphasis added).

Thus, *Bruton* is implicated only if the prosecution seeks to admit the *testimonial* statements of a non-testifying co-defendant.

In addition, even testimonial statements are not "against" another defendant if the statement doesn't implicate the other defendant. Distinguishing *Bruton*, the United States Supreme Court in *Richardson* held that a confession of a defendant that redacted any mention of the co-defendant that did not implicate the co-defendant and was therefore admissible at a joint trial with a limiting instruction. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). The Court explained:

> There is an important distinction between this case and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony). (Internal citations omitted).

Id. at 208.

The Court then articulated the holding in its own words:

> [T]he Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

Id. at 211.

Testimonial statements that do not implicate a co-defendant or mention the existence of a co-defendant, do not, therefore, violate the co-defendant's confrontation clause even if the statements are linked to the co-defendant at trial, as long as the jury is read a limiting instruction.

B. Other Improper Restrictions on Cross-Examination

Error to prevent defense counsel from exploring juvenile witnesses' pending charges and involvement in pre-trial diversion because it was relevant to witness's motive for testifying. *People v. Bowman*, 669 P.2d 1369 (Colo. 1983).

8. CONFRONTATION

Error to prevent defense counsel from questioning witness about probationary status. *Margerum v. People*, 454 P.3d 236 (Colo. 2019).

Error to prevent defense counsel from cross-examining victim about methamphetamine use on night of shooting. *People v. Dunham*, 381 P.3d 415 (Colo. App. 2016).

C. Reasonable Restrictions on Cross-Examination

Not error to preclude defense questions about the Department of Human Services' attempt to remove victims from defendant's daughter's custody. *People v. Larsen,* 488 P.3d 83 (Colo. App. 2015) (rev'd on other grounds).

A defendant is not entitled to confront a witness about privileged statements. *People v. Zapata*, 443 P.3d 78 (Colo App. 2016) (competency evaluation); *People v. Turner*, 109 P.3d 639 (Colo. 2005) (therapy records)*; Dill v. People*, 927 P.2d 1315 (Colo. 1996) (therapy records).

No error in limiting cross-examination into witnesses' mental health, to prevent questions about an old competency evaluation and where there was no good faith basis to ask a question about current medications. *People v. McFee,* 412 P.3d 484 (Colo. App. 2016).

No error in preluding questions of one witness about another witness's drug use when the defense attorney failed to ask the question of the witness who used drugs. *People v. Lopez*, 401 P.3d 103 (Colo. App. 2016).

A defense attorney's right to effective cross-examination does not include the right to know a witness's location before trial if the witness's safety will be endangered by the disclosure. *People v. Ray, 252 P.3d 1042 (Colo. 2011)*.

* * *

2025 Contributions by Alison Suthers

Senior Deputy District Attorney

2nd Judicial District

CHAPTER 9

CONTINUANCES

9. CONTINUANCES

9.1 STANDARD FOR GRANTING OR DENYING CONTINUANCES

A. Generally within Discretion of Trial Court

People v. Bakari, 780 P.2d 1089 (Colo. 1989) (citing People v. Hampton, 758 P.2d 1344 (Colo. 1988) *(internal quotations omitted)*. "A motion for continuance is addressed to the sound discretion of the trial court, and the trial court's ruling will not be disturbed in the absence of an abuse of discretion. We noted in Hampton that [t]here are **no mechanical tests** for determining whether the denial of a continuance constitutes an abuse of discretion. Id. The answer as to whether a trial court has abused its discretion must be found in the circumstances present in every case."

People v. Roberts, 146 P.3d 589 (Colo. 2006). The trial court looks at the totality of the circumstances, including any resulting prejudice in granting or denying a motion for a continuance. If it is the People's motion, they must show the consequence of denying the continuance would be "sufficient to overcome the prejudice to the defendant's statutory right to a speedy trial." If the continuance is to obtain a witness, the testimony must be of greater consequence beyond relevance, and the People bear the burden of showing the evidence has materiality beyond relevance. *See People v. Valles*, 412 P.3d 537 (Colo. App.-2013).

People v. Jompp, 440 P.3d 1166 (Colo. App. 2018). The People filed a motion to continue the jury trial based on the possibility of a material witness being unavailable. At a motions hearing the People provided additional information that there was a warrant for this material witness in Utah and law enforcement authorities had indicated that there was some promise in soon finding her. Section 18-1-405(6)(g)(I) provides a statutory speedy trial exclusion to allow for an additional six-month delay, without the defendant's consent, if the People make a sufficient record that **all** of the following elements are met: **(1)** evidence material to the state's case is unavailable; **(2)** the prosecution has exercised due diligence to obtain the evidence; and **(3)** there exist reasonable grounds to believe the evidence will be available at a later date. The Court of Appeals upheld the trial court's decision in finding sufficient proof to continue the trial based on the People's request.

1. Factors to be considered

The Colorado Supreme Court in *Bakari* recognized that a court should grant a continuance "only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case. . . . Of paramount importance is whether granting a continuance will affect the defendant's right to a speedy trial." People v. Bakari, 780 P.2d 1089 (Colo. 1989). The Court did, however, recognize among the relevant factors in considering the state's request for a continuance is the impact the denial may have on the state's case.

2. Victim's position

Section 24-4.1-303(3) requires the district attorney, if practicable, to inform the victim of any pending motion that may substantially delay the prosecution and inform the court of the victim's position on that motion. If the victim objects to the continuance, the court must state in writing or on the record prior to granting any delay that the objection was considered.

For child sexual offenses, § 18-3-411(4) states that "[a]ll cases involving the commission of an unlawful sexual offense [defined in the statute section (1) as those offenses involving children] shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed."

3. Standard of appellate review

People v. Crow, 789 P.2d 1104 (Colo. 1990). The trial court's discretionary ruling on a motion for continuance "will not be disturbed on appellate review in the absence of a showing of a clear abuse of discretion. A court abuses its discretion only when, based on the particular circumstances confronting it, its ruling on the motion is **manifestly arbitrary, unreasonable, or unfair**." *See also* People v. Bakari, 780 P.2d 1089 (Colo. 1989); People v. Ellis, 148 P.3d 205 (Colo. App. 2006).

People v. Denton, 757 P.2d 637 (Colo. App. 1988). "[A] defendant must also demonstrate actual prejudice arising from denial of the continuance." *See also* People v. Villano, 181 P.3d 1225 (Colo. App. 2008).

4. When charged to the defendant

People v. Scales, 763 P.2d 1045 (Colo. 1988). Except when the defendant requests a continuance of the trial date once set, when a continuance is chargeable to the defendant, the deadline for speedy trial is extended the length of time of the continuance. The continuance is **chargeable to the defendant in one of three circumstances: (1)** it is caused by an affirmative action of the defendant; **(2)** the defendant expressly consents to the continuance; or **(3)** other affirmative action evinces consent by the defendant. In this case, the defendant's counsel's request for a continuance over the defendant's objection on speedy trial grounds was deemed to be properly granted and charged against the defendant because the replacement counsel was due to the defendant's disagreement with his own previous counsel.

9.2 GROUNDS FOR CONTINUANCE

A. Absent Witness

People v. Crow, 789 P.2d 1104 (Colo. 1990). The trial court did not abuse its discretion by denying the prosecution's motion to continue a suppression hearing on the asserted grounds that one of the arresting officers was scheduled to attend a training program and would therefore not be available to testify at the scheduled hearing, where the prosecution made no effort to subpoena the officer for the hearing. The Colorado Supreme court stated that "when the asserted reason for the

continuance is the absence of a witness, a trial court properly may consider **whether the party requesting the continuance has exercised due diligence** in attempting to secure the presence of the witness." While recognizing that the officer would have been inconvenienced were he subpoenaed to attend the hearing, "[s]ome degree of inconvenience . . . is obviously experienced by all witnesses subpoenaed for judicial proceedings, **but inconvenience, by itself, does not constitute good cause** for the continuance of a scheduled hearing."

People v. Wolfe, 9 P.3d 1137 (Colo. App. 1999). No abuse of discretion in finding prosecutors acted with due diligence in seeking to obtain presence of **out-of-state witness**. The continuance was warranted, and defendant's speedy trial right was not violated.

People v. Trujillo, 338 P.3d 1039 (Colo. App. 2014). In addition to due-diligence, the **People must also show reasonable grounds** to believe the unavailable witness will be available to testify at a later date.

People in Interest of D.J.P., 785 P.2d 129 (Colo. 1990). Denial of prosecutor's motion to continue preliminary hearing based on absence of witness was within court's discretion where witness was present at an earlier preliminary hearing and knew of continued date, witness had told prosecutor he could attend the continued hearing if absolutely necessary, testimony was not essential because victim was present and able to testify as to offense, and juvenile was being held in detention at time of requested continuance).

People v. Anderson, 659 P.2d 1385 (Colo. 1983). Prosecutor's motion to continue preliminary hearing because of non-appearance of essential witness was properly denied due to prosecutor's **failure to subpoena necessary witnesses** or "make even minimum arrangements" for the hearing.

People v. Senette, 436 P.3d 561 (Colo. App. 2018). Trial court abused its discretion in denying a continuance requested by the People, where the **victim had been personally served** to appear at trial, without first inquiring whether issuance of a bench warrant would assist in procuring the victim's attendance.

People v. Stewart, 417 P.3d 882 (Colo. App. 2017). Trial court abused its discretion by denying defendant's motion to continue based on lack of having a material witness present at trial that had been endorsed by both the defendant and the People, finding that there were several justifiable reasons for defendant's request and no perceivable prejudice to the People.

Gallagher v. County Court, 759 P.2d 859 (Colo. App. 1988). Motion for continuance of preliminary hearing because only witness [police officer] was **on vacation** properly denied where district attorney offered no explanation for failure to secure witness and no showing he had exercised due diligence in trying to obtain witness' presence.

For witness unavailable due to a medical reason, *see* *People v. Gutierrez*, 432 P.3d 579 (Colo. 2018) (finding no abuse of discretion by the trial court in denying the use of Skype, or other

electronic method, to receive an officer's testimony during a motion to suppress hearing; case had been set over previously to accommodate the officer's schedule, defense had requested in-person testimony because of credibility concerns, and trial court had warned the prosecution that it would be unable to meet its burden without the personal appearance of the officer).

But see *People v. Bakari*, 780 P.2d 1089 (Colo. 1989). The district court abused its discretion in denying the prosecution's motion to continue a suppression hearing where, although the prosecution inadvertently failed to subpoena the necessary witnesses, the district attorney who was only recently assigned to the case **exercised due diligence** in attempting to contact the witnesses, and thereafter made arrangements for another division of the district court to hear the motions such that there would be no delay of the trial or prejudice to the defendant.

People v. Rodriguez, 914 P.2d 230 (Colo. 1996). Defendant subpoenaed a witness to allegedly testify that the knife used to kill the victim was the knife that witness gave a third person as a birthday present. Defendant claimed that testimony would impeach the testimony given by the third person that she had never seen the knife before defendant used it to kill the victim. The witness failed to appear, defendant moved for a continuance, and the prosecutor objected that the testimony would be cumulative. The trial court denied the continuance. The Court of Appeals held that the trial court acted within its discretion where the **testimony would have been cumulative** to that given at trial by another witness and defendant had failed to show how denial of the continuance prevented him from effectively impeaching the witness.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). Defendant subpoenaed a witness to testify concerning another suspect in the case and witness failed to appear. The trial court acted within its discretion in denying continuance because it was **uncertain whether witness could be located and alleged testimony was largely cumulative**.

B. Defense Failure to Subpoena Expert Witness

People v. Mann, 646 P.2d 352 (Colo. 1982). The denial of the defendant's motion to continue a trial date because a defense expert was out of the country and unavailable to testify at trial was upheld by the Colorado Supreme Court because of the **failure of the defense to personally serve the psychiatrist** before he left the country, even though the defense had been forewarned that no continuance would be granted if the psychiatrist failed to appear. Although the **defense mailed a subpoena to the witness**, relying upon an administrative order which provided that "non-appearance of a witness served by the Public Defender by mail . . . shall normally be grounds for continuance of the case unless otherwise ordered by the court . . . ," the Colorado Supreme Court concluded that such service was not sufficient to invoke the sanction of contempt, and without the availability of such a sanction the witness, "who would not otherwise be available to testify, cannot be said to have been compelled to appear."

People v. Conley, 804 P.2d 240 (Colo. App. 1990). Denial of defendant's second motion for continuance proper where defense failed to exercise due diligence by **allowing subpoena to lapse**

and where court accommodated defendant's request to recess trial to allow defense counsel to remedy situation.

C. Defense Continuance Based on Being Unprepared

People v. Ahuero, 403 P.3d 171 (2017). Defense counsel requested a continuance of a trial where the defendant was charged with sexual abuse of a child. The trial court considered the following: (1) defense counsel would have three weeks to prepare for a two- or three-day trial involving eight witnesses; (2) the trial court would have had to rearrange its docket such that the case may have been transferred to a different judge; (3) priority is given to cases involving sexual assault on a child; and (4) the victim's family wanted a prompt resolution. Defense counsel did not specify why he needed additional time to prepare. The Colorado Supreme Court concluded that the trial court's decision to deny a continuance was not so manifestly arbitrary, unreasonable, or unfair to constitute an abuse of discretion.

D. Continuance to Obtain Replacement Counsel

People v. Brown, 322 P.3d 214 (Colo. 2014). The Colorado Supreme Court adopted a multi-factor balancing test when facing a continuance request to replace currently hired counsel with separate hired counsel. For a defendant who hires their own attorney or finds one to represent them pro bono, the Sixth Amendment right to counsel also encompasses a right to choose their counsel. However, when the state appoints and pays for an attorney for an indigent defendant, that defendant does not have a constitutional right to select the particular attorney. *Brown* applies only in the former situation. The trial court's final determination is "whether the public's interest in the efficiency and integrity of the judicial system outweighs the defendant's Sixth Amendment right to counsel of choice."

The 11 Factors:

- The defendant's actions surrounding the request and apparent motive for making the request;
- the availability of chosen counsel;
- the length of continuance necessary to accommodate chosen counsel;
- the potential prejudice of a delay to the prosecution beyond mere inconvenience;
- the inconvenience to the witnesses;
- the age of the case, both in the judicial system and from the date of the offense;
- the number of continuances already granted in the case;
- the timing of the request to continue;
- the impact of the continuance on the court's docket;
- the victim's position, if the victim's rights act applies; and
- any other case-specific factors necessitating or weighing against further delay.

9. CONTINUANCES

> ***Practice Tip***: The *Brown* factors apply only when the when the request for a continuance to obtain new counsel does not implicate right to counsel of choice. *People v. Gilbert*, 510 P.3d 538 (Colo. 2022). In deciding whether to grant a continuance to enable defendant to exercise right to counsel of choice, the trial court does not have to make explicit findings as to each factor set forth in *Brown*.

People v. Schuett, 819 P.2d 1062 (Colo. App. 1991) (*rev'd on other grounds*). The defendant sought a continuance of the trial date because the attorney who had been working on the case left the law firm that had been retained by the defendant and the new attorney would have insufficient time to prepare adequately for trial. In holding that the trial court did not abuse its discretion in denying the motion, the court of appeals stated: "The law firm representing defendant had three and one-half months to prepare for trial after the attorney originally assigned to the case departed. We note that the law firm was involved with the case from the time of arraignment, a period of five and one-months [sic]. Also, at the time of the denial of the motion for continuance, approximately one month remained until the trial date."

People v. Garrison, 411 P.3d 270 (Colo. App. 2017). Trial court did not abuse its discretion in denying defendant's request for a motion to continue based on him having new counsel that was not prepared; three continuances had already been granted and defendant's counsel was able to give an opening statement, direct and cross-examine witnesses, preserve objections, give input on jury instructions, and do a closing argument.

People v. Cook, 342 P.3d 539 (Colo. App. 2014). Trial court did not abuse discretion in denying fourth request for continuance so defendant's expert could further investigate and his counsel could prepare for trial.

People v. Gardenhire, 903 P.2d 1165 (Colo. App. 1995). The trial court did not abuse its discretion in denying the defendant's motion for continuance because the public defender who had originally been assigned the case was unavailable for trial which necessitated the substitution of another public defender to represent him. The record did not reveal how much work the original public defender devoted to the case other than representing the defendant at the preliminary hearing, the arraignment, and a motions hearing, and the **defendant pointed to no specific instances in which he was actually prejudiced by the denial of the continuance** or his actual representation at trial.

People v. Williams, 446 P.3d 944 (Colo. App. 2019). The defendant asked for a continuance on the first day of trial, the trial had been continued twice previously, the defendant had not retained his counsel of choice, and his counsel of choice was not available to represent him on the first day of trial. In denying the defendant's request, the trial court reasoned that if a continuance was granted, it would delay the case for a long period of time, and a delay would prejudice the People because there is a co-defendant waiting to testify along with a victim who has delayed a trip overseas to visit an ill relative. In applying *Brown*, "[b]ecause the trial court's findings are supported by the record, and the court considered the appropriate factors in balancing defendant's right to have counsel of his choosing against the efficient and effective administration of justice,

we conclude that the court did not abuse its discretion in denying defendant's motion for a continuance."

1. When Defendant's request for continuance does not implicate Sixth Amendment right to counsel of choice

People v. Travis, 438 P.3d 718 (Colo. 2019). The defendant made the following request on the morning of the rescheduled trial: "My request was that I was going to look for and pay for an attorney. I don't feel this case is fair regarding [the victim]. There's a lot of stuff that needs to come out about her. I don't think it is fair to me." The Colorado Supreme Court found that the defendant's statement did not trigger an assessment required by the Sixth Amendment and *Brown*. The Court stated that *Brown* did not apply because the defendant here expressed a general interest in retaining counsel, but did not identify the replacement counsel or describe any steps taken to retain the new counsel. In approving of the trial court's decision to deny the continuance and finding that the trial court did not abuse its discretion, the Court held that "[T]he right to be represented by counsel of the defendant's choosing is not implicated by a vague request to '**look for and pay for an attorney'".**

People v. Flynn, 456 P.3d 75 (Colo. App. 2019). Holding that the Sixth Amendment and *Brown* are inapplicable when "the defendant expresses a general interest in retaining counsel, but has not identified replacement counsel or taken any steps to retain any particular lawyer" and noting that to require a *Brown* analysis would require a trial court do an unrealistic amount of speculation.

Compare with Ronquillo v. People, 404 P.3d 264 (Colo. 2017). The Colorado Supreme Court held that "the right to counsel of choice includes the right to fire retained counsel. A defendant who wishes to discharge retained counsel may do so without good cause, even if he seeks to replace retained counsel with appointed counsel." The Court suggested the trial court inquire as to how the defendant would like to proceed and whether there are any "procedural impediments" to proceeding as the defendant would like. The Court stated that a trial court should inquire as to whether the *Arguello* factors are met and the defendant should be allowed to proceed *pro se*; or, whether the defendant would qualify for court-appointed counsel or have time to retain an attorney. If there were no procedural impediments to the defendant doing as he wishes, the trial court must release retained counsel. If there are, however, procedural impediments to the defendant's preferred representation, before the trial court releases retained counsel, it should give the defendant the choice between keeping retained counsel and proceeding in a *pro se* manner.

There is no right to counsel of choice if a defendant has appointed counsel. *United States v. Gonzales-Lopez*, 548 U.S. 140 (2006) and *People v. Rainey*, 527 P.3d 387 (Colo. 2023). When counsel has been appointed for a defendant, defendant does not have a Sixth Amendment right to continued representation by that particular lawyer. The right to continued representation by a particular attorney flows from the right to choose that attorney, which does not apply when counsel is appointed. Still, if a defendant represented by an appointed attorney can show that denying a

continuance and replacing that appointed attorney would prejudice their case, due process requires that the defendant be given a continuance so the attorney can continue the representation.

2. Invocation of right to proceed *pro se*

People v. Denton, 757 P.2d 637 (Colo. App. 1988). "The trial court's discretion extends to continuances requested in order to replace either retained or appointed counsel with new counsel. And, because a pro se defendant is entitled to no greater safeguards or benefits than if he were represented by counsel, the same discretionary standard governs such a defendant's requests for continuance. Further, although a trial court's denial of a continuance to discharge or substitute counsel may implicate the Sixth Amendment right to counsel, no abuse of discretion will be found unless the denial is so arbitrary as to deny the accused due process of law."

3. Right to counsel vs. right to speedy trial

People v. Scales, 763 P.2d 1045 (Colo. 1988). Shortly before a scheduled trial date, the public defender representing the defendant sought to withdraw from the case because the attorney-client relationship had broken down. The court was advised that another public defender would be assigned to the case, and a motion to continue the trial was filed by the public defender over the objection of the defendant, who refused to waive his right to a speedy trial. The motion to substitute counsel was granted and the trial was reset on a date more than one month after the original speedy trial deadline had passed. The Court of Appeals reversed the defendant's conviction, concluding that the trial was reset over the defendant's clear refusal to waive speedy trial, and that the delay occasioned by the continuance was accordingly chargeable to the trial court and not the defendant. On certiorari review by the Colorado Supreme Court, the judgment of the Court of Appeals was reversed, inasmuch as that court found sufficient evidence supporting the conclusion that substitution of counsel was required, and "[s]ince the trial court's substitution of counsel was proper, and continuing the trial date was necessary to allow new counsel to prepare for trial, we agree that the continuance of the speedy trial deadline by the trial court was chargeable to [the defendant]."

People v. Copeland, 976 P.2d 334 (Colo. App. 1998). The Court of Appeals found no error in failing to continue habitual criminal portion of trial to allow counsel to investigate validity of defendant's prior convictions where, before trial, defendant moved for continuance for that purpose, then stated he was unwilling to give up his speedy trial rights and withdrew his motion for continuance, which trial court informed him amounted to giving up right to have separate counsel investigate prior convictions.

a. Withdrawal of counsel due to conflict of interest

People v. Monroe, 907 P.2d 690 (Colo. App. 1995) (*rev'd on other grounds*). A continuance necessitated by the withdrawal of the defendant's trial counsel was properly granted and chargeable to the defendant where the withdrawal was occasioned by counsel's statements that a conflict of interest had developed. Although counsel did not articulate the exact nature of the

conflict, the court was informed that counsel had previously represented an endorsed prosecution witness, that the conflict had been discovered as the result of information gained during an investigation of the charges, and that an irreconcilable conflict would exist even if the prosecution did not call the former client as a witness. The Court of Appeals recognized that the withdrawal of counsel did not result from any conduct on the part of the defendant, who expressly refused to waive his right to a speedy trial but who acquiesced to a continence rather than proceed to trial *pro se*. "However, in such instances, it has been held that defendant's choice constitutes 'other affirmative conduct evincing consent' so long as the record demonstrates that the trial court did not abuse its discretion in allowing counsel to withdraw."

E. Absence of Counsel

People v. Thomas, 962 P.2d 263 (Colo. App. 1997). When defendant decided not to attend trial, but to have the defense team represent him, the defense team asked for a second continuance to discuss with defendant his appearance at trial. The trial court denied the continuance because the case had been pending for two years and one continuance had already been provided for the same purpose. Defendant and the defense team left the courtroom, and the trial began. After the prosecutor's opening statement and direct examination of one witness, the defense team appeared; it gave an opening statement and cross-examined the initial witness. The court of appeals found that defendant was not constitutionally "deprived" of counsel because the defense team chose not to appear for the beginning of trial. The Court of Appeals also held there was no structural error, and that the trial court was not required to grant a continuance where the defense team strategically decided not to appear. The jury was properly instructed concerning the absence of defendant and the defense team and the burden of proof, the prosecutor's opening statement did not exceed proper boundaries and the defense was allowed an opening statement within an appropriate time frame, and the cross-examination of the first witness was not impacted by the defense team's absence during direct.

F. Information Obtained During or Just Before Trial

People v. Chambers, 900 P.2d 1249 (Colo. App. 1994). Where during the course of trial the defendant **threatened a prosecution witness** in the presence of a deputy sheriff and the defense was promptly informed of the threat and the prosecution's endorsement of the **sheriff to testify regarding the threat**, it was **not an abuse of discretion to deny the defendant's motion for continuance** in order to prepare to meet the sheriff's testimony. The Court of Appeals recognized that, at the time of the endorsement, the defendant was available to confer with counsel regarding the incident and the defense was otherwise unable to explain how further investigation would improve its ability to meet the newly discovered testimony.

People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994). During the pendency of trial, the defendant, while briefly confined with another prosecution witness, **made an inculpatory statement** regarding his knowledge of the caliber of weapon used during the commission of the murder. After disclosure of the information to the defense, the court granted a recess to permit further

investigation of the incident but denied the defendant's request for a continuance of the trial. In holding that the **denial** of the continuance **did not constitute an abuse of discretion**, the Court of Appeals recognized that the defense was afforded an opportunity to interview the witness during the recess and cross-examine him regarding the statement during trial, and that the defense failed to demonstrate how further investigation of the circumstances surrounding the statement would have affected their ability to present a defense.

People v. Inman, 950 P.2d 640 (Colo. App. 1997). During preparation of jury instructions, defense counsel told the court he had "just learned" that defendant's ex-wife had been previously convicted of false reporting against defendant and asked for a continuance. The trial court did not abuse its discretion in denying the continuance where the ex-wife had already testified and been excused without objection, defendant either knew or should have known of the conviction, and the jury was waiting to receive instructions. Also, because the conviction could not have been proved with extrinsic evidence, further time for investigation would have provided no more of a good faith basis for cross examination.

People v. Duncan, 31 P.3d 874 (Colo. 2001). The Colorado Supreme Court found that, absent any bad faith attributable to the prosecutor's disclosure three days before trial of a letter bearing on the credibility of one of the prosecutor's witnesses, the legal consequence of defense counsel's request for a continuance was to extend for another six months from the date of the continuance the period within which the trial could begin.

G. Additional Time to Obtain Evidence

People v. Villano, 181 P.3d 1225 (Colo. App. 2008). The trial court denied defendant's motion to continue the trial concluding that "(1) defendant's representation that he could obtain tangible evidence was speculative; (2) defendant did not describe the nature of the tangible evidence or explain how it would be exculpatory; and (3) trial had been continued twice." The Court of Appeals held that the trial court did not abuse its discretion. "Defendant's motion did not sufficiently describe the factual information he expected to uncover, the basis of his belief that E.H. was an informant, or, even assuming E.H. was an informant, how E.H. had allegedly entrapped him. Thus, he did not show that it was likely that an additional continuance would have enabled him to discover exculpatory evidence. Consequently, he has also failed to show that the denial of his motion resulted in actual prejudice."

People v. Faussett, 409 P.3d 477 (Colo. App. 2016). Defense counsel requested a continuance of the trial based on (1) prosecutor had re-interviewed the girlfriend and defense counsel wished to review the written report of the interview; (2) counsel had never met the defendant outside of court to discuss the trial; and (3) there may be additional witnesses that should be interviewed and possibly subpoenaed. First, the Court of Appeals found that there was nothing in the record to indicate anything new or different found in the prosecution's report of the girlfriend's interview, and defense counsel notified the court that she "had an opportunity to speak at length" with the prosecution about the context of the interview. Second, "[w]ith respect to defendant's other ground

for requesting a continuance, . . . **any lack of communication between him and his counsel was the result of defendant's own actions**." Finally, defense counsel made no offer of proof regarding what substantive testimony defendant expected from the additional witnesses or even who they were. The court of the appeals held that there was no error in trial court's exercise of discretion to deny a continuance.

People v. Cook, 342 P.3d 539 (Colo. App. 2014). No abuse of discretion in denying continuance for further expert investigation where expert was not endorsed until 12 days before trial, and provided report that afternoon, in addition to other claims of defense.

H. Continuance of Sentencing Hearing

People v. Cross, 531 P.3d 444 (Colo. App. 2023). Denial of defendant's request for continuance of sentencing hearing based on probation department's failure to provide a presentence investigation report within the statutory time frame was not harmless, where defense counsel was surprised to find material omissions from the report and would be of importance for sentencing.

People v. Valdez, 928 P.2d 1387 (Colo. App. 1996). Defendant is entitled to notice of the amount of damages claimed and restitution requested and an opportunity to controvert those claims at the sentencing hearing. Here the parties agreed to proceed to sentencing immediately upon entry of defendant's plea, but defendant was not given adequate notice of the proposed amount of restitution or persons owed. Thus, the trial court abused its discretion in denying defendant's motion for continuance.

People v. Rivera-Bottzeck, 119 P.3d 546 (Colo. App. 2004). Trial court denied defendant's motion to continue the sentencing hearing so that he could be sentenced by the judge who presided over the trial and over the hearing at which he entered his guilty plea. The Court of Appeals disagreed. The Court held that "[a] defendant has no constitutional right to be sentenced by the same judge who accepted the defendant's guilty plea." The Court further held that the limitations outlined under Crim. P. 25 did not apply to this matter because the trial did not result in a guilty verdict. Crim. P. 25 provides that any judge regularly sitting in or assigned to the court may perform post-verdict duties if the judge before whom the defendant was tried is unable to perform those duties because of absence from the district, death, sickness, or other disability.

* * *

2025 Contributions by Jessica Dotter

Sexual Assault Resource Prosecutor

Colorado District Attorneys' Council

CHAPTER 10

CORPUS DELECTI

10. CORPUS DELECTI

Under the old rule, to establish guilt in a criminal case, the prosecution had to "corroborate" the plea by proving the *corpus delicti*, or "body of the crime." As such, the prosecution was required to present evidence in addition to a defendant's confession in order to establish that a crime occurred. *LaRosa*, however, replaced the old *corpus delecti* rule with a "trustworthiness" standard. *People v. LaRosa*, 293 P.3d 567 (Colo. 2013).

In *LaRosa*, the defendant confessed to his wife, his mother, his pastor, a police dispatcher, and an investigating police officer that he had sexually assaulted his two-and-a-half-year-old daughter. He was charged with various crimes, and a jury convicted him of all charges. Before trial, the defendant filed a motion to dismiss the charges, arguing that his confessions to the dispatcher and the investigating officer were insufficient evidence to sustain a conviction because there was no physical evidence that a crime had occurred, no eyewitnesses, and his daughter could not remember the incident. The defendant's motion was denied and the case went to trial. The prosecution's case depended on Defendant's confessions to the dispatcher and the investigating officer, both of which were admitted into evidence. The defendant moved for a judgment of acquittal, again based on the *corpus delicti* rule. The Court of Appeals reversed the defendant's convictions and directed the trial court to enter a judgment of acquittal. The People appealed and the Colorado Supreme Court granted certiorari to examine the viability of the *corpus delicti* rule in Colorado.

The *LaRosa* Court decided to shift away from the *corpus deliciti* rule toward a "trustworthiness" standard when evaluating a plea based on a confession:

> Under the trustworthiness standard, the prosecution is not required to present evidence other than a defendant's confession to establish the *corpus delicti*. Rather, the prosecution must present evidence that proves the trustworthiness or reliability of a confession. The evidence is sufficient if the corroborating evidence "supports the essential facts admitted sufficiently to justify a jury inference of their truth. [T]he corroborating facts may be of any sort whatever, provided only that they tend to produce a confidence in the truth of the confession.

Id. at 577–78 (internal quotations and citations omitted).

When determining whether corroborating evidence "proves the trustworthiness or reliability of a confession," a court "must find that corroboration exists" from one or more of the following evidentiary sources:

- facts that corroborate facts contained in the confession;
- facts that establish the crime which corroborate facts contained in the confession; or
- facts under which the confession was made that show that the confession is trustworthy or reliable.

Id.

10. CORPUS DELECTI

For a criminal conviction to be based entirely on a defendant's statements, those statements must amount to a "confession of a crime." "It is not enough that the statements would establish some, but not all, elements of an offense." *People v. Johnson*, 381 P.3d 348, 357 (Colo. App. 2016) (Judge Jones, specially concurring).

CHAPTER 11

REAL AND DEMONSTRATIVE EVIDENCE

11. REAL AND DEMONSTRATIVE EVIDENCE

11.1 REAL VS. DEMONSTRATIVE EVIDENCE

A. Real Evidence

Real evidence is evidence found by law enforcement that helps prove the defendant committed the crime. It includes the gun that shot the victim, the knife that stabbed the victim, the ammunition casings found near the body, the defendant's DNA found on the sexual assault victim, the gloves used in the robbery, etc.

> Objects offered as playing an actual and direct part in the incident or transaction giving rise to a trial, for example the alleged weapon in a murder prosecution, are commonly called "real" evidence.

2 McCormick On Evid. § 213 (8th ed.).

B. Demonstrative Evidence

Demonstrative evidence is any evidence, typically generated by the prosecution in preparation for trial, that helps the jury understand facts in the case:

> Demonstrative aids can take various forms, including diagrams, maps, computer animations, or, as relevant here, models or mock-ups. Regardless of the particular form, demonstrative aids generally serve the same purpose: to illustrate or clarify a witness's testimony. In other words, the primary purpose of a demonstrative aid is to "illustrate other admitted evidence and thus to render it more comprehensible to the trier of fact."

People v. Palacios, 419 P.3d 1014 (Colo. App. 2018) (citing Black's Law Dictionary and McCormick on Evidence) (citations omitted).

11.2 ADMISSIBILITY OF REAL EVIDENCE

A. Governing Rules of Evidence

1. Connection to the defendant, the victim, or the crime required

People v. Penno, 534 P.2d 795 (Colo. 1975). In an aggravated robbery case, the trial court admitted a pistol found in the defendant's possession at the time of his arrest, even though neither eyewitness to the crime could identify it. In upholding the admission of the exhibit, the Colorado Supreme Court stated: "The test for determining the relevancy of real evidence was set out in *Washington v. People*, 405 P. 735 [Colo. 1965] . . . in which we said that the real evidence must '**only be connected in some manner with either the perpetrator, the victim or the crime**.' . . . [E]vidence that the defendant may have possessed weapons or instruments which could be used in the commission of the crime with which the defendant was charged have been found to be

admissible under the test set out in *Washington*." The court further stated that since the pistol recovered from the defendant was similar to that used in the robbery, a proper foundation for admission had been laid, and the jury could determine what weight should be given to its connection with the defendant.

2. Circumstantial connection sufficient

People v. Bedwell, 506 P.2d 365 (Colo. 1973). The Colorado Supreme Court upheld the admission of a tire iron found next to the cash register after the robbery even though the victim never saw the tire iron, where it had not been in the service station prior to the robbery and the wound on the back of the victim's head was consistent with infliction by such an instrument. "We have consistently held that an item of real evidence which is circumstantially connected with the perpetrator, or with the victim, or in some manner with the crime is sufficient to establish its relevancy or materiality for the purpose of admitting it into evidence."

a. Illustrative cases

People v. Taylor, 804 P.2d 196 (Colo. App. 1990). Records of telephone calls from a certain pay phone to the home of a co-conspirator were sufficiently linked to the defendant and the crime of arson charged and were therefore admissible, where the defendant resided in an area within one or two blocks from the phone in question and the calls were placed just prior to the explosions in issue.

People v. Garcia, 784 P.2d 823 (Colo. App. 1989). A wire hanger discovered 15 feet from a parking lot money depository and in the pathway followed by the defendant when leaving the box was properly admitted in a prosecution for third degree burglary of the depository box because of its potential relationship to the defendant and crime and its relevancy to the issues in the case.

People v. Renfro, 508 P.2d 396 (Colo. 1973). A box of .22 caliber cartridges found under the defendant's coat in the back seat of an automobile which he had borrowed were admissible where the victim of the aggravated robbery had described the gun as appearing to be a .22 caliber weapon.

Mitchell v. People, 476 P.2d 1000 (Colo. 1970). Although not positively identified as the murder weapon, a gun was properly admitted into evidence where the owner testified that he had loaned it to the defendant on the morning of the homicide and received it back a few days later missing one cartridge, and expert testimony showed that the bullet which killed the victim could have been fired from such a gun.

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). A letter that was purportedly written by the defendant implicating her involvement in drug distribution was properly admitted by the trial court. C.R.E. 901(a). Authentication as a condition precedent to admissibility is satisfied when there is evidence sufficient to support a finding the item is what its proponent claims. Evidence

may include its appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances. C.R.E. 901(b)(4).

People v. Glover, 363 P.3d 736 (Colo. App. 2015). When authenticating communications from **social media** the prosecution is required to make two separate showings: (1) the records were those of the social media site (in this case Facebook); and, (2) the communications contained within the site were made by the defendant. The court also held that these showings must be made by a preponderance of the evidence. Here, the evidence was introduced as a business record and showed that the social media account was registered in the defendant's name, and contained personal photographs of the defendant. There was also testimony from witnesses who communicated with the defendant on the page about the homicide.

B. Identification and Authentication Where Chain of Custody is Not Required

C.R.E. 901(a) requires that the party offering evidence authenticate documents or identify real evidence as a condition precedent to admissibility. The requirement of authentication or identification "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Rule enumerates a variety of examples of forms of identification and authentication which conform with the requirements of the Rule, most pertinent of which includes: **testimony of a witness with knowledge** [C.R.E. 901(b)(1)], **opinions on handwriting** [C.R.E. 901(b)(2)], **distinctive characteristics and the like** [C.R.E. 901(b)(4)], and **voice identification** [C.R.E. 901(b)(5)]. It is important to note, however, that the examples enumerated in the Rule are illustrative only, and are not the exclusive means by which evidence may be identified or authenticated. *See* C.R.E. 901(b).

The examples in C.R.E. 901(b), particularly handwriting and voice identification, suggest that a *prima facie* showing short of positive identification is sufficient to meet the requirements of C.R.E. 901(a). Federal cases which have addressed this issue have required only a substantial showing of identification or authenticity to warrant admission, noting that the weight to be accorded the evidence is for the jury to determine. *See* *United States v. Goichman*, 547 F.2d 778 (3d Cir. 1976); *United States v. Cuesta*, 597 F.2d 903 (5th Cir. 1979). Colorado courts apply a similar standard. *See* *People v. Esch*, 786 P.2d 462 (Colo. App. 1989) (co-conspirator's letters were sufficiently authenticated by testimony of postal inspector who had knowledge of conspirator and his handwriting; objections regarding authentication concern weight and not admissibility of evidence); *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996) (once authenticity established, defects in physical evidence go to weight of that evidence; testing procedure did not alter character of transmitter or constitute destruction of or failure to preserve evidence, so any effect of testing procedure was circumstance for jury to consider in weighing evidence on charge of conspiracy to commit criminal eavesdropping).

Practice Tip: Stricter requirements for identification and authentication prevail in cases where a chain of custody is required.

1. Pre-C.R.E. caselaw on identification of real evidence

Cokley v. People, 449 P.2d 824 (Colo. 1969). A shotgun taken from the defendant upon his arrest was held to be admissible where several witnesses testified that it "looked like" the shotgun used in the robbery, even though the gun used in the robbery had a stock on it and the one recovered from the defendant did not: "Similarly, **'looks like' identification of objects or things has been held sufficient identification to warrant admission into evidence of the items thus 'identified**.'"

Claxton v. People, 434 P.2d 407 (Colo. 1967). Blood-stained clothing was held to be admissible where the victim testified that it "looked like" the clothing she wore on the night of the kidnapping and attempted rape.

2. Illustrative cases

People v. Beltran, 634 P.2d 1003 (Colo. App. 1981). Items recovered at the scene of an attempted rape were held to be admissible even though the officer who recovered the items did not initial or otherwise mark the items, because he was able to testify that they appeared to be the same, or looked like, the items found at the scene. *See also* *People v. Brake*, 553 P.2d 763 (1976).

People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994). A revolver recovered by police and identified by witnesses as **looking like** the weapon used in a homicide was properly admitted where there was no break in the chain of custody once the evidence was recovered by police and test bullets fired from the gun, though not conclusive, were consistent with the bullet recovered from the victim. The lack of positive identification of the pistol **affects the weight rather than the admissibility** of the evidence.

People v. Ridenour, 878 P.2d 23 (Colo. App. 1994). Several handguns and a holster recovered from defendant's home properly admitted though no witness positively connected items to crime, where several witnesses testified that the handguns were **similar** to weapons used in robbery and the holster was of similar design, though not same color, as that worn by defendant.

> ***Practice Tip:*** The cases consistently hold that **uncertainty** in the identification of objects goes to **weight rather than admissibility**. *See* *Martinez v. People*, 425 P.2d 299 (Colo. 1967); *People v. Bailey*, 552 P.2d 1014 (Colo. 1976). Likewise, uncertainty as to the identification of the **defendant** goes to weight rather than admissibility. Thus, testimony that the defendant "looks like" the person who committed the crime is admissible. *See* *Cokley v. People*, 449 P.2d 824 (Colo. 1969).

C. Chain of Custody

1. When chain of custody is required

Showing a chain of custody is one means of establishing the identity and authenticity of an object or substance. A chain of custody is **required in only two basic situations**:

- Where it is not possible to establish the identity of the object by a single witness. See *Washington v. People,* 405 P.2d 735 (Colo. 1965); *Reynolds v. People*, 471 P.2d 417 (Colo. 1970); or
- Where an object or substance has been tested and the results of the test are valid only if there has been no alteration, tampering, or substitution of the evidence. *See People v. Sutherland*, 683 P.2d 1192 (Colo. 1984); *People v. Smith*, 512 P.2d 269 (Colo. 1973).

2. When chain of custody is not required

Real evidence that does not change in composition is usually admissible without proving a chain of custody if a witness can testify that the evidence is the same as when originally seized. *See People v. Marquez*, 692 P.2d 1089 (Colo. 1984) (unmarked bullet identified by distinctive indentations); *People v. Fite*, 627 P.2d 761 (Colo. 1981) (blood-stained mattress); *Reynolds v. People*, 471 P.2d 417 (Colo. 1970) (work sheets).

Practice Tip: Although not stated expressly, chain of custody falls within the provisions of Rules 901(a) and 901(b)(1) of the Colorado Rules of Evidence. *See* Advisory Committee's Note to the identical Federal Rule 901(b)(1); *United States v. Zink*, 612 F.2d 511 (10th Cir. 1980).

3. Sufficiency of chain of custody

The chain of custody for evidence (such as blood or drugs) that is to be tested is established when: (1) the recovering officer places the evidence in a sealed container; (2) the container is received in tact by the chemist or technician; (3) the chemist puts the evidence back in the sealed container after testing; and (4) both the recovering officer and the chemist are able to identify the sealed container by, for example, their initials. *See People v. Atencio*, 529 P.2d 636 (Colo. 1974).

If such a procedure is followed, it is not necessary that the recovering officer be able to positively identify the evidence seized, nor is it necessary to call other witnesses who may have had custody of, or transported the evidence, while it was in a sealed container. *See People v. Brake*, 553 P.2d 763 (Colo. 1976) (chain of custody sufficient even though no witness was able to say who removed envelope from evidence custodian's office and took it to forensic laboratory)

a. Missing link

People v. Sutherland, 683 P.2d 1192 (Colo. 1984). If a link in the chain of custody is missing the evidence may still be admissible if the evidence is accounted for at all times, especially if there is no evidence of tampering.

b. Weak link

People v. Sanchez, 518 P.2d 818 (Colo. 1974). Where the chain of evidence is complete, any weakness in the chain goes to weight and not to admissibility of the evidence.

4. Confusion as to chain of custody and the possibility of tampering

People v. Atencio, 565 P.2d 921 (Colo. 1977). The chain of custody as to a quantity of drugs was held to be sufficient despite a conflict in the testimony as to the sequence of transfer from the recovering officer and the chemist and despite a discrepancy as to the description of the evidence on the custodian's invoice. "Even where there is some confusion about the chain of custody, so long as the evidence was accounted for at all times, the evidence is admissible. Confusion may prompt speculation about the possibility of tampering, but where there is only speculation, the evidence may be admitted and the jury may consider the effect of the confusion on the weight to be given to the evidence."

People v. Smith, 512 P.2d 269 (Colo. 1973). Evidence of a blood sample was properly admitted even though it was placed in a tube from an unsealed kit which had been left unattended for approximately two hours prior to the defendant's blood being drawn. The Colorado Supreme Court stated that "[a]pplicable here is the rule that the burden is upon the party offering the evidence to show to the satisfaction of the court, with reasonable certainty, that there was no alteration of or tampering with the evidence. When it is only speculation that there was tampering, it is proper to admit the evidence and let the jury determine its weight."

People v. Moltrer, 893 P.2d 1331 (Colo. App. 1994). The trial court did not abuse its discretion in admitting two bindles of cocaine even though there was "a small amount of confusion" regarding chain of custody. Generally, "issues concerning alleged deficiencies in the chain of custody go to the weight rather [than] to the admissibility of the evidence." ***But see*** *People v. Rodriguez*, 508 P.3d 276 (Colo. App. 2022) (holding the chain of custody presented was **insufficient** because the officer who packaged drugs for testing did not testify and the officer who initially recovered drugs could not testify to seeing second officer package the drugs for testing).

5. Instruction on chain of custody improper

People v. Atencio, 565 P.2d 921 (Colo. 1977). The court stated that the trial court should not have instructed the jury to disregard the heroin exhibits if it found that the prosecution had failed to establish the chain of custody beyond a reasonable doubt: "Whether there is a complete chain of custody of evidence **is a question to be determined by the court** before it admits the evidence. Once evidence is admitted, any weakness in the chain of custody is a question of weight for the jury.

6. Illustrative cases

People v. Brown, 313 P.3d 608 (Colo. App. 2011). Proponent of the evidence must establish a chain of custody showing "that the evidence was involved in the incident and that the condition of

the evidence at trial is substantially unchanged." In this case, computer forensics expert was able to testify as to the images he had found on defendant's hard drive and that he later placed on a "finding CD." He also testified that the images were "in the same condition as they were when he found them off the hard drive and laptop" and they were "accurate representations" of what was on his "finding CD." Court allowed the admission of the "finding CD" as well as three exhibits that contained a photo and two videos. The seized evidence had been marked with evidentiary bar codes.

11.3 PHOTOGRAPHS

A. Foundation

A proper foundation for any photograph is that the item in the photograph is a fair and accurate representation of the item.

Mow v. People, 72 P. 1069 (Colo. 1903). In rejecting the defendant's contention that several photographs were improperly admitted in a murder case because there was no evidence that they were taken by a skilled photographer, the Colorado Supreme Court stated: "It is only necessary to show that a photograph, in order to warrant its admission in evidence, if otherwise competent is a correct likeness of the objects which it purports to represent. This may be shown by the person who made it, or by any other competent witness . . . ."

People v. Brown, 313 P.3d 608 (Colo. App. 2011). In prosecution of sexual exploitation of children, sexually exploitative pictures of children were admissible through testimony about the pictures themselves and testimony from a detective. The prosecution must prove that the images are of actual children, but it is not required to present evidence of a child's identification or expert testimony establishing that the image depicts a real child.

People v. Salcedo, 985 P.2d 7 (Colo. App. 1998), *rev'd on other grounds, Salcedo v. People*, 999 P.2d 833 (Colo. 2000). The trial court properly refused defendant's request to admit a photograph of his daughters because the evidence was insufficient to show the photograph accurately depicted the daughters' size at the pertinent time.

B. Relevancy

As in the case of all other testimonial, real, and demonstrative evidence, the specific standards of relevancy for photographs are governed by Rules 401 through 403 of the Colorado Rules of Evidence. A significant body of case law also articulates the relevant standards of admissibility.

1. General rule

Martinez v. People, 235 P.2d 810 (Colo. 1951). "We have heretofore held that **photographs are admissible as evidence of anything which it is competent for a witness to describe in words**, and that their admissibility does not depend upon whether the objects pictured could be described

in words, but on whether it could be helpful to permit the witness to supplement his description by their use."

2. Admissibility within trial court's discretion

People v. Sepeda, 581 P.2d 723 (Colo. 1978). The Colorado Supreme Court held that photographs of the victim's wounds were properly admitted, and rejected the defendant's assertion that they served only to incite the passions of the jury. The court stated that the **admissibility of the photographs was a matter within the discretion of the trial court**, weighing the probative value against any inflammatory effect. "There is no reason to exclude pictures simply because a witness can testify and describe the wounds. If pictures could be excluded on that basis, there would be few cases where a picture would ever be admitted. As has been said, one picture is worth a thousand words, and the introduction of such photographs served to prevent confusion and misconception on the part of the jurors."

People v. Dunlap, 975 P.2d 723 (Colo. 1999). The trial court acted within its discretion in admitting **photographs of two tattoos** defendant acquired while awaiting his capital trial. One was relevant to show "through a series of reasonable inferences" that defendant was the author of threatening letters, and the jury could have concluded that the other tattoo related to defendant's remorse, or lack thereof, "and thus circumstantially to the nature of his continuing threat to society." The court also acted within its discretion in admitting **photographs of the victims** that were relevant to show the crime scene, identities of the victims, and the locations of the victims' personal possessions. "In the sentencing phase, the pictures helped to demonstrate the deliberate, execution-style manner in which [the defendant] committed the shootings, thus assisting the jury in its consideration as to whether [the defendant] presented a continuing threat to society. Moreover, these photographs were not particularly shocking in the context of a murder: the entry wounds depicted were approximately one-half centimeter in diameter and were nearly clean of blood."

People v. Vazquez, 768 P.2d 721 (Colo. App. 1988). The trial court did not abuse its discretion in admitting in a drug prosecution a photograph taken inside the defendant's home depicting a book entitled "Handling Narcotic and Drug Cases." The photograph was relevant to show the defendant's knowledge and intent relative to the conspiracy and distribution of cocaine charge, and it was within the court's discretion to decide whether the photograph was inflammatory or unduly prejudicial to the defendant.

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012). Here the Court of Appeals upheld the trial court's ruling to allow two photographs of child victims of a sexual assault. When the children testified, they were sixteen and eighteen years old. The photographs depicted the children wearing their communion clothing when they were age eight and twelve which was how old they were when the crimes were committed against them. The Court of Appeals indicated this use of pictures was an issue of first impression. The Court of Appeals held the pictures were relevant to illustrate

the child's age at that time, a material element of the crime of sexual assault of a child, and to show the jury more clearly how the child.

People v. McClelland, 350 P.3d 076 (Colo. App. 2015). "In life" photographs of homicide victims are not per se inadmissible; rather, their admissibility must be determined on a case-by-case basis, including analysis under C.R.E. 403. Here, the Court of Appeals found the admission of three "in life" photographs of the victim unfairly prejudiced the defendant because the prosecution admitted them for the purpose of establishing an undisputed fact—that the victim had been alive—and because the prosecution used the photographs to elicit the jury's sympathy.

3. Murder, morgue, and autopsy photographs

People v. Crespin, 631 P.2d 1144 (Colo. App. 1981). Changes in the victim's condition will not necessarily render photographs inadmissible, so long as they maintain relevance. *See, e.g.*, *Armijo v. People*, 304 P.2d 633 (1956) (holding that photographs of deceased in stabbing case were admissible even though they showed a surgical incision made during rescue efforts).

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998). Defendant claimed that admitting seven of the eight photographs of the deceased child's nude body was error, especially in light of defendant's offer to stipulate to the cause of death. The Court of Appeals disagreed, finding the trial court did not abuse its discretion by admitting all eight photographs of the victim for the purpose of showing the nature and extent of the victim's injuries, an issue that was relevant to the jury's determination of defendant's recklessness.

People v. Zekany, 833 P.2d 774 (Colo. App. 1992). Not an abuse of discretion to admit color photographs depicting the victim lying dead at the scene of the crime. "Photographs may be introduced which graphically portray the scene of the crime, appearance of the victim, and other facts which are competent for a witness to describe in words."

People v. Galimanis, 765 P.2d 644 (Colo. App. 1988). Photographs were properly admitted even though they depicted "a shocking decapitation scene," because the evidence was relevant and probative of the defendant's ability to deliberate and were not so unduly prejudicial as to outweigh their probative value.

People v. Moya, 899 P.2d 212 (Colo. App. 1994). The trial court did not abuse its discretion in admitting six of seven photographs taken of the victim at the autopsy since none of the photographs were particularly "horrifying and graphic" and all would assist the pathologist in explaining the victim's injuries.

People v. Raglin, 21 P.3d 419 (Colo. App. 2000) (*rev'd other grounds*). Photographs of a homicide victim are admissible at trial when they depict the appearance of the victim, the location and nature of the wounds, or other facts that would be competent for a witness to describe in words. The admissibility of such photographs is not precluded merely because prosecution witnesses have

testified to such matters. The trial court concluded that although seven of the photos could be characterized as graphic and inflammatory, they were admissible because they would help the coroner relate his testimony to the wounds depicted in the photographs.

Archina v. People, 307 P.2d 1083 (Colo. 1957). The trial court committed reversible error in admitting gruesome morgue photographs of the victim and three of her relatives killed in the same incident. The defendant was not charged with nor linked to the shootings of two of the relatives, and one of the morgue photographs was taken 17 days after the shooting and after extensive surgery had been performed to save the decedent's life. The conviction was reversed on the ground that many of the photographs had no probative value and served only to incite the passion of the jury.

4. Stipulations by defense does not preclude admissibility

People v. Dobson, 847 P.2d 176 (Colo. App. 1992). "Photographs are not inadmissible solely because defendant has stipulated to these matters, or because these matters have been established through testimony of prosecution witnesses."

People v. Carrier, 791 P.2d 1204 (Colo. App. 1990). Photographs depicting the victim's surgical scars were properly admitted despite the defendant's offer to stipulate to the fact of serious bodily injury. "[T]he fact that the defendant offered to stipulate to the issues for which the photographs were offered does not render the photographs inadmissible."

People v. Clary, 950 P.2d 654 (Colo. App. 1997). Enlarged school photograph of child victim and testimony relating to victim's injuries and cause of death properly admitted where defendant's proffered stipulation affected probative value of evidence relevant to victim's identity and cause of death of crime.

People v. T.R., 860 P.2d 559 (Colo. App. 1993). Photograph of victim and her husband taken eight months before fatal collision was neither too inflammatory or unfairly prejudicial to be admitted; defendant's offer to stipulate that victim died from injuries received during collision did not affect admissibility since photograph was offered for purpose of identifying victim.

People v. Guffie, 749 P.2d 976 (Colo. App. 1987). Admission of photographs depicting the homicide victim was not precluded because of the pathologist's use of a diagram to illustrate the victim's wounds, where the photographs were relevant to show the victim's identity and the extent and nature of the wounds. "Photographs of the deceased may have probative value to show the victim's identity and appearance, or the location and nature of wounds, and their admission is not precluded because these matters have been established through the testimony of prosecution witnesses. [Citations omitted.] Hence, the pathologist's testimony and use of a diagram to show the victim's wounds did not render the photos either irrelevant or non-probative."

C. Changed Conditions or Inaccuracies in Photographs

People v. Cardenas, 592 P.2d 1348 (Colo. App. 1979). Photographs of the crime scene were properly admitted even though an overturned chair had been restored to an upright position. "The proper test for admission of reconstructed scenes in photographs is set forth in *People v. Sexton*, 555 P.2d 1151 (Colo. 1976), i.e. the conditions must be substantially similar to the event reconstructed. There, the Court noted that minor variations would not preclude admission; they would merely affect the weight of the evidence. The question of what constitutes a permissible variation depends upon whether it tends to confuse or mislead the jury."

D. Posed Photographs

People v. Mattas, 645 P.2d 254 (Colo. 1982). In a case of sexual assault and burglary it was not error to admit photographs of the defendant's ring held next to distinctive bruises which the victim sustained in the course of the sexual assault.

Reed v. Davidson Diary Co., 50 P.2d 532 (Colo. 1935). In a civil case, two posed photographs illustrating the condition of a collision taken five months after the incident were held to be admissible. The court recognized that the photographs were not admissible to merely illustrate a hypothetical situation or to explain the theories of a party. Rather, such photographs may be admissible where they are simply a graphic representation of the location of objects as previously established by other evidence.

11.4 AUDIO AND VIDEO RECORDINGS

A. Audio Recordings

1. Foundation

Gonzales v. People, 417 P.3d 1059 (Colo. 2020). "When offering a voice recording into evidence, the proponent need only provide evidence sufficient to support a finding that the voice recording is what he or she claims it to be. C.R.E. 901(a). Testimony establishing the recording's accuracy or the reliability of the recording process, while relevant in some circumstances, is unnecessary in the ordinary course to authenticate a voice recording under C.R.E. 901." Here, the trial court did not abuse its discretion in admitting a contested voicemail.

People v. Johnson, 613 P.2d 902 (Colo. App. 1980). Tape recording of the defendant was properly admitted despite the defendant's contention that her exculpatory statements were not recorded.

2. Voice identification

C.R.E. 901(b)(5) provides for authentication or identification by means of "identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

United States v. Cuesta, 597 F.2d 903 (5th Cir. 1979). In finding that substantial testimony identifying voices on tape recordings satisfied all legal requirements for authentication and identification, the court stated, "Rule 901(b)(5) merely requires that the witness have some familiarity with the voice which he identifies. Once this minimal showing has been made, the jury determines the weight to accord the identification testimony.

Practice Tip: The **defendant may also be compelled to speak** at trial for purposes of voice identification without violation of defendant's constitutional privilege against self-incrimination, a privilege that is "limited to testimonial, as opposed to demonstrative, evidence." *People v. Thatcher,* 638 P.2d 760 (Colo. 1981) (*rev'd on other grounds*) (holding that in light of defendant's opposition to an in-court voice identification, court properly allowed victim to testify that she had heard defendant's voice at "some time" after the assault and it was the same voice as her attacker's); *People v. Ortega*, 370 P.3d 181 (Colo. App. 2015) (upholding the court ordering defendant to read a portion of a transcript from an audio-recorded drug by encounter because the defendant was compelled only to participate in a non-communicative demonstration revealing the qualities of his voice, and this procedure did not violate his right against self-incrimination).

3. Defects in recording

People v. Roy, 723 P.2d 1345 (Colo. 1986). A tape recording may be admitted into evidence even though portions of it are inaudible. The decision as to the admissibility of the recording is one that rests in the sound discretion of the trial court.

Compare with People v. Odneal, 559 P.2d 230 (Colo. 1977). It was reversible error to permit the People to play a tape recording to the jury in rebuttal where substantial portions of the tape were garbled and unintelligible. "We apply the principle stated in *United States v. Young,* 488 F.2d 1211 (8th Cir. 1973): '. . . Should the garbled portions be so substantial, in view of the purpose for which the tapes are offered, as to render the recording as a whole untrustworthy, admissibility will be denied.'"

4. Use of transcripts with audio recordings

People v. Coca, 580 P.2d 1258 (Colo. App. 1978). In a sale-of-narcotics case it was not error to admit accurate transcriptions of audio tape recordings, and to permit the jury to read the transcripts while the tapes were being played.

a. When accuracy of transcript disputed

People v. Haider, 829 P.2d 455 (Colo. App. 1991). The Court of Appeals rejected the defendant's assertion that, because portions of the audio tapes were inaudible, an accurate transcription was not possible and it was therefore error to admit any transcript. "Courts have long recognized the need to use transcripts of tape recorded conversations to assist the jury where portions of a tape are inaudible. If the parties do not stipulate to an 'official' transcript, the judge may either make a

pretrial determination of the accuracy of the transcript by comparing it to the tapes, or may permit the jury to examine both versions of the transcript so it can determine which version is more accurate." The court further recognized that **if the accuracy of a transcript is disputed and one of the parties requests an instruction, a cautionary instruction must be given**.

B. Video Recordings

People v. Avery, 736 P.2d 1233 (Colo. App. 1986) (*overruled on other grounds*). The Court of Appeals upheld the admission of a videotape depicting the crime scene and the victim's body as it was found shortly after the shooting, as well as a videotape of one of five tests performed on the murder weapon. Like the law governing the admission of photographs, the court held that a videotape is ordinarily admissible to illustrate or explain anything a witness may describe in words. The court further stated that "[t]he law and policy governing the admissibility of photographs and motion pictures applies to videotapes."

People v. Armijo, 179 P.3d 134 (Colo. App. 2007). "The law and policy governing the admissibility of photographs and motion pictures applies to videotapes. Thus, they must be relevant to the issues and must be properly authenticated before they may be introduced."

People v. Saiz, 32 P.3d 441 (Colo. 2001). "Videotaped interviews, like other forms of evidence, are subject to the rules governing the admissibility of evidence and are not automatically admissible as original documents. Nor are they necessarily more probative than other evidence depicting the same events." Reversing the decision of the Court of Appeals, the Colorado Supreme Court held that the trial court did not abuse its discretion by excluding the videotaped interview of defendant's minor child offered to impeach the child's testimony with a prior inconsistent statement because that purpose had been accomplished through the testimony of another witness. Even if the videotape had been offered to prove a fact to which the child's testimony or inconsistent statement related, in light of the abundant evidence admitted concerning the child's capacity and truth of his statements, exclusion of the videotape was not an abuse of discretion and did not deprive defendant of his constitutional right to cross-examine or present a defense.

1. Jury's access to video recordings during deliberations

a. Judge must exercise discretion

Frasco v. People, 165 P.3d 701 (Colo. 2007). In *Frasco*, the Court held that allowing a jury unsupervised access to a videotape is not, per se, an abuse of discretion. The trial court must consider all the specific circumstances before it when making this decision so as to avoid unfair prejudice to the defendant. "[T]he trial court's ultimate objective must be to assess whether the exhibit will aid the jury in its proper consideration of the case, and even if so, whether a party will nevertheless be unfairly prejudiced by the jury's use of it. Parties must, of course, be given an opportunity to be heard on the matter, and at least where prompted to do so, a court's refusal to

exclude or otherwise limit the use of an exhibit [during deliberations] will be reviewed for an abuse of its discretion."

People v. Jefferson, 393 P.3d 493 (Colo. 2017). Trial court's abuse of discretion was not harmless and warranted reversal of the defendant's conviction, where: (1) the trial court's failure to exercise some control over the jury's access to the videotape or to specify why such control was unnecessary left no record as to how or if the jury reviewed the tape during deliberations; (2) the "nearly silent record" prevented the Court from determining whether the trial court had fulfilled its obligation to "observe caution" that the videotape was not used in such a manner as to create a likelihood of the jury's giving it undue weight or emphasis; (3) "the videotape was the linchpin of the prosecution's case" because it was the only complete recounting of the charged assaults; and (4) because the victim's testimony deviated from his videotaped statement, the inconsistencies "underscore[d] how central the victim's credibility was to the resolution of the trial, thus heightening the danger of providing the jury with unchaperoned access to only one side of the story."

b. Video recordings of defendant's statements

People v. Carter, 414 P.3d 15 (Colo. App. 2015). Trial court did not err in allowing the jury unfettered access to the video of defendant's interview. Citing *People v. Gingles*, 350 P.3d 968 (Colo. App. 2014), the Court held that "the historical reason for treating the defendant's confession" differently from a third party witnesses' statement is that the defendant's confession's "centrality in the case warrants whatever emphasis may result", which supports "unrestricted jury access during deliberations to a defendant's voluntary and otherwise admissible confession". The Court further found that it is immaterial whether the defendant's statement is inculpatory or exculpatory.

People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006). The trial court admitted the videotape and transcript of both a witness and the defendant's interview. During deliberations the jury reported that they were having difficulty understanding the videotapes. Because the transcripts were properly admitted into evidence, the trial court did not err in allowing the jury unfettered access to them.

c. Video recordings of testimonial evidence

People v. Isom, 140 P.3d 100 (Colo. App. 2005). A jury is entitled to view any testimonial evidence admitted into evidence, including videotaped interviews, during deliberations without supervision by the court. *See also* *People v. McKinney,* 80 P.3d 823 (Colo. App. 2003) *(rev'd on other grounds*); *People v. Pahlavan,* 83 P.3d 1138 (Colo. App. 2003).

In *Frasco*, the Colorado Supreme Court stated: "(1) trial courts have discretion to allow a deliberating jury access to evidence admitted during trial; (2) there is no blanket rule excluding

'testimonial evidence,' such as depositions, from the scope of the court's discretion; (3) courts should be aware, when exercising this discretion, that *jury access to testimonial evidence can present a risk of undue weight or emphasis being given the evidence*; and (4) *courts should ensure that juries are not allowed to use exhibits in a way that unfairly prejudices defendants or the prosecution*." The court disapproved of the application of C.R.C.P. 47(m) to exhibits in criminal proceedings and clarified that "control over the use of exhibits during jury deliberations in criminal proceedings must remain firmly within the discretion of the [trial] court."

DeBella v. People, 233 P.3d 664 (Colo. 2010). In *DeBella,* the defendant was charged with sexual assault on a child and enticement. The evidence at trial included two videotaped interviews in which the victim had described the incidents underlying the charges. Parts of the first videotape and all of the second were ultimately admitted into evidence and played for the jury in open court. At the close of the evidence, the court announced that it intended to provide the jury with a television and the second videotape, thus allowing the jury unconstrained access to the second videotape during deliberations. The Colorado Supreme Court reversed stating that "the trial court's failure to assess the potential for undue prejudice with respect to the jury's access to the tape was a failure to exercise discretion, and so an abuse of discretion."

Martinez v. People, 393 P.3d 557 (Colo. 2017). Because Martinez did not base his defense on inconsistencies between the victims' in-court and out-of-court accounts (perhaps due to the fact that those accounts were largely consistent), unlimited access to the forensic interviews neither impeded the jury's assessment of Martinez's theory of defense nor unduly emphasized the prosecution's version of events.

d. Crime-scene videos

Rael v. People, 395 P.3d 772 (Colo. 2017). Trial court did not abuse its discretion by allowing jurors **unfettered access to a crime scene video** during their deliberations in a murder trial. The video was more like a non-testimonial, tangible exhibit, such as a still photograph of a crime scene, than a testimonial one such as a witness's recorded statements, and jurors have consistently been allowed access to non-testimonial exhibits. The danger of undue emphasis faced in *DeBella* does not apply to non-testimonial evidence such as a crime scene video.

People v. Aponte, 867 P.2d 183 (Colo. App. 1993). The trial court did not err in a distribution of controlled substances prosecution by admitting into evidence a videotape and transcripts depicting the drug transaction in question and permitting the jury unsupervised access to the evidence during its deliberations. The rule restricting the jury's unsupervised access to videotaped witness *statements* is premised upon the admission of evidence deemed to be testimonial in nature, similar to depositions. However, a videotape that depicts the commission of the actual crime is not evidence of a testimonial character but rather constitutes a "tangible [exhibit] with verbal content which [is] non- testimonial in character," and is therefore subject to admission without restriction.

People v. Blecha, 940 P.2d 1070 (Colo. App. 1996). Jury was properly permitted unsupervised and unlimited viewing of videotape depicting crime scene prior to removal of victim, removal of victim, and medical examination, where audio portion of tape was not audible and its contents were nontestimonial and similar in character to still photographs.

e. Defendant's presence

Zoll v. People, 425 P.3d 1120 (2018). Even if the Court of Appeals erred in determining that replaying a small portion of a recording in the courtroom during deliberations was not a critical stage of the proceeding that required the defendant's presence, any error in failing to secure the defendant's attendance was harmless beyond a reasonable doubt.

2. Admissibility of videotaped statements of child victims

In *People v. Newbrough*, 803 P.2d 155 (Colo. 1990), the Colorado Supreme Court held that videotapes depicting statements of a child victim that ordinarily qualify for admission into evidence pursuant to section 13-25-129 may be admitted at trial only if the videotapes are made in compliance with the requirements for videotaped depositions. *See* § 18-3-413. Following the decision in *Newbrough*, however, the General Assembly enacted section 18-3-413(5), providing that "[n]othing in this section shall prevent the admission into evidence of any videotaped statements of children which would qualify for admission pursuant to section 13-25-129 or any other statute or rule of evidence."

But see *People v. Carter*, 919 P.2d 862 (Colo. App. 1996). The amendment to section 18-3-413(5) is applicable only to offenses charged as occurring after its effective date of June 6, 1991; amendment does not apply to cases arising before effective date and cannot validate admission of videotaped statements so created that do not comply with requirements for videotaped depositions.

11.5 EMAILS, TEXT MESSAGES, CLOUD STORAGE, AND SOCIAL MEDIA

A. Facebook Messages

People v. Glover, 363 P.3d 736 (Colo. App. 2015): Facebook printouts are not authenticatable as business records under CRE902(11). To authenticate the printouts the prosecution had to show (1) the records were those of Facebook and (2) the communications recorded therein were made by defendant. Facebook records are analogous to phone records or emails and may be authenticated under either C.R.E. 901(b)(1) through testimony of a witness with knowledge that a matter is what it is claimed to be, or C.R.E. 901(b)(4), through consideration of distinctive characteristics shown by an examination of their contents and substance in light of the circumstances of the case.

People in re A.C.E-D., 433 P.3d 153 (Colo. App. 2018): Authenticating Facebook messages requires two showings: first, the party seeking admission must show that the records were those of Facebook and, second, that the communications recorded therein were made by the purported

party. Regarding the second showing, witness testimony about making and receiving the Facebook messages at issue, the use of nicknames and other unique identifiers, as well as the witness' belief that she was never talking to someone other than the defendant, are all relevant factors that a trial court may consider.

People v. Dominguez-Castor, 469 P.3d 514 (Colo. App. 2020). When the prosecution seeks to admit a computer printout of social media communications of the defendant, the prosecution must make two showings for authentication: (1) the records were those of the social media platform and (2) the communications recorded therein were authored by the defendant. The record supported a finding that defendant authored the messages from the relevant Facebook account. The record included evidence that the sending account belonged to the defendant, messages referred to plans that only defendant knew, the messages originated from a particular phone defendant owned, and only defendant had access to the phone when the message was sent.

B. Text Messages

People v. Heisler, 488 P.3d 176 (Colo. App. 2017). The authentication of text messages has two components: (1) the witness must testify that printouts of text messages accurately reflect content of messages and (2) the witness must establish the identity of the purported sender. The victim testified that the printouts accurately reflected the texts she received, she recognized the number as being the defendant's, she recognized the content of the text messages as being from the defendant, and the content of the text messages included corroborative evidence that they came from the defendant. This testimony was sufficient for authentication.

C. Emails

People v. Bernard, 305 P.3d 433 (Colo. App. 2013). Emails may be authenticated (1) through testimony explaining that they are what they purport to be, *see* 901(b)(1), or (2) through consideration of distinctive characteristics shown by an examination of their contents and substance in light of the circumstances of the case, *see* C.R.E. 901(b)(4). The court found sufficient evidence of authentication. The victim testified that an email print-out was a true and accurate copy of the email that defendant had sent to her and that she recognized the email address of the sender as one that belonged to defendant. Additionally, the contents of the email indicated knowledge by the sender of defendant's previous relationship with the victim.

D. Dropbox and Cloud Storage

People v. N.T.B., 457 P.3d 126 (Colo. App. 2019). The prosecution expressed intent to admit Dropbox (cloud storage) records containing digital media depicting child pornography as well as subscriber and account information connected to the defendant. The prosecution proposed to authenticate the Dropbox records under 901(b)(1) and (4) as opposed to authenticating and seeking admission of the records as business records under C.R.E. 803(6) because no custodian of records was able to testify or submit an affidavit. Defendant objected, arguing the Dropbox records were

business records that contained hearsay and could only be authenticated under either C.R.E. 803(6) or by certification that complied with C.R.E. 902(11). The Court of Appeals upheld the trial court's suppression of the Dropbox records. The Dropbox records could be authenticated under 901(b)(1) through the officer's testimony regarding his execution of a search warrant, Dropbox's compliance with the search warrant, and the defendant's and the defendant's acknowledgment that he owned a Dropbox account using his work email address. The prosecution failed, however, to overcome the hearsay objection to admission of the records. The Dropbox account identification number, activity log, and associated IP address of the Dropbox account were offered for the truth of the information. There was no evidence these records were automatically generated. The prosecution could have overcome this hearsay deficiency had they admitted the records as business records under C.R.E. 803(6).

Practice Tip: The admission of electronic and social media evidence can often require further admission requirements under **rules regarding hearsay** and **the confrontation clause.**

Certain computer-generated business records are admissible under hearsay exception C.R.E. 803(6). *See State ex re. Coffman v. Robert J. Jopp & Assocs*, 442 P.3d 986 (Colo. App. 2018) (invoicing data), *People v. Marciano*, 411 P.3d 831 (Colo. App. 2014) (checking account statements), *People v. Huehn*, 53 P.3d 733 (Colo. App. 2002) (ATM records); *People v. Berger-Levy*, 677 P.2d 351 (Colo. App. 1983 (credit card statements).

Computer-generated records generated entirely by computers and without any human input are not hearsay because there is no human speaker. *See, e.g.*, *People v. Hamilton*, 452 P.3d 184, 193 (Colo. App. 2019)

Computer generated **business records containing statements by third parties** are admissible under C.R.E. 803(6) only when the third party's information is provided as part of a business relationship between the business and the third party **and evidence shows that the business substantially relied on the information**. *See People in Interest of R.D.H.*, 944 P.2d 660 (Colo. App. 1997) (incident reports). When **evidence cannot show that the business substantially relies on the information** in the computer record, computer generated business records containing third party statements may be admissible as non-hearsay statements by a party opponent under C.R.E. 801(d)(2). *See People v. Glover*, 363 P.3d 736 (Colo. App. 2015) (Facebook messages); *Dominguez-Castor*, 469 P.3d 514 (Colo. App. 2020) (Facebook messages).

11.6 ADMISSIBILITY OF DEMONSTRATIVE EVIDENCE

A. Admissibility Generally

Like other evidence, demonstrative evidence is admissible if it is:

1. **Authentic**. The evidence is what it is claimed to be. *People v. Cauley*, 32 P.3d 602, 607 (Colo. App. 2001); C.R.E. 901.
2. **Relevant**. It will assist the trier of fact in understanding other testimonial and documentary evidence. *People v. Douglas*, 411 P.3d 1026 (Colo. App. 2016); C.R.E. 401.
3. **A fair and accurate representation** of the evidence to which it relates. *Id. See also* C.R.E. 403.
4. **Not unduly prejudicial**. Its probative value must not be substantially outweighed by its danger for unfair prejudice. *Id.*; C.R.E. 403.

People v. Palacios, 419 P.3d 1014, 1018 (Colo. App. 2018).

B. Diagrams, Models, and the Like

McCormick, Evidence, Section 21 at 530 (1972): "Models, maps, sketches, and diagrams . . . are admissible simply on the basis of testimony that they are substantially accurate representations of what the witness is endeavoring to describe. Some discretionary control in the trial court is generally deemed appropriate, however, since exhibits of this kind, due to inaccuracies, variations of scale, etc., may on occasion be more misleading than helpful."

1. Models or facsimiles

People v. Thompson, 950 P.2d 608 (Colo. 1998) Trial court did not abuse its discretion by allowing common kitchen knife to be used to illustrate the general type of weapon used to commit the murder, when there was testimony that the knife was consistent with the wound. The knife was not admitted as evidence and the jury was not permitted to use it in its deliberations.

People v. Smith, 682 P.2d 493 (Colo. App. 1983). "The defendant's contention that the trial court erred in admitting a facsimile of defendant's knife is without merit."

People v. LeMasters, 666 P.2d 573 (Colo. App. 1983), *aff'd,* 678 P.2d 538 (Colo. 1984). The Court of Appeals upheld the admission of a glass similar to the one from which the defendant's fingerprints were lifted, where the glass was offered simply to demonstrate how a fingerprint expert lifts a print from such a surface. The court acknowledged that "[i]t is **within the discretion of the trial court** to admit models for purposes of demonstration."

Hampton v. People, 465 P.2d 112 (Colo. 1970). The trial court did not abuse its discretion in denying the defendant the right to attempt to impeach an eyewitness' identification testimony by demonstrating, using a similar mask, that the masks used in the robbery could not have come off the robber's face in the manner described by the witness. Exclusion of the facsimile was warranted because possible variances between the demonstration mask and the actual mask worn in the robbery might render the proposed demonstration unreliable.

People v. Richardson, 58 P.3d 1039 (Colo. App. 2002). Prosecutor used a mannequin during the trial to demonstrate the manner in which the victim was tied. The Court of Appeals found that the trial court properly admitted such evidence. For evidence to be admissible demonstratively and not substantively, the evidence must be "shown to be reasonably accurate and correct… It is not necessary that the witness whose testimony is illustrated has personally prepared the evidence. However, testimony regarding the accuracy of the demonstrative [or illustrative] evidence must be given by a person having personal knowledge of the scene depicted and may not be based on hearsay statements."

2. Reenactments and simulations

People v. Sexton, 555 P.2d 1151 (Colo. 1976). The test for reenactments is whether the conditions were substantially similar to the conditions of the event reenacted. Conditions need not be identical; minor variances affect weight rather than admissibility. Admissibility lies within the sound discretion of the court and will not be disturbed without a showing of an abuse of discretion.

People v. Evans, 987 P.2d 845 (Colo. App. 1998) (*overrruled other grounds)*. Trial court properly required defendant to reenact, using a necktie and a Styrofoam head, certain events for a limited purpose. Although the reenactment must be substantially similar to the actual event, because reenactments can be highly persuasive, a trial court must take special care to ensure the reenactment fairly depicts the events at issue.

3. Computer-Generated Animations

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). The trial court did not abuse its discretion by admitting a computer-generated videotape that "demonstrated the 'mechanism of injury' for shaken baby syndrome" where the trial court considered all of the requirements for admission of the evidence and gave an appropriate limiting instruction. "A computer animation is admissible as demonstrative evidence if the proponent of the video proves that it: (1) is authentic under C.R.E. 901; (2) is relevant under C.R.E. 401 and 402; (3) is a fair and accurate representation of the evidence to which it relates; and (4) has a probative value that is not substantially outweighed by the danger of unfair prejudice under C.R.E. 403.

People v. Douglas, 411 P.3d 1026 (Colo. App. 2016). The defendant appealed the trial court's decision to admit three videos from the prosecution that the defendant contended were inadmissible simulations, not animations. Animations are based on information that an expert has gathered and the opinions that the expert has reached based on that information. A simulation depicts how the event occurred based wholly or at least in part on a computer's analysis. The defendant was convicted of leaving the scene of an accident, failure to report an accident, and careless driving. The defendant argued that the videos depicting an automobile-bicycle collision were simulations and that the prosecution did not lay an adequate foundation to support the court's decision to admit them. The court held that the videos were animations, and the prosecution laid a

sufficient foundation. Courts view animations as demonstrative evidence. The proponent of an animation must (1) authenticate it; (2) show that it is relevant; (3) show that it is a "fair and accurate representation of the evidence to which it relates"; and (4) show that its probative value is not substantially outweighed by the danger of unfair prejudice. *See also People v. Palacios*, 419 P.3d 1014 (Colo. App. 2018).

4. Miscellaneous diagrams, summaries, or models

People v. Sandoval, 488 P.3d 441 (Colo. App. 2018). The use of a partial reconstruction of a crime scene as a demonstrative aid met the four-part test for admissibility set out in *People v. Palacios*, 419 P.3d 1014 (Colo. App. 2018), where: (1) it was authenticated by the prosecution's criminalist; (2) it was relevant to assist the jury in understanding a witness's testimony; (3) the defendant had an opportunity to cross-examine the criminalist about discrepancies in the reconstruction; and (4) the probative value of the reconstruction was not substantially outweighed by its danger of unfair prejudice.

People v. Richardson, 486 P.3d 282 (Colo. App. 2018). Trial court's admission of demonstrative evidence that depicted defendant's basement where standoff with police occurred was not an abuse of discretion. The Court of Appeals found that the drawings were fair and accurate representation of the alleged crime scene. Further, police officers did not testify that diagrams were exact replicas of defendant's basement, but rather testified that they were rough drawings created from memory introduced to help jury understand the basement's layout. The jury could reasonably understand that slight variations among diagrams might vary in drawings not drawn to scale and created from memory, and the fact that police officers whose testimony illustrated the diagrams did not prepare the exhibits was immaterial.

Murray v. Just in Case Bus. Lighthouse, LLC, 374 P.3d 443 (Colo. 2016): The Colorado Supreme Court held in a civil case that trial courts abuse their discretion when they admit summary charts that characterize evidence in an argumentative fashion rather than simply organize it in a manner helpful to the trier of fact.

C. Experiments

People v. McCombs, 629 P.2d 1088 (Colo. App. 1981). In a burglary case, the trial court did not abuse its discretion in permitting a police officer to testify as to a time/distance experiment to demonstrate the People's theory that the defendant burglarized the store, took items to his apartment, and returned for more in approximately the same amount of time that it took police to respond to the silent burglar alarm. The court stated that for evidence of an experiment to be admissible, it must aid rather than confuse the jury and it must tend to directly establish or disprove a material issue in the case. Further, the requirement of substantial similarity of conditions does not render an experiment inadmissible because it is based on a disputed reconstruction of that crime. "It is not necessary to establish that conditions under which an experiment is conducted be

identical to those existing at the time of the occurrence of the crime. Minor variations go to the weight of the evidence rather than to its admissibility."

People v. Agado, 964 P.2d 565 (Colo. App. 1998). The trial court did not abuse its discretion by proceeding with defendant's demonstration of how he held the gun and pulled the trigger, even though defendant had a broken finger (which, he explained on redirect, "prevented him from demonstrating the trigger pull as it had actually occurred when the victim was shot"), nor by allowing the jury to examine and experiment with the gun during deliberations.

People v. LeMasters, 666 P.2d 573 (Colo. App. 1983). Evidence of a drive test conducted in response to the defendant's notice of alibi was properly admitted, even though the test was conducted on dry roads when those roads were snow packed at the time of the offense. "Whether or not test conditions are substantially similar to those being recreated is a matter for the trial court's discretion, and any doubts concerning test reliability may be adequately explored on cross-examination."

D. Jury's Access to Demonstrative Evidence During Deliberations

The jury's access to demonstrative evidence is at the discretion of the judge. *People v. Agado*, 964 P.2d 565, 567 (Colo. App. 1998).

* * *

2025 Contributions by Tanya Karimi
Deputy District Attorney
4th Judicial District

CHAPTER 12

DESTRUCTION OF EVIDENCE

12. DESTRUCTION OF EVIDENCE

12.1 INTRODUCTION

The loss or destruction of evidence by the police or the prosecution in a criminal case may become significant when it impacts the defendant's constitutional right to due process of law. *Brady v. Maryland, 373 U.S. 83 (1963)* In *Gallagher*, Colorado adopted the *Brady* rule that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good-faith or bad-faith of the prosecution. *People ex rel. Gallagher v. District Court, 656 P.2d 1287 (Colo. 1983)*.

A defendant may therefore be entitled to **sanctions** imposed against the prosecution if the defendant's due process rights have been violated by the state's loss, destruction, or failure to preserve material evidence. The trial court has broad discretion in fashioning an appropriate remedy, which should be designed to protect the truth-finding process and deter the prosecution and the police from destroying material evidence. However, that **remedy should be no more restrictive than necessary** to protect the defendant's right to due process. *People ex rel. Gallagher v. District Court*, 656 P.2d 1287 (Colo. 1983); citing *People v. Morgan*, 606 P.2d 1296 (Colo. 1980). Although it is the character of the evidence destroyed and not the degree of the prosecutor's culpability that determines if there has been a constitutional violation, the conduct of the prosecution may be taken into account in fashioning a remedy. Although less drastic sanctions can often be imposed, dismissal of the charges may be appropriate when no other remedy will produce a fair result. *People v. Sheppard*, 701 P.2d 49 (Colo. 1985).

12.2 CONSTITUTIONAL STANDARD

People v. Greathouse, 742 P.2d 334 (Colo. 1987). In reversing the dismissal of first-degree murder charges against the defendant due to the prosecution's negligent destruction of evidence in the form of samples of the victim's body fluids, the Colorado Supreme Court set forth a **three-part test** which must be met in order to establish a due process violation:

- the evidence was suppressed or destroyed by the prosecution;
- the evidence possessed an exculpatory value that was apparent before it was destroyed; and
- the defendant was unable to obtain comparable evidence by other reasonably available means.

This three part test for constitutional materiality was first articulated by the U.S. Supreme Court in *California v. Trombetta*, 467 U.S. 479 (1984).

Under *Greathouse,* the burden is upon the **defendant** to prove **all three** prongs of the test in order to establish a due process violation. *See also* *People v. Enriquez*, 763 P.2d 1033 (Colo. 1988); *People v. Braunthal*, 31 P.3d 167 (Colo. 2001) (holding that the trial court erred in finding that defendant's due process rights were violated where three prongs of test were not satisfied). The

Court stated that the determination of the materiality of the evidence **focuses upon the state's knowledge prior to the actual loss or destruction of the evidence** and not "on conjectural possibilities developed months or years after the evidence is no longer available . . . ." **Lacking any apparent exculpatory value prior to its destruction**, the evidence failed to satisfy the test of "constitutional materiality," and its unavailability therefore did not violate the defendant's right to due process.

Practice Tip: The standard of materiality set forth in *Greathouse* **overrules** prior case law that required the prosecution to preserve evidence that is "not merely incidental" to the defendant's defense, and instituted a "more realistic way to evaluate a due process claim" by requiring that the evidence possess an exculpatory value that is apparent before the evidence was lost or destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *See, e.g.*, *People v. Morgan*, 606 P.2d 1296 (Colo. 1980).

A. Due Process Violation if Destruction was Done in "Bad Faith"

People v. Wyman, 788 P.2d 1278 (Colo. 1990). If the evidence does not have an apparent exculpatory value at the time of destruction, the defendant must show bad faith on the part of the police to establish a violation. The Colorado Supreme Court held in this case that the suppression of the results of blood tests was not appropriate in connection with careless driving and drug possession charges when a second sample preserved for the defendant turned out to be untestable: "The due process clause of the fourteenth amendment does not invariably require a state to preserve evidence which might be favorable to the accused when dealing with evidentiary material of which no more can be said than it could have been subjected to tests."

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998). The court held that there was no due process violation where defendant did not allege police willfully destroyed evidence and trial court found police only negligent, and that damage to truck while impounded was not result of any bad faith conduct by police. There was no apparent exculpatory value prior to damage and other evidence admitted was as reliable as what defendant sought.

People v. Abdu, 215 P.3d 1265 (Colo. App. 2009). Defendant was convicted for spitting at a nurse at the jail. The incident was recorded but the recording was automatically recorded over. Defendant argued that his due process rights were violated. The court stated that "[b]ecause defendant claims only that the videotape was potentially useful, and cannot show it had apparent exculpatory value when it was destroyed, he must show bad faith in order to establish a federal or state due process violation." The court held that the videotape was not destroyed in bad faith. The court also reiterated that the standard is not negligence.

B. Failure to Preserve as "Suppression"

People v. Humes, 762 P.2d 665 (Colo. 1988). In reversing an order suppressing evidence of a driver's blood alcohol test because the prosecution failed to preserve a second sample of the

defendant's blood for independent testing, the Colorado Supreme Court acknowledged that when evidence can be routinely collected and preserved by state agents, the "failure to do so is **tantamount to suppression** of the evidence." However, the inquiry then becomes **whether the evidence is constitutionally material**, *i.e.,* whether it possessed an exculpatory value that was apparent before it was lost or destroyed and the defendant was unable to obtain comparable evidence by other reasonably available means. The Court concluded that **the second blood sample fails to meet the exculpatory value requirement** and that the defendant's right to due process was not violated by the prosecution's "suppression" of the evidence. "In a situation such as this, where one blood sample has already been tested, we are not persuaded that a second sample drawn at the same time has an 'apparent' exculpatory value."

1. Duty to preserve exculpatory evidence

People v. District Court, 793 P.2d 163 (Colo. 1990). "It is incumbent upon the prosecutor to promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation."

People v. Greathouse, 742 P.2d 334 (Colo. 1987). The Court recognized that "when the police conduct scientific tests, they must preserve samples to permit the defendant to accomplish independent testing, permit the defendant's experts to monitor the police testing, or provide some other suitable means to allow the defendant to verify independently the appropriateness of the procedures and the accuracy of the results of the testing." However, given that the evidence, which was not so preserved, **was not constitutionally material, no due process violation occurred**.

People v. Braunthal, 31 P.3d 167 (Colo. 2001). "[T]he prosecutor's duty to prevent the loss or destruction of evidence is not absolute." In this interlocutory appeal, the Court held that the trial court erred in finding that defendant's due process rights were violated where the videotape evidence at issue was not exculpatory, there was comparable evidence available to defendant, and there was no indication that the prosecution deliberately destroyed the videotape. *See also People v. Abdu*, 215 P.3d 1265 (Colo. App. 2009).

People v. Acosta, 860 P.2d 1376 (Colo. App. 1993). Failure to preserve second sample of defendant's breath and keep in storage defendant's vehicle did not constitute due process violation where there was no evidence that further testing of items would have exonerated defendant and best that could be said is that it "might" have.

People v. Rodriguez, 914 P.2d 230 (Colo. 1996). Defendant was not denied due process based on destruction of allegedly exculpatory photographs where he did not establish that some photographs at issue ever existed and, as to all photographs at issue, comparable evidence was available to defendant through videotape or police officer's testimony and notes.

People v. Barrientos, 956 P.2d 634 (Colo. App. 1997). No due process violation based on release of defendant's truck and its contents to lien holder where items had no apparent exculpatory value at time of release.

People v. Kearns, 988 P.2d 189 (Colo. App. 1999). No due process violation based on police failure to obtain test of unconscious victim's blood where record shows, at best, such test "might" have been exculpatory; assuming police violated statutory mandate to test victim's blood, statute not for benefit of defendant and such violation not basis for reversal.

People v. Eason, 516 P.3d 546 (Colo. App. 2022). No due process violation based on police failure to preserve body worn camera footage where defendant failed to establish that the bodycam recording had apparent exculpatory value before the sheriffs destroyed it.

2. But no general duty to investigate

People v. Norwood, 547 P.2d 273 (Colo. App. 1975). The defendant asserted that she was denied due process of law through the negligent handling of evidence and the otherwise inadequate investigation of the homicide, resulting in the loss of the opportunity to obtain possibly exculpatory evidence. The alleged investigative negligence included the failure to find and interview several potential witnesses and the failure to fingerprint and preserve several items found at or near the scene of the shooting. In rejecting this assertion, the Court of Appeals recognized that "although negligent suppression of evidence can violate due process, **the evidentiary deficiencies presented here were the result, if anything, of the failure to investigate properly and were not the result of suppression of evidence**, negligently or otherwise. No evidence was in fact 'suppressed' in the sense that evidence known to the police or District Attorney and not to the defendant' was not disclosed to the defendant."

> ***Practice Tip:*** In *Norwood*, it was significant that any evidence "lost" as a result of inadequate investigation **was not known to be material at the time.** It is clear that an attempt to circumvent the obligation to disclose exculpatory information by deliberately failing to collect or preserve evidence possessing an **apparent exculpatory value** would constitute a due-process violation. *See People v. Anderson*, 837 P.2d 293 (Colo. App. 1992).

People v. Apodaca, 998 P.2d 25 (Colo. App. 1999). Police not required to gather all evidence favorable to defendant. No due process violation by state's failure to gather and test blood samples from crime scene, have investigator take notes of victim's interview, failure to examine weapon until one month before trial, or failure to produce 911 tape which defendant had not shown existed or was destroyed.

People v. Perryman, 859 P.2d 263 (Colo. App. 1993). The Court of Appeals rejected the defendant's assertion that his right to due process was violated by the alleged failure of police investigators to adequately preserve the crime scene "Here, the trial court denied defendant's motion to dismiss, finding that he had **only speculated** as to evidence that might have been present

at the scene and had failed to establish that any unpreserved items at the crime scene had any exculpatory value or that any evidence had been collected and destroyed by the prosecution. Moreover, the trial court found that defendant had failed to show any bad faith or intentional misconduct on the part of the prosecution or police."

See also *People v. Moore*, 701 P.2d 1249 (Colo. App. 1985) (holding the failure to secure and maintain crime scene was not tantamount to suppression); *People v. Apodaca*, 998 P.2d 25 (Colo. App. 1999) (holding that police have no duty to gather from crime scene all evidence favorable to defendant).

12.3 STATUTORY STANDARD

A. Admissibility of Laboratory Results: § 16-3-309

1. Small quantities of evidence

§ 16-3-309(1). "When evidence is seized in so small a quantity or unstable condition that qualitative laboratory testing will not leave a sufficient quantity of the evidence for independent analysis by the defendant's expert and when a state agent, in the regular performance of his duties, can reasonably foresee that the evidence might be favorable to the defendant, the trial court shall not suppress the prosecution's evidence if the court determines that the testing was performed in good faith and in accordance with regular procedures designed to preserve the evidence which might have been favorable to the defendant."

2. Leaving a sufficient sample for independent analysis

Section 16-3-309(2) mandates that the trial court consider various factors when considering whether to suppress test results if the testing will not leave a sufficient sample for independent analysis.

3. Good-faith standard on preserving or destroying evidence

People v. Wartena, 156 P.3d 469 (Colo. 2007). This statute "leaves for the court the determination of admissibility based on the reasonableness of the prosecution's actions. The statute establishes a good faith standard of prosecutorial conduct requiring that the state seek to preserve evidence where possible and act reasonably in destroying evidence where necessary."

B. Preservation of DNA Evidence: § 18-1-1103, et. seq.

1. Duty to preserve DNA evidence

§§ 18-1-1103, 18-1-1104. A law enforcement agency that collects DNA evidence in the investigation of a felony has a duty to preserve that evidence and shall include, where possible, a sufficient sample to allow for independent testing. If law enforcement is unable or cannot produce the DNA upon request, it must produce an affidavit describing the efforts taken, that may be considered by a court to determine if there is a due process violation.

2. Statute of limitations for uncharged felonies

§ 18-1-1102(1)(a). If felony charges are not filed, law enforcement shall preserve the DNA evidence for the length of the statute of limitations.

3. Class 2 felonies and sex offenses

§ 18-1-1103(2). Upon a conviction of class 1 felony or sex offense, law enforcement must preserve the DNA for the life of the defendant.

4. Felony convictions

§ 18-1-1105. Upon receiving notice from law enforcement of its intent to dispose of DNA evidence, the district attorney must give notice to the defendant, who has 98 days from the date of the notice to object. The defendant may file an objection to the court, who may rule on the motion to preserve DNA evidence without a hearing.

5. *Greathouse* still applies

People v. Young, 412 P.3d 676 (Colo. App. 2014). Following a conviction for kidnapping and sexual assault the defendant pursued post-conviction relief. During the proceedings the victim's underwear that contained DNA evidence was destroyed. In determining whether there is a due process violation under § 18-1-1104(4), the Colorado Court of Appeals employed "the well-established test created by the federal and state courts to make that determination." To establish a due process violation under § 18-1-1104(4), the "well established test created by the federal and state courts" is used, requiring the defendant to show that (1) the evidence was suppressed or destroyed by the state; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (3) the defendant is unable to obtain comparable evidence by other reasonably available means. Unless there is a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.

12.4 LOSS OR DESTRUCTION OF EVIDENCE

A. Vehicle in a Crash

People v. Sheppard, 701 P.2d 49 (Colo. 1985). The dismissal of vehicular homicide charges was affirmed by the Colorado Supreme Court on grounds that the destruction of the defendant's vehicle by an agent of the prosecution after a request had been made to inspect the vehicle violated the defendant's right to due process of law. Although decided prior to *Greathouse,* the court concluded that, given the number of **serious mechanical defects** associated with the vehicle, "**the exculpatory value of this evidence was clear even before it was destroyed**," thereby establishing its materiality under the *Trombetta* and *Greathouse* standard.

Compare with *People v. Enriquez*, 763 P.2d 1033 (Colo. 1988). Dismissal of vehicular homicide charges based on prosecutorial destruction of the vehicle involved in the collision after a specific

request for its preservation by the defense was **reversed** by the Colorado Supreme Court and remanded for the district court to make specific findings regarding whether the evidence possessed an exculpatory value that was apparent at the time it was destroyed, and whether the defendant was unable to obtain comparable evidence by other reasonably available means.

People v. Silva, 782 P.2d 846 (Colo. App. 1989). Defendant failed to establish a due process violation in the release from impound [and subsequent unavailability] of a vehicle, the condition of which, the defendant claimed, could have been used to impeach the testimony of the victim in a sexual assault case. "In view of the long delay before defendant asserted any significance in the car's condition and of the speculative nature of the impact that the alleged discrepancy might have had upon the victim's credibility, we conclude that defendant failed to demonstrate the car's apparent exculpatory value at the time prior to its release."

B. "Lost Letter"

People v. Austin, 799 P.2d 408 (Colo .App. 1990). Although a letter written by an investigating police officer, the contents of which were disputed, was lost prior to trial, the defendant failed to establish a due process violation in that the letter possessed an "unknown" evidentiary value and it could not therefore possess an exculpatory value that was apparent before the letter was lost. The defendant also had means of obtaining comparable evidence because the officer was available to testify and had made prior statements under oath prior to trial.

People v. Roblas, 568 P.2d 57 (Colo. 1977). This pre-*Greathouse* case reversed suppression of accomplice testimony on grounds that a tape-recorded interview of accomplice was inadvertently lost. The Colorado Supreme Court ruled that suppression was not required when there was no bad faith involved in loss of tape, the report was made immediately after taping session provided to defense, and there were five witnesses to interview available for testimony at trial.

C. Physical Evidence

People v. Thomas, 916 P.2d 582 (Colo. App. 1995). In a prosecution for criminal trespass and theft, the Court of Appeals rejected the defendant's assertion of a due process violation because the police "lost" the **jacket he was wearing the night the crimes were committed**. Although the defendant claimed the jacket possessed an exculpatory value because prosecution witnesses failed to describe certain distinctive markings on it, the Court of Appeals concluded that the jacket possessed no apparent exculpatory value **at the time it was lost** and, indeed, was not even material to the issue of identity. "[The defendant's] identity was established as to these crimes through the testimony of the officer who had confronted him face-to face while he was in the car and the officer who assisted in his apprehension as he tried to flee from the car. Neither [witness] relied on defendant's clothing as the basis of identification."

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008). Defendant engaged in a nine-hour standoff with police where he barricaded himself inside his motor home and fired shots at police. Defendant argued that the police destroyed evidence when they removed tarps from the windows of his motor

home, thereby, violating his due process rights. In order to succeed on such an argument, a defendant must show "(1) the evidence was destroyed by state action; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (3) the defendant was unable to obtain comparable evidence by other reasonably available means. **If the evidence was not apparently exculpatory when it was destroyed and was merely potentially useful, the defendant must show that the state agents acted in bad faith."** *See People v. Wyman*, 788 P.2d 1278 (Colo. 1990); *Arizona v. Youngblood*, 488 U.S. 51 (1988). The court held that although significant information was lost when the tarps were removed that might have been favorable to the defendant because it could have provided a basis for impeaching the bullet-trajectory analysis expert, the defendant did not suffer a due process violation. The defendant failed to show that the tarps were removed in bad faith. Nor did he show that there was an exculpatory value that was apparent when the tarps were removed.

D. Failure to Obtain Evidence

People v. Franklin, 782 P.2d 1202 (Colo. App. 1989). The court rejected the defendant's assertion that his due process rights were violated because of the state's failure to preserve fingerprint evidence from shell casings ejected from the murder weapon. The court recognized that the state has a duty to preserve evidence "**only if it might be expected to play a significant role in the suspect's defense**." In this case, "[t]he significance of any fingerprint evidence on the casings was not so obvious for purposes of defendant's defense as to require them to be retained and examined. . . We agree with the trial court that, even if fingerprints had been found on the casings, such evidence would not necessarily be favorable or material to defendant."

People v. Simpson, 93 P.3d 551 (Colo. App. 2003). Defendant argued that the police destroyed evidence by "failing to (1) conduct gunshot residue testing on the wall or on the victim, (2) record with measurements and pictures the exact location of the bullet holes, and (3) conduct testing that would have provided the bullets trajectories." The court stated that in order to demonstrate that the state's failure to preserve potentially exculpatory evidence violated the Due Process Clause, "a defendant must establish that (1) the evidence was destroyed by the prosecution; (2) the evidence possessed exculpatory value that was apparent before it was destroyed; and (3) the defendant was unable to obtain comparable evidence by other reasonably available means." Further, "[f]ailure to preserve useful evidence does not constitute a due process violation absent a showing of bad faith on the part of the police." The court held that the defendant failed to show bad faith or that the evidence had apparent exculpatory value.

E. Loss of Hair Sample

People v. Schrecongost, 796 P.2d 45 (Colo. App. 1990). The defendant's motion for sanctions against the prosecution for the loss of pubic hair samples in a sexual assault case was properly denied because, even if the hairs failed to show traces of the victim's menstrual blood, that fact would not necessarily exonerate the defendant. "Thus we conclude that **no apparent exculpatory**

value had attached to the hair sample prior to its loss and that the trial court properly denied the motion for sanctions."

F. Failure to Take or Preserve Notes

People v. Anderson, 837 P.2d 293 (Colo. App. 1992). The defendant's assertion that the failure of the police to take notes during certain meetings with a co-defendant constituted prosecutorial misconduct was rejected by the Court of Appeals, which reaffirmed that **there is no duty upon the prosecution to reduce oral interviews with witnesses to writing** and to provide them to defense counsel. While recognizing that "the prosecution cannot circumvent an obligation to disclose exculpatory information by deliberately avoiding taking notes or reducing statements to writing," the court concluded that, in this case, the information at issue was neither exculpatory nor inculpatory, nor was there any evidence of willful misconduct or bad faith on the part of the police.

People v. Alonzi, 580 P.2d 1263 (Colo. App. 1978). In this pre-*Greathouse* case, the Court of Appeals ruled that no sanctions were warranted for officer's destruction of field notes incorporated into formal report when there no basis to conclude that the loss of notes materially affected defendant's ability to present a defense.

People v. Erickson, 883 P.2d 511 (Colo. App. 1994). The destruction of an investigating detective's original handwritten notes of certain inculpatory statements of the defendant after the preparation of a written report did not constitute a due process violation where the detective testified that his written report precisely and accurately related the defendant's statements and there was no indication that the notes contained any exculpatory value that was apparent before they were destroyed.

Smith v. Cain, 132 S. Ct. 627 (2012). Failure to disclose handwritten notes of the detective that contained statements of a witness that conflict with his testimony at trial identifying the defendant was a due process violation. Although the Court explained that "we have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict," in this case that witness was the only evidence linking the defendant to the crime.

G. Lab Results

People v. Wartena, 156 P.3d 469 (Colo. 2007). The trial court issued an order suppressing DNA results for tests that had not yet been conducted if CBI refused to permit videotaping of the tests or the prosecution refused to pay for part of the expense for a defense expert to witness the testing. The Colorado Supreme Court stated that "[although] the court may exercise its authority over the evidence by prohibiting testing that does not comply with the procedures adopted by the court to permit independent evaluation of the evidence," "a commitment to suppress unknown results of testing that has not yet been conducted based on circumstances that might develop exceeds the court's authority and is an abuse of discretion." The court emphasized that the trial court is bound

by § 16-3-309 and must make the findings as outlined under that section. Additionally, the court indicated that the order was premature because at the time it was issued, no test had been conducted, no evidence was destroyed, no results were offered into evidence, and there was no finding by the court as to whether the evidence might be favorable to the defendant.

H. Videotaped Interviews

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). The prosecution destroyed videotaped interviews of two child sexual assault victims, related to a case that was dismissed. Years later in a subsequent sexual assault on a child prosecution, the trial court admitted 404(b) evidence related to the dismissed case. The Court of Appeals held that the defendant could not prove that the videotapes had an apparent exculpatory value when they were destroyed and could not establish any bad faith on the part of the prosecution.

People v. Casias, 59 P.3d 853 (Colo. 2002). The Court reversed the trial court suppression of any testimony related to the defendant's confession because it was inadvertently not recorded because of an equipment malfunction. Finding that the police have no duty to record statements, the Court also held that there was no destruction of evidence. It added as a matter of policy that "recording interviews is good investigative practice, and we do not wish to place officers in fear that a failed attempt to record will lead to the suppression of valuable evidence."

I. Returned Evidence

People v. Baca, 109 P.3d 1005 (Colo. App. 2005). The police released a wallet where the drugs were found and a digital scale to the defendant's wife prior to trial. The Court of Appeals upheld the trial court's ruling to allow testimony on both those items because assuming that the release of property "constitutes destruction by state action, the wallet, like the scale, was not apparently exculpatory when it was destroyed" and the "defendant made no showing of bad faith on the part of the police and thus failed to establish that he was deprived of due process."

J. Body-Worn Camera

People v. Eason, 516 P.3d 546 (Colo. App. 2022). The police could not produce a body worn camera recording because it had been inadvertently and automatically deleted from the department's digital files. The Court upheld the trial court's denial of the defendant's motion to dismiss because the defendant failed to establish that the bodycam recording had apparent exculpatory value before the police destroyed it and other evidence—the officer's written statement documenting his investigation and other witnesses' body camera footage—enabled the defendant to obtain comparable evidence. The Court of Appeals also rejected the defendant's claim that the police acted in bad faith because the prosecution provided the trial court with communications showing that the recording had been destroyed due to negligence.

12.5 REMEDIES WHERE LOSS OR DESTRUCTION OF EVIDENCE RESULTS IN A DENIAL OF DUE PROCESS

12. DESTRUCTION OF EVIDENCE

A. Applicable Rule

Crim. P. 16 Part III(g) states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems just under the circumstances.

B. Within Discretion of Trial Court

People v. Poole, 555 P.2d 980 (Colo. 1976). The power of the court to fashion remedies for the loss or destruction of evidence **must remain discretionary in order to prevent injustice or unfairness of the trial procedures.** In exercising this discretion, the court must weigh the significance of the evidence lost or destroyed and the conduct of the prosecution which led to its loss or destruction.

1. Least-restrictive sanction favored

People v. District Court, 793 P.2d 163 (Colo. 1990). "The purpose of the discovery process, including the imposition of sanctions, is to advance the search for truth. When a party violates Rule 16, we believe the court should impose the least severe sanction that will ensure that there is full compliance with the court's discovery orders." Although suppression of evidence and dismissal are among the potential sanctions available to the court, such sanctions are not favored as their results are often capricious and may produce a disproportionate windfall for the defendant.

* * *

2025 Contributions by Tanya Karimi
Deputy District Attorney
4th Judicial District

CHAPTER 13

DISCOVERY

13. DISCOVERY

13.1 INTRODUCTION

In Colorado, the prosecution has a statutory duty pursuant to **Rule 16** of the Colorado Rules of Criminal Procedure to disclose specific types of evidence to a defendant in a criminal case.

The prosecution also has a constitutional duty to disclose exculpatory, impeaching, and mitigating information under due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. *See Brady v. Maryland,* 373 U.S. 83 (1963). *See also People v. Villano,* 181 P.3d 1225 (Colo. App. 2008).

In addition, under Rule 3.8(d) of the Colorado Rules of Professional Conduct, the prosecution has an ethical duty to disclose exculpatory, mitigating, and impeaching information, as well as information that would affect a defendant's decision about whether to accept a plea disposition.

When analyzing and arguing discovery issues, the prosecutor must distinguish between types of discovery violations. A constitutional ("Brady") violation is only triggered by nondisclosure of exculpatory material and must be "material" to warrant relief. If undisclosed material is not required to be disclosed under Rule 16, relief may not be warranted. Claimed violations of C.R.P.C. 3.8(d) do not entitle a defendant to relief in a criminal case. *See* Comment 3 to C.R.P.C. 3.8.

13.2 SEVEN KEY DISCOVERY PRINCIPLES

1. Rule 16 Limits Disclosures. Rule 16 is the guide post of what and how discovery must be provided to the defense. "In general, discovery in criminal cases is governed by Crim. P. 16. This rule describes each party's obligations and imposes deadlines for disclosure of certain items and information." *People v. Jowell,* 199 P.3d 38, 41 (Colo. App. 2008). Under the Rule there are automatic and discretionary disclosures.

2. Disclosure Before Any Critical Stage. *In re Attorney C,* 47 P.3d 1167 (Colo. 2002) held that when a prosecutor is aware of *Brady* evidence before any critical stage of the proceeding, the material must be disclosed before the proceeding takes place.

3. Confrontation Does Not Guarantee Access. The confrontation clause does not guarantee access to every possible source of information relevant to cross-examination. *People v. Spykstra,* 234 P.3d 662, 670 (Colo. 2010).

4. Exculpatory, Impeaching, or Mitigating Evidence Must be Disclosed. *Brady* and its progeny require disclosure to the defendant of any information that may be exculpatory, impeaching, or mitigating. *Brady v. Maryland,* 373 U.S. 83 (1963) (mitigating and exculpatory evidence); *United States v. Bagley*, 473 U.S. 667 (1985) (impeachment evidence). However, exculpatory information need not be admitted into evidence. *People v. Austin,* 523 P.2d 989 (Colo. 1974).

5. Information Must Be Constitutionally Material. For a violation of constitutional due process rights, the item must be material. "The specific test for materiality is whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *In re Attorney C*., 47 P.3d 1167, 1170 (Colo. 2002) (quoting *Kyles v. Whitley,* 514 U.S. 419 (1995)).

6. Rule 16 Exceeds *Brady*. "By providing additional means for disclosure, Colorado's rules of criminal procedure to some extent compensate for the limitations on the protections afforded criminal defendants under the *Brady* doctrine." *People v. District Court of El Paso County,* 790 P.2d 332, 338 (Colo. 1990).

Practice Tip: The constitutional disclosure requirements articulated in *Brady* are specifically set forth in Crim. P. 16(I)(a)(2).

7. No General Constitutional Right to Discovery. "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987); *People v. Baltazar,* 241 P.3d 941(Colo. 2010); *People v. Spykstra,* 234 P.3d 662, 670 (Colo. 2010); *People v. District Court of El Paso County,* 790 P.2d 332, 338 (Colo. 1990).

13.3 ANALYTICAL FRAMEWORK

1. Was there a discovery violation? Crim. P. 16. and *Brady*.

Look to Rule 16, *Brady*, and Court's discretionary orders in the case to determine if there was a discovery violation.

2. Possible Sanctions: Crim. P. 16(III)(g).

- Permit discovery or inspection;
- Grant a continuance;
- Prohibit a party from introducing the material not disclosed; or
- Such other order as the court deems just under the circumstances

3. Factors to be Considered:

- reasons for delay in providing discovery;
- prejudice;
- feasibility of curing such prejudice by way of a continuance or recess in situations where the jury has been sworn and the trial has begun.

People v. Lee, 18 P.3d 192 (Colo. 2001).

4. Least-Severe Sanction

A court should utilize the least severe sanction in light of the goals of discovery sanctions and the factors to be considered. *Lee,* 18 P.3d 192, 196 (Colo. 2001).

5. Dismissal as a Remedy

Dismissal is a drastic remedy to be reserved for situations where no other sanction would attain the proper result. *People v. Holloway,* 649 P.2d 318, 230 (Colo. 1982).

13.4 COLORADO AND FEDERAL CONSTITUTIONAL STANDARDS

A. Exculpatory Evidence Withheld from the Defense: The "*Brady* Doctrine"

Brady v. Maryland, 373 U.S. 83 (1963). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

1. Impeachment evidence is exculpatory

Giglio v. U.S., 405 U.S. 150 (1972). Failure to disclose impeachment evidence, including promises made to key government witness, is a violation of the defendant's due process rights.

United States v. Bagley, 473 U.S. 667, 676 (1985). "In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. **Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule**. Such evidence is evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."

B. The Prosecutor's Constitutional Duty to Disclose: Materiality of the Information

United States v. Bagley, 473 U.S. 667 (1985). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Strickler v. Greene, 527 U.S. 263, 281 (1999). "Strictly speaking, there is never a real *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Here, "reasonable *possibility*" of different result was insufficient to meet the standard of materiality.

The Colorado Supreme Court adopted *Bagley's* materiality standard in *People v. District Court (El Paso),* 790 P.2d 332 (Colo. 1990).

Practice Tip: CRPC 3.8(d) specifically imposes an ethical duty to disclose exculpatory information regardless of materiality, but materiality still governs the availability of a remedy in the criminal case. ***But see*** *People v. Terry,* 720 P.2d 125 (Colo. 1986), the Colorado Supreme

Court suggested the prosecutor had acted unethically by not disclosing her awareness of false testimony, even though the testimony was likely not material.

C. Role of the Court

Pennsylvania v. Ritchie, 480 U.S. 39, 41 (1987). The Supreme Court recognized that "a defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [State's] files," and that the Court had never held that "a defendant alone may make the determination as to the materiality of the information." The Court acknowledged that in the typical case when a general request for *Brady* material is made, the prosecution makes the final determination as to what information must be disclosed. However, should the defense become aware that other exculpatory evidence is being withheld, the ultimate decision regarding the propriety of withholding the information must be made by the trial court. "We find that [the defendant's] interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the [Child and Youth Services] files be submitted only to the trial court for *in camera* review. Although this rule denies [the defendant] the benefits of an 'advocate's eye,' we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file . . . he is free to request it directly from the court, and argue in favor of its materiality." *See also People v. District Court (El Paso),* 790 P.2d 332 (Colo. 1990).

D. Illustrative Cases: Exculpatory information Required to be Disclosed

1. False testimony

Deluzio v. People, 494 P.2d 589 (Colo. 1972). Co-defendants received plea bargains based upon their testimony against the defendant, but testified in trial that they had not received any plea bargain for their cooperation.

2. Alternate suspect evidence

People v. Bueno, 409 P.3d 320 (Colo. 2018). To make a discovery violation claim under *Brady v. Maryland*, 373 U.S. 83 (1963), the defendant must show that the prosecution suppressed material evidence that is exculpatory or favorable to him. Here, in a prison murder case, the prosecution violated *Brady* by not turning over to the defense two investigative reports the prosecution possessed shortly after the crime that could have supported an alternate suspect defense. It did not matter that the reports were contained among large numbers of prison incident reports to which the defense was given access.

E. Illustrative Cases: Immaterial information not Required to be Disclosed

People v. Deninger, 772 P.2d 674 (Colo. App. 1989). The failure of the prosecution to reveal that the victim had retained counsel to represent her in a civil suit against the defendant did not constitute a denial of due process.

13. DISCOVERY

People v. Doss, 782 P.2d 1198 (Colo. App. 1989). Failure to disclose that the child sexual assault victim was participating in on-going treatment with a therapist did not constitute a denial of due process.

People v. Flynn, 456 P.3d 75 (Colo. App. 2019). No *Brady* violation found when detective testified at trial about observations that were not included in the written disclosed police report.

13.5 GENERAL DISCLOSURE REQUIREMENTS: RULE 16

Although Rule 16 provides for broad discovery, including discretionary disclosure of relevant material under Part I(d), the rights and duties of discovery are nevertheless defined and limited by the rule. *See Roybal v. People, 493 P.2d 9 (Colo. 1972)* (discovery "was unknown under the common law" and there is "no inherent judicial discretion to permit unlimited discovery").

A. Prosecution's Disclosure Requirements

Crim. P. 16 provides the defendant with three potential means for obtaining disclosure from the prosecution:

(1) **automatic disclosures** pursuant to Crim. P. 16(I)(a)(1);

(2) ***Brady*** **disclosures** pursuant to Crim. P. 16(I)(a)(2); and

(3) **discretionary disclosures** pursuant to Crim. P. 16(I)(d)(1).

"Coupled with the provisions of Crim. P. 16(I)(e)(1) for protecting **attorney work product** and excising it from discoverable material, the rules provide an efficient roadmap for identifying the materials that must be disclosed to the defense." *See People v. District Court (El Paso), 790 P.2d 332 (Colo. 1990)*.

1. Automatic Disclosures

Crim. P. 16(I)(a)(1) requires automatic disclosure to the defense of the following 8 types of evidence:

1) police, arrest and crime or offense reports, including **statements** of all witnesses.

People v. District Court (El Paso), 790 P.2d 332 (Colo. 1990). "The scope of the rule clearly encompasses witness statements in or associated with police reports, arrest reports, crime reports and offense reports. Witness statements included in a prosecutor's notes fall outside the specifically enumerated categories, and thus are not automatically discoverable under Crim. P. 16(I)(a)(1). Such statements, however, may be discoverable under Crim. P. 16(I)(a)(2) or Crim. P. 16(I)(d)(1)."

People v. Montalvo-Lopez, 215 P.3d 1139 (Colo. App. 2008). Co-defendant gave a statement to the DEA regarding defendant's involvement in the case. No copy of the

statement was provided to defense counsel. The prosecution used the statements during the direct examination of the co-defendant and to impeach the co-defendant with a prior inconsistent statement. The Court of Appeals would not decide on the issue of whether Crim. P. 16(I)(a)(1)(I) imposes a duty to disclose witness statement given to another governmental authority. The Court held that "any error in not disclosing the statement was harmless because defendant knew of the statement and its contents but failed to request it."

People v. Alberico, 817 P.2d 573 (Colo. App. 1991). The Court of Appeals affirmed the dismissal of charges against the defendant because of failure of the prosecution to disclose copies of statements taken by the prosecutor's investigator of the victim and two defense witnesses. While acknowledging the exemption from automatic disclosure of statements in an attorney's work product, the Court of Appeals distinguished statements contained in an investigator's notes, stating that "a statement of a witness, whether such witness has been endorsed by the People or by the defense, which is summarized in an investigative report is not outside the scope of the automatic discovery requirement of Crim. P. 16(I)(a) (1)."

People v. Lafferty, 9 P.3d 1132 (Colo. App. 1999). In a second-degree assault case, the prosecution inadvertently failed to disclose a page of the investigator's report which contained the victim's statement, "[Defendant] didn't hit me that hard." Defense counsel noticed during the investigator's examination that a page was missing and asked for a mistrial. The trial court denied the motion, but allowed defendant to recall any prosecution witness or any unendorsed witness. The remedy was sufficient.

People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009). The trial court ruled that the prosecution was not required to disclose notes made by its investigator at an interview with defendant's expert. The Court of Appeals held that if there was any error it was harmless.

People v. Knight, 167 P.3d 147 (Colo. App. 2006). The prosecution introduced the testimony of a police officer who responded to the scene. The officer testified that he saw the victim "who appeared to be deceased . . . twitch." This statement was not contained in the officer's report that was properly disclosed to defense. The Court of Appeals held that the "prosecution was not required to reduce the officer's oral statement to writing or furnish the substance of her anticipated testimony. Because the officer's statement was not exculpatory, disclosure was not required under Crim P. 16(I)(a)(2)."

People v. Denton, 91 P.3d 388 (Colo. App. 2003). "Crim. P. 16(I)(a)(1)(I) only requires the prosecution to provide the defense with the written statements of witnesses or any written reports that quote or summarize oral statements made by witnesses." **The prosecution has no obligation to reduce oral statements to writing and provide them to defense counsel**. In this case, statements of the victim made to a police officer and to the prosecutor were not exculpatory and nothing in the record suggested that the prosecutor or police deliberately refrained from reducing the victim's statements to writing in order

to avoid a discovery obligation; therefore, the trial court did not err in finding that the prosecution had not committed a discovery violation. *See also People v. Anderson, 837 P.2d 293 (Colo. App. 1992)*.

People v. Vlassis, 247 P.3d 196 (Colo. 2011). Witness statements contained in prosecutor's work product are not automatically discoverable under Crim. P. 16(I)(a)(1)(I). Witness statements in prosecutor's work product which are also exculpatory are, however, automatically discoverable under Crim P. 16 (I)(a)(2).

2) grand jury transcripts and tangible evidence presented to the grand jury.

3) reports or statements of experts made in connection with the case, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons.

No disclosure of a report is required if no report exists, though a court may order an expert to prepare a report as a discretionary disclosure. *See People v. Brown*, 313 P.3d 608 (Colo. App. 2011). Best practice is to designate witnesses as experts in witness endorsements to enable the defense to request discretionary disclosures, but this is not specifically required by Rule 16. *People v. Greer,* 262 P.3d 920 (Colo. App. 2011).

People v. Evans, 886 P.2d 288 (Colo. App. 1994). The Court of Appeals recognized that, while Crim. P. 16(I)(a)(1)(III) requires the prosecution to make available to the defense any reports or statements of expert witnesses along with the results of any scientific testing, the additional requirement to automatically provide the actual readouts of the instruments used to reach the test results is not mandated by the rule. (e.g. "litigation packets"; but could be ordered as discretionary disclosures).

4) any books, papers, documents, photographs or tangible objects held as evidence in connection with the case.

5) records of prior criminal convictions of the defendant, any co-defendant, and any person the prosecution intends to call as a witness in the case.

People v. Fox, 862 P.2d 1000 (Colo. App. 1993). Although Crim. P. 16(I)(a)(1)(V) requires the prosecution to disclose to the defense the criminal history of "any person" to be called as a prosecution witness, the provision **does not automatically apply to law enforcement officers.** "Because police officers cannot, pursuant to statute, be qualified for their positions if they have criminal histories that could be used for impeachment purposes pursuant to Rule 16 [i.e. felony convictions and crimes of moral turpitude], the trial court did not err in declining to order the prosecution to obtain and disclose the criminal histories of the police officer witnesses. However, we approve of the trial court's order requiring the prosecution to disclose any criminal history of a police officer witness if it is aware of or becomes aware of any evidence that such a history exists."

People v. Carlson, 72 P.3d 411 (Colo. App. 2003). The prosecution has no responsibility under Crim. P. 16(I)(a)(1)(V) to provide defendant with the criminal history of a defense witness.

People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). The Court held that the prosecution violated Crim. P. 16 by failing to disclose the pending juvenile robbery case of a prosecution witness before he testified. "Neither pending criminal charges nor prior juvenile adjudications can be used for general impeachment purposes. But this general rule does not prohibit cross- examination as to bias, prejudice, motivation for testifying, or the hope for leniency with respect to pending juvenile proceedings as consideration for testifying."

People v. Corson, 379 P.3d 288 (Colo. 2016). Crim. P. 16 does not require prosecutors to disclose juvenile adjudications for witnesses. Juvenile adjudications are not subject to automatic disclosure discovery rules because they are not criminal convictions. However, *Brady* still applies, so if it could be used as impeachment, it must provided in discovery.

6) tapes and transcripts of any electronic surveillance of conversations involving the defendant, any co-defendant, or any witness in the case.

7) written list of names and addresses of witnesses known to the prosecution and whom the prosecution intends to call at trial.

"However, the prosecution may call witnesses, without prior notification, whose names or the materiality of whose testimony are [sic] first learned by the district attorney upon the trial." *People v. Jowell,* 199 P.3d 38 (Colo. App. 2008) (quoting §16-5-203).

People v. Avila, 944 P.2d 673 (Colo. App. 1997). Holding the trial court properly allowed the prosecution to call an undisclosed expert to testify on rebuttal because the "necessity of calling the witness was not known to the prosecution until mid-trial.

People v. Thurman, 787 P.2d 646 (Colo. 1990). Whether to order disclosure of a testifying witness's address and place of employment, notwithstanding the witness's fears for her safety, is a matter within the discretion of the court. The Colorado Supreme Court recognized that "a witness's assertion of concern for personal safety does not have a talismanic quality automatically giving the witness the right to withhold information about identity, address, and place of employment." Rather, **the prosecution is obligated to offer an explanation when it objects to divulgence of information about the witness**. "The prosecution's showing must consist of more than the mere expression of apprehension by a witness who is reluctant to divulge her identity, address or place of employment. Ideally, the witness or the prosecution will provide the trial court, outside the presence of the jury, with a factual basis for the witness' apprehension . . . such as evidence of an actual threat to the witness. **At a minimum, however, the danger claimed by the witness must in**

some way relate to the particular defendant. There must be a nexus such that the witness legitimately fears reprisal from the defendant or his associates."

People v. Turley, 870 P.2d 498 (Colo. App. 1993). No abuse of discretion in refusing to require sexual assault victim to reveal her current address where defendant had expressly threatened victim and her family **during the course of the criminal episode**, defendant was aware of victim's previous address and place of employment, and witness had been made available to defense for interview prior to trial.

People v. District Court (Denver), 933 P.2d 22 (Colo. 1997). The district **court abused its discretion** in ordering the disclosure of the **current addresses and phone numbers of witnesses placed in witness protection**. While the defendant's right to confrontation includes the right to obtain information necessary to place witnesses in their proper setting, under the circumstances of this case that interest is outweighed by the witnesses' right to personal safety. "Here, the threat to the witnesses' safety is emphasized by the fact that the State found it necessary to place them under witness protection and the district court found it necessary to delay disclosure of the witnesses' identities until they had been placed under witness protection. Moreover, it is important in this case that the defendants' right of confrontation has been accommodated because the prosecution has made the witnesses' former addresses and telephone numbers available to the defendants, thereby making the current addresses and telephone numbers unnecessary."

People v. Joyce, 878 P.2d 48 (Colo. App. 1994). In holding the "personal safety exception" applicable to a witness who refused to divulge her current address because of safety concerns arising from an **unrelated homicide prosecution that was pending in another courtroom** in which she was a witness, the Court of Appeals acknowledged the general rule that the threat to a witness' safety must in some way relate to the particular defendant. "Nevertheless, the *Thurman* holding does not exclude from the personal safety exception **a genuine threat relating to another trial that is being conducted in the same courthouse contemporaneously with the trial in question**," particularly where the witness's current address was not sufficiently material as to prejudice the defendant's presentation of a defense.

People v. Ray, 252 P.3d 1042 (Colo. 2011). The Colorado Supreme Court held that a "personal safety exception" to the defendant's right to confront a witness exists in Colorado. The exception requires the prosecution to show that the witness's safety would be endangered by disclosure and, at a minimum, there is a nexus between the defendant and the perceived danger. The defendant must show some materiality. The trial court must balance the threat to witness safety against the materiality of the witness's information. A key consideration is whether the defendant at a hearing will have an opportunity to place the witness in his proper setting without learning his address. [The defendant] had been convicted and sentenced to death for the murder of a witness and his fiancée. This, along

with other general threats to witnesses by the defendant "created a unique, extraordinary threat and risk to witness safety." The Court held that the trial court abused its discretion in requiring disclosure of witnesses' addresses.

8) any written or recorded statements of the accused or of a co-defendant, and the substance of any oral statements made to the police or prosecution by the accused or by a co-defendant, if the trial is to be a joint one.

People v. McKnight, 626 P.2d 678 (Colo. 1981). The trial court erroneously admitted into evidence an oral statement made by the defendant to an officer, where the statement had not been provided to the defense pursuant to its request for discovery. Although the trial court ruled that disclosure was not required since the statement was not directly relevant to the charge for which the defendant was on trial, the Colorado Supreme Court emphasized that "Rule 16 requires that *every* statement made by the accused which is in the possession or control of the district attorney and which relates in any way to the series of events from which the charges pending against the accused arose must be disclosed to the defense . . . ."

People v. Grant, 492 P.3d 345 (Colo. App. 2021). Rule 16 also requires disclosure of the defendant's statements to law enforcement agencies from other jurisdictions involved in the investigation of a case.

2. Timing of disclosures

The performance of the prosecution's discovery obligations are regulated by Crim. P. 16(I)(b), which specifies the time in which disclosure of each category of information must be accomplished. Crim. P. 16(I)(b)(4) also requires the prosecution to ensure that a flow of information is maintained between the various investigative agencies and the district attorney's office sufficient to place the prosecution in possession or control of all material and information relevant to the accused and the offense charged.

People v. Walthour, 537 P.3d 371 (Colo. 2023). A trial court has no authority to alter the deadlines established by Crim. P. 16 absent good cause. Here, the court had no authority to order the prosecution to disclose a report of blood test results before the testing had been completed by the laboratory and before the pretrial deadline established by Crim. P. 16. *In re Attorney C*, 47 P.3d 1167 (Colo. 2002): Prosecution has an ethical responsibility to produce exculpatory information in a "timely" fashion before critical proceedings. This is true even if the exculpatory information is not directly relevant to the critical proceeding. *People v. Adams County Court*, 767 P.2d 802 (Colo. App. 1988).

People v. Rodriguez, 786 P.2d 1079 (Colo. 1989). The prosecution has a continuing duty to disclose exculpatory material, **even after trial and sentence**.

People v. Robles, 302 P.3d 269 (Colo. App. 2011). Timeliness is flexible enough to account for witness safety concerns. A prosecution witness who had previously fled was located and interviewed by an investigator with the district attorney's office slightly less than thirty days prior to trial. During the interview, the witness disclosed personal safety concerns related to the defendant. The prosecution did not disclose to the defense that the witness had been located and interviewed until nine days later. When the defense received the eventual disclosure it was roughly two weeks prior to the trial date. The Court of Appeals held that the prosecution did not violate any provision of Crim. P. 16 because the delayed disclosure was justified for witness safety reasons and thus, the disclosure was made "as soon as practicable" in compliance with Crim. P. 16. Further, the Court noted the defense failed to show any justification for not making an attempt to contact the witness in the two weeks prior to trial.

A represented defendant does not have the right to review discovery obtained by his counsel. *People v. Krueger,* 296 P.3d 294 (Colo. App. 2012).

3. Discretionary disclosures

In addition to the material automatically discoverable under Crim. P. 16(I)(a), Colorado courts also have discretion pursuant to Crim. P. 16(I)(d) to order disclosure to the defense of "relevant material and information not covered by Parts I(a), (b), and (c), upon a showing by the defense that the request is reasonable."

People v. District Court (El Paso), 790 P.2d 332 (Colo. 1990). "Crim. P. 16(I)(d)(1) is not intended to afford an accused an additional opportunity to pursue material which could not be discovered under Crim. P. 16(I)(a)(1) or (a)(2) . . . . [The rule] further requires a showing by the defense that its request is reasonable, including a showing that the material or information sought is unavailable from any source other than the prosecution. Final determination of the reasonableness of the request, as of the relevance of the material sought, rests in the discretion of the trial court."

a. Discretionary disclosure prior to the preliminary hearing

People v. Adams County Court, 767 P.2d 802 (Colo. App. 1988). "The county court may only require disclosure of materials, pursuant to Crim. P. 16 Part I(d) if those materials are relevant to the preliminary hearing. The sole issue at the preliminary hearing is whether probable cause exists to believe that the defendant committed the crime charged. Thus, before the preliminary hearing, the county court may order discovery of discretionary materials only insofar as they are relevant to that issue."

13.6 LIMITATIONS ON DISCOVERY; PRIVILEGED OR CONFIDENTIAL INFORMATION

A. Motion to Quash Subpoena

13. DISCOVERY

By the express terms of Crim. P. 16, the prosecution's discovery obligations are applicable to material and information **"in the possession or control"** of the prosecuting attorney and agents of the prosecuting attorney who have participated in the investigation or evaluation of a criminal case. Crim. P. 16(I)(a)(3).

Crim. P. 16(I)(b)(4). The prosecution must ensure that a flow of information is maintained between the various investigative personnel associated with a case and the office of the District Attorney sufficient to place within the prosecution's possession or control all material and information relevant to the accused and the offense charged.

Crim. P. 16(I)(c). The prosecution must use "diligent good faith efforts" to make discoverable material within the possession or control of other governmental agencies available to the defense.

However, information and materials that are not within the possession or control of the prosecution, as defined by Rule 16, are accessible to the defense, if at all, only through mechanisms other than those provided within Rule 16. The primary means by which such access is sought is through the use of subpoenas to produce that are served directly upon the party possessing the desired material. *See* Crim. P. 17.

In some instances, subpoenaed materials may be the subject of an *in camera* judicial review to resolve preliminary issues regarding relevancy, confidentiality and waiver. In other instances, a court may lack the authority to undertake even this preliminary inquiry. The extent to which such judicial inquiry is permissible is defined by the nature and scope of the applicable privilege and the presence or absence of any statutory or common law exceptions to that privilege.

People v. Spykstra, 234 P.2d 662 (Colo. 2010). In a sexual assault against a child case, the defendant issued a *subpoena duces tecum*, pursuant to Crim. P. 17(c), to the victim's parents to produce every electronic device in the home. The prosecution moved to quash the subpoena as unduly burdensome and oppressive fishing expedition. The court held that the prosecution has standing and held that when challenged the defendant must demonstrate:

- A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
- That the materials are evidentiary and relevant;
- That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
- That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
- That the application is made in good faith and is not intended as a general fishing expedition.

Zoll v. People, 425 P.3d 1120 (Colo. 2018). The Supreme Court held that when an appellate court determines that the trial court erred in failing to disclose certain documents from a file reviewed *in camera*, the proper remedy is to remand the case to the trial court with instructions to provide the improperly withheld documents to the parties and to afford the defendant an opportunity to demonstrate that there is a reasonable probability that, had the documents been disclosed before trial, the result of the proceeding would have been different. *See also People v. Lowe*, 486 P.3d 397 (Colo. App. 2020).

People v. James, 5 P.3d 328 (Colo. App. 2000). Defendant was charged with 27 felonies including violation of the Colorado Organized Crime Control Act, a charge alleging, *inter alia,* that defendant was a member of the "Bloods" gang. Defendant subpoenaed the Denver Police Department's **gang files** for the Bloods, and the trial court denied defendant access to the files. The Court of Appeals upheld the trial court's ruling, finding the "subpoenaed records were and still are subject to a statutory confidentiality exception to the Public Records Act, §§ 24-72-204(2)(a)(I) and 24-72-305(5). The prosecution has no greater knowledge of the contents of the files than does defense counsel."

B. General Limitations on Discovery

A court has no authority to order discovery beyond what is contemplated by Crim. P. 16. *People v. Kilgore*, 455 P.3d 746 (Colo. 2020).

People In the Interest of E.G., 368 P.3d 946 (Colo. 2016). A defendant has no right to access a third party's property. The analysis might be different if the property is still in the possession or control of law enforcement. *See People v. Chavez, 368 P.3d 943, (Colo. 2016)*

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). Witnesses cannot be ordered to speak with counsel. The Court of Appeals held that the trial court properly denied the defendant's request for an order compelling the prosecution to instruct law enforcement witnesses to speak with defense counsel. While Crim. P. 16(III)(a) states that neither party shall advise any witness to refrain from speaking with opposing counsel or impede the investigation of a case, and while the trial court acted within its discretion in directing the prosecution to advise its witnesses of the elements of the rule, the Court concluded that a trial court **does not have the authority to compel witnesses to speak with opposing counsel except pursuant to the provisions of Crim. P. 15** governing depositions. Likewise, the trial court properly refused to order the law enforcement officers to submit to depositions where the defendant did not allege that any of the witnesses would be unavailable at trial. Depositions in criminal proceedings are strictly governed by the provisions of Crim. P. 15, which requires a showing by affidavit that a witness may be unable to attend a proceeding and a deposition is necessary to prevent injustice. "Because there was no showing that the prospective witnesses would be unavailable at trial, we conclude that the trial court did not err in denying defendant's motion for expanded discovery in the form of depositions." *See People v. Arellano-Avila,* 20 P.3d 1191 (Colo. 2001) (holding that Crim. P. 15 does not permit trial court to order depositions of foreign citizens residing in foreign nations).

People v. Roy, 948 P.2d 99 (Colo. App. 1997). The trial court did not err by denying defendant's motion filed pursuant to Crim. P. 41.1 for a fingerprint analysis. Under the discovery rules, defendant could have had his expert take fingerprints from the plastic bag seized to compare with defendant's fingerprints; defendant did not do this, nor did he seek an order to provide the services of a fingerprint expert at state expense. *See also People v. Williams*, 446 P.3d 944 (Colo. App. 2019).

C. Internal Affairs and Grievance Files

People v. Walker, 666 P.2d 113 (Colo. 1983). Internal affairs files must be reviewed *in camera* upon motion by the defendant. In a case in which the defendant was charged with assaulting a police officer, the court held that "all complaints of brutality, excessive use of force, dishonesty or untruthfulness . . . [and] evidence probative of the officer's propensity towards misconduct" must be produced whether the complaint was sustained or not. *See also Martinelli v. District Court,* 612 P.2d 1083 (Colo. 1980).

People v. Blackmon, 20 P.3d 1215 (Colo. App. 2000). A defendant must show how the requested police files and reports are relevant to the case before the trial court is required to conduct an *in camera* review. Defendant broadly requested all documents for the prior three years "bearing on truthfulness and complaints of use of excessive force" related to one arresting officer. The trial court properly quashed the subpoena because, other than "bare allegations" that the documents would relate to the officer's credibility, defendant failed to show how the documents would assist in his defense, the "preliminary threshold" for *in camera* review. *People v. Pacheco,* 618 P.2d 1102 (Colo. 1980). The prosecution may obtain disclosure of grievance committee files where the request for access was carefully tailored to meet the specific needs of the investigation into the criminal conduct of an attorney.

D. Attorney Work Product

Crim. P. 16(I)(e)(1) exempts from disclosure legal research, records, correspondence, reports, or memoranda to the extent such materials contain the opinions, theories, or conclusions of the prosecuting attorney or members of the prosecution's staff.

People v. District Court (El Paso), 790 P.2d 332 (Colo. 1990). "Although under Crim. P. 16(I)(e)(1), the work product of the prosecuting attorney or members of his legal staff is not discoverable, **the rule does not operate to shield the entire contents of affected material**. 'When some parts of certain material are discoverable under the provisions of [the Colorado Rules of Criminal Procedure], and other parts are not discoverable, **the non-discoverable material may be excised** and the remainder made available in accordance with the applicable provisions of these rules.' Crim. P. 16(III)(e). Excision may be made in the first instance by the disclosing party, but the ultimate decision on the propriety of withholding excised information in the event of controversy must be made by the trial court."

People v. Ullery, 984 P.2d 586 (Colo. 1999). Defendant's assertion of impaired mental condition waives physician/psychologist-patient privilege but does not permit such broad discovery that it includes attorney work product, and discussing procedures to excise attorney work product from material sought in discovery.

People v. Trujillo, 15 P.3d 1104 (Colo. App. 2000) (*rev'd on other grounds*). Prosecution's *voir dire* notes are attorney work product and not discoverable.

People v. Vlassis, 247 P.3d 196 (Colo. 2011). "Witness statements included in a prosecutor's notes fall outside the specifically enumerated categories, and thus are not automatically discoverable under Crim. P. 16(I)(a)(1)." The rationale for the holding is that prosecutor's notes are normally non-discoverable work product. The Colorado Supreme Court found that only exculpatory information contained in prosecutor's work product is automatically discoverable consistent with Crim. P. 16(I)(a)(2).

People v. Angel, 277 P.3d 231 (Colo. 2012). The Court considered if the District Attorney investigation of an officer involved shooting is discoverable in the defendant's related eluding case. In Colorado, "[t]he work product doctrine, although most frequently asserted as a bar to discovery in civil litigation, *applies with equal, if not greater, force in criminal prosecutions.*" Furthermore, the Court held that to require work product to be discovered would violate the private sphere within which a prosecutor's office may validly exercise its constitutionally mandated prosecutorial discretion. The effect would dilute the extent to which such documents reflect a candid and thorough review of the full range of considerations that must be evaluated by the prosecutor before deciding whether to charge a person with a crime and would a prosecutor would therefore be less likely to memorialize her legal analysis and impressions of a case for fear that it might be discoverable in a different prosecution.

E. Disclosure of Confidential Informants

Crim. P. 16(I)(e)(2) provides: "Disclosure shall not be required of an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial."

1. General Rule: Qualified Privilege

People v. District Court (Jefferson), 767 P.2d 1208 (Colo. 1989). "The government has a qualified privilege to choose not to disclose the identity of a confidential informant. While a defendant generally does not have a constitutional right to learn the identity of a confidential informant, 'considerations of fundamental fairness sometimes require that the identity of such an informant be revealed' [citing *Roviaro v. United States,* 353 U.S. 53 (1957)]. The standard described by the United States Supreme Court is this: 'Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.' Therefore, **if a defendant has**

established that learning the informant's identity, or the contents of the informant's communication, is either relevant and helpful to his defense or 'essential to a fair determination of a cause,' then a trial court can order disclosure." *See also People v. Dailey,* 639 P.2d 1068 (Colo. 1982).

People v. Vigil, 729 P.2d 360 (Colo. 1986). "A defendant is not entitled to the disclosure of an informant based on the bare assertion that his defense requires it. . . Therefore, **disclosure of a confidential informant may be ordered only where the defendant has established a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused.**"

People v. District Court (Jefferson), 767 P.2d 1208 (Colo. 1989). The mere involvement of an informant does not of itself justify the compelled disclosure of his identity. Rather, "disclosure is required if the facts establish that the informant 'was so closely related' to the defendant as to make the informant's highly material."

2. Balancing test required

People v. Walters, 768 P.2d 1230 (Colo. 1989). In reviewing the district court's dismissal of charges against the defendant because of the prosecution's failure to comply with its order to disclose the identity of a confidential informant, the Colorado Supreme Court recognized that, should the defendant meet the initial burden of showing a need for the information, "the court must decide whether the privilege applies by **balancing** the 'public's interest in protecting the flow of information to law enforcement authorities about criminal activity with the defendant's need to obtain evidence for the preparation of a defense.'" In reversing the order of dismissal, however, the Court held that the defendant failed to make even a minimal showing of a reasonable basis in fact to believe the informant was a likely source of relevant and helpful evidence: "All of the evidence indicated that the informant had merely relayed information to officials, which proved accurate and resulted in defendant's arrest. **When all the evidence discloses is that the informant was an informant and nothing more, the prosecution should not, as a general rule, be required to reveal his identity**."

People v. Marquez, 546 P.2d 482 (Colo. 1976). Among the factors to be considered in the balancing process are "whether the informant was an **eyewitness and ear witness** to the criminal transaction and whether the informer himself is available or could, in the exercise of reasonable diligence, be made available; whether **other witnesses to the transactions are in a position to testify**; the **likelihood that testimony of the informer will vary significantly from that of other available or potentially available witnesses**; whether the **defendant himself knows the identity of the informant** or could without undue effort discover his identity; [and] whether the informant was **deeply or only peripherally involved** in the criminal transaction."

People v. Siegl, 914 P.2d 511 (Colo. App. 1996). The trial court properly denied defendant access to an anonymous informant, whom defendant characterized as the eyewitness to a crime, because

once the informant's tip was corroborated, the informant's existence became irrelevant. "By corroborating the information, the People did not rely on the informant's unestablished credibility. And, the evidence resulting from the search speaks for itself."

People v. District Court (Jefferson), 767 P.2d 1208 (Colo. 1989). "No single factor should be considered a threshold requirement or determinative of disclosure or non-disclosure."

3. Illustrative cases

People v. Garcia, 752 P.2d 570 (Colo. 1988). In rejecting the defendant's assertion that the informant did not give the police the information on which they relied for probable cause to arrest, the Colorado Supreme Court acknowledged that a judge who has doubts about the credibility of an informant may require that the informant be identified or produced. However, the defendant is required to make an initial showing that the informant will provide information essential to the merits of the suppression ruling: "To make this showing, **the defendant must establish a reasonable basis in fact to believe one of two things: either that the informant does not exist, or that the informant did not give the police the information on which they purportedly relied as probable cause for the arrest or search**."

Compare with *People v. Dailey,* 639 P.2d 1068 (Colo. 1982). The district court acted within its discretion in ordering disclosure of informant's identity where the defendant needed to inquire of the informant in order to meet the burden of showing that an error in the affidavit for a search warrant was caused by the affiant's perjury or reckless disregard for the truth.

People v. Villanueva, 767 P.2d 1219 (Colo. 1989). The district court abused its discretion in ordering disclosure of the identities of informants who directed police to a residence that was being used to store and sell stolen merchandise. Even though the defense established that the informants would provide relevant and helpful evidence, there was no indication that the informants were eye or ear witnesses to the crimes charged, and there was no indication of bad faith on the part of police regarding their inability to locate the informants.

F. Privilege for Medical Psychological Records

Section 13-90-107 recognizes particular relations in which "it is the policy of the law to encourage confidence and to preserve it inviolate." The statute accordingly creates a privilege for information provided to a **physician, surgeon, or registered professional nurse** by a patient, § 13-90-107(1)(d), or to a **licensed psychologist, professional counselor, marriage and family therapist, social worker, unlicensed psychotherapist, or licensed addiction counselor** by a client during the course of a professional relationship. § 13-90-107(1)(g).

1. Privileges are absolute

People v. Marquez, 692 P.2d 1089 (Colo. 1984) (*rev'd on other grounds*). Physician-patient privilege, which applies to "observations resulting from examination" and actual communications, is statutory privilege and should be construed narrowly.

People v. Sisneros, 55 P.3d 797 (Colo. 2002). "Once it attaches, the psychologist-patient privilege protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment. Once the privilege has attached, the Defendant may not compel discovery unless it is waived." An evidentiary showing of waiver is required before the trial court may order the documents be produced for an *in camera* review.

Clark v. District Court, 668 P.2d 3 (Colo. 1983). In construing § 13-90-107(1), the Colorado Supreme Court recognized that the physician- patient and psychologist-client privileges prohibit not only testimonial disclosures in court but also **pretrial discovery of information** within the scope of the privileges. The Court further rejected the district court's conclusion that the privileges are merely qualified in nature such as to permit a court to resolve a claim of privilege by balancing a party's need to obtain information essential to a claim or defense with the privilege holder's interest in preserving the confidentiality of the information requested. "There being no statutory language conditioning the applicability of the physician-patient and psychologist-client privileges to a judicial balancing of interests, we decline to engraft one onto the statute. **Once these privileges attach, therefore, the only basis for authorizing a disclosure of the confidential information is an express or implied waiver**."

People v. District Court (Denver), 719 P.2d 722 (Colo. 1986). Specifically rejecting application of a balancing test.

People v. Overton, 759 P.2d 772 (Colo. App. 1988). The trial court was neither authorized nor required to balance defendant's need for information with patient's interest in preserving confidentiality of records.

People v. Moore, 860 P.2d 549 (Colo. App. 1993) (*rev'd on other ground*). Where victim's post-assault mental condition is not critical to claim or affirmative defense, defendant has no right to review her post- assault psychotherapy records.

People v. Tauer, 847 P.2d 259 (Colo. App. 1993). In a sexual assault prosecution where the defense sought discovery of psychotherapy records relating to pre-assault therapy sessions where the victim made allegations of sexual assault and later recanted the allegations, the Court of Appeals reaffirmed that the psychologist-client privilege remains applicable unless waived by the patient and held that "there is no meaningful distinction between privileged communications taking place before an alleged assault and those taking place after an alleged assault." The court also recognized that, even though the police obtained information regarding the prior therapy from the victim's therapist in apparent violation of the privilege, "the holder of the privilege should not suffer the consequences of either an accidental or intentional revelation of privileged matters by the treating professional."

2. Waiver of privilege

People v. Covington, 19 P.3d 15 (Colo. 2001). The case involved **photographs** of the victim's gunshot wound to the groin area that were **taken by a physician's assistant** for purposes of treating the victim. The court found the photographs fell within the physician-patient privilege, then considered whether the privilege was waived. The presence of a police officer in the emergency room did not waive the privilege where the record did not clarify whether the victim consented to the taking of the photographs or even knew the photographs were being taken. The **layperson exception** did not apply here because the record was unclear regarding the officer's location in the room and his ability to observe the photographs being taken, the information was not "readily discernible" to the officer due to the location of the wound and fact that a patient would not necessarily expose the location to a layperson, and the private nature of the wound's location and potential embarrassment surrounding publication is what the privilege is designed to protect. However, § 12-36-135, requiring a physician "to report to law enforcement any bullet wound or injury the physician has attended or treated or that he or she believes was intentionally inflicted or the result of a criminal act," applied as a statutory exception to the privilege and allowed the photographs to be admitted into evidence.

People v. Marquez, 692 P.2d 1089 (Colo. 1984) (*rev'd on other grounds*). For physician-patient privilege to be waived by presence of third party, information must be readily discernible to everyone present.

People v. Sisneros, 55 P.3d 797 (Colo. 2002). Defendant argued that the victim waived psychologist-patient privilege by testifying at the preliminary hearing that "she originally could not remember when the assault occurred, [and] her discussions with [her psychologist] aided her in narrowing down the date." To determine whether there was a waiver of psychologist-patient privilege, the trial court must determine "*whether the victim has injected her physical or mental condition into the case as a basis of a claim or an affirmative defense.*" The **Defendant bears the burden** of establishing a waiver of the privilege by presenting evidence showing that the privilege holder, 'by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.'". The Court held that the victim did not waive her privilege because the case was not one in which the victim asserted a personal claim or defense in which her mental health is at issue, her testimony did not place the substance of her treatment or post-assault mental condition in issue, and the "circumstances of her testimony do not reflect an intent to forego the protections of the privilege." Because the victim did not waive her privilege, the trial court did not have discretion to order her records be disclosed for *in camera* review.

Compare with People v. Wittrein, 221 P.3d 1076 (Colo. 2009). Victim expressly waived her privilege to the Children's Hospital records relating to her treatment and PTSD diagnosis; the prosecution put her mental state at issue when it stated its intention to introduce a diagnosis of PTSD from Children's Hospital; however, there was no waiver from AMH records because the victim never placed the substance of her ongoing AMH treatment sessions at issue.

3. Illustrative Cases

People v. Meyer, 952 P.2d 774 (Colo. App. 1997). The trial court did not abuse its discretion by refusing to conduct an *in camera* examination of the victim's hospital records where defendant offered no basis for his claim the records may contain evidence supportive of his theory and he failed to overcome the physician-patient privilege protecting the records.

People v. Ullery, 984 P.2d 586 (Colo. 1999). When a defendant claims the affirmative defense of impaired medical condition he waives his physician/psychologist-patient privilege pursuant to § 16-8-103.6, but that waiver does not apply to attorney work product.

4. Statutory exception to physician-psychotherapist privilege: reports of child abuse

Section 19-3-311 provides that an "incident of privileged communication" between a patient and a physician, registered nurse, certified or licensed school psychologist, psychotherapist, or other specified care provider which provides the basis for a mandatory report of child abuse under § 19-3-304 is not subject to the statutory privilege otherwise applicable under § 13-90-107. The statute further provides that "privileged communication shall not apply to any discussion of any future misconduct or of any other past misconduct which could be the basis for any other report under § 19-3-304."

Dill v. People, 927 P.2d 1315 (Colo. 1996). As part of a child abuse investigation the victim was interviewed on two occasions by a child psychologist, who used the information to prepare a written report that was submitted to police investigators as required by § 19-3-304. The psychologist thereafter met with the victim for therapeutic purposes, where the allegations that were reported to the authorities and formed the basis for the abuse charges were discussed further. Although the trial court permitted disclosure of information connected to the initial two interviews, it denied discovery of additional material connected with the therapist's subsequent therapeutic sessions with the victim. In rejecting the assertion that the waiver provisions of § 19-3-311 apply to communications made in a therapeutic setting after the initial report of abuse is made pursuant to 19-3-304, the Colorado Supreme **construed the statutory waiver "to abrogate the psychologist-client privilege for only those communications upon which a report required by § 19-3-304 is based**. Later communications between the psychologist and the client relating to the same incident that occasioned the earlier report are not subject to statutory waiver of the privilege under § 19-3-311." The Court further held that an ***in camera* review of the post-report therapeutic statements is not compelled by the Supreme Court's holding in *Pennsylvania v. Ritchie***. Unlike *Ritchie,* the statements in dispute were not provided to a state agency but rather to a psychologist for purposes of treatment. Communications under such circumstances warrant a higher level of confidentiality. Moreover, unlike the expansive waiver provision at issue in *Ritchie,* Colorado's statutory exception to the psychologist-client privilege is narrower. "[The exception] necessarily depends on the psychologist to report child abuse and does not contemplate judicial review of all the psychologist's notes to determine whether such report is required. Accordingly, we are not persuaded that *Ritchie* requires an *in camera* inspection of a psychologist's notes of

post-report therapeutic sessions with the child to ascertain whether information material to the defense might have been disclosed by the child."

G. Social Services Records

Section 19-1-307(1)(a) provides that "[e]xcept as provided in this section and § 19-1-303, **reports of child abuse or neglect** and the name and address of any child, family, or informant or any other identifying information contained in such reports shall be confidential and shall not be public information." The statute creates several **exceptions** to the rule of confidentiality which include "a court, upon its finding that access to such records may be necessary for determination of an issue before such court." § 19-1-307(2)(f). In such cases, access is limited to "*in camera* inspection unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue pending before it."

People v. Jowell, 199 P.3d 38 (Colo. App. 2008). "[T]he defendant cannot expect automatic disclosure of child abuse or neglect records that are 'within the possession or control of the prosecuting attorney' under Crim. P. 16(I)(a)(1). Instead, the defendant must request an *in camera* review, identify the type of information sought, and explain why disclosure of that information 'is necessary' under subsection [§19-1-307(2)(f)]." "To justify review, the defendant must show that the child abuse and neglect records exist and may contain relevant information. To achieve the broadest possible disclosure, the defendant should explain the relevance and materiality of the information sought." **"[I]f the prosecutor believes that a social services record contains material exculpatory information, he or she must ask the court to review the record *in camera* and to find that public disclosure 'is necessary for the resolution of an issue,' under [§ 19-3-307(2)(f)]."** "[T]he court may review social services records only if it finds that 'access to such records may be necessary for determination of an issue.'" In making this determination, the court should consider the following, 1) "the court must disclose any information that is materially favorable to the defendant because it is either exculpatory or impeaching," 2) "the court should disclose even inculpatory information when such disclosure would materially assist in preparing the defense," and 3) consider whether the records contain information that would otherwise be subject to automatic disclosure under Crim. P. 16(I)(a)(1).

People v. District Court (Denver), 743 P.2d 432 (Colo. 1987). "Under § 19-10-115(2)(f) [now § 19-1-307(2)(f)], the party seeking access to the child abuse reports has the initial burden of showing the applicability of an exception to the statute's rule of confidentiality. This provision requires that the party seeking access to the records initially show that the report sought 'may be necessary for determination of an issue' in the case. The court should afford the party opposing the request an opportunity to rebut the moving party's arguments. If the court makes a finding, it should then conduct an *in camera* inspection of the material. As a result of such an inspection, the court must determine whether 'public disclosure of the information contained therein is necessary for the resolution of [the] issue then pending before it.' If an affirmative determination is made as to any of the material examined, the court should make such information available to the parties.

If a negative determination is made, it should not. Copies of any material not so disclosed should be preserved for appellate review of the court's ruling."

People v. Turley, 870 P.2d 498 (Colo. App. 1993). In a sexual assault and kidnapping prosecution where the defendant sought discovery regarding whether the victim had any history of contact with the Department of Social Services, the trial court concluded that an insufficient offer of proof was presented to require *in camera* review. In affirming the refusal to conduct such a review, the Court of Appeals held that the defendant failed to establish the existence of mental health or social service records and, if the records existed, "an evidentiary hypothesis as to how the requested information would be relevant to the sexual assault and kidnapping prosecution and necessary for the determination of an issue in his case."

People v. Frost, 5 P.3d 317 (Colo. App. 1999). Defendant sought discovery of all Department of Social Services records concerning the victim, her brother, and their family. Although the trial court found defendant did not make a sufficient offer of proof to support disclosure of the records, in an "excess of caution" the trial court conducted an *in camera* review of the child abuse and neglect records as allowed by § 19-1-307(2)(f) and released a portion of the records and found the remainder irrelevant. Upon *in camera* review, the Court of Appeals found that the trial court acted within its discretion and, further, that appellate counsel was not entitled to review the sealed records. The two courts' review of the records sufficiently safeguarded defendant's right to discovery of potentially exculpatory material.

H. School Records

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008). A defendant can obtain school records of a student who is a witness in a criminal case without the consent of the student or student's parents. This is governed by § 22-1-123, which ensures that that Colorado schools comply with the Family Educational Rights and Privacy Act of 1974 (FERPA). There are two exceptions to the prohibition against releasing school records without consent, in response to a subpoena issued for a law enforcement purpose and in compliance with a judicial order, or any lawfully issued subpoena, when the parents have been notified. "A subpoena is issued for a law enforcement purpose if it is intended to advance the 'detection and punishment of violations of the law.'" In deciding whether to order disclosure of school records, courts should comply with the follow directives: 1. "[A]scertain whether the student or parents have been notified and given an opportunity to respond." 2. "If the student or parents do not consent to release of the records, the court must balance the student's and parents' confidentiality interests against the party's need for the requested information. The court may review the school records *in camera* to determine whether disclosure is required." 3. "[T]he court must disclose any information that is materially favorable to the defendant. The court should also disclose inculpatory information that will be of material assistance in preparing the defense." 4. "The court should consider the following factors, (1) the nature of the information sought, (2) the relationship between the information sought and the issue in dispute, and (3) the harm that may result from the disclosure." In this case, the trial court applied

too narrow of a standard when reviewing the records *in camera*. "The court should have determined whether the records contained evidence that would have materially undermined [the victim's] credibility . . . ."

People v. Wittrein, 221 P.3d 1076 (Colo. 2009).The trial court refused to order discovery of the education records of victim. The Supreme Court held that "education records may be reviewed *in camera* if the defendant shows a need for the information that outweighs any privacy interests." The Court outlined several factors that the trial court should consider when making this determination, "(1) the nature of the information sought, (2) the relationship between the information and the issue in dispute, and (3) the harm that may result from disclosure." The Court found that the trial court did not commit reversible error in declining to review the records because the records "related only tangentially to her diagnosis and treatment for sexual abuse" and the prosecution did not rely on the records at trial.

People v. Meyer, 952 P.2d 774 (Colo. App. 1997). The privacy interest of defendant's son and his girlfriend in their high school records outweighs defendant's interest, and the trial court did not abuse its discretion by refusing to allow defendant to examine those confidential records.

13.7 SANCTIONS FOR DISOCOVERY VIOLATIONS

Crim. P. 16(III)(g) provides that "[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may **order such party to permit the discovery or inspection of materials** not previously disclosed, **grant a continuance**, **prohibit the party from introducing in evidence the material not disclosed** or **enter such other order as it deems just under the circumstances**." The rule generally affords trial courts with broad discretion in fashioning remedies and sanctions for discovery violations.

A. Least-Restrictive Sanction Favored

People v. District Court (Denver), 808 P.2d 831 (Colo. 1991). "The imposition of sanctions serves the dual purposes of protecting the integrity of the truth finding process and deterring the prosecutor and the police from [misconduct]. In serving the purpose of protecting the truth-finding process, we have required that **the sanction 'be no more restrictive than necessary to protect the defendant's right to due process**.' Similarly, in serving the purpose of deterrence, we have stated that '**the court should impose the least severe sanction that will ensure that there is full compliance with the court's discovery orders**.'" Among the **factors** identified by the court in fashioning an appropriate sanction are "the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." *See also People v. Lee,* 18 P.3d 192 (Colo. 2001).

People v. Dunlap, 975 P.2d 723 (Colo. 1999). Defendant claimed the prosecution had not timely disclosed information uncovered during its investigation of another case against him. The

Colorado Supreme Court found the trial court acted within its discretion by ordering a continuance and requiring the prosecution to submit to the court a discovery schedule. Any prejudice related to the delayed notice of the prosecution's intent to prosecute the defendant in the other case was cured by the continuance; the remedy requested by defendant—that the prosecution be prohibited from using a conviction in the other case as a statutory aggravator in this death penalty case would have resulted in an unwarranted windfall for the defendant . . . ."

People v. Copeland, 976 P.2d 334 (Colo. App. 1998). There was no abuse of discretion in admitting forensic evidence linking defendant to uncharged criminal act and, as remedy for prosecution's late disclosure of such evidence, allowing defendant to interview forensic witness before witness testified and ordering prosecution to provide defendant written materials in its possession regarding the evidence.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). Where prosecution failed to disclose potentially exculpatory information that victim's son changed his testimony, court's cautionary instruction that prosecution had not disclosed this information to defendant and that defendant was hearing inconsistent testimony for first time was "tacit sanction" that was not manifestly arbitrary, capricious and unfair.

People v. Lee, 18 P.3d 192 (Colo. 2001). The trial court abused its discretion by excluding DNA evidence as discovery sanction.

People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). "The absence of actual knowledge of exculpatory evidence is not a defense to a discovery violation, but it should be considered in determining the appropriate remedy."

People v. Stevenson, 228 P.3d 161 (Colo. App. 2009). The prosecution failed to disclose the victim's inconsistent statements. The trial court dismissed two criminal counts but would not grant a mistrial. The Court of Appeals held that the trial court did not abuse its discretion as a mistrial was not necessary. The Court noted that the defendant did not argue that any further sanction was necessary to restore a level playing field.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). Prosecution failed to provide information to a change in a witness's information. Although the trial court found that the information was neither inculpatory nor exculpatory, that there was a discovery violation for failing to disclose the change. The trial court issuance of a cautionary instruction to the jury as a sanction was upheld.

People v. Mendez, 488 P.3d 294 (Colo. App. 2017). The district court's discovery sanction was inadequate in this case because the defendant was given no opportunity to cross-examine the CI about whether he believed he would receive immigration support from Homeland Security for his willingness to participate in the controlled buy. However, due to the overwhelming evidence of guilt, any error was harmless beyond a reasonable doubt.

B. Dismissal

13. DISCOVERY

People v. Daley, 97 P.3d 295 (Colo. App. 2004). "In the absence of **willful misconduct**, **dismissal** as a sanction for a discovery violation is usually **beyond the discretion of the trial court**."

People v. District Court (Denver), 808 P.2d 831 (Colo. 1991). Dismissal of charges against the defendant is beyond the discretion of the trial court as a sanction for the failure of the prosecution to disclose potentially exculpatory information to the defense where the conduct on the part of the prosecutor was unintentional and any prejudice to the defendant could be cured by a continuance to allow time to prepare, followed by a new trial (which was necessitated by a hung jury). "In fashioning a sanction to achieve the goal of eliminating the due process violation, a court must strive to restore as nearly as possible the level playing field that existed before the discovery violation. Only when that goal cannot be achieved is dismissal required as a remedy for the violation of due process."

People v. Loggins, 981 P.2d 630 (Colo. App. 1998*)* Dismissal is a "highly serious consequence, justifiable only in furtherance of the most important principles." Where prosecution provided late discovery and material not exculpatory, remedy of continuance conditioned upon waiver of speedy trial, which right defendant refused to waive, was not "arbitrary, capricious, or unfair." *See also People v. Brown*, 313 P.3d 608 (Colo. App. 2011). *People v. Salazar,* 870 P.2d 1215, 1220 (Colo. 1994). Conviction will not be reversed for discovery violation absent showing of prejudice to defendant. *See also People v. Herdman,* 310 P.3d 170 (Colo. App. 2012) (same).

People v. Perryman, 859 P.2d 263 (Colo. App. 1993). Prosecutors failed to provide defendant with certain diagrams, notes, and police reports in their possession concerning the investigation until approximately four weeks prior to his trial. The trial court acknowledged that the prosecution had made numerous discovery violations. However, the court also noted that the **"information that was not provided [did not] appear to be strikingly new or to have a large impact on the case,"** and that the failure to disclose had not resulted from any bad faith by the sheriff's office or the prosecution. The trial court did not abuse its discretion in refusing to dismiss the charges against defendant.

People v. Acosta, 338 P.3d 472 (Colo. App. 2014). Dismissal not appropriate for failure to disclose defendant's fourth statement until immediately before trial. The prosecutor immediately disclosed the statement when he became aware of it, therefore there was no willful misconduct. The defendant was given time to review the statement and did not accept the court's offer to continue the trial.

People v. Lowe, 969 P.2d 746 (Colo. App. 1998). Dismissal not required for violation of discovery rules absent showing of prejudice to defendant.

People v. Moore, 226 P.3d 1076 (Colo. App. 2009). The Court of Appeals found that the trial court abused its discretion in dismissing the second-degree burglary and criminal mischief charges as a sanction for an inadvertent discovery violation. The court, relying on *Daley, Lee,* and *District Court (Denver)* based its holding on the fact that the trial court found that the discovery violation

was inadvertent rather than willful and that there was no evidence of a pattern of discovery violations by the prosecution.

Compare with People v. Alberico, 817 P.2d 573 (Colo. App. 1991). Dismissal of charges against the defendant as a sanction for the prosecution's failure to disclose investigator's notes containing summaries of statements of the victim and two defense witnesses was within the discretion of the trial court where the reports and statements were revealed after the victim had testified and while the defendant was in the midst of presentation of his case, meaning that there was no effective way to make use of the materials.

People v. Eason, 516 P.3d 546 (Colo. App. 2022). Upholding against a defense challenge the trial court's discretion to dismiss a single charge as a sanction for a discovery violation rather than all charges.

C. Suppression

People v. Lee, 18 P.3d 192 (Colo. 2001). "If at all possible, a trial court should avoid excluding evidence as a means of remedying a discovery violation because the attendant windfall to the party against whom such evidence would have been offered defeats, rather than furthers, the objectives of discovery."

People v. District Court (Adams), 793 P.2d 163 (Colo. 1990). The trial court abused its discretion in precluding the prosecution's eyewitness from testifying as a discovery sanction for failure to disclose until just before trial evidence bearing on the credibility of a witness the prosecution intended to call. The court recognized the American Bar Association Standards which "**strongly disfavor suppression of evidence as a sanction for violation of discovery**" inasmuch as the results of suppression are often capricious and "may produce a disproportionate windfall for the defendant . . . ." *See* II ABA Standards for Criminal Justice 11-4.7 commentary at 11-19S (2d ed. 1986 Supp.). Under the circumstances, in which the prosecutor did not act willfully or in bad faith and any prejudice could be cured by granting a continuance, the court concluded that the trial court's exclusionary order did not further the search for truth or advance the goal of deterrence of prosecutorial misconduct.

Compare with People v. Monroe, 907 P.2d 690 (Colo. App. 1995) (*rev'd on other grounds*). While properly denying a defense motion to dismiss all charges following the prosecution's mid-trial disclosure of a photo lineup procedure that was conducted by a previous prosecutor but not disclosed to the defense, the trial court acted within its discretion in precluding the prosecution from thereafter questioning the witness regarding the result of the out- of-court identification procedure. The Court of Appeals recognized that the sanction imposed for the discovery violation was appropriate because it was no more restrictive than necessary to put the defendant in as good a position as if the violation had not occurred, particularly where there was no evidence of bad faith on the part of the prosecution.

D. Other Remedies

People v. District Court (Denver), 808 P.2d 831 (Colo. 1991). Although Crim. P. 16(III)(g) permits a trial court to "enter such other order as it deems just under the circumstances," a court is not authorized under the rule to award attorney's fees to a defendant in a criminal action as a remedy for a discovery violation.

People v. Pagan, 165 P.3d 724 (Colo. App. 2006). Defendant was tried and convicted of theft. The prosecution discovered defendant's bank records to defense counsel during the second day of trial. Defense counsel requested that the documents be excluded. The trial court denied the request and ordered the prosecutor to refrain from referring to the documents until defense counsel had a chance to review them. The Court of Appeals held that the trial court's remedy was not an abuse of discretion, stating that the material was not exculpatory, the defendant did not suffer any prejudice, and the information was relevant to show what defendant did with the victim's money.

People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006). After the delinquency trial began, defense counsel moved for dismissal because the prosecution failed to provide a videotaped interview of the juvenile and photographs of his injuries and the crime scene. The prosecutor was unaware of these items because they were contained in a police department internal affairs file. The trial court denied the request for dismissal and ordered a one-day recess to allow defense an opportunity to examine the materials. Because the juvenile did not demonstrate any prejudice resulting from the delay, the Court of Appeals found no abuse of discretion.

People v. Grant, 492 P.3d 345 (Colo. App. 2021). Holding a mid-trial suppression hearing for an undisclosed statement by a defendant, rather than barring introduction of the statement, was an appropriate remedy when there was no willful misconduct.

People v. Tippet, 539 P.3d 547 (Colo. 2023). Reduction of charge from first to second degree murder in a single case is appropriate sanction for "an ongoing, significant pattern of discovery violations across multiple cases."

People v. Kent, 476 P.3d 762 (Colo. 2020). Disqualifying the prosecutor's office was not an appropriate sanction for a discovery violation.

13.8 DEFENDANT'S DISCLOSURE OBLIGATIONS

Crim. P. 16(II) provides that, subject to constitutional limitations, the court **may require** the defendant to make the following pre-trial disclosures:

a. upon request of the prosecution the defendant may be required to submit to a non-testimonial identification procedure.

b. reports or statements of experts made in connection with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons.

c. the nature of the defense and the names and addresses of persons whom the defendant intends to call as witnesses in support of the defense.

d. notice of alibi and the names and addresses of any alibi witnesses the defendant intends to call at trial.

People v. Dye, 541 P.3d 1167 (Colo. 2024). Crim. P. 16(II)(c)'s requirement to disclose "the nature of any defense" does not apply only to affirmative defenses. "Any defense" necessarily includes an alternate suspect defense, including the identity of the alternate suspect. An alternate suspect who is unidentifiable by name but be otherwise identified, and the alternate suspects address, if known, but be provided to the prosecution.

People v. Castro, 854 P.2d 1262 (Colo. 1993). The Colorado Supreme Court held that the district court abused its discretion in granting a continuance and resetting trial beyond the speedy trial date as a sanction for the defendant's failure to specifically inform the prosecution pursuant to Crim. P. 16(II)(c) of his intention to assert the defense of general denial. The Court reasoned that the prosecution was placed on notice that the defendant denied committing the charged offenses by virtue of his pleas of not guilty, and his failure to thereafter provide a written statement of his intention not to present other defenses at trial confirmed that his only defense at trial would be general denial. "An express statement that [the defendant] did not intend to present any defenses except general denial would have clarified the nature of his defense. Rule 16, however, does not impose such a requirement; it only requires that the prosecuting attorney be informed of the nature of any defense which defense counsel intends to use at trial and of the witnesses the defendant intends to call in support of that defense."

A. Sanctions for Defense Violations

People v. Pronovost, 773 P.2d 555 (Colo. 1989). The trial court erred by excluding the defendant's expert witness for failure to make a timely endorsement without considering the factors of the balancing test developed in determining the propriety of excluding alibi witnesses for failure to comply with the alibi notice requirement. Among the **factors** to be considered are the **reasons** for the late endorsement and the **culpability of the defendant**; the **prejudice the prosecution might suffer** in preparing for trial; **whether events occurring subsequent to the defendant's noncompliance mitigate the prejudice** to the prosecution; whether there is a **reasonable and less drastic alternative** to the preclusion of the defense evidence; **and any other relevant factors arising out of the circumstances of the case**. *See* *People v. Hampton,* 696 P.2d 765 (Colo. 1985).

People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992). The trial court did not abuse its discretion in excluding an unendorsed defense witness where the prosecution was prejudiced by not being able to interview him and the defense was not prejudiced because the proffered testimony was cumulative and the defendant objected to the court's offer to grant a mistrial.

Compare with People v. Cobb, 962 P.2d 944 (Colo. 1998). In this trial for first-degree sexual assault, defendant failed to disclose before trial his intent to call a police officer as a witness. The officer would testify that, nine days before the incident in this case, he had contacted the victim sitting with another man in a parked car near where defendant had met her in this case and that the victim had told the officer she had run out of gas, as the victim asserted in this case. As a sanction for the late disclosure, the trial court excluded the officer's testimony and refused to allow cross-examination of the victim concerning the parked car incident. The Colorado Supreme Court found the trial court erred in failing to apply the correct legal standard (the *Pronovost* factors), particularly where it rejected more limited alternatives to excluding the testimony outright, and that its refusal to allow cross-examination of the victim on the issue violated defendant's right of confrontation. Only the "most compelling circumstances" allow other interests to take precedence over truth-seeking. "[O]utright exclusion of an undisclosed witness is to be avoided, if possible, particularly when a lesser sanction is available."

People v. Lopez, 946 P.2d 478 (Colo. App. 1997). Trial court abused its discretion by excluding testimony of defense expert as sanction for late disclosure of witness without considering factors set forth in *Pronovost*, particularly where asserted basis for imposing sanction was pattern of **noncompliance** with Rule 16 disclosure requirement by **attorneys in other cases**.

13.9 POST-CONVICTION DISCOVERY

In a death penalty case, *People v. Owens,* 330 P.3d 1027 (Colo. 2014), the Court held that Crim. P. rule 16 does not extend to post-conviction proceedings. The Court, however, did find that trial courts have inherent authority to order timely disclosure. Further, the due process clause requires the discovery of Brady material to the defendant of evidence even arising after the conviction. The Court cited *People v. Rodriguez,* 786 P.2d 1079, 1082 (Colo. 1989) for the proposition that post-conviction (at least in death penalty cases) the trial court is required to evaluate the nature, significance, and materiality of the material and provide any material "to which the prosecution had failed to show a compelling interest in withholding."

* * *

2025 Contributions by Alison Suthers
Senior Deputy District Attorney
2nd Judicial District

CHAPTER 14

EXPERT AND OPINION TESTIMONY

14. EXPERT AND OPINION TESTIMONY

14.1 INTRODUCTION

Colorado Rules of Evidence 701-705 govern opinion evidence and expert testimony.

701. Opinion Testimony by Lay Witnesses

702. Testimony by Experts

703. Bases of Opinion Testimony by Experts

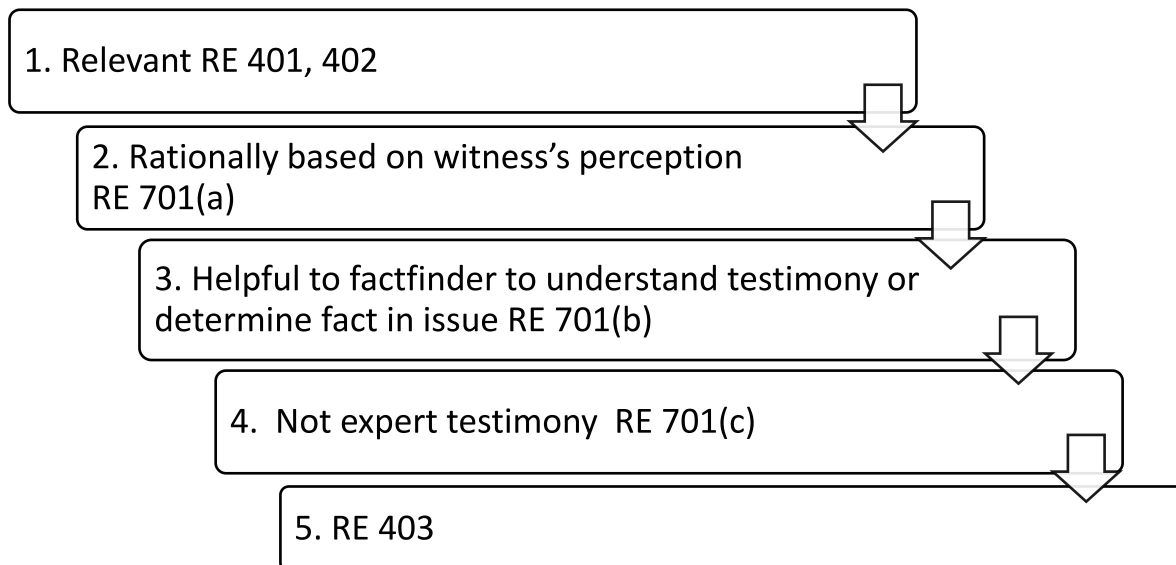
704. Opinion on Ultimate Issue

705. Disclosure of Facts or Data Underlying Expert Opinion

Given the difference in law applicable to lay opinion and expert opinion, especially as it relates to admissibility and discovery obligations, distinguishing lay opinion from expert opinion is a threshold issue.

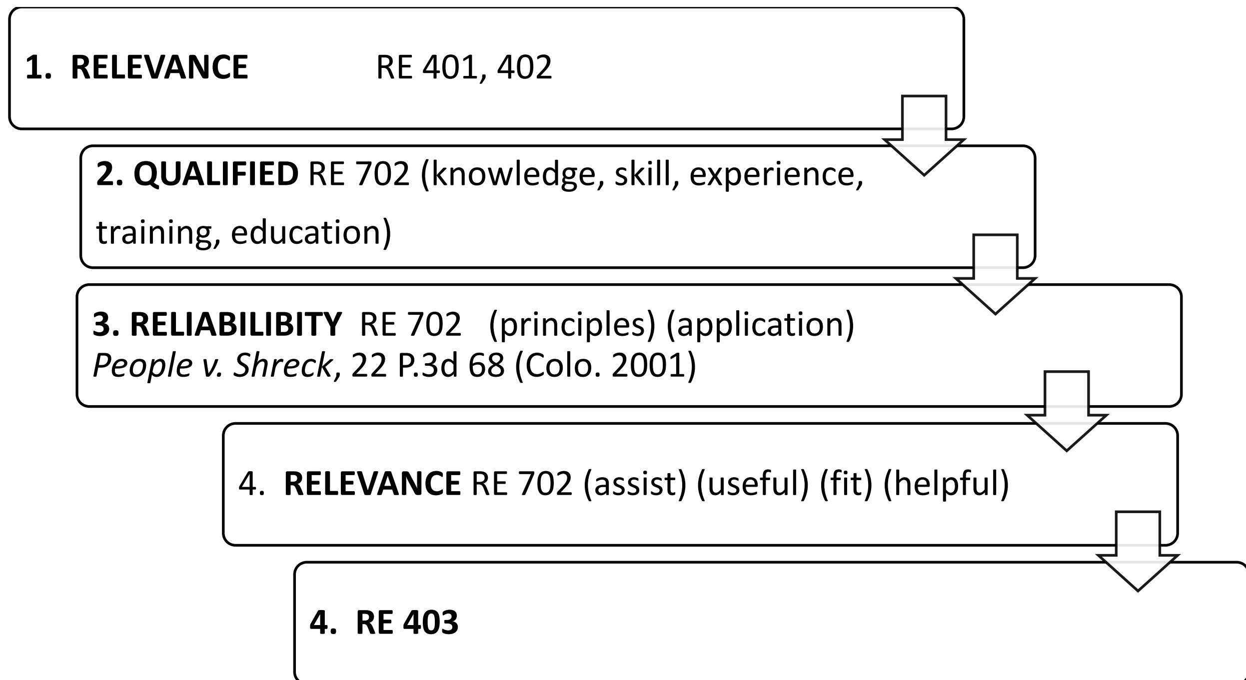
A. Lay Opinion Analytical Framework

Lay Opinion is analyzed using the following framework:



B. Expert Testimony Analytical Framework

Expert testimony is analyzed using a different framework:



14.2 LAY VS. EXPERT OPINION

When determining whether testimony is lay or expert opinion, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. *Campbell v. People*, 443 P.3d 72 (Colo. 2019); *Venalonzo v. People*, 388 P.3d 868 (Colo. 2017). If the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony. *Id.* In *Campbell*, the Court found that horizontal gaze nystagmus was expert opinion and required that the witness be qualified.

A. Police Officer Testimony

People v. Stewart, 26 P.3d 17 (Colo. App. 2000). If a witness expresses an opinion or inference that is "beyond common experience or is based on knowledge of a scientific, technical, or specialized nature," C.R.E. 702 requires the witness to be qualified as an expert in the subject matter that is the basis of the testimony. Here, the trial court abused its discretion by allowing the investigating officer to testify about reconstruction of an accident without first qualifying him as an expert because the testimony involved "considerably more than common experience and required practical knowledge of a scientific, technical, or specialized nature."

People v. Douglas, 296 P.3d 234 (Colo. App. 2012). In an enticement and solicitation case, an undercover officer was not required to be qualified as expert prior to testifying concerning her interpretation of certain statements made by defendant and certain language used in Internet postings because her testimony did not depend on her specialized skills and training as police officer, but rather depended on her ability to interpret conversation in which she took part, a

process of reasoning familiar in everyday life. Lay opinion is the result of a process of reasoning familiar in everyday life rather than a process of reasoning that can only be mastered by specialists in the field.

People v. Warrick, 284 P.3d 139 (Colo. App. 2011). Witness's testimony that conspiracy to commit robbery is a class 5 felony was lay rather than expert opinion. "Lay witness opinion testimony is only proper if the opinions or inferences do not require specialized knowledge and could be reached by an ordinary person."

"[P]olice officers regularly and appropriately offer lay opinion testimony based on their perceptions and experiences." *People v. Stewart*, 55 P.3d 107 (Colo. 2002).

- **Facebook, how it works, slang**. *People v. Glover, 363* P.3d 736 (Colo. App. 2015) (finding no specialized knowledge and not plain error).
- **Methamphetamine, under the influence**. *People v. Russell*, 396 P.3d 71 (Colo. App. 2014) (holding that even if erroneous, error was harmless).
- **Interviewing techniques**. *People v. Conyac*, 361 P.3d 1005 (Colo. App. 2014) (holding that interviewing concepts could be gleaned by ordinary person watching television or reading crime materials and not plain error). When a police officer's testimony requires the application or, or reliance on, specialized skills or training, the officer must be qualified as an expert before offering the testimony. People v. Stewart, 55 P.3d 107, 123 (Colo. 2002).
- **Accident reconstruction**. *People v. Stewart, 55 P.3d 107 (Colo. 2002)*; *People v. McMinn*, 412 P.3d 551 (Colo. App. 2013) (addressing an officer's testimony about mathematical calculations regarding speed and force and holding error was harmless because the testimony was corroborated by defendant's testimony, eyewitness testimony, and related to an undisputed fact).
- **Possession of large amount of a particular drug indicative of intent to manufacture methamphetamine, street price for crack cocaine, types of paraphernalia used when consuming crack**. *People v. Veren*, 140 P.3d 131 (Colo. App. 2005).
- **Blood spatter and transfer evidence**. *People v. Ramos*, 388 P.3d 888 (Colo. 2017).
- **Gunshot residue and fingerprint evidence**. *People v. Theus-Roberts*, 378 P.3d 750 (Colo. App. 2015) (holding testimony cumulative of other properly qualified experts and, therefore, no plain error).
- **Fleeing suspects not wearing same clothes**. *People v. Rhodus*, 303 P.3d 109 (Colo. App. 2012) (holding that assuming without deciding that the testimony was expert opinion, any error was harmless).

People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005). Officers were properly permitted to testify that "it is not uncommon for guilty criminal suspects and defendants (1) to deny committing the offenses, (2) to falsely accuse the police of brutality, and (3) to falsely claim that they do not understand their *Miranda* rights." One of the officers also testified that he suspected the defendant

"might be messing with [him] on his not understanding [his rights]." The officer then went on to explain why he believed that. The Court held that this was not expert testimony and was admissible as lay opinion testimony. The "officers stated their opinions of defendant's conduct based on their observations of him and their everyday experiences and then drew a rational conclusion about defendant's state of mind."

People v. Veren, 140 P.3d 131 (Colo. App. 2005). The Court of Appeals found that the trial court abused its discretion in admitting testimony of police officers as lay opinion testimony when it was expert testimony. Officer testified that "possession of a large amount of nonprescription pseudoephedrine is indicative of a person's intent to use such a product as a precursor in the manufacture of methamphetamine." The Court of Appeals held that this should only have been admitted as expert testimony. The Court also held that the testimony of officers that possession of large amount of pseudoephedrine in combination with the other chemicals and supplies found in defendant's truck indicated intent to manufacture methamphetamine" should only have been admitted as expert testimony. The Court found that this testimony showed that the officers' "knowledge was specialized and based on their police training and experience, which an ordinary person would not have." The Court held that the officer's testimony describing "how methamphetamine is manufactured and how the various precursor chemicals are used was expert testimony." *Compare with People v. Graybeal*, 155 P.3d 614 (Colo. App. 2007).

14.3 LAY OPINION

A. Standard of Review

Farley v. People, 746 P.2d 956 (Colo. 1987). The sufficiency of the evidence to establish the qualifications and knowledge of a witness to express an opinion based on physical facts she has observed is a question for the trial court, not subject to reversal unless clearly erroneous.

B. Foundation

The foundation for admission of lay opinion pursuant to C.R.E. 701 is comprised of three elements: (1) the opinion is rationally based on the perception of the witness, (2) the lay opinion is helpful to a clear understanding of the testimony or the determination of a fact, and (3) the testimony may not be that qualifies as an expert opinion.

1. Rationally based on perception of the witness

People v. Rowe, 837 P.2d 260 (Colo. App. 1992) (rev'd on other grounds). The Court of Appeals held that the trial court properly excluded testimony from a defense investigator regarding the character of the victim, where the investigator was not personally acquainted with the victim and the opinion was based on a background investigation and interviews with the victim's friends and employers. The Court stated that "the requirement that the opinion be based on the witness' perception embodies the requirement of personal knowledge contained in C.R.E. 602." In as much

as the opinion was based on the investigation, and not on the investigator's personal knowledge, the testimony was properly excluded.

People v. Caldwell, 43 P.3d 663 (Colo. App. 2001). Although expert testimony is generally required to introduce ballistics evidence that explains how a shooting occurred, the position of the victim, or the existence or absence of self-defense, the trial court acted within its discretion by admitting lay witness testimony concerning ballistics and bullet trajectory which included only the witness' own observations without any additional explanation.

Practice Tip: establishing the "perception" prong of C.R.E. 701 may depend upon the nature and importance of the opinion sought. For example, compare the substantial foundation requirements to render an opinion as to sanity, *see People v. Medina,* 521 P.2d 1257 (Colo. 1974), with the minimal requirements to render an opinion as to age. *See People v. Fierro*, 606 P.2d 1291 (Colo. 1980).

2. "Helpful" versus "necessary" standard for permitting lay opinion

Lay testimony in the form of opinion as opposed to fact, historically has been permitted only where "it is difficult or impossible to state with sufficient exactness, or in detail, the facts, with their surroundings, in such a manner as to produce upon the minds of the jury the impression that a personal observation has been produced upon the mind of the witness." *See Denver, Texas and Fort Worth Railroad Company v. Pullaski Irrigating Ditch Company*, 35 P. 910 (Colo. 1894).

C.R.E. 701(b), however, merely requires the opinion to be helpful. The Advisory Committee's Note to the identical federal rule points out that "helpful" rather than "necessary" was adopted as the standard for permitting opinions because, given the practical impossibility of determining by rule what is a "fact," the "necessary" standard has proven to be inadaptable for purposes of satisfactory judicial administration.

People v. McFee, 412 P.3d 848 (Colo. App. 2016). The detective's testimony of what he believed he heard on an audio recording of a statement by defendant was not helpful to the jury where the jury heard the recording. The jury was in the same position as the detective to hear and interpret the words. Therefore, it was error to have the testimony, but it was harmless.

3. C.R.E. 403

Even though a lay opinion may qualify for admission pursuant to C.R.E. 701, the trial court retains the discretion to exclude the opinion testimony if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or need. C.R.E. 403.

C. Lay Opinion as to Ultimate Issue

C.R.E. 704 provides that opinion testimony that is otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

People v. Collins, 730 P.2d 293 (Colo. 1986). The Colorado Supreme Court rejected the assumption that permitting a witness to state an opinion as to an ultimate fact would usurp the function of the jury, and recognized that C.R.E. 704 has the effect of abolishing the "ultimate issue" rule. However, "while Rule 704 does not prohibit a lay witness from testifying to an issue of ultimate fact, obviously, it does not mean a witness may testify that a particular legal standard has or has not been met." A question eliciting a lay opinion must therefore be phrased so to elicit a factual rather than a legal opinion.

D. Lay-Opinion Testimony About Truthfulness under C.R.E. 608

People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005). Officer testified that he suspected the defendant was "messing" with him when he claimed to not understand his *Miranda* rights. "Opinion testimony regarding a witness's truthfulness on a specific occasion, rather than concerning the witness's general character for truthfulness, is inadmissible." The Court held that the "officer's testimony was not offered to show that defendant lied to the officer about understanding his *Miranda* rights. Rather, the testimony was offered to rebut defendant's intoxication defense and to demonstrate his state of mind."

E. Illustrative Cases by Topic

1. Age

People v. Fierro, 606 P.2d 1291 (Colo. 1980). Observer may be permitted to estimate or state opinion as to age of another. An estimate will be rejected only if it is "surmise, speculation, conjecture or guesswork."

Robinson v. People, 927 P.2d 381 (Colo. 1996). Lay opinion admissible if a lay witness is in a better position than the jury to determine identity and the other C.R.E. 701 factors are established.

2. Appearance

United States v. Borrelli, 621 F.2d 1092 (10th Cir. 1980). Defendant's stepfather with familiarity of defendant's appearance could state his opinion that the person in robbery photograph resembled the defendant.

3. Body Language

People v. Murphy, 484 P.3d 678 (Colo. 2021). Trial courts must determine whether an opinion could be reached by an ordinary person and whether citizens can be expected to know certain information or to have had certain experiences. Whether such testimony is lay or expert opinion is fact specific and required careful examination on a case-by-case basis. Non-verbal responses in

this case were the type that ordinary people have likely experienced. When a witness has personally observed the motions and summarizes his impression, the witness is testifying as a lay witness.

4. Cell Tower Information

People v. Woodyard, 540 P.3d 278 (Colo. App. 2023). Detective's testimony where he input only data-generated maps showing location of cell towers was not an expert opinion.

5. Controlled Substance Identification

People v. Graybeal, 155 P.3d 614 (Colo. App. 2007). The trial court properly admitted lay opinion testimony of witnesses identifying marijuana as the substance provided to them by the defendant. "The witnesses described prior experiences with marijuana and based their identification on its appearance, taste, and distinctive smell. These matters did not require any technical or specialized knowledge that would fall within the scope of C.R.E. 702."

6. Dangerous Instrument

People v. Oliver, 474 P.3d 207 (Colo. App. 2020). The Court held that it was a lay opinion whether a razorblade attached to a toothbrush handle was capable of causing or inducing fear of causing death or bodily injury and, therefore, a dangerous instrument pursuant to 18-8-203(4).

7. Death

People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984). Lay witness was permitted to state opinion that victim was dead.

8. Condition of Evidence

People v. Garcia, 784 P.2d 823 (Colo. App. 1989). An officer with experience in investigating burglaries of parking lot money depositories and with the tools used to extract money could testify to the condition of the bills removed from defendant were consistent with tearing that occurs when bills are removed.

9. Grooming

People v. Romero, 2017 CO 37 (Colo. 2017). Law enforcement officer's testimony concerning "grooming" in a sexual assault case was expert opinion, not lay opinion.

10. Handwriting

C.R.E. 901(b)(2) provides that non-expert opinion evidence as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation, is admissible for authentication or identification purposes.

11. Identification

People v. Grant, 492 P.3d 345 (Colo. App. 2021). A lay witness may testify to the identity of a person in surveillance video if there is some basis to conclude the witness is more likely to correctly identify the defendant from the video than the jury. The lay witness need only be personally familiar with the person depicted in the video.

United States v. Ladd, 527 F.2d 1341 (5th Cir. 1976). A witness who was independently familiar with the defendant's voice was properly permitted to identify his voice that had been recorded on a tape.

C.R.E. 901(b)(5): "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

12. Interview Techniques

Marsh v. People, 389 P.3d 100 (Colo. 2017). "Even if trial court erred in admitting, as lay opinion testimony, the testimony of forensic interviewers regarding their qualifications and protocols for interviewing child victims of possible sexual abuse, rather than subjecting such testimony to expert witness requirements, such error was harmless in sexual assault prosecution; forensic interviewers testified briefly and provided only general background information about interview process, with testimony providing only minimal assistance to jury, each of child victims testified at trial and was subject to cross-examination, other witnesses also testified and corroborated children's accounts, and prosecutor did not rely on forensic interviewers' testimony in closing argument."

12. Intoxication

People v. Norman, 572 P.2d 819 (Colo. 1977). A person who has had sufficient opportunity to observe the demeanor and conduct of another may express an opinion as to whether that person is intoxicated, under the influence of alcohol, or drunk.

13. State of Mind

People v. Herdman, 310 P.3d 170 (Colo. App. 2012). The defendant's sergeant gave an opinion that the defendant did not suffer from PTSD. The Court held that even if the sergeant's testimony was improper lay opinion, it was not plain error because experts on both sides testified as to whether the defendant suffered from PTSD, and most of the sergeant's testimony amounted to his personal observations of the defendant's conduct, which were the proper subject of lay testimony.

14. Necessity of Physical Force

People v. Collins, 730 P.2d 293 (Colo. 1986). In an assault case in which the defendant claimed self-defense, the Colorado Supreme Court held that the testimony of a witness that "a fight is a fight," and that "if two people are to fight why pull a rifle? I myself don't know why it was pulled," was relevant and "helpful" with respect to the issue of apparent necessity: "[I]f an objective, reasonable person, under like conditions and circumstances, believes the defendant's use of

physical force was necessary, then the defendant is entitled to invoke the subjective, internally minded, affirmative defense of self-defense. The observations of a third person are, therefore, `helpful' to the standard of apparent necessity . . . [The testimony] was based on factual observations which conveyed information that a mere description of the participant's behavior could not."

People v. Jones, 907 P.2d 667 (Colo. App. 1995). In a homicide prosecution where the trial court refused to admit testimony of a lay witness regarding her opinion or "impressions" as to the cause of the fight between the defendant and the victim, the Court of Appeals recognized that lay opinion regarding another person's motivation or intent is permissible only when the witness had a sufficient opportunity to observe the person and to draw a rational conclusion about that person's state of mind. In reversing the defendant's conviction, the Court concluded that "the fact that the witness observed most of the altercation [between the defendant and the victim], and most particularly the beginning, establishes an adequate foundation for her testimony summarizing or concluding as to what was happening. Summary characterizations and impressions as to what transpired, especially when the event is somewhat tumultuous, can be of significant assistance to the fact finder."

15. Attempted Robbery

People v. Jones, 907 P.2d 667 (Colo. App. 1995). Witness's lay opinion that the victim was attempting to rob the defendant was admissible lay opinion where the defendant's theory was that he was entitled to use deadly force in a second-degree murder prosecution.

16. Sanity

People v. Medina, 521 P.2d 1257 (Colo. 1974). A lay witness may express an opinion as to the sanity of another person when the proper foundation is laid that the witness has had an adequate means of becoming acquainted with that person, and the contacts with him were close in time to the alleged offense. *See also People v. Osborn*, 599 P.2d 937 (Colo. App. 1979).

17. Smell or Taste

Enyart v. People, 201 P. 564 (Colo. 1921). In a prosecution for selling whiskey, a lay witness was properly permitted to testify that he had smelled and tasted the liquid sold by the defendant and that, in his opinion, it was whiskey.

18. Shoeprints

Vigil v. People, 455 P.3d 332 (Colo. 2019). Officer's testimony comparing shoes with photographs from crime scene and finding a match was permissible lay opinion.

19. Speed

Eagan v. Maiselson, 350 P.2d 567 (Colo. 1960). A person of reasonable intelligence may express an opinion of the speed of an automobile or other moving object within the person's observation.

People v. T.R., 860 P.2d 559 (Colo. App. 1993). "A person with reasonable experience may express an opinion of the speed of an automobile or other moving objects coming under his observations without proof of further qualifications."

20. Value

City and County of Denver v. Hinsey, 493 P.2d 348 (Colo. 1972). A witness is qualified to give an opinion about value where it is shown that the witness has the means to form an intelligent opinion, derived from an adequate knowledge of the nature and kind of property in question.

14.4 EXPERT TESTIMONY

A. Statute: C.R.E. 702

C.R.E. 702 governs the qualifications of experts. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

B. Analytical Framework—*Shreck*

People v. Shreck governs admissibility of expert opinion testimony. *People v. Shreck*, 22 P.3d 68, 78–79 (Colo. 2001). *Shreck* held that the admissibility of all expert testimony is governed by Rules 702 and 403 of the Colorado Rule of Evidence. *Id.* This includes testimony given based on experience rather than scientific principles. *Ruibal v. People*, 432 P.3d 590 (Colo. 2018) (explaining *Shreck*). Under Rule 702, expert testimony is admissible if it is relevant and reasonably reliable. *Shreck*, 22 P.3d at 77. Under Rule 403, expert testimony is admissible if its probative value is not substantially outweighed by the danger of unfair prejudice. *Id.* at 78.

When determining whether proposed expert testimony is reliable, "a trial court should apply a liberal standard that only requires proof that the underlying scientific principles are *reasonably* reliable." *Kutzly v. People*, 442 P.3d 838, 841 (citing *Shreck*, 22 P.3d at 77) (emphasis Court's own).

There is no specific set list of reliability factors. *Id.* The Court must consider "the totality of the circumstances surrounding the proposed expert testimony." *Id.* The Court must also consider whether the expert is qualified to testify to the proposed testimony. *Id.* When deciding whether testimony is relevant under 702, the Court must consider whether the proposed testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *See* C.R.E. 702 ("If scientific, technical, or *other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.") (emphasis added).

The expert testimony must also be helpful to the jury. *People v. Cooper*, 496 P.3d 430, 432 (Colo. 2021). That means the testimony must "fit" the facts of the case. *Id.* Generalized testimony, such as testimony by a "blind" expert, fits the facts of a case "if it has a sufficient logical connection to the factual issues to be helpful to the jury while still clearing the ever-present C.R.E. admissibility bar." *Id.* When evaluating fit, the Colorado Supreme Court has cautioned that although the generalized testimony must fit the case, it need not fit perfectly:

> While generalized expert testimony must fit the case, the fit need not be perfect. In other words, each aspect of such testimony need not match a factual issue. Since generalized expert testimony, by definition, seeks to inform the jury about generic concepts or principles without knowledge of the facts, it is almost inevitable that parts of such testimony will not be logically connected to the case. For that reason, the fit inquiry must be flexible. A trial court should certainly not be expected to parse the proposed testimony and determine whether each statement the expert intends to utter is logically connected to a fact in the case. If the generalized expert testimony's logical connection to the factual issues is sufficient to be helpful to the jury without running afoul of C.R.E. 403, the testimony fits the case.

Id.

A party may request a *Shreck* hearing to decide, pre-trial, whether an expert's proposed testimony is admissible. *Kutzly,* 442 P.3d at 841. Trial courts are not required, however, to hold a *Shreck* hearing. *Id.* A *Shreck* hearing is not necessary if the Court has "sufficient information to make an admissibility determination without one." *Id.* If the Court decides to not hold a *Shreck* hearing, it must make specific findings about the proposed testimony's admissibility unless, among other exceptions, Colorado has already held such testimony as reliable and admissible. *Id.*

In summary, *Shreck* and C.R.E 702 require the trial court to determine, not necessarily with a pre-trial hearing, whether:

- the proposed expert testimony is reliable,
- the expert is qualitied to testify about the subject matter,
- the testimony "fits the case" sufficiently enough to be "helpful" to the jury, and
- the testimony's passes the classic C.R.E. 401/403 balancing test.

See People v. Cooper, 496 P.3d 430, 432 (Colo. 2021) (explaining the requirements of admitting expert testimony under C.R.E. 702).

C. Manner of Expert Testimony

C.R.E. 702 states that an expert may testify in the form of an opinion or otherwise. The Advisory Committee's Note to the identical federal rule states: "Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly

recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts."

D. Admissibility within Court's Discretion

People ex rel. Stodtman, 293 P.3d 123 (Colo. App.). Court has broad discretion to determine the admissibility of expert testimony. A court may admit expert testimony if the witness can offer appreciable assistance on a subject beyond the understanding of an untrained layman.

People v. Williams, 790 P.2d 796 (Colo. 1990). "A trial court has broad discretion to determine the admissibility of expert testimony, and appellate courts may not overturn a trial court's ruling unless it is manifestly erroneous." *See also id.*, 790 P.2d at 801, Quinn, J., specially concurring (recognizing that trial court's refusal to qualify witness as expert was extremely close question but granting trial court deference in resolving issue).

Lanari v. People, 827 P.2d 495 (Colo. 1992). The exercise of discretion in deciding whether to admit expert testimony requires consideration of numerous circumstances, in addition to the elements of the crime, to determine whether the testimony will assist the jury. "Among those considerations are the nature and extent of other evidence in the case, the expertise of the proposed expert witness, the sufficiency and extent of the foundational evidence upon which the expert witness' ultimate opinion is to be based, and the scope and content of the opinion itself."

People v. Miller, 981 P.2d 654 (Colo. App. 1998). The trial court properly analyzed and admitted expert testimony on crime reconstruction; it properly analyzed and excluded expert testimony concerning typical reactions of people subjected to sexual assault where testimony was based on survey that was inconsistent with defendant's story and expert drew conclusions properly left to jury.

E. Foundation

"Expert testimony is admissible if the expert's specialized knowledge will assist the jury to understand the evidence or to determine a fact in issue." *People v. Pahl*, 169 P.3d 169 (Colo. App. 2006).

C.R.E. 702 employs a "helpfulness" standard of admissibility that must be applied on a case-by-case basis: i.e., whether a witness, by virtue of knowledge, training, skill, or other such qualification, can offer testimony that will assist the fact finder to either understand other evidence or to determine a fact in issue. *See People v. Fasy*, 829 P.2d 1314 (Colo. 1992). The adequacy of the foundation for expert testimony is a matter within the trial court's discretion which is to be determined as a preliminary matter pursuant to C.R.E. 104(a). *See People v. Wis*, 790 P.2d 796 (Colo. 1990); *People v. Lowe*, 519 P.2d 344 (Colo. 1974). If an objection is raised with respect to the adequacy of the foundation or the admissibility of the expert testimony, the trial court must be sufficiently apprised, by means of an offer of proof pursuant to C.R.E. 103(a)(2), of the nature and substance of the testimony to exercise its discretion in accordance with the Rule. *See Lanari v. People*, 827 P.2d 495 (Colo. 1992).

"Helpfulness hinges on whether the proffered testimony fits the particular case, and fit demands more than simple relevance. There must be a logical relation between the proffered testimony and the factual issues involved." *People v. Valdez*, 183 P.3d 720 (Colo. App. 2008).

People v. Williams, 790 P.2d 796 (Colo. 1990). "The 'crucial question' trial courts must answer when determining the admissibility of proffered expert testimony is: 'On this subject can a jury from this person receive appreciable help?' 'There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute' [quoting the Advisory Committee's Note to F.R.E. 702]."

F. Foundational Objections

Objections to expert testimony typically arise in three general contexts: (1) qualifications of the expert; (2) the appropriateness of the subject matter for expert testimony; and (3) the basis of knowledge upon which the expert's opinion is formed.

1. Subject matter

People v. Davis, 296 P.3d 219 (Colo. App. 2012). An officer's testimony concerning a prison gang, 211 Crew, and regarding the code used in letters were within the officer's expertise. Doubts as to accuracy of interpretation or lack of experience go to weight, not its admissibility.

With regard to the subject matter of expert testimony, the trial court must resolve two, often interrelated, issues: (1) whether the subject matter is appropriate from which to elicit expert testimony and (2) whether it is grounded on a sufficiently reliable body of scientific, technical or other knowledge to warrant its use in the Courtroom. See *United States v. Pino,* 606 F.2d 908 (10th Cir. 1979).

2. Appropriateness of subject matter

People v. Davis, 296 P.3d 219 (Colo. App. 2012). Care needs to be taken to separate the legitimate use of a police officer's expert to translate terminology or explain a gang's hierarchical structure from improper substitution of expert opinion for factual evidence.

People v. Mulligan, 568 P.2d 449 (Colo. 1977). It was not error to exclude expert testimony on union tactics and meaning of certain statements attributed to defendant where statements contained no technical terms and inferences to be drawn from them were within competence of trier of fact.

People v. Salcedo, 985 P.2d 7 (Colo. App. 1998) (rev'd on other grounds). It was not error to exclude expert testimony on "Mexican culture" where proffered testimony did not constitute specialized knowledge that would assist trier of fact.

3. *Shreck* admissibility factors

People v. Shreck, 22 P.3d 68 (Colo. 2001). In reversing the trial court's determination that certain multiplex PCR-based techniques for analysis of DNA were not generally accepted under a Frye analysis nor sufficiently reliable under a C.R.E. 702 analysis, the Colorado Supreme Court, squarely addressed the proper standard governing the admissibility of scientific evidence in Colorado. The Court concluded that "Frye's general acceptance test, particularly when viewed rigidly, is unsuitable as the sole dispositive standard for determining the admissibility of scientific evidence in Colorado." Rather, the more flexible standard of C.R.E. 702 governs the determination as to whether scientific or other expert testimony should be admitted into evidence. The focus of the trial court's inquiry should be on the reliability and relevance of the scientific evidence, and requires a determination as to (1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury. The Court specifically declined to mandate any particular set of factors when making the determination of reliability. "Instead, we hold that the C.R.E. 702 inquiry contemplates a wide range of considerations that may be pertinent to the evidence at issue." By way of illustration, the Court recognized the nonexclusive set of factors set forth in *Daubert*, including:

- whether the technique can and has been tested;
- whether the theory or technique has been subjected to peer review and publication;
- the scientific technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and
- whether the technique has been generally accepted.

Also illustrative are the factors set forth by the Court in *United States v. Downing*, 753 F.2d 1224 (3rd Cir. 1985), including:

1) the relationship of the proffered technique to more established modes of scientific analysis;
2) the existence of specialized literature dealing with the technique;
3) the non-judicial uses to which the technique is put;
4) the frequency and type of error generated by the technique; and
5) whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure.

Consistent with *Kumho Tire Company, Ltd., v. Carmichael*, 526 U.S. 137 (1999), the Colorado Supreme Court held that, ultimately, the C.R.E. 702 inquiry may, but need not, involve consideration of the *Daubert* or *Downing* factors, depending on the totality of the circumstances of a given case. "A trial court may also consider other factors not listed here, to the extent that it finds them helpful in determining the reliability of the proffered evidence." In addition, a trial court should "apply its discretionary authority under C.R.E. 403 to insure that the probative value of the evidence is not substantially outweighed by unfair prejudice." Finally, the trial court must issue specific findings as it applies the C.R.E. 702 and 403 analysis.

People v. Rector, 226 P.3d 1170 (Colo. App. 2009). In determining whether to admit expert testimony into evidence, the trial court "must adequately inquire and determine that (1) the expert testimony is based on reasonably reliable scientific principles; (2) the expert is qualified to opine on such matters; and (3) the expert testimony is helpful to the jury."

4. Reliability of scientific principles

Kutzly v. People, 442 P.3d 838 (Colo. 2019). Determining if expert testimony is reasonably reliable requires considering the totality of the circumstances surrounding the proposed expert testimony and is not contingent on any specific list of factors. Therefore, certain factors—such as whether the technique has been tested, whether it has been subjected to peer review and publication, whether it has been generally accepted, its known or potential rate of error, and the existence and maintenance of standards controlling its operation—will be crucial in some cases but inapposite in others. The factors significant to making a C.R.E. 702 reliability determination will vary depending on the particular subject matter at hand. A trial court's reliability determination should consider whether the witness is qualified as an expert regarding the proposed testimony.

Among the factors a trial court may consider in making this determination are "(1) whether the technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the existence and maintenance of standards controlling the technique's operation; (4) the frequency and type of error generated by the technique; and (5) whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure." *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008).

People v. Laurent, 194 P.3d 1053 (Colo. App. 2008). Defendant argued that the expert's opinion was unreliable because the methods used by the forensic chemistry expert did not follow a "written analytical method." The Court of Appeals held that the expert was not required to follow a "written analytical method" in order for the expert testimony to be admissible.

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). The trial court excluded a defense expert whose proffered testimony was regarding the reliability of the victim's identification of the defendant and that of a gun. The Court of Appeals held that the trial court properly excluded the expert, "Defendant presented no evidence that the expert had conducted the study in conformance with any standard or procedure that would ensure it was reliable. Further, there was no evidence that the participants were a representative sampling of individuals such that the study would yield a reliable statistical analysis."

People v. Ramirez, 155 P.3d 371 (Colo. 2007). "Testimony is not speculative simply because an expert's testimony is in the form of an opinion or stated with less than certainty, i.e., 'I think' or 'it is possible.' If such were the case, most expert testimony would not be admissible, as rarely can anything be stated with absolute certainty, even within the realm of scientific evidence." "Speculative testimony under C.R.E. 702 is opinion testimony that has no analytically sound

basis." Meaning, the opinion is based on subjective belief, unsupported speculation, or a bare assertion based on expertise.

Masters v. People, 58 P.3d 979 (Colo. 2002). "Because social science attempts to understand highly complex behavior patterns, it is necessarily inexact. However, this does not make it per se inadmissible. Like other expert testimony, its admissibility depends on whether it is reasonably reliable, and whether it is helpful to the jury-and thus on the facts of the case."

People v. Ornelas-Licano, 490 P.3d 714 (Colo. App. 2020). The testimony concerning the shape of a bullet hole and the angle of firing lacked reliability. The defendant had fired a bullet into the windshield of an officer's motor vehicle. An inspector developed an experiment by firing the defendant's gun through a number of windshields to help determine the intent of the defendant. The officer's expertise did not focus on the relationship between the angle of the bullet's impact and the shape of the resulting hole. The appellate court held that the record was devoid of any showing that the expert's opinion was reliable because there was no evidence that anyone other than the inspector used the technique or came to the expert opinion.

a. Reliability, not certainty

Estate of Ford v. Eicher, 250 P.3d 262 (Colo. 2011) (civil case). The trial court used a wrong legal standard in determining that the opinion had to be based upon reasonable medical probability. Concerns about the degree of certainty to which the expert holds his opinion are sufficiently addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than exclusion. *People v. Ramirez*, 155 P.3d 371 (Colo. 2007). The prior standard that expert testimony be rendered with a "reasonable medical probability or certainty" is no longer the standard. This standard was abrogated by the adoption of the Colorado Rules of Evidence. Here the issue was the testimony from a pediatric nurse practitioner. The nurse had performed a sexual assault examination. The proponent need not prove the expert is undisputably correct or the theory is generally accepted. The evidence, pursuant to C.R.E. 702, must be reliable and relevant.

People v. Price, 903 P.2d 1190 (Colo. App. 1995) Expert testimony regarding why criminal defendant might fabricate military history was properly admissible pursuant to C.R.E. 702 in light of expert's undisputed expertise regarding subject and relevance of testimony to central issue of case. The fact that witness stated she could not support her opinion with certainty goes to weight and not admissibility of evidence.

Masters v. People, 58 P.3d 979 (Colo. 2002). "Because social science attempts to understand highly complex behavior patterns, it is necessarily inexact. However, this does not make it per se inadmissible." "The standard for admissibility is relevance and reliability, not certainty."

People v. Rojas, 181 P.3d 1216 (Colo. App. 2008). Defendant argued that the trial court erred in admitting "confusing and scientifically inconclusive DNA evidence." An expert in forensic serology and DNA analysis testified that the defendant could not be excluded as the source of the

major component of the penile swabs taken from him and that the victim could not 'be excluded to the minor component and 99.6 percent of the population can be excluded.' The Court held that even though the victim could not definitely be identified as a contributor of the DNA in the mixture, the expert testimony was still useful to the jury and relevant and therefore properly admitted into evidence.

Compare with People v. Wilkerson, 114 P.3d 874 (Colo. 2005). Trial court denied defendant's request that his expert testify that it was more likely than not that the shooting was accidental. The trial court found that although the expert was qualified in the general area of human factors/ergonomics, there was insufficient reliability in the expert's conclusion as there was a significant lack of literature or knowledge concerning standards of measurement and error rates. The Colorado Supreme Court agreed with the trial court. "Even though a general area of scientific knowledge is determined to be reliable, if the results of a scientific test or comparison are not self-evident, the test itself lacks relevance unless there is also reliable expert interpretation of its results." "[S]uch a numeric probability statement was . . . completely without empirical or methodological justification in the record."

5. Reliable in application

Estate of Ford v. Eicher, 250 P.3d 262 (Colo. 2011). Once it is determined that there are reliable principles and methods in an area of expertise, the Court needs to determine whether those principles and methods have been reliably applied. In the medical field, differential diagnosis, or diagnosis by exclusion, is a reliable method of diagnosis which is taught to doctors in training and used in practice.

The standard if reliability, not certainty. A court may reject expert testimony that relies on bare assertions, subjective belief, or unsupported speculation. The danger is the jurors giving more weight to what appears to be expert testimony but is not than it deserves. Lorezen v. Pinnacol Assurance, 457 P.3d 100 (Colo. App. 2019).

6. Qualification of the witness

C.R.E. 702 provides that an expert may be qualified by knowledge, skill, experience, training or education. A qualified expert does not need to "hold a specific degree, training certificate, accreditation, or membership in a professional organization." *Huntoon v. TCI Cablevision of Colo*., 969 P.2d 681 (Colo. 1998).

That the qualifications of a witness may given at trial, that fact does not necessarily make the witness's testimony concerning a topic into an expert topic. *See, e.g.*, *People v. Murphy,* 2021 CO 22 (body language).

Simply referencing one's "training and experience" does not transform an officer's lay opinion testimony into expert testimony. *See Vigil v. People,* 455 P.3d 332 (Colo. 2019) (reasoning that, though the testifying officer referenced his experience and training on evidence collection, his

testimony on shoe print size comparison did not constitute expert testimony); *People v. Kubuugu,* 433 P.3d 1214 (Colo. 2019) (noting that an ordinary person could have formed the same opinion regarding the defendant's intoxicated state despite the officer's training and years of experience); *People v. Gallegos,* 644 P.2d 920, 928 (Colo. 1982) ("That [the officer] based his conclusion in part on his experience as a police officer does not render his testimony inadmissible.").

People v. Oliver, 474 P.3d 207 (Colo. App. 2020). Concluding that, despite referring to his training and experience, an officer's observations and deductions about prison contraband was not "beyond the realm of common experience."

"In making its determination, a trial court should assess the witness's qualifications in the context of the evidence that is presented to the jury." *Golob v. People*, 180 P.3d 1006 (Colo. 2008).

People v. Davis, 296 P.3d 219 (Colo. App. 2012). The trial court did not abuse discretion in qualifying a police officer as an expert concerning a penitentiary gang, 211 Crew, based upon his reading 1600 letters, reviewing over 300 hours of phone calls, speaking with 70 to 75 people, making presentations concerning 211 Crew, and having been qualified twice before on the topic.

Marsh v. People, 389 P.3d 100 (Colo. 2017). Training, interview protocols, and techniques do not constitute expert opinion. A forensic interviewer may testify about the qualifications, experience, and training without being qualified as an expert. Further, in this case, the witnesses did not give detailed discussions or opinions about the interviewees or the defendant.

People v. Brown, 313 P.3d 608 (Colo. App. 2011). The trial court did not abuse its discretion in qualifying a detective as an expert to testify to the ages of children depicted in child pornography. The detective had two years with the child abuse unit, classes on investigating sexual exploitation of children, and previous handling of approximately a dozen child pornography investigations. A witness can be qualified by any one of the five factors in C.R.E. 702: knowledge, skill, experience, training, or education.

Estate of Ford v. Eicher, 250 P.3d 262 (Colo. 2011). A doctor was qualified as expert in injuries a baby can sustain during gestation and delivery.

When an expert's qualification is based upon experience and not on a scientific explanation, a trial court must find that the testimony would be useful to the trier of fact and that the witness is qualified to render an expert opinion on the subject. *Schuessler v. Wolter*, 310 P.3d 151 (Colo. App. 2012) (civil case).

People v. McFee, 412 P.3d 848 (Colo. App. 2016). An expert's opinion must be limited to the scope of his expertise. At trial a prosecution expert in "blood stain patter and crime scene reconstruction," was prohibited from answering the prosecutor's question concerning whether the victim might have known the person who murdered her. However, the defendant opened the door to the testimony based upon his questions during cross-examination. The prosecutor was entitled to try to show that the expert's opinion was not based entirely on improper, unscientific biases.

7. Usefulness and helpfulness

Usefulness hinges on whether there is a logical relation between the proffered testimony and the factual issues involved in the case. In determining whether the testimony will be helpful to the fact finder, the Court should consider, among other things, the elements of the particular claim and the scope and content of the opinion itself. *Lorenzen v. Pinnacol Assurance*, 457 P.3d 100 (Colo. App. 2019).

The testimony proffered from an attorney concerning the law is not helpful, *i.e.*, it will not assist the trier of fact to understand the evidence or to determine a fact in issue. *Black v. Black*, 422 P.3d 592 (Colo. App. 2018) (holding that testimony in court trial about the law was properly excluded).

People v. Montante, 351 P.3d 530 (Colo. App. 2015). In a prosecution for false statement regarding medical marijuana, a physician's statements concerning general medical assessment and diagnosis was helpful to the jury in determining whether the defendant's representation that there was a bona fide physician-patient relationship and the he had fully assessed the patient's medical condition and diagnosed the patient with a debilitating condition was helpful to the jury in determining whether the representations were false.

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). The trial court properly excluded defense expert from testifying regarding the reliability of the victim's identification of the defendant and gun. "We agree with the trial court that the jury could infer and weigh the suggestiveness of the identification procedure without the expert's opinion. Because the opinion would not have been helpful, the Court acted within its discretion in excluding it."

People v. Ramirez, 155 P.3d 371 (Colo. 2007). "The fact that [the expert] could not definitely state that AV was sexually assaulted did not make her testimony irrelevant . . . . Expert testimony is most helpful to the jury when it assists the jury to weigh ambiguous evidence."

Masters v. People, 58 P.3d 979 (Colo. 2002). A forensic psychologist and expert in sexual homicide testified to the traits and characteristics of perpetrators of sexual homicides and that defendant's writing and drawings were consistent with the characteristics of a typical perpetrator. His testimony was helpful to the jury in that it provided an explanation for the seemingly inexplicable. The murder of [the victim] "involved bizarre and deviant behavior that was unlikely to be within the knowledge of ordinary citizens. This testimony placed the crime in context and explained puzzling aspects of the murder, such as sexual mutilation." Although this case is still good law, Timothy Masters' conviction was ultimately overturned and sealed.

8. No *Shreck* hearing required

Kutzly v. People, 442 P.3d 838 (Colo. 2019). A party may move the trial court to conduct a pretrial evidentiary hearing, *i.e.*, a *Shreck* hearing, to decide the admissibility of an expert witness's proposed testimony. A trial court, however, may decide that a *Shreck* hearing is unnecessary. A trial court need not conduct a *Shreck* hearing if there is sufficient information to make an

admissibility determination without one, but the trial court must nonetheless address the testimony and make specific findings regarding its challenged admissibility. Notably, a trial court fails to make a specific finding if such a finding must be inferred. If the trial court fails to make a specific finding, then it abuses its discretion in not holding a *Shreck* hearing unless the record not only supports admission of the contested testimony, but virtually requires it, or if Colorado has already properly accepted the basis of the expert's testimony. *See Ruibal v. People*, 432 P.3d 590 (Colo. 2018) (finding improper expert testimony about "overkill" in a prosecution for second degree murder); *People v. Marston*, 491 P.3d 412 (Colo. App. 2021) (holding that denial of a *Shreck* hearing is reviewed for an abuse of discretion and may be denied where the trial court has sufficient information to make specific findings concerning the reliability requirements).

People v. Ambrose, 506 P.3d 57 (Colo. App. 2021). When a party requests a *Shreck* analysis, the Court may, in its discretion, determine whether an evidentiary hearing would be helpful. However, the trial court is not required to conduct a hearing if it "already has sufficient information to make specific findings under *Shreck*." "Concerns about conflicting theories or the reliability of scientific principles go to the weight of the evidence, not its admissibility." These concerns are mitigated by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.

People v. McAfee, 104 P.3d 226 (Colo. App. 2004). "*People v. Shreck* does not require the trial court to conduct a hearing to inquire into the reliability of the evidence."

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). "*Shreck* does not require trial courts to hold hearings to inquire into the reliability of evidence. Rather, *Shreck* requires the trial court to receive sufficient information to make specific findings about the reliability of the scientific principles involved and the expert's qualification to testify to such matters."

People v. Rector, 248 P.3d 1196 (Colo. 2011). The party challenging the admissibility of expert testimony must move for a *Shreck* hearing. Trial courts should make every effort to resolve expert witness testimony before trial, although the issue may be raised during trial. The trial court may avoid unnecessary reliability proceedings where the principles and methods may properly be taken for granted.

9. Generalized experts (AKA "Blind Experts")

People v. Coons, 495 P.3d 961 (Colo. 2021). Generalized expert testimony fits a case if it has a sufficient logical connection to the factual issues to be helpful to the jury while still clearing the ever-present C.R.E. 403 admissibility bar. In evaluating the fit of generalized expert testimony, a trial court must be mindful of the purposes for which such testimony is offered—that is, the reasons why the proponent of the evidence has asked the expert to educate the jury about certain concepts or principles. While generalized expert testimony must fit the case, the fit need not be perfect. In other words, each aspect of such testimony need not match a factual issue. Since generalized expert testimony, by definition, seeks to inform the jury about generic concepts or principles without

knowledge of the facts, it is almost inevitable that parts of such testimony will not be logically connected to the case. For that reason, the fit inquiry must be flexible. If the generalized expert testimony's logical connection to the factual issues is sufficient to be helpful to the jury without running afoul of C.R.E. 403, the testimony fits the case.

People v. Baenziger, 97 P.3d 271, 275 (Colo. App. 2004). "It has been repeatedly held that rape trauma syndrome evidence is reasonably reliable." Rape trauma syndrome testimony includes testimony on a variety of counter-intuitive victim behaviors such as delayed disclosure.

Examples of other Colorado law allowing similar expert testimony include:

Kutzly, 442 P.3d at 841 (affirming admission of expert testimony from a social worker about sexual assault victim behavior under *Shreck*);

People v. Fasy, 829 P.2d 1314, 1317 (Colo. 1992) (affirming admission under C.R.E. 702 the testimony of expert about post-traumatic stress disorder of child sexual assault victim to explain victim's delay in reporting);

People v. Morrison, 985 P.2d 1 (Colo. App. 1999) (holding an expert's testimony was allowed to aid the jury in understanding the typical reactions by young boys who have been sexually abused);

People v. Cordova, 854 P.2d 1337 (Colo. App. 1992) (holding a social worker's expert testimony about the characteristics present in sexually abused children was properly admitted pursuant to C.R.E. 702 under a "helpfulness" standard);

People v. Woertman, 786 P.2d 443, 447 (Colo. App. 1989) (holding expert testimony about typical behaviors of sexually abused children was properly admitted under C.R.E. 702 because the testimony could be used by the jury to understand the evidence and determine facts in issue);

People v. Hampton, 746 P.2d 947 (Colo. 1988) (holding that expert testimony of rape trauma syndrome admissible and properly admitted under C.R.E. 702, including delay in reporting when victims are related in some way to the perpetrator);

People v. Romero 93CA1849 (Colo. App. 1993) (not selected for publication) (holding that expert testimony about the defendant's grooming of a child sexual assault victim was admissible to assist the jury in understanding how sexual abuse arises in family settings).

10. Requirement of specific findings by trial court

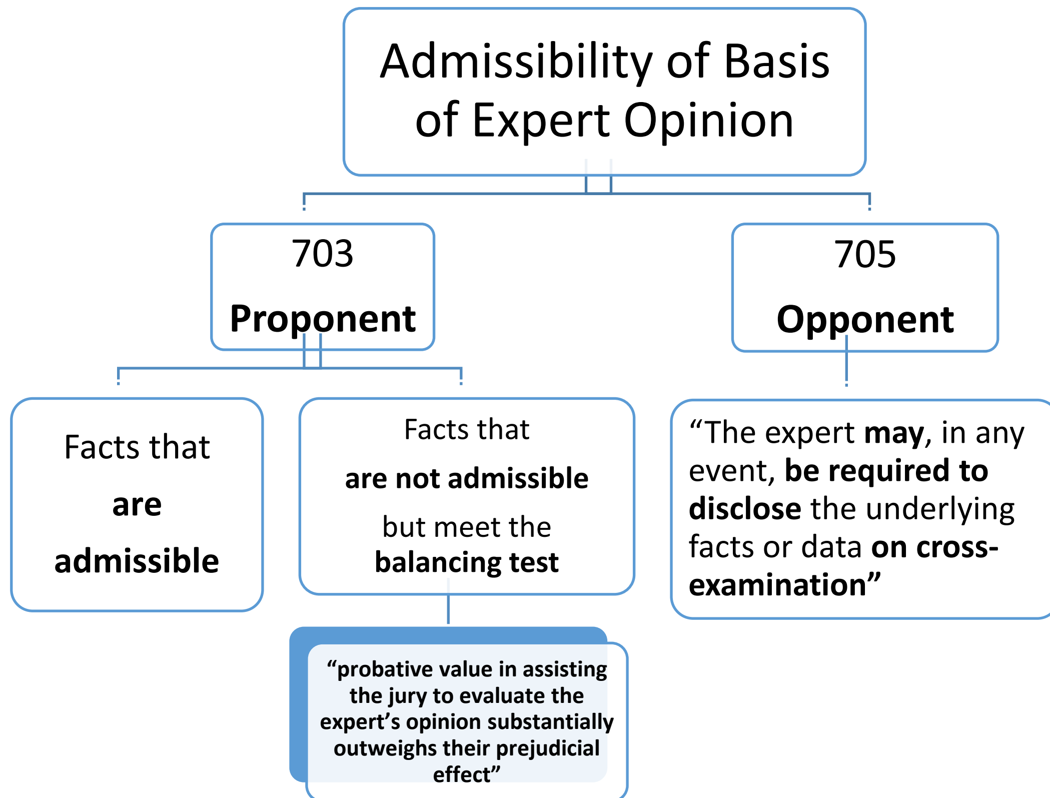
Ruibal v. People, 432 P.3d 590 (Colo., 2018). Trial courts have the obligation to determine and make specific findings on the record of the reliability, qualifications of the expert, usefulness of the testimony, and C.R.E. 403. Here the trial court made no specific findings.

People v. Yachik, 469 P.3d 582 (Colo. App. 2020) (grooming behavior in sexual assaults). The trial court is the gatekeeper and is required to make specific findings concerning reliability, relevance, qualifications, and C.R.E. 403. Here the trial court did not make those findings: because

the case was reversed on other grounds, the trial court was required on remand to make specific findings.

G. Admissibility of the Basis Underlying an Expert's Opinion

1. Analytical framework



2. Rules

C.R.E. 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made know to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The Advisory Committee's Note to the identical federal rule states that the facts or data upon which expert opinions are based may be derived from three possible sources: (1) first hand observation of the witness; (2) facts presented at trial, either testified to in the presence of the expert or presented in the form of a hypothetical question; and (3) data presented to the expert outside of court and other than that personally perceived by the witness.

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). The trial court properly admitted evidence of healing rib fractures observed during the autopsy of the infant victim which was offered under C.R.E. 703 as a basis for expert opinion that death resulted from shaken baby syndrome. Noting

that the evidence was offered under C.R.E. 703 and that the jury was instructed on the limited purpose for which the evidence of the rib fractures could be considered, the Court of Appeals rejected defendant's claim that admissibility of this evidence was also subject to the safeguards of C.R.E. 404(b).

3. Personal observation as a basis for expert opinion

Personal observation or examination is a common basis for expert opinion, particularly with regard to medical and psychiatric opinions. In addition, statements made for the purpose of medical diagnosis or treatment are admissible as substantive evidence under C.R.E. 803(4), and are not received merely for the limited purpose of showing the basis for expert opinion.

4. Facts presented at trial as a basis for expert opinion

O'Brien v. Wallace, 324 P.2d 1028 (Colo. 1958). In a pre-C.R.E. case, the Colorado Supreme Court stated: "One seeking to have an expert express his opinion based on evidence which he has heard [at trial] must be sure: (1) that there is no material conflict in the testimony; (2) the witness must assume the testimony to be true; (3) must be sure that the testimony has been properly admitted and is not inadmissible as immaterial, hearsay or for other reasons; and (4) the expert's opinion must not be predicated in whole or in part on opinions of others, expert or lay."

C.R.E. 703 is less restrictive, particularly as to requirements (3) and (4) of *O'Brien* questions regarding what testimony or other information the expert relied upon may be resolved by means of C.R.E. 705, which under certain circumstances requires the disclosure of the underlying facts or data upon which an expert opinion is based.

5. The hypothetical question as a basis for expert testimony

People v. Reynolds, 575 P.2d 1286 (Colo. 1978). "Hypothetical questions must be carefully framed so as to fairly embody all of the material facts in evidence relating to the particular matter as to which the expert's opinion is sought. When, however, an objection is made on the basis of an absence of material facts, it is incumbent upon the objecting counsel to state specifically the material facts omitted from the hypothetical question. This allows the Court to rule intelligently upon the objection and gives interrogating counsel an opportunity to amend and correct the defect in the question propounded." *See also People v. Jenkins*, 83 P.3d 1122 (Colo. App. 2003).

A primary purpose of C.R.E. 705 is to eliminate the need for the hypothetical question. See Advisory Committee's Note to Federal Rule 705. Generally, the fairness of a hypothetical question is a matter within the sound discretion of the trial court. See *People v. Horrocks*, 549 P.2d 400 (Colo. 1976). Resolution of the question of whether matters assumed in hypothetical questions are true is exclusively for the fact finder, and the fact that witnesses express doubt as to some of these matters is not grounds for excluding them from the hypothetical question. See *Ryan v. People*, 114 P. 306 (Colo. 1911).

6. Facts presented to the expert before trial as a basis for expert opinion

C.R.E. 703 specifically states that expert opinion may permissibly be based on facts or data presented to the expert at or before trial. This source of data represents the greatest expansion of existing law, and may include sources such as, inter alia, written reports, depositions, and statements from parties and counsel.

People v. Jenkins, 83 P.3d 1122 (Colo. App. 2003). Psychologist testified that she did not form her opinion that the victim's behavior was consistent with that of a person burned as a result of an assault at the time she treated the victim. She stated that she formed that opinion when she heard that assault charges had been filed against the defendant. The Court held that this was permissible. "As permitted by C.R.E. 703, she based her opinion on facts made available to her before the trial. Contrary to defendant's assertion, she was not basing her conclusion on the state's decision to prosecute defendant, but rather on the fact that the assault scenario would explain the victim's behavior . . . ."

7. Facts or data reasonably relied upon by experts in a particular field as a basis for expert opinion

In addition to personal observation and facts presented before and at trial, C.R.E. 703 permits an expert to base an opinion on other facts, which need not be admissible in evidence, if they are of the type reasonably relied upon by experts in the particular field. The Advisory Committee's Note to the identical federal rule: "If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data 'be of a type reasonably relied upon by experts in the particular field.'" As an example, the Note points out that Rule 703 would not permit the opinion of an "accidentologist" based on statements of bystanders, since such information is not reasonably relied upon by experts in the field.

People ex rel Strodtman, 293 P.3d 123 (Colo. App. 2011). Experts may testify to inadmissible facts and data including hearsay if that evidence formed the basis of the expert's opinion and is of a type reasonably relied upon by experts in the field.

People v. Green, 296 P.3d 260 (Colo. App. 2012). Expert witness testimony offered only to show the basis for the expert's findings and opinions is not hearsay because it is not evidence of the matters cited. *See* C.R.E. 703; *Golob v. People*, 180 P.3d 1006 (Colo. 2008).

People v. Gordon, 738 P.2d 404 (Colo. App. 1987). A pediatrician qualified as an expert in the field of child abuse was properly permitted to render an opinion that the death of the child was not accidental on the basis of eight diagnostic factors that can be utilized to determine whether a child's injury is non-accidental, because such factors are reasonably relied upon by experts in the field.

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). An expert in pediatrics and child abuse testified that, during the autopsy, the coroner observed four healing rib fractures on the victim and that these rib fractures were a basis for her conclusion that death resulted from shaken baby syndrome.

People v. Beasley, 608 P.2d 835 (Colo. App. 1979). It was not error to admit a psychiatrist's opinion of sanity based in part upon police offense reports and a pre-sentence report. The Court recognized the "modern trend" represented by C.R.E. 703, which was not then in effect, for reliance upon such materials.

People v. Romero, 593 P.2d 365 (Colo. App. 1978). It was not error to admit a serologist's opinion concerning the frequency of the victim's blood type in the general population where the opinion was based in part upon published tables of pharmaceutical supply companies. The expert testified that such tables were regularly relied upon by experts in the medical profession.

Compare with People v. Diefenderfer, 784 P.2d 741 (Colo. 1989). It was not an abuse of discretion to limit cross-examination of a child psychologist regarding the contents of Social Services records relating to the child-victim, where the psychologist had reviewed the records but based her opinion on her interview with the child and not the records.

i. Hearsay considerations

C.R.E. 703 does not create an exception to the hearsay rule. Thus, hearsay facts or data which may be brought out in testimony under C.R.E. 703 or C.R.E. 705, which is admissible as forming the basis of an expert's opinion, are not admissible as substantive evidence unless they are also admissible under C.R.E. 803 or C.R.E. 804.

People v. Drake, 748 P.2d 1237 (Colo. 1988). The trial court erroneously sustained the prosecution's objection to admission of the defendant's statement to a psychologist who testified at trial, where the statements were not offered to establish the truth thereof but were offered to establish the basis of the psychologist's opinion that the defendant suffered from a dependent-submissive personality disorder.

People v. Beasley, 608 P.2d 835 (Colo. App. 1979). The Court of Appeals recognized the "modern view" of the Rules of Evidence [which had not yet been adopted], but nevertheless held that it was error to admit the opinion of one psychiatrist where it was based in part upon the analysis of a test performed by another psychiatrist. *See also People v. Ferrell*, 613 P.2d 324 (Colo.1980).

The Advisory Committee's Note to the identical federal rule, however, states that under Rule 703 the opinions of others, if of a type reasonably relied upon by experts in the particular field, may serve as a basis for expert opinion. The example given is a physician basing an opinion in part upon the opinions from nurses, technicians and other doctors. The Note points out that if a physician makes life and death decisions in reliance upon such opinions, courtroom testimony based on the same sources (which is subject to cross-examination) ought to suffice for judicial purposes.

People v. Griffin, 985 P.2d 15 (Colo. App. 1998). Expert's testimony regarding her peer's statements, though implied, were inadmissible hearsay offered to prove truth of matter asserted,

and not admissible under C.R.E. 703 where peer's conclusions used merely to bolster expert's findings and opinions and not as basis for them.

8. Disclosure of facts or data underlying expert opinion

C.R.E. 705 provides: "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

Several safeguards are built into the Rules of Evidence. C.R.E. 705 itself permits the trial court to require disclosure if, in its discretion, such disclosure is warranted, and the adverse party may cross-examine the expert regarding the underlying data or basis. In addition, to some extent, the expert's underlying data may be obtained in discovery pursuant to Crim. P. 16, and the trial court may permit *voir dire* of the expert pursuant to C.R.E. 611. The discretion of the trial court to permit the adverse party's own expert to remain in the courtroom during the testimony of an expert witness under C.R.E. 615 provides an additional safeguard.

H. Cross Examination of Experts

1. Cross examination on basis of opinion

People v. Diefenderfer, 784 P.2d 741 (Colo. 1989). An expert may be cross-examined as to the basis of an opinion. However, the provision of C.R.E. 705 that an expert may be required to disclose the underlying facts or data on cross-examination is not absolute, and the trial court properly prohibited cross-examination of a prosecution expert regarding the contents of Social Services records when those records, while reviewed by the expert, were not relied upon as the basis of her opinion.

People v. Raglin, 21 P.3d 419 (Colo. App. 2000). It was proper to allow prosecution to cross-examine defense expert concerning brevity or thoroughness of her report where it was proper means of casting doubt on testimony and defendant opened door.

2. Cross-examination by the use of learned treatises

People v. Beasley, 608 P.2d 835 (Colo. App. 1979). The trial court did not err in permitting cross-examination of a psychiatrist regarding a theory elaborated in a text upon which the psychiatrist did not rely in arriving at his opinion: "While [defendant] argues the traditional position, the modern rule is that an expert may be upon them in reaching his conclusions. Fed.R.Evid. 803(19). *See also* Colorado Rules of Evidence, C.R.E. 803(18) (effective January 1, 1980)."

Practice Tip: Under C.R.E. 803(18), statements contained in learned treatises used in direct or cross-examination of an expert witness are admissible as substantive evidence if they meet the requirements of the rule.

14. EXPERT AND OPINION TESTIMONY

I. Expert Opinion on Ultimate Issues

C.R.E. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See People v. Martinez*, 608 P.2d 359 (Colo. App. 1979). "However, an expert may not usurp the function of the Court by expressing an opinion on the applicable law or legal standards." *People v. Pahl*, 169 P.3d 169 (Colo. App. 2006). "[A] trial court may prohibit expert testimony regarding an ultimate legal determination that the fact finder is capable of determining." *People v. Rector*, 226 P.3d 1170 (Colo. App. 2009).

People v. Baker, 485 P.3d 1100 (Colo. 2021). The Colorado Supreme Court delineated the facts the trial court should consider for C.R.E. 704 admissibility. These factors include, but are not limited to, whether (1) the testimony was clarified on cross-examination; (2) the expert's testimony expressed an opinion of the applicable law or legal standards and thereby usurped the function of the Court; (3) the jury was properly instructed on the law and that it could accept or reject the expert's opinion; and (4) the expert opined that the defendant had committed the crime or that there was a particular likelihood that the defendant did so. The Court held that the testimony is inadmissible if it (1) expresses an opinion on whether the prosecution's factual allegations are true, (2) gave an opinion that another witness was telling the truth on a specific occasion, or (3) applied the law to the facts to suggest the defendant was guilty. Thus, the commissioner's testimony that gave the opinion that the prosecution's factual allegations were true was improperly admitted.

But see *Lawrence v. People,* 486 P.3d 269 (Colo. 2021). Testimony is admissible where the witness never expressed an opinion concerning the applicable law—he only provided a general overview of the law and offered examples to help explain the concepts. Any error was diminished by defense's cross-examination that explored the definition of an investment contract, the meaning of materiality, the limited facts on the basis of the witness's opinions, and any potential bias. Any error was harmless.

J. Expert Opinion on Legal Conclusions Inadmissible

People v. Rector, 248 P.3d 1196 (Colo. 2011). It was not plain error for the doctor to testify that his medical diagnosis was child physical abuse that might be confused with "child abuse" as a legal standard. The defense attorney had highlighted the difference between medical and legal child abuse both during cross-examination and during closing arguments. The doctor indicated that there was a difference between the legal standard and the medical diagnosis. The jury was instructed on its ability to accept or reject the expert's testimony.

People v. Wimer, 799 P.2d 436 (Colo. App. 1990). The trial court properly disallowed expert testimony that cannabis plants seized from the defendant did not fit within the statutory definition of marijuana because, as a matter of law, the statute includes all varieties of cannabis.

14. EXPERT AND OPINION TESTIMONY

People v. Rector, 226 P.3d 1170 (Colo. App. 2009). Expert testified "that a subdural hematoma, such as the one [the victim] suffered, is rarely, if ever, caused by a minor household fall. He stated that it was highly probable that physical abuse explained the severity of [the victim's] injuries, because there was no other adequate explanation. He concluded that the victim's injuries were reasonably certain to have been the result of child abuse." The Court of Appeals held that "the jurors heard [ ] expert opinion regarding the ultimate legal issue, which usurped their role as fact finders. This error requires reversal because the primary issue for the jury was the nature of [the victim's] injuries and the Court did not instruct the jurors on the different definitions of medical and legal child abuse." The Court further held that upon remand, if the trial court determines that the scientific conclusions of the expert are reliable, direct testimony that the victim's injuries resulted from child abuse is not proper. However, the expert could testify that the injuries were consistent with medical child abuse.

Compare with People v. Martinez, 74 P.3d 316 (Colo. 2003). The expert "testified that a subdural hematoma rarely occurs and does so only in high-speed motor vehicle accident either as a pedestrian or where the baby is unrestrained; or when a baby is violently shaken or violently shaken and slammed." The Colorado Supreme Court held that this testimony was relevant and helpful to the jury because it provided a basis for the expert's opinion that a subdural hematoma requires massive violent force.

People v. Pahl, 169 P.3d 169 (Colo. App. 2006). Expert testimony that the transaction was a security was proper although this testimony risked crossing the line to an unacceptable interference with the Court's or jury's role).

People v. Rivera, 56 P.3d 1155 (Colo. App. 2002). Expert testimony that a limited partnership agreement entered into constituted a security was admissible. The commissioner was qualified as an expert on the Colorado Securities Act, its application, and case law interpreting it.

People v. Destro, 215 P.3d 1147 (Colo. App. 2008). Expert testimony on the issue of whether the agreement entered into by defendant's company and real estate buyers was an investment contract, and thus a security, was properly admitted. "[T]he expert offered no opinion regarding defendant's guilt or his knowledge whether the WIIN program [a program devised by the defendant that met the test for an investment contract] was governed by securities law, and the jury was instructed by the Court that it was free to reject the expert's opinion and that it should follow the law as given by the Court."

Masters v. People, 58 P.3d 979 (Colo. 2002). Forensic psychologist was properly permitted to testify as an expert to traits and characteristics of perpetrators of sexual homicides and that the defendant's writing and drawings were consistent with the characteristics of a typical perpetrator. Although this case is still good law, Timothy Masters's conviction was ultimately overturned and sealed.

K. Defense Experts

1. Prosecutorial use of defense-retained experts during case-in-chief

Hutchinson v. People, 742 P.2d 875 (Colo. 1987). In a forgery prosecution, the district attorney called a defense-retained expert in its case-in-chief. In reversing the defendant's conviction, the Colorado Supreme Court held that the prosecution's use of the expert in its case-in- chief, absent compelling circumstances or a waiver by the defendant, violated the defendant's right to effective assistance of counsel. In such situations, the defendant is entitled to relief only upon a specific showing of prejudice, *i.e.*, "whether there is a reasonable probability that, absent the improperly used witness, the fact finder would have had a reasonable doubt respecting guilt."

Perez v. People, 745 P.2d 650 (Colo. 1987). The prosecution's use of the defendant's handwriting expert in its case-in-chief in a forgery prosecution violated the defendant's right to effective assistance of counsel, where there was no compelling circumstances or waiver on behalf of the defendant, and the Court was unable to conclude that there was no reasonable probability that the jury would have reached a different verdict were it not for the improper use of the defense-retained expert.

2. Impeachment of defendant by statements made to defense-retained expert

Lanari v. People, 827 P.2d 495 (Colo. 1992). The Colorado Supreme Court held that the prosecution was properly allowed to impeach the defendant with statements made to a defense-retained psychiatrist that were obtained by the prosecution during a pre-trial interview with the expert. The Court recognized that, although statements made by a defendant to a psychiatrist during an examination conducted at the request of defense counsel constitute statements to the attorney for purposes of the attorney-client privilege, "the statements lost the cloak of confidentiality essential to the statutory attorney-client privilege when the defendant endorsed the physician as a defense witness, thus authorizing disclosure of those statements pursuant to the discovery process." However, a waiver of the statutory privilege does not necessarily constitute a knowing and unequivocal waiver of the constitutional right to assert that efforts to impeach trial testimony by means of statements made to the psychiatrist violated the right to counsel and the privilege against self-incrimination. In this case, the Court held that, by exercising his right to testify, the defendant forfeited his right to object to the use of voluntary statements which conflicted with his sworn testimony at trial. "The defendant's ability to assert [the right to counsel and privilege against self-incrimination] remained available to him until he elected to present testimony to the jury that contradicted statements he had voluntarily made to Dr. Plazak. At that point in the trial proceedings, the prosecution, exercising its responsibility to ensure the integrity of the truth-seeking function of the criminal adjudication, was entitled to impeach the defendant by means of his prior inconsistent voluntary statements."

3. Cross-examination of defense expert as shifting the burden of proof

People v. Santana, 255 P.3d 1126 (Colo. 2011). Comments and questions by a prosecutor may imply that the defendant has a burden of proof. The more a prosecutor is legitimately responding to questions and arguments raised by defense counsel, the less likely it is the prosecutor intended to shift the burden of proof. A prosecutor can comment on the lack of evidence confirming defendant's theory of the case. The prosecutor can make inquiry into areas that (1) clarify the defense's expert witness's testimony; (2) rebut the implication, raised by the defendant, that the prosecution failed to offer conclusive testing; and (3) highlight the strength of the prosecution's case. The questions and arguments by the prosecutor in this case were fair response to the questions and arguments of the defense.

4. Exclusion of Defendant's Expert

The exclusion on the basis of relevance of defendant's psychologist who performed a sex offense specific evaluation of the defendant was held to be reversible error. *People v. Brown*, 342 P.3d 564 (Colo. App. 2014). At a pretrial hearing the defense indicated the testimony would be limited to the results of the examination and no opinion would be expressed concerning defendant's guilt or innocence. The Court held that the prosecution could inject appropriate objections to the admissibility of the evidence on retrial.

Shreck also governs the admissibility of defense expert witnesses.

L. Expert Testimony About the Credibility or Truthfulness of a Witness

A problematic issue recurring in the context of child abuse and sexual assault prosecutions involves the expression by an expert of an opinion relating to credibility or the truthfulness of a victim's or witness' prior statement. Questions regarding the admissibility of such evidence typically arise in one of three contexts: (1) expert testimony that the witness was truthful on a specific occasion [always **inadmissible**]; (2) expert testimony regarding the likelihood that children, in general, do not fabricate stories of abuse [**may be admissible** if witness' character for truthfulness is attacked]; and (3) generalized or "blind" expert testimony regarding general demeanor or behavioral patterns of abuse victims [generally **admissible**].

1. Expert testimony that witness is believable or truthful

People v. Martinez, 486 P.3d 412 (Colo. App. 2020). Detective testified that the victim went through different phases of demeanor during the interview and that the victim's responses were "not surprising" considering his interviews with sexual assault victims. The Court held that this testimony was admissible expert opinion because the testimony was based upon the witness's training and experience. Although error, it was not plain error.

People v. Collins, 491 P.3d 438 (Colo. App. 2021). Interviewer testified to victims "pattern of disclosure" and that it was would be uncommon for a child to lie about having experienced sexual assault. The Court held the expert was testifying to credibility of the witness, *i.e.*, bolstering

victim's testimony. The lines of questioning were improper, but it was harmless error. An expert may testify whether a victim's behavior or demeanor was consistent with the typical behavior of victims of abuse. *People v. Glasner*, 293 P.3d 68 (Colo. App. 2011).

People v. Cernazanu, 410 P.3d 603 (Colo. App. 2015). The "general characteristics" of credibility that the witness testified to "were not those of a class of victims who had experienced child incest, sex assault, rape trauma, or the like. They were, instead, 'characteristics' *peculiar* to [the victim], which were directly indicative of [the victim's] *credibility*, and which were relevant *only* to ascertaining whether [the victim] was telling the truth on a specific occasion."

People v. Bridges, 410 P.3d 512 (Colo. App. 2014). Testimony of a forensic interviewer that child sexual assault victim "had not been coached" was impermissible opinion testimony concerning credibility on a specific occasion, improper, and required reversal.

People v. Koon, 724 P.2d 1367 (Colo. App. 1986). The testimony in a sexual assault on a child prosecution by the victim's therapist that "I think it happened and she knows it happened and that is what mattered" constitutes a direct assertion by the therapist that the victim's claims are true and accurate, and as such, is inadmissible.

People v. Ross, 745 P.2d 277 (Colo. App. 1987). It was error to admit police officer's testimony that, in his opinion, victim told him truth when relating details of assault.

People v. Guilbeaux, 761 P.2d 255 (Colo. App. 1988). It was reversible error to allow prosecutor's medical expert to express opinion that victim was telling truth regarding circumstances surrounding incident.

But see *People v. Jones*, 851 P.2d 247 (Colo. App. 1993). Expert's testimony that child abuse victim was not "suggestible" did not constitute improper comment on credibility of witness where implication from testimony was that victim would be unlikely to agree to something suggested by an adult "and hence, in the witness' opinion [the victim's] story, whether true or false, was likely to have emanated from within the victim [and] not from someone else."

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998). Toxicologist's testimony limited to alcohol absorption and elimination rates, including extrapolation of blood alcohol data, and witness not asked to express, nor gave, opinion on defendant's truthfulness; testimony properly admitted to "explain, refute, counteract or disprove" defendant's testimony.

2. Expert testimony about truthfulness after attack on veracity: C.R.E. 608

Tevlin v. People, 715 P.2d 338 (Colo. 1986). In a child abuse prosecution, the victim initially told investigators that he was injured during a fall, but later stated that his father caused the injuries by hitting him with a belt. After testifying at trial that his father had beaten him with a belt, an expert qualified in the field of child abuse expressed the opinion that the victim was telling the truth when

he reported that his father had beaten him with a belt. In holding that admission of the testimony was erroneous, the Colorado Supreme Court stated that the victim's character for truthfulness had not been directly attacked by the defense as to permit evidence of truthful character under C.R.E. 608. Moreover, the expert's testimony was improper in any event because it failed to refer to the victim's general character for truthfulness and instead related to his truthfulness on a specific occasion. However, in light of the overwhelming evidence of the defendant's guilt, the error was harmless.

Compare with People v. Zamora, 13 P.3d 813 (Colo. App. 2000). Detective's testimony that he did not indicate in his report defendant's initial denials of the crime because they were "lies" did not amount to "credibility opinion evidence."

People v. Gaffney, 769 P.2d 1081 (Colo. 1989). Testimony of a pediatrician who testified that "this history [as reported by the victim] is very believable" constitutes an impermissible opinion regarding the veracity of the victim: "Dr. Evans was the prosecution's last witness, and at no time during the trial did the defense attack [the victim's] character for truthfulness. Consequently, the foundation requirements of C.R.E. 608(a) for admitting opinion evidence of truthful character were never satisfied. Moreover, even if defense counsel on cross-examination of [the victim] had attacked his character for truthfulness, C.R.E. 608(a) would have permitted the prosecuting attorney to elicit on direct examination of Dr. Evans her opinion only as to [the victim's] general character for truthfulness, but not, as here, the doctor's opinion that [the victim] was speaking the truth on a particular occasion."

People v. Wallace, 97 P.3d 262 (Colo. App. 2004). "The expert's testimony that no deception was indicated by the defendant's [polygraph] test results was tantamount to an expert opinion on defendant's truthfulness on a specific occasion and was thus inadmissible under C.R.E. 608."

3. Testimony about a child's tendency to fabricate

People v. Snook, 745 P.2d 647 (Colo. 1987). Testimony by a witness qualified as an expert in the field of child abuse that children in general do not fabricate erotic experiences constituted reversible error. The Court of Appeals held that, even though the expert had no personal knowledge of the victim's credibility and couched the testimony in general terms, the only conceivable use of such testimony would be as support for the victim's truthful character. Since the victim's character for truthfulness had not been previously attacked by the defense, such testimony was inadmissible under C.R.E. 608(a).

> ***Practice Tip:*** The opinion in *Snook* suggests that, if the victim's character for truthfulness had previously been attacked by the defense, the testimony regarding the tendency of children, *in general,* to fabricate may have been admissible. *See People v. Ashley*, 687 P.2d 473 (Colo. App. 1984).

People v. Morrison, 985 P.2d 1 (Colo. App. 1999). Experts may testify concerning typical reactions of young boys following sexual abuse, but improper to testify whether children that are victim's age typically lie about homosexual acts, but such testimony did not amount to plain error under circumstances.

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). Expert's sexual abuse allegations for the specific purpose of being seen as a victim," was improper as this testimony was tantamount to testifying that the child victim was telling the truth about her allegations.

4. Expert testimony about demeanor or general behavioral patterns

People v. Fasy, 829 P.2d 1314 (Colo. 1992). In a prosecution for sexual assault on a child, a psychologist qualified as an expert in child psychology described the symptoms of post-traumatic stress disorder, stated that sexual assault was a traumatic event that could trigger the disorder, and expressed the opinion that the victim's symptoms were consistent with the disorder. In holding that the testimony was properly admitted, the Colorado Supreme Court stated: "Dr. Mosley testified in general terms regarding post-traumatic stress disorder. He did not provide a detailed history of the sexual assault. He did not make any statement relating to the victim's truthfulness or untruthfulness on a specific occasion. Likewise, the People's examination of Dr. Mosley did not focus on the truthfulness of the victim's statements."

People v. Morrison, 985 P.2d 1 (Colo. App. 1999). Holding that all of expert's testimony, with one exception, was similar to that in *Fasy* and properly admitted.

People v. Koon, 724 P.2d 1367 (Colo. App. 1986). A police psychologist qualified as an expert in the field of victim psychology was properly permitted to testify about certain behavioral patterns which are unique to child incest victims and their families. The Court of Appeals recognized that "if a qualified expert offers testimony that the reaction of one child is uniquely similar to the reaction of most victims of familial child abuse, and, if believed, this testimony would assist the jury in deciding whether a sexual assault occurred, it may be admitted." The Court held that since the expert rendered no opinion regarding whether the victim was truthful in her report of the assault or whether she was in fact an incest victim, the testimony was admissible within the discretion of the trial court.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). "[T]estimony about children's general characteristics and their behavior is not the same as testimony supporting the veracity of statements. Such testimony should be permitted where the expert offers appreciable help to the jury. Expert testimony about the general behavior of sexual assault victims is admissible.

People v. Rogers, 800 P.2d 1327 (Colo. App. 1990). Detective's testimony about range of responses and demeanor demonstrated by child sexual assault victims was admissible.

People v. Doss, 782 P.2d 1198 (Colo. App. 1989). An expert's accurate description of details and sequence of events involved in assault did not constitute opinion regarding truthfulness on specific occasion.

People v. Carter, 919 P.2d 862 (Colo. App. 1996). Expert testimony on behavioral changes in children associated with sexual abuse is admissible even though it may have some tendency to support victim's credibility, so long as it is not offered as evidence that victim was truthful on particular occasion.

But see *People v. Eppens*, 948 P.2d 20 (Colo. App. 1997). It was plain error where, in context, social service worker's opinion that child "was sincere" on occasion of interview, was tantamount to verifying that child was being truthful both in reporting sexual abuse and in reporting she was sexually assaulted.

People v. Jenkins, 83 P.3d 1122 (Colo. App. 2003). "[U]nder C.R.E. 702, an expert may testify concerning whether a victim's behavior and demeanor is consistent with that of typical victims of abuse." A "psychologist testified that the victim seemed fearful and very quiet, refusing to discuss any details of the events. She testified that she found it very unusual for a burn patient—especially one with such serious and painful burns—to wait six days to come in for treatment and that it was unusual for burn patients to not want to talk about their injuries . . . . The psychologist testified that when she treated the victim, she did not believe the injuries resulted from an assault . . . . She then opined that the victim's behavior was consistent with that of a person burned as a result of an assault." The Court held that this testimony was admissible as it did not focus on the victim's credibility, but instead on the fact that her behavior, including her delay in seeking treatment, was consistent with the alleged assault scenario."

People v. Rojas, 181 P.3d 1216 (Colo. App. 2008). Pediatrics physician's assistant properly testified that the "[victim's] statements to her, as well as the physical findings made during her examination of [the victim], were consistent with the statements of, and the physical findings concerning, children who had been sexually abused."

5. Assessment of credibility to explain officer's investigative techniques or decisions

People v. Liebler, 510 P.3d 548 (Colo. App. 2022). Where general statements on credibility of witness are made to explain the officer's investigative techniques or decisions, the evidence may be admissible. Generally, pursuant to C.R.E. 608, witnesses are prohibited from testifying that another witness was telling the truth on a particular occasion. In *Davis v. People,* 310 P.3d 58 (Colo. 2013), the Court held that an officer may testifying about his assessments of interviewee credibility to provide context for interrogation techniques and decisions.

M. Fingerprints

1. Admissibility relative to the number of points identified

People v. Gomez, 537 P.2d 297 (Colo. 1975). In a burglary prosecution, the Colorado Supreme Court stated that "the inability of the prosecution to establish the twelve-point comparison used by the Federal Bureau of Investigation went to the weight to be given the fingerprint identification, but not to the admissibility of the evidence." *See also Breeding v. State*, 151 A.2d 743 (Md. App. 1959) (identification of five points goes to weight not admissibility); Annot. 28 A.L.R.2d 1115.

2. Sufficiency of fingerprint evidence on motion for judgment of acquittal

People v. Ray, 626 P.2d 167 (Colo. 1981). The trial court properly granted the defendant's motion for judgment of acquittal where the only evidence tying the defendant to the burglary was a fingerprint found on the outer surface of the inner door to a milk chute at the rear of the victim's house. "It has been generally recognized that where, as here, the only evidence of guilt of accused persons consists of their fingerprints found at the scene of the crime, the evidence, to be legally sufficient to sustain a conviction, must be coupled with evidence of other circumstances tending to reasonably exclude the hypothesis that prints were impressed at a time other than that of the crime. Such 'other circumstances' need not be those completely independent of the fingerprint and may properly include circumstances such as the location of the print, the character of the place or premises where it was found and the accessibility of the general public to the object on which the print was impressed." Since there was no evidence that the defendant was inside the house, nor when his print was left on the milk chute, and because the milk chute was accessible to anyone in the victim's backyard, the Court held that the evidence, when viewed as a whole and in the light most favorable to the prosecution, was not substantial and sufficient to support a conclusion by a reasonable mind that the defendant was guilty of the burglary beyond a reasonable doubt.

3. Discovery considerations

People v. Montoya, 543 P.2d 514 (Colo. 1975). The trial court did not err in compelling the defendant to submit to having his fingerprints taken in the presence of the jury during the habitual criminal phase of the trial for the sole purpose of identifying the defendant with records of conviction already in evidence. *See also* Crim. P. 16, Part II(a)(1).

N. Arguing Expert Evidence without Expert Testimony

People v. Davis, 280 P.3d 51 (Colo. App. 2011). Prosecutorial misconduct for prosecutor in closing argument to argue the stages experienced by trauma victims and give a slide presentation on the issues while attempting to portray them as matters the jury would know from common sense or common experience. There was no expert or lay testimony about trauma victims' experience or stages. The prosecution implied that he had specialized knowledge and expertise, and his arguments encouraged the jury to rely on his supposed knowledge and expertise. The testimony improperly bolstered the victim's testimony.

O. Lack of Foundation for Expert Opinion

People v. Valencia, 257 P.3d 1203 (Colo. App. 2011). The trial court abused its discretion in sex assault case when it allowed expert to testify as to the results of several tests she conducted because the items tested were not introduced into evidence, the expert did not describe how the items she tested were marked, and thus there was no proper evidence establishing that the tested items came from either defendant or the victim.

P. Endorsement of Expert

People v. Greer, 262 P.3d 920 (Colo. App. 2011). Crim. P. 16 requires a written list of names of the witnesses the prosecution intends to call at trial. The rule does not require a witness to be identified as a lay or expert witness, but rather requires the prosecution to provide pertinent reports and statements of experts at least thirty days before trial. While it is the **better practice to identify witnesses as experts**, the burden is on the defendant to request expert endorsements.

But see *People v. Brown*, 313 P.3d 608 (Colo. App. 2011). The Court discussed the discrepancy between the opinion in *Greer* and those in *People v. Stewart*, 55 P.3d 107 (Colo. 2002), and *People v. Veren*, 140 P.3d 131 (Colo. App. 2005). Although Crim. P. 16 does not expressly require an expert endorsement when there are no written reports or statements of the expert, the admission of unendorsed expert testimony from police officers subverts pretrial disclosure and discovery requirements. Without deciding the issue, the Court in *Brown* found that the defendant did not demonstrate prejudice, and as such was not entitled to a reversal due to any discovery violation.

Q. Confrontation and Expert Testimony

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). Introduction of a certificate from a state laboratory to prove the weight and identity of a substance without in-court testimony from the analyst is a violation of the Confrontation Clause because the certificate is testimonial evidence, and therefore the defendant must have an opportunity to cross-examine the analyst. The Court distinguishes such reports from other types of business records and public records as those other reports are created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.

Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). The analyst who performed the testing was not called as a witness. Instead an analyst who did not participate in the testing or review of the testing was called by the prosecution. The witness relied on the original analyst's certificate that included chain of custody and compliance with protocol information. The Court held that this was not simply a scrivener writing down the result of a machine's testing and, therefore, was testimonial. Questioning one witness about another's testimonial statements does not satisfy the confrontation clause. A document created solely for an evidentiary purpose and made in aid of a police investigation is testimonial.

Williams v. Illinois, 132 S.Ct. 2221 (2012). The state's expert testified that the defendant's DNA profile, as generated by the state's forensic laboratory, was a match with a DNA profile from the

victim's vaginal swabs, as developed by Cellmark. No forensic expert from Cellmark testified. The plurality upheld the introduction of testimony regarding the Cellmark report under two theories: (1) that the evidence was admitted not for its truth, but as a basis for the testifying expert's opinion (this argument is rejected by 5 Justices), and (2) that there was no Confrontation Clause violation even if the report from Cellmark was offered, since the report was produced before there was a suspect (this argument is rejected by 5 Justices).

Campbell v. People, 464 P.3d 759 (Colo. 2020). The issue in this case was whether it was error for the testifying expert to rely on the DNA test results that were performed by a non-testifying analyst. The defendant argued the results were testimonial and therefore violated his confrontation rights. However, the defendant did not object at trial—the Court found that there was no plain error. At the time of Campbell's trial, the U.S. Supreme Court had narrowly held in *Williams v. Illinois* that expert testimony about a DNA profile generated by a non-testifying technician did not violate the Confrontation Clause. The case resulted in a fractured plurality ruling, generating four separate opinions and no majority rationale. Given the absence of clear guidance in *Williams*, any error was not so obvious that the trial judge should have identified it without the benefit of an objection.

R. Cumulative Experts

Lombard v. Colorado Outdoor Educ. Center, Inc, 266 P.3d 412 (Colo. App. 2011) (civil). The trial court did not err when it refused to permit the party to call a third expert witness. The party did not demonstrate that the third expert added anything substantive to the evidence, rather than being merely cumulative of the two prior experts.

S. Testimony: Live vs. Video

People v. Casias, 312 P.3d 208 (Colo. App. 2012). Refusal to allow expert testimony by video-conferencing was not an abuse of discretion. Twenty-one days before trial of a child abuse case, the defendant endorsed a radiologist to contest whether the injuries were accidental or not. The defense also filed a motion to permit testimony via telephone which was denied. The defense then filed a motion for videoconferencing which was also denied. The trial court denied the motion because the Court did not have confidence the equipment would work and videoconferencing would not be sufficient "to see how the expert reacts." The defendant alleged constitutional violations of his right to present a defense and to a fair trial. The Court held that it was proper to favor in-court testimony over remote testimony. Crim. P. Rule 26 requires testimony be taken orally in open court "unless otherwise provided by law." The Court emphasized that the ruling was not a categorical ban on videoconferenced testimony.

People v. Phillips, 315 P.3d 136 (Colo. App. 2012). On motion of the prosecutor under the authority of 16-10-402, another child who had been present in the home during child abuse incidents was permitted to testify from the judge's chamber using closed circuit television. Present

in chambers was the child witness, one of the child's family members, defense counsel, and the prosecutor. The defendant had two-way communication with the defense counsel during the child's testimony. The trial court instructed the jury that the process was being used because of the young age of the witness and the possibility that the courtroom might be intimidating and cautioned the jury not to be swayed or influenced because of the procedure. The Appellate Court cited *Maryland v. Craig*, 497 U.S. 836 (1990), as establishing a three-prong test for procedures protecting child witnesses where the trial court must find:

1. The procedure is necessary to protect the child witness's welfare;
2. The child witness would be traumatized specifically by the defendant's presence;
3. The child witness would suffer more than de minimis distress in the defendant's presence.

The Colorado Court of Appeals noted that the procedure was codified in 16-10-402. The defendant's argument that *Crawford v. Washington* overruled *Craig* was rejected. Further, the Court cited *Compan v. People*, 121 P.3d 876 (Colo. 2005) as the basis for rejecting a Colorado face-to-face argument.

T. Usurping the Factfinder's Role

People in the Interest of J.R., 495 P.3d 346 (Colo. App. 2021). In *J.R.*, the juvenile was charged with sexual assault on a child and indecent exposure. A child abuse pediatrician testified as an expert, opining that victims were diagnosed with sexual abuse. The Court held that this was error because the doctor's testimony usurped the jury's factfinding role. An expert witness cannot "tell the jury what result to reach or form conclusions for the jurors that they are competent to reach on their own," *People v. Baker*, 487 P.3d 1194 (Colo. App. 2019).

Venalonzo v. People, 388 P.3d 868 (Colo. 2017). The danger in admitting testimony that a child victim is truthful "lies in the possibility that it will improperly invade the province of the fact-finder."

U. Illustrative Cases by Topic

1. Absorption inhibition testing

In *People v. Banks*, 804 P.2d 203 (Colo. App. 1990). Expert testimony from absorption inhibition testing of bodily fluids was deemed admissible under the *Frye* test. This method, which indicates the secretor status of individuals involved in a crime, was recognized as reliable in previous criminal cases. Both the prosecution and defense acknowledged an authoritative source book discussing "weak secretors."

2. Age of Victim

People v. Brown, 313 P.3d 608 (Colo. App. 2011). Prosecution must prove that images in a sexual exploitation case depict real children, though expert testimony or child identification is not

required. A fact-finder could base this determination on the images themselves and testimony from a detective and a doctor.

3. Alcohol testing

People v. Bowers, 716 P.2d 471 (Colo. 1986). Tests measuring alcohol concentration were recognized as scientifically valid evidence. § 42-4-1301 mandates trial courts take judicial notice of alcohol testing methods, believing them reliable. Additionally, *People v. Ambrose*, 506 P.3d 57 (Colo. App. 2021), ruled that the trial court did not err in denying a hearing regarding the reliability of the I-9000 machine, emphasizing that any concerns about machine certification went to the weight of the evidence, not its admissibility.

4. Arrest control and use of force

People v. Cline, 525 P.3d 303 (Colo. App. 2022). The trial court restricted the defense expert's testimony to reasonable use of force in handcuffing, excluding discussions on taser use and the proper technique for moving someone from prone to standing. The Court found this limitation appropriate based on the case's specifics.

5. Arson

People v. Vasquez, 521 P.3d 1042 (Colo. App. 2022). Fire investigator substantially complied with standards and guidelines, and deviations only affected the weight of the testimony, not its admissibility.

6. Battered woman syndrome

People v. Yalich, 833 P.2d 758 (Colo. App. 1991). The Court of Appeals rejected a claim that evidence of battered woman syndrome justified a duress defense. However, the Court acknowledged that, in certain circumstances, evidence of battered woman syndrome could be admissible in self-defense cases. The admissibility of such expert testimony was further clarified in *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002), and *People v. Hare*, 782 P.2d 831 (Colo. App. 1989), where the Court allowed expert testimony on learned helplessness and the cycle of violence experienced by battered women.

7. Blood pattern analysis

People v. Bobian, 461 P.3d 643 (Colo. App. 2019). An officer's testimony on blood cast-off or smear patterns required specialized knowledge, but the error in admitting this testimony was harmless.

8. Blood testing

People v. Saathoff, 837 P.2d 239 (Colo. App. 1992). "Multi-system electrophoresis" is a reliable technique under the *Frye* test for analyzing blood and bodily fluids.

9. Brain injury

Trujillo v. Vail Clinic, 480 P.3d 721 (Colo. App. 2020). An expert's opinion on brain injury leading to cerebral palsy in a medical malpractice case was deemed reliable and relevant, meeting the standards of C.R.E. 403.

10. Burn pattern

People v. Jenkins, 83 P.3d 1122 (Colo. App. 2003). Expert testimony on burn patterns, including the nature of burns and their correlation to the victim's position, was admissible as it aligned with the prosecution's theory of the case.

11. Canine scent tracking

Brooks v. People, 975 P.2d 1105 (Colo. 1999). Scent tracking by a trained police dog should not be considered "scientific" evidence but rather experience-based specialized knowledge. Admissibility depends on its relevance, corroboration by other evidence, and compliance with C.R.E. 702 and C.R.E. 403.

12. Child abuse—victim's behavior and disclosure barriers

People v. Thompson, 413 P.3d 306 (Colo. App. 2017). Experts can testify about whether a victim's behavior aligns with common patterns seen in abuse cases. Testimony about "closed family systems" and "barriers to disclosure" was permissible as it did not improperly vouch for the victim's truthfulness.

13. Computers—dates and software programs

People v. Froehler, 373 P.3d 672 (Colo. App. 2015). Lay testimony about the "date created" and "date modified" of files found on a flash drive was admissible but required expert testimony on the specialized knowledge of software programs used to search computers. The admission of this testimony was considered harmless.

15. Cycle of violence

People v. Ruibal, 434 P.3d 606 (Colo. App. 2015). Expert testimony on the cycle of violence in domestic abuse cases, specifically the escalation of violence and the intimate nature of strangulation, was admissible for explaining the context of the abuse.

People v. Lafferty, 9 P.3d 1132 (Colo. App. 1999). The Court accepted expert testimony on the cycle of violence to explain victim recantations.

16. Demeanor of victim during law enforcement interview—Sexual Assault

People v. Martinez, 486 P.3d 412 (Colo. App. 2020). Testimony regarding the victim's demeanor during a sexual assault interview was found to be expert opinion based on the detective's training and experience. Despite being error, it was not plain error.

People v. Collins, 491 P.3d 438 (Colo. App. 2021). Testimony about a victim's "pattern of disclosure" was ruled improper as it bolstered the victim's credibility, but the error was harmless.

17. DNA evidence

Fishback v. People, 851 P.2d 884 (Colo. 1993). The Court upheld the admissibility of DNA evidence obtained using RFLP-based techniques, applying the *Frye* test for novel scientific evidence.

People v. Shreck, 22 P.3d 68 (Colo. 2001). The Court ruled that DNA evidence from PCR-based techniques, such as STR methods, met the reliability standard under C.R.E. 702.

People v. Marks, 374 P.3d 518 (Colo. App. 2015). Inconclusive DNA results were deemed irrelevant if offered to implicate the defendant.

18. Domestic violence

People v. Coons, 495 P.3d 961 (Colo. 2021). The Court ruled that expert testimony on domestic violence must be logically connected to the case facts.

People v. Cooper, 496 P.3d 430 (Colo. 2021). The Court found expert testimony on domestic violence dynamics appropriate, even if the connection to the facts was not perfect.

19. Drug courier profile

People v. Gamboa-Jimenez, 508 P.3d 263 (Colo. App. 2022). The court ruled that drug courier profiles, which are often based on behaviors and characteristics believed to indicate drug smuggling, are inadmissible unless reliability is established. The testimony in this case was found to mislead the jury, and its admission was ruled erroneous.

20. Drug language, slang

People v. Bryant, 428 P.3d 669 (Colo. App. 2018). The Court ruled that an officer's interpretation of slang terms, like "sherm" for PCP, qualified as expert testimony.

21. Drug dealing paraphernalia

People v. Dominquez, 454 P.3d 364 (Colo. App. 2019). Court upheld expert testimony about the significance of drug paraphernalia, such as electronic scales and text messages related to drug transactions.

22. IP vs. ISP

People v. Garrison, 411 P.3d 270 (Colo. App. 2017). Expert testimony was required to explain the link between IP addresses and Internet Service Providers as part of digital evidence analysis.

23. Eyewitness identification

Campbell v. People, 814 P.2d 1 (Colo. 1991). The Colorado Supreme Court ruled that expert testimony on the reliability of eyewitness identification, especially in the context of factors like stress and post-event information, should be evaluated under C.R.E. 702.

24. Fingerprints

People v. Wilson, 318 P.3d 538 (Colo. App. 2013). Fingerprint analysis did not require a *Shreck* hearing in habitual criminal proceedings, as the method's reliability was accepted as a standard practice.

People v. Lowe, 486 P.3d 397 (Colo. App. 2020). The Court upheld the admissibility of fingerprint testimony.

25. Fire investigator

People v. Perkins, 533 P.3d 971 (Colo. App. 2023). The Court affirmed that fire investigation based on National Fire Protection Association guidelines by a qualified investigator was reliable and relevant.

26. Forensic interviewer

Venalonzo v. People, 388 P.3d 868 (Colo. 2017). Forensic interviewers testimony about he she conducted forensic interviews constituted lay witness testimony. Similarly, her testimony that children were "not very good at understanding physical measurements, that they often used generalities when speaking, and that they often revealed secrets to other children before they told adults" was lay opinion testimony.

27. Frame of reference or syndrome evidence

People v. Martinez, 74 P.3d 316 (Colo. 2003). The validity of using a social framework, like battered women's syndrome, was considered under C.R.E. 702. These frameworks help the jury understand issues such as due care, intent, or purpose by allowing the jury to infer facts based on the presented evidence and apply those in the context of the case.

28. Gang evidence

People v. James, 117 P.3d 91 (Colo. App. 2005). Evidence of gang membership and activities may be admissible when based on the training and experience of law enforcement officers, provided it helps contextualize gang culture within the case.

29. GPS evidence

People v. Campbell, 425 P.3d 1163 (Colo. App. 2018). GPS technology is presumed reliable, and there was no error in denying a pretrial *Shreck* hearing regarding its use as evidence.

30. Hair and fiber analysis

People v. Prieto, 124 P.3d 842 (Colo. App. 2005). Expert testimony regarding hair and fiber analysis is admissible, even if the expert cannot conclusively match fibers but can state consistency between samples.

31. Hair follicle analysis to determine cause of death

People v. Archer, 518 P.3d 1143 (Colo. App. 2022). Two chemists testified about hair follicle analysis to determine the cause of a child's death. The trial court found the tests to be reliable and relevant, allowing the expert testimony to be admitted.

32. Heat of passion

Lanari v. People, 827 P.2d 495 (Colo. 1992). An expert testified on the degree of provocation necessary to induce an irresistible urge to kill in a reasonable person under the heat of passion manslaughter statute.

People v. Dooley, 944 P.2d 590 (Colo. App. 1997). Limited expert testimony to focus on an objectively reasonable person rather than one with the defendant's personality traits.

33. Horizontal gaze nystagmus ("HGN")

Campbell v. People, 443 P.3d 72 (Colo. 2019). Horizontal gaze nystagmus testing requires expert testimony because it is not something a layperson can understand without specialized training and knowledge.

34. Law

Black v. Black, 422 P.3d 592 (Colo. App. 2018). Expert testimony on the law is not helpful in a case where the judge is the fact-finder. This emphasizes that legal principles are for the judge, not experts, to address.

35. Marijuana

People v. Douglas, 412 P.3d 785 (Colo. App. 2015). Officers' testimony about marijuana edibles and drug distribution practices was admissible. It was not common knowledge for citizens to recognize the parts of the plant used to make edibles, justifying the expert testimony.

36. Mathematical calculation

People v. Ramos, 417 P.3d 902 (Colo. App. 2017). Basic mathematical calculations such as addition and subtraction are considered lay opinions and do not require expert testimony.

37. Mental condition

People v. Moore, 485 P.3d 1088 (Colo. 2021) and *People v. Day*, 544 P.3d 1242 (Colo. App. 2023) emphasized that mental condition testimony is allowed if it avoids delving into insanity defenses without a proper examination.

People v. Lane, 343 P.3d 1019 (Colo. App. 2014). A trial court may exclude testimony if the defendant fails to comply with procedural requirements like undergoing court-ordered examinations.

38. “Overkill” evidence

People v. Ruibal, 434 P.3d 606 (Colo. App. 2015). A forensic pathologist testified that multiple injuries to one body area indicated a strong emotional attachment by the perpetrator. The Court allowed this testimony as it helped explain the victim’s injuries and counter the defense’s alternate suspect theory.

39. Pathologist testimony

People v. Medrano-Bustamante, 412 P.3d 581 (Colo. App. 2013). A pathologist’s testimony about whether a victim and defendant were likely sitting during an accident was permissible.

Ruibal v. People, 432 P.3d 590 (Colo., 2018). Testimony concerning “overkill” was inadmissible without proper scientific reliability.

40. Pediatric nurse testimony

People v. Ramirez, 155 P.3d 371 (Colo. 2007). The Court allowed a pediatric nurse’s testimony regarding sexual assault examinations in child cases. The nurse’s opinions on what constitutes “suspicious” findings were found to meet the standard of reliability under C.R.E. 702.

41. Polygraph examination

People v. Anderson, 637 P.2d 354 (Colo. 1981). Polygraphs are inadmissible due to the unreliable nature of polygraph technology.

People v. District Court, 785 P.2d 141 (Colo. 1990). Statements made before a polygraph examination can be admissible, even if the defendant believed they would be inadmissible.

42. Rape-trauma syndrome

People v. Glasser, 293 P.3d 68 (Colo. App. 2011). Expert testimony on rape trauma syndrome to explain victim behavior, such as delayed reporting and inconsistent memories, is admissible.

People v. Snook, 745 P.2d 647 (Colo. 1987). Experts cannot testify to the credibility of the victim.

43. Securities law testimony

People v. Baker, 485 P.3d 1100 (Colo. 2021). Testimony by a deputy commissioner on the credibility of evidence was improperly admitted, as it pertained to the jury’s fact-finding role.

Lawrence v. People, 486 P.3d 269 (Colo. 2021). General law overviews offered by a commissioner were admissible because they did not provide legal opinions.

44. Sexual abuse diagnosis

People in the Interest of J.R., 495 P.3d 346 (Colo. App. 2021). Expert testimony diagnosing sexual abuse based on a victim's allegations was improper. Experts can discuss general characteristics of sexual abuse but cannot comment on a victim's credibility or the truth of specific allegations.

45. Sexual assault—behavior of victim

Kutzly v. People, 442 P.3d 838 (Colo. 2019). Expert testimony was properly allowed to educate the jury on typical behaviors exhibited by sexually abused children.

46. Sexual assault—forensic interviewers

People v. Relaford, 409 P.3d 490 (Colo. App. 2016). A therapist's testimony on the typical behaviors of sexually abused children and their relationship with perpetrators was permitted. However, the therapist was not allowed to comment on the specific credibility of the victim in the case.

47. Sexual assault—percentage testimony

People v. Marx, 467 P.3d 1196 (Colo. App. 2019). Testimony on the percentages of children who fabricate abuse allegations or who are sexually abused by family members was impermissible because it improperly bolstered the victim's credibility.

48. Sexual assault—medical examination

People v. Ramirez, 155 P.3d 371 (Colo. 2007). Expert testimony from a pediatric nurse regarding sexual assault examinations was deemed relevant, as it provided a reliable basis for determining whether a sexual assault occurred.

49. Sexual assault—grooming

Romero v. People, 393 P.3d 973 (Colo. 2017). Expert testimony about sexual predators' grooming strategies was admissible, as ordinary citizens would not be familiar with such tactics. The trial court erred by not qualifying the police officer as an expert.

50. Sex trafficking, commercial, pimping, prostitution

People v. Grosko, 491 P.3d 484 (Colo. App. 2021). Expert testimony regarding the roles of pimps in prostitution and their tactics of coercion was admissible. This evidence was relevant to rebut the defendant's claim that he was merely pretending to be a pimp.

51. Shaken-baby syndrome

People v. Friend, 431 P.3d 614 (Colo. App. 2014). Expert testimony on non-accidental trauma, including shaken baby syndrome, was admissible to explain injuries caused by forceful actions. The Court found the experts used reliable medical methods to determine the cause of injuries.

52. Shoe-print identification and comparison

People v. Perryman, 859 P.2d 263 (Colo. App. 1993). The Court of Appeals upheld the admission of evidence comparing a photograph of the defendant's shoes with a shoe print found at the crime scene. The Court determined that the process did not involve the manipulation of physical evidence and that the expert's techniques were understandable to the jury without requiring highly technical knowledge. The Court ruled that C.R.E. 702 was the appropriate test for this case, while also acknowledging that the evidence was admissible under the *Frye* test.

People v. Fears, 962 P.2d 272 (Colo. App. 1997). The trial court allowed expert testimony on shoe print identification, affirming that it was within the Court's discretion.

Vigil v. People, 455 P.3d 332 (Colo. 2019). An officer's testimony on shoe print size comparisons, based on his experience and training, was not expert testimony, but rather lay testimony.

53. State of mind

People v. Herdman, 310 P.3d 170 (Colo. App. 2012). A defendant was charged with sexual assault and kidnapping and underwent multiple evaluations concerning his competency and mental state. The Court ruled that evaluations conducted under 16-8-107 were admissible, but only to rebut any evidence presented by the defendant to show his incapacity to form a culpable mental state.

People v. Requejo, 919 P.2d 874 (Colo. App. 1996). The district court wrongly excluded testimony from a defense expert who would have explained the defendant's mental condition. The Court determined that the testimony was admissible to clarify the defendant's mental state and his lack of awareness regarding key details of the crime, despite not asserting an affirmative defense of impaired mental condition.

People v. Lopez, 946 P.2d 478 (Colo. App. 1997). The trial court erred by excluding psychological testimony on the voluntariness of the defendant's confession. Although the trial court had ruled the confession voluntary, the Court held that the defendant's expert testimony was relevant to challenge the reliability of his statements.

People v. Lucas, 992 P.2d 619 (Colo. App. 1999). Evidence of the state of mind of the defendant's friend, involved in a robbery, was irrelevant to whether the defendant committed the crime. Therefore, the trial court did not err by excluding expert testimony on this matter.

54. Toolmark identification

People v. Genrich, 928 P.2d 799 (Colo. App. 1996). Expert testimony on toolmark identification was reliable enough for admission into evidence. The Court emphasized that experts trained in tool use and analysis could testify about marks left by those tools, noting that the absence of data banks

or points of comparison did not inherently render the analysis unreliable. The Court also clarified that formal academic degrees or training were not required for an expert to offer testimony in this field.

55. Vehicles and tools used to operate stolen vehicles

People in Interest of D.I., 361 P.3d 1104 (Colo. App. 2015). An officer testified about methods used to steal cars, including the use of screwdrivers to punch ignition locks. The officer's observations were considered lay opinions. The Court did not rule on whether other testimony in the case was expert testimony, as it found the evidence to be harmless.

56. Voiceprint analysis

People v. Drake, 748 P.2d 1237 (Colo. 1988). The Colorado Supreme Court followed a line of decisions rejecting voice analysis evidence. The Court determined that voice analysis techniques were inherently flawed, much like polygraph tests, which had also been disallowed in judicial proceedings due to their deficiencies.

* * *

2025 Contributions by Dan Edwards
Adjunct Professor, Sturm College of Law
Retired Senior Assistant Attorney General
Colorado Attorney General's Office

CHAPTER 15

HEARSAY

15. HEARSAY

15.1 INTRODUCTION

Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the mater asserted. C.R.E. 801(c). A "declarant" is a person who makes a statement. C.R.E. 801(b). A "statement" is either "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him to be communicative." C.R.E. 801(a).

People v. Buckner, 228 P.3ed 245 (Colo. App. 2009). Defendant's cellular phone was properly admitted to show that the undercover officer's phone number was listed on the incoming call register; the telephone was an electronic device containing electronically stored information, not a "person" or "declarant" making a communicative "statement."

People v. Hamilton, 452 P.3d 184 (Colo. App. 2019). A computer-generated report of the contents of a cell phone is not hearsay so long as it was created without human input or interaction. To qualify as a computer-generated report that does not constitute hearsay, the party seeking to introduce the report must lay a foundation that it was machine-generated without human input.

C.R.E. 801 is definitional. It determines whether something is hearsay in the first place. The hearsay rule, however, is C.R.E. 802. C.R.E. 802 states that anything meeting the definition of hearsay is inadmissible unless admissible by another evidentiary rule, court rules, or statutes.

Practice Tip: If you determine that a statement is hearsay that falls under a hearsay exception and the declarant will not or cannot testify at trial, you must determine whether the statement is testimonial under *Crawford*.

15.2 NOT HEARSAY UNDER C.R.E. 801(D)

A. Prior Inconsistent or Consistent Statements

Where declarants appeared and testified at trial, the prosecution could properly inquire into prior inconsistent statements made by the declarants to the police. *People v. Banks*, 412 P.3d 417 (Colo. App. 2012) (rev'd on other grounds); *People v. Tate*, 352 P.3d 959 (Colo. 2015). Section 16-10-201(1) requires that the witness be given an opportunity to explain or deny the statement, or the witness be still available to give further testimony at trial. The statement must relate to a matter within the witness's own knowledge.

C.R.E. 801(d)(1)(A) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is *inconsistent* with the declarant's testimony. Although prior inconsistent statements are, by definition, non-hearsay, the foundational requirements for admission of such statements are governed by § 16-10-201 and C.R.E. 613.

C.R.E. 801(d)(1)(B) provides that a prior *consistent* statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination, and the statement is offered to rebut an express or implied charge of recent fabrication, improper influence or motive. The determination of how much of a prior consistent statement is admissible is based upon its relevance and probative use. If the impeachment goes only to specific facts, then only prior consistent statements regarding those specific facts are relevant and admissible. However, if the impeachment is general and not limited to specific facts, then the jury should have access to all the relevant facts, including consistent and inconsistent statements. *People v. Elie*, 148 P.3d 359 (Colo. App. 2006).

B. Extrajudicial Identification

C.R.E. 801(d)(1)(C) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person after perceiving him.

"[I]f the declarant testifies at the trial or hearing and is subject to cross-examination concerning the out-of-court statement of identification then the statement is admissible through another witness as nonhearsay" or through that witness. *People v. Johnson*, 701 P.2d 620 (Colo. App. 1985). *See also, People v. Howard*, 599 P.2d 899 (Colo. 1979); *Kurtz v. People*, 494 P.2d 97 (Colo. 1972).

C. Statements by the Defendant

Any statement that is made by the defendant relevant to the issues in the case are admissible whether the statement "admits" something or not. C.R.E. 801(d)(2)(A) provides that a statement is not hearsay if the statement is offered against the party and is that party's own statement, in either an individual or representative capacity. It is significant that the only requirement to render a defendant's statement non-hearsay under the Rule is that it be offered against the defendant; the actual statement or admission by the defendant need not be a statement or admission "against interest." *See* Advisory Committee's Note to Federal Rule 804(b)(3); *United States v. Matlock*, 415 U.S. 164 (1974).

1. "Self-Serving Statements" of defendant

People v. Vanderpauye, 530 P.3d 1214 (Colo. 2023). *Vanderpauye* overturned long-standing Colorado precedent excluding self-serving statements of a defendant. Rather, a defendant's statements are admissible at trial if they are admissible under some hearsay exception. The court must analyze the statement as it would any other hearsay statement. The self-serving nature of a defendant's hearsay statement, while not grounds for automatic exclusion, may be relevant in some cases to the determination of whether the statement fits within the scope of a hearsay exception in C.R.E. 803. In *Vanderpauye,* the defendant's statement to a victim after she accused him of rape was an excited utterance.

2. "Rule of completeness"

Under the doctrine of completeness, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." C.R.E. 106. Rule 106's purpose is to "avoid creating a misleading impression by taking evidence out of context or otherwise creating a distorted picture by the selective introduction of evidence. *See, e.g.*, *People v. Murray*, 452 P.3d 101 (Colo. App. 2018) (upholding exclusion of unadmitted remainder of defendant's statement under rule of completeness because the rule is about avoiding misleading the jury, not permitting a defendant to admit statements merely because the defendant would prefer the jury to hear them). The rule prevents a party from achieving an unfair result by introducing part of a writing, recording, or conversation out of context.

People v. Short, 425 P.3d 120 (Colo. App 2018). iIt was error for the prosecution to admit the defendant's statement "someone's abusing [the victim]," without also admitting what the defendant said immediately thereafter: "[B]ut it ain't me." The Court held that the appropriate way to resolve the hearsay issue is to hold that the party who offers an incomplete statement or document forfeits any hearsay objection to completing evidence that is necessary to correct a misleading impression. By introducing evidence in an unfair and selective way, the proponent can be deemed to waive its right to object to hearsay that would be necessary to place that evidence in proper context.

Callis v. People, 692 P.2d 1045 (Colo. 1984). The Colorado Supreme Court held that irrespective of the applicability of the rule of completeness, a trial court may properly exclude part of a statement if it is irrelevant or prejudicial. "The appropriate inquiry in determining the admissibility of *references* to *prior criminal conduct in an accused's custodial statement* should be whether the reference to other offenses has independent relevancy to the charges and, if not, whether this reference can be eliminated without significantly impairing the substantive content of those parts of the statement otherwise admissible." The Court accordingly held that, when determining the admissibility of a defendant's statement, the court must first excise or delete any reference to prior criminality that is not otherwise admissible, unless such excision would significantly impair the meaning and evidentiary value of the admissible portions of the statement. If references to other criminality in the statement are otherwise admissible, or if inadmissible portions cannot be excised or deleted without impairing the meaning or evidentiary value of the statement, the court must thereafter comply with the applicable rules governing the admission of other transactions and instruct the jury accordingly.

People v. Drake, 748 P.2d 1237 (Colo. 1988). Although *Callis* rejected rule of completeness, that decision was expressly made applicable to cases filed after effective date of decision.

People v. Melillo, 25 P.3d 769 (Colo. 2001). The rule of completeness is similar to the concept of "opening the door," which is also based on principles of fairness and completeness. Therefore, as with the "opening the door" concept, application of the rule of completeness is subject to the

considerations of relevance and prejudice required under C.R.E. 401 and C.R.E. 403." In this case the trial court excluded a portion of the defendant's statement to police referencing the victim 's prior sexual abuse. The defendant argued that the trial court erred in excluding the evidence because its admission was required under the concept of "opening the door" and the rule of completeness. The Colorado Supreme Court held that the trial court properly excluded the evidence because the defendant failed to comply with the requirements of the rape-shield statute, and his offer of proof was insufficient to demonstrate that the evidence was relevant to a material issue in the case. Furthermore, admitting that particular portion of defendant's statement posed a risk of prejudice to the victim.

People v. Muniz, 190 P.3d 774 (Colo. App. 2008). "The rule of completeness does not render admissible evidence of a defendant's willingness to take a polygraph examination that is otherwise inadmissible because of its lack of probative value."

3. Defendant's identity may be established by circumstantial evidence

People v. Forbes, 524 P.2d 1377 (Colo. 1974). Where there was sufficient circumstantial evidence to permit the trial court to make a preliminary finding that the defendant was the person who stated, "You'd better hurry before we get caught," the statement was admissible as a party admission even though the witness who heard the statement could not positively identify the defendant at trial.

4. Must be the defendant's statement

People v. Glover, 363 P.3d 736 (Colo. App. 2015). The defendant's own statements on Facebook were admissible once authenticated.

People v. Morise, 859 P.2d 247 (Colo. App. 1993). The trial court erroneously admitted three newspaper articles that attributed certain statements to the defendant. Although acknowledging that the articles were properly authenticated pursuant to C.R.E. 902, they nevertheless constituted inadmissible hearsay. "These news articles were not the statement of defendant; they were the statements of the two reporters who wrote them . . . . True, these hearsay statements by the reporters contained what purported to be statements by the defendant, *see* C.R.E. 801(d)(2), but the court prevented the People from offering any evidence, aside from the reporter's hearsay statements themselves, to establish that the defendant made such statements." Inasmuch as the articles were offered "to prove the truth of the reporter's statements that defendant gave certain explanations for his behavior," they were inadmissible hearsay.

5. Personal knowledge of the declarant not required

Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951). In disapproving the exclusion of testimony of an admission by a party, offered by the party-opponent, on the ground that the declarant had no personal knowledge concerning the fact admitted, the Court stated: "The rule is well settled [that admissions] do not come in on the ground that the party making them is speaking from his personal

knowledge, but upon the ground that the party will not make admissions against himself unless they are true."

Practice Tip: Admissions in **opinion form** are also admissible if offered against the party-declarant. *See Holman v. Boston Land and Security Co.*, 36 P. 797 (Colo. 1894) (error to exclude, in action for damages allegedly caused by defendant's negligence in starting fire, plaintiff's statement immediately after fire that "nobody was to blame"); McCormick, Evidence, §264 (1972); Annot. 118 A.L.R. 1230.

6. Factual voluntariness and consciousness of declarant

Martinez v. People, 132 P. 64 (Colo. 1913). "[I]t is only the voluntary statements of the accused that can be used against him. If defendant was asleep when he spoke, he was not conscious and the statement was not voluntary . . . . Where there is a question as to whether the accused was conscious or unconscious when he spoke, it should be left to the jury under proper instructions." See also *Taylor v. People*, 237 P. 159 (Colo. 1925).

7. Attacking credibility of a hearsay statement

C.R.E. 806 provides that, when a hearsay statement or a non-hearsay statement under **Rule 801(d)(2)(C), (D), or (E)**, is admitted, "the credibility of the declarant may be attacked . . . by any evidence which would be admissible for those purposes if declarant had testified as a witness." *People v. Dore*, 997 P.2d 1214 (Colo. 1999). Where a defendant elicits his own hearsay statements, prosecution may impeach defendant with prior felony convictions. *People v. Short*, 425 P.3d 1208 (Colo. App. 2018). When *the prosecution* introduces a defendant's statements, however, it cannot impeach with prior felony convictions.

People v. McLaughlin, 530 P.3d 1206 (Colo. 2023). Under the rule of completeness, if the prosecution creates a misleading impression by excluding a defendant's statements that ought in fairness to be considered contemporaneously with the proffered evidence, then the rule of completeness requires the prosecution to introduce such statements. When a defendant-declarant's statements are admitted under the rule of completeness, the prosecution may not impeach the defendant-declarant under C.R.E. 806.

People v. Krueger, 296 P.3d 294 (Colo. App. 2012). When a defendant elicits his own hearsay statements through another witness, C.R.E. 806 authorizes the jury to hear impeachment evidence that would have been admissible if the defendant had testified because the defendant is putting his credibility in issue.

8. Illustrative examples

People v. Greenlee, 200 P.3d 363 (Colo. 2009). Statements by the defendant about his plan to kill a woman and hide the body in a remote area were not hearsay under C.R.E. 801(d)(2). They also satisfied the other standards of admissibility. Defendant's statements were relevant to prove his

state of mind that he knowingly shot the victim, and the probative value of these statements was not substantially outweighed by the danger of unfair prejudice even though the statements were made nine weeks before he shot the victim. In addition, this was not 404(b) evidence; rather this plan evidence was admissible under hearsay and relevancy rules.

D. Adoptive Admissions

C.R.E. 801(d)(2)(B) provides that a statement is not hearsay if it is offered against the party and is a statement in which the declarant has manifested an adoption or belief in its truth.

In determining whether a defendant has adopted another's incriminating statement, a court should consider whether: "(1) the statement is such that an innocent defendant would normally be induced to respond; (2) the defendant heard and understood the statement made in his presence; and (3) he could have denied or objected to the statement without emotional or physical impediment." *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

People v. Green, 629 P.2d 1098 (Colo. App. 1981). The Court of Appeals held that it was reversible error to admit, as an adoptive admission, an accusation by the defendant's wife, to which the defendant did not respond, where the circumstances showed that the defendant was not free from an emotional impediment to making an immediate response (*i.e.,* fear that his wife would shoot him).

An incriminating statement uttered by a third party in the presence of the defendant is deemed not to be hearsay, and, therefore, admissible against the defendant, when the evidence establishes that the defendant demonstrated his or her adoption of the statement or belief it its truth. Underlying this 'adoptive admission' exemption from normal hearsay concepts is the general assumption that it would be reasonable to expect any person who hears a statement accusing him or her of misconduct to deny such statement. The assumption is a weak one, and evidence of such statements must be scrutinized with special concern in criminal cases, where there are constitutional limits to the possible inferences from a defendant's silence. . . . The ultimate fact question is whether the defendant adopted or acquiesced in the statement, or in some manner indicated his or her belief in its truth. Before admitting any such statement into evidence a trial court must determine preliminarily, normally by means of an *in camera* hearing, that the party offering the statement can produce evidence to support the factual conclusions that the defendant heard and understood the statement, had knowledge of the contents thereof, and was free from any emotional or physical impediment which would inhibit an immediate response. The issue should then be submitted to the jury under appropriate instructions.

People v. Quinn, 794 P.2d 1066 (Colo. App. 1990). In a prosecution of a deputy sheriff for introducing contraband into a jail, a letter received from the defendant from an inmate, which the defendant told investigators would establish the date that she brought alcohol into the jail, was admissible as an adoptive admission, inasmuch as the defendant's statements and actions with the investigators demonstrated her belief in the truth of the contents of the letter.

Agnes v. People, 93 P.2d 891 (Colo. 1939). Defendant's smiling when victim accused him of intending to beat her up was admissible as an adoptive admission.

1. Evasive response

Kingsbury v. People, 99 P. 61 (Colo. 1908). When the defendant, who was charged with cohabiting with his sister, was shown letters from neighbors stating that he and his "wife" were brother and sister, the defendant replied: "You wait and see, my people are Mormons and you don't understand about this." In upholding the admission of the letters (with a limiting instruction) and the defendant's response, the Colorado Supreme Court stated: "It was for the jury to determine whether or not the answer he made when the contents of these letters were made known to him was such that an honest man should make."

McCormick, Evidence, § 270 (1972) "Since it is the failure to deny that is significant, an equivocal or evasive response may also be used . . . as an adoptive admission."

2. Silence in the face of accusation

People v. Thomas, 345 P.3d 959 (Colo. App. 2014). The defendant was charged with vehicular homicide and several counts of vehicular assault. At the hospital, the mother of one of the surviving victims said to the defendant "just admit it. It would be better for you in the long run. I mean, mentally better for you." When the defendant appeared about to say something, the defendant's mother elbowed the defendant and pushed him back and said "let's talk about something else." The Court held that the defendant adopted the statement through his silence. The Court referred to the three "Sweeney" factors:

1. The statement is such that an innocent defendant would normally respond;
2. The defendant heard and understood the statement made in his presence; and
3. He could have denied or objected to the statement without emotional or physical impediment.

People v. Sweeney, 78 P.3d 1133, 1135 (Colo. App. 2003). "[I]n a noncustodial setting, silence in the face of an accusation of wrongdoing gains probative weight when it occurs in circumstances where the silent party could be expected to disagree with the statement." S*ee also* *People v. Quintana*, 665 P.2d 605 (Colo. 1983); *United States v. Aponte*, 31 F.3d 86 (2d Cir. 1994) (cited in *Sweeney*); *United States v. Jenkins*, 779 F.2d 606 (11th Cir. 1986) (cited in *Sweeney*).

3. Active conduct that demonstrates adoption of statements

People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003). Defendant and his accomplice returned home after committing a robbery. They encountered accomplice's roommate. In defendant's presence, the accomplice showed his roommate a pillowcase stuffed with money. The accomplice then stated that they robbed a hotel. The accomplice told the roommate to keep quiet about the incident, and

said that if the roommate said anything, "you know what's going to happen," and looked at the defendant who raised his shirt to reveal a pistol and then tapped the pistol and said "yeah that is what is going to happen." The statements and conduct were properly admitted as adoptive admissions under C.R.E. 804(d)(2).

4. Other parts of conversation—adoption of informant's statements

United States v. Hicks, 635 F.3d 1063 (7th Cir. 2011). The defendant's telephone conversation was admissible against the defendant. The other person's statements were admissible for the purpose of context. The "context exception" holds that another person's statements contained in a conversation are admissible because without this part of the conversation the defendant's words would make no sense. Also, the adoption of an informant's statements is a basis for admission—adopted by the defendant where they either led or responded to each of the informant's requests or questions, and at no time contradicted the informant's comments or questions.

E. Co-conspirator Statements

C.R.E. 801(d)(2)(E) provides that the admission of statements of co-defendants made during and in furtherance of the conspiracy are not hearsay. As a predicate to admissibility the trial court must find by a preponderance that a conspiracy existed. In making this determination the court can consider statements that are sought to be admitted as co-conspirator statements, but additional evidence of the conspiracy are required. The exclusion applies until the object of the conspiracy has been attained. The "in furtherance" language generally excludes casual conversations, gossip, or mere narratives of past events. The language can be construed to mean "encouraging a co-conspirator or other person to advance the conspiracy, or as enhancing a co-conspirator's or other person's usefulness to the conspiracy."

People v. Godinez, 457 P.3d 77 (Colo. App., 2018). Generally, co-conspirator statements cover the crime itself and not necessarily a later cover-up. To include statements concerning a cover-up, the prosecution must show that there was proof of a continuing conspiracy that included the cover-up.

People v. Faussett, 409 P.3d 477 (Colo. App. 2016). The People filed a motion *in limine* to admit a co-defendant statements, arguing that the statements were co-conspirator statements and admissible under C.R.E. 801(d)(2)(E). The evidence consisted of four telephone calls—three to a girlfriend and one to the driver. The trial court found that the object of the conspiracy was not only to steal the scooter but also to sell, obtain the proceeds from the sale. The conspiracy did not terminate until the scooter was sold and the proceeds distributed. Of the four calls, the Court found that two qualified for the exclusion and two did not. Even though the Court found error, the error was determined to be harmless.

People v. Thompson, 413 P.3d 306 (Colo. App. 2017). The statements by the co-defendant, not currently at trial, to others in attempts to enlist them in the cover-up of a child abuse death are admissible as co-conspirators statements. The co-defendant described the circumstances of the

death, a plan to create a false story, and attempted to get the listener to assist in a false story. The trial court found that the co-defendant was unavailable, her statements subjected her to criminal liability for concealing the death, and that she understood the legal consequences of her statements. The trial court also found that statements to be trustworthy and reliable. The appellate court also found that the statements would be admissible under C.R.E. 804(b)(3), statements against interest. Another witness's statements were admissible because the co-defendant attempted to have the witness commit identity theft in order to raise money for defendant's legal fees.

F. Statements Not Admitted for Their Truth

Generally, if the statement is offered for the truth of the content of the statement, it is hearsay and to be admissible must meet an 801(d) exclusion or an exception under 803, 804 or 807. However, if either the statement is admitted because it is false or it does not matter whether the statement is true or false, it is not hearsay. The hearsay rule applies only to statements of fact that can be considered true or false.

People v. Huckleberry, 768 P.2d 1235 (Colo. 1989). In a homicide prosecution in which the prosecution alleged that the defendant incapacitated the victim (his wife) and then drove over her in a truck obtained from his car dealership, the trial court admitted evidence of a conversation between the victim and a friend on the day before the homicide, during which the victim stated that she had a flat tire on her car and was driving a truck that the defendant obtained from his dealership. The court also admitted evidence regarding the defendant's response to the victim's statements, in which he disputed that the victim drove a truck on the date stated, told the friend to say the victim was actually driving the truck a day earlier, and warned her not to tell the police about the victim's statement or they would "hang him for sure." In holding that the victim's statement to her friend did not constitute hearsay, the Colorado Supreme Court recognized that the statements were being offered, not for their truth, but rather for the **non-hearsay purpose** of shedding light on the factual issues surrounding the defendant's efforts to persuade the friend to alter her version of the conversation with the victim and refrain from informing the police of the statements.

1. Limiting Instruction

Extrajudicial statements offered for non-hearsay purposes may be admitted into evidence with an instruction regarding the limited purpose of the evidence.

C.R.E. 105:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

2. Imperatives or commands

People v. Phillips, 315 P.3d 136 (Colo. App. 2012). Statements of the child-victim that the adults "better get him something to drink" were imperatives that are not hearsay because the fact cannot be determined to be true or false.

3. Statements that are false that indicate coaching or changing of story

People v. Phillips, 315 P.3d 136 (Colo. App. 2012). Certain statements of the child-victim and child-witness were admissible as non-hearsay, not for their truth, that indicated there was fabrication, coaching, or changing of the story from child abuse to accident.

4. Context

C.R.E. 801(d)(2)(E) provides that a statement is not hearsay if it is a statement by a co-conspirator during the course and in furtherance of the conspiracy. *See People v. Glover*, 2015 COA 16 (Colo. App. 2015); *People v. Smalley*, 369 P.3d 737 (Colo. App. 2015).

People v. Isom, 140 P.3d 100 (Colo. App. 2005). The defendant asserted that the trial court should not have admitted the victim's videotaped interview because it contained hearsay statements made by the interviewer who was not available for cross-examination. "There is no right of confrontation or hearsay preclusion when statements are offered, not for their truth, but to provide context for the declarant's statements. "Here, the interviewer's videotaped questions and statements were offered solely to place the victim's statements into context. The format of the interview was question-and-answer, and the interviewer offered no substantive comments of her own.

People v. Hagos, 250 P.3d 956 (Colo. App. 2009). Transcripts of calls between defendant and the victim were admissible under C.R.E. 801(d)(2)(A), and "the utterances of the victim are not hearsay because they were offered for the limited purpose of putting defendant's responses in context."

5. "Verbal Acts" with independent legal consequence

Verbal acts have been defined as statements to which the law attaches duties and liabilities. Included in this definition are such statements as words of contract and words of slander or deceit (which are actionable in and of themselves). *See* McCormick, Evidence, §249 (1972). "Verbal acts" or "verbal parts of acts" are further defined as words which accompany an act or transaction which by itself may be unclear, but acquire significance in conjunction with the accompanying statements. For example, the physical transfer of money, by itself, may be for a variety of purposes (*e.g.,* a loan, a gift, repayment of a debt); the "verbal acts" spoken in conjunction with the transfer would give character to the transaction. *Id. See also Alexander Film Co. v. Industrial Commission*, 319 P.2d 1074 (Colo. 1957) (setting forth substantially the same definition). Neither "verbal acts" nor "parts of verbal acts," constitute hearsay statements within the meaning of C.R.E. 801(c), so long as such statements are offered to define the character of a transaction or act and not to prove the truth of the statements themselves. *See* Advisory Committee's Note to Federal Rule 801(c).

People v. Dominquez, 454 P.3d 364 (Colo. App. 2019). Message "can you do 2 for 1500" is a verbal act, which is nn utterance of an operative fact that gives rise to legal consequences and offered to show that it was made without a claim of truth. A request to purchase something has a legal effect regardless of its truth.

People v. Scearce, 87 P.3d 228 (Colo. App. 2003). "Performative utterances, committing the parties to a course of action to which legal consequences attach, qualify as nonhearsay verbal acts." "Nonhearsay verbal act evidence is admissible on the issue of whether a conspiratorial agreement existed." In this case the Court held that it was error for the trial court to prevent defendant from eliciting testimony about statements he and the co-conspirator made.

People v. Pinkey, 761 P.2d 228 (Colo. App. 1988). Victim's testimony in burglary case that neither she nor her husband authorized defendant's entry was not hearsay inasmuch as testimony was "not an iteration of an out-of- court statement made by the husband; nor was it an iteration of nonverbal conduct intended by the husband to be communicative").

Crespin v. People, 488 P.2d 876 (Colo. 1971). Investigator's testimony that defendant's wife gave him permission to search defendant's automobile was not hearsay when admitted "merely to show that representations were made and consent obtained."

6. Effect on the listener

a. Ensuing state of mind

In assault cases involving a claim of self-defense, evidence of prior violent acts of the victim, including what the defendant has heard regarding those acts, is generally admissible for the purpose of showing the effect it had upon the defendant (apprehension or fear) and to explain his subsequent actions (application of force in self-defense). *See People v. Jones*, 675 P.2d 9 (Colo. 1984); *People v. Ferrell*, 613 P.2d 324 (Colo. 1980).

People v. Lowe, 565 P.2d 1352 (Colo. App. 1977). The trial court committed reversible error in refusing to permit the defendant to testify about statements made to him by the victim during the course of the alleged sexual assault, where the statements were being offered to show the defendant's state of mind regarding whether the victim consented to sexual intercourse.

Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951). In a civil action against a doctor for negligently leaving sponges in a patient after an operation, the trial court improperly excluded testimony that the doctor had been informed by a person in the operating room regarding a discrepancy in the sponge count, where the evidence was offered for the limited purpose of establishing that the doctor had warning of a potential problem.

People v. Robinson, 226 P.3d 1145 (Colo. App. 2009). The unavailable informant's statements-referencing the drug transaction arrangements, purportedly described the two suppliers and giving their street names, and identifying them upon arriving at the scene-were all introduced for the non-hearsay purpose of showing their effect on the listening officers, that is, to show why they chose

to go to that particular location and stop, arrest, and search defendant and the car in which he was traveling.

b. Explaining subsequent conduct of hearer

People v. Godinez, 457 P.3d 77 (Colo. App. 2018). Statements by defendant's brother that the defendant went out to get pizza the night of a sexual assault were admissible to explain why the police went to the area of the pizza shop to investigate and obtain video surveillance of the area.

People v. Tenorio, 590 P.2d 952 (Colo. 1979). The Colorado Supreme Court held that testimony by police officers that they received a call on an incident at a park involving a man fitting the defendant's description was properly admitted as non-hearsay testimony: "None of the above statements by the officers were inadmissible as hearsay. They were elicited only to establish the officers' reasons for going to the park and for drawing their guns after arrival there. The statements were not offered to show the truth of the contents of the radio report or to establish that the defendant did in fact possess a weapon."

People v. Todd, 538 P.2d 433 (Colo. 1975). In theft-by-deception case, it was proper to admit testimony by witness who received telephone call from representative of defendant's bank stating there were sufficient funds in defendant's account for purpose of explaining witness' subsequent act of issuing defendant a check).

Sarkisian v. People,138 P. 26 (Colo. 1914). In abortion case, testimony by victim that druggist had given her a card with defendant's name on it admissible to explain how victim happened to go to defendant's office for abortion.

People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994) Testimony that defendant's brother told witness in threatening manner to "get rid of the gun or else [you will] not be leaving the party" was admissible to explain why witness was in possession of murder weapon when leaving party for last time, regardless of whether declarant was truthful in making threatening statements).

People v. J.M., 22 P.3d 545 (Colo. App. 2000). Officer's testimony concerning statements made to him by two boys when the officer arrived at the scene was not hearsay because the testimony was offered to explain the officer's subsequent actions not to prove the truth of the boys' assertions.

7. Machine-generated statements

People v. Hamilton, 452 P.3d 184 (Colo. App. 2019). Statements in reports are not hearsay if they are generated automatically by a machine. The reports in this case were machine-generate and therefore not hearsay because:

1. the operator made no statements of any kind;
2. the operator did not say or write the information the machine generated;
3. the operator simply operated the machine;
4. the machine used a common scientific and technological process;

5. the conclusion of the machine-generated report was drawn solely from the machine's data; and
6. the source of the data was independent of human observation or reporting.

"A computer-generated record constitutes hearsay, however, when its creation involves human input or interpretation."

8. Victim's state of mind

People v. Gladney, 570 P.2d 231 (Colo. 1977). In a homicide prosecution, the Colorado Supreme Court held that testimony from a friend of the victim, who had been told by the victim that the defendant had threatened her, was properly admitted for the non- hearsay purpose of explaining the victim's state of mind and subsequent actions: "The defendant further contends that the evidence of threats was inadmissible because it was hearsay. If offered solely to show the victim's state of mind, however, and not to show the fact that the defendant threatened the victim, the evidence was not within the definition of hearsay. The testimony tended to show the decedent's fear of the defendant and was relevant to explain her subsequent actions, including carrying a gun. Since the defendant attempted to prove that the decedent may have been the aggressor, her fear of the defendant was clearly relevant. Thus, correctly analyzed, this evidence was not offered to prove the truth of facts asserted in the out-of-court declarant's statements and therefore it was not hearsay."

Bustamonte v. People, 401 P.2d 597 (Colo. 1965). Testimony that the homicide victim told a witness that the night before the homicide he had an argument with the defendant, that he had to slap her and take a gun away from her, and that he was going home to put her out, was properly admitted for the limited purpose of showing the "mental state of the victim and the ill feeling or hostility between the decedent and defendant."

People v. Evans, 987 P.2d 845 (Colo. App. 1998) (*rev'd on other grounds*). Friend properly allowed to testify victim told her she was afraid of defendant, particularly where defendant opened door by asking friend about victim's perception of defendant.

People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000). Not abuse of discretion to allow victim's sister to testify that victim was "getting afraid of" defendant because defendant had become more aggressive and she thought he was using drugs; first part of testimony showed victim's state of mind and second part explained that state of mind and was brief and general).

9. Defendant's state of mind

People v. Green, 553 P.2d 839 (Colo. App. 1976). The Court of Appeals held that it was reversible error to exclude testimony of a witness who was present during a conversation between the defendant and a third party during which the parties discussed the purchase of a refrigerator that was taken in a burglary, where the statement was "offered to prove defendant's state of mind or intent, and was not offered to prove the truth of the matter asserted."

People v. Lyles, 526 P.2d 1332 (Colo. 1974). The defendant's statements regarding his future plans were admissible in a sanity release hearing for the purpose of establishing his mental stability.

People v. Mossmann, 17 P.3d 165 (Colo. App. 2000). The trial court erred in rejecting defendant's offer of proof as to two witnesses whose testimony would have substantiated defendant's assertion that he had taken his daughter, in violation of custody, to protect her after she revealed to him that his ex-wife and another man were abusing her physically, mentally, and sexually, and that his ex-wife and the other man lived together in violation of a restraining order entered to protect defendant's daughter. The statements of the two witnesses were admissible as non-hearsay because they were not offered to prove the truth of the matter asserted, but only to substantiate defendant's claim that he believed his daughter was being abused by his ex-wife and a man living with her in violation of a restraining order.

10. Decedent's state of mind to negate claim of suicide

Simonton v. Continental Casualty, 507 P.2d 1132 (Colo. App. 1973). In an action on a life insurance policy where the issue was whether the decedent fell or jumped from an office building window, it was proper to permit the decedent's brother to testify that, ten days before the fatal fall, the decedent told him that he (the decedent) kept drugs on the window sill outside of his office (other evidence established that the decedent sometimes abused drugs). The Court of Appeals recognized that the testimony was admissible for the limited purpose of "demonstrating decedent's possible intention or state of mind."

Practice Tip: Admission of statements for the non-hearsay purpose of establishing the declarant's state of mind is different from the admission of hearsay statements that fall under the "present sense impression" [C.R.E. 801(1)] or "state of mind" [C.R.E. 803(3)] *exception* to the hearsay rule. Non-hearsay is admissible without meeting any exceptions.

G. Language Translations

People v. Gutierrez, 916 P.2d 598 (Colo. App. 1995). The Court of Appeals upheld the admission of testimony relating to an interpreter's out-of-court translation of statements that were made by a third party. The defense conceded that the statement was otherwise admissible as a co-conspirator statement pursuant to C.R.E. 801(d)(2)(E), but relied upon *People v. Gallegos*, 403 P.2d 864 (Colo. 1965), which held that testimony regarding another's statements made through an interpreter is hearsay. In rejecting the defendant's claim, the Court of Appeals recognized that Gallegos was decided prior to the adoption of the Colorado Rules of Evidence, and that the majority of federal and state courts that construe identical rules of evidence now permit admission of translated testimony "in appropriate circumstances assuring its reliability, on the theory that the interpreter serves as an agent of, or a language conduit for, the declarant." Among the factors to be considered in admitting such testimony are: "1) whether actions taken subsequent to the conversation were consistent with the statements translated; 2) the interpreter's qualifications and language skill; 3)

whether the interpreter had any motive to mislead or distort; and 4) which party had supplied the interpreter." *See also United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991).

15.3 HEARSAY EXCEPTIONS UNDER C.R.E. 803

If a statement is hearsay, **C.R.E. 803** sets forth 23 exceptions to the hearsay rule which may be established whether or not the declarant is available to testify—only the most common of which are covered here. Statements falling qualifying for a hearsay exception are subject to exclusion under other evidentiary rules, e.g., C.R.E. 401, 402, 403, 404(b), or constitutional limitations.

A. Present Sense Impressions: C.R.E. 803(1)

C.R.E. 803(1) provides that a statement is excluded from the rule against hearsay if it is a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.

1. Statement must be instinctive and spontaneous

People v. Robles, 302 P.3d 269 (Colo. App. 2011). In a murder and kidnap case, the prosecution offered evidence that the victim had made statements to several individuals including her then boyfriend (a police officer), A.W., and J.H. The statements were to the effect that the victim was afraid of the defendant and believed that he might kill her and then kill himself. The Court found the statements to be hearsay, but admissible under 803(3) then existing condition, 803(1) present sense impression, and 803(2) excited utterance. The defense was that the victim had consented to leave the house with him. The statements were relevant to the disputed issue of consent, the victim's relevant state of mind.

People v. Czemerynski, 786 P.2d 1100 (Colo. 1990). In a prosecution for criminal harassment and extortion, based on a series of obscene phone calls made by the defendant to the victim, the Colorado Supreme Court upheld the testimony of the victim's mother who testified that, on one occasion upon receiving an obscene phone call she handed the phone to her daughter who, after listening briefly, stated, "That's Chuck [the defendant], just hang up." In holding that the statement was properly admissible under the spontaneous present sense exception of C.R.E. 803(1), the Court recognized the requirement that "'a present sense impression be instinctive and spontaneous in order to be admissible . . . spontaneity is the most important factor governing trustworthiness' [quoting the Committee Comment to Colorado Rule 803(1)]." The Court concluded that the statement of the victim-declarant, which was made immediately after perceiving the defendant's voice, satisfied the spontaneous and contemporaneous requirement of the Rule.

Compare with People v. Franklin, 782 P.2d 1202 (Colo. App. 1989). In a first-degree murder prosecution, the trial court admitted testimony from a witness who stated that, just before the shooting, he tried to follow the victim out the front door but was prevented by an unnamed man who stated, "Now is not a good time to go out," and then counted off three shots as they were fired saying, "That's three, three more to go." In holding that the statements did not qualify for

admission under the spontaneous present sense impression exception, the Court of Appeals recognized that the statements were not a spontaneous impression of acts then taking place, but were rather statements "that implied the declarant's knowledge of existing facts not then observable to the witness or the declarant, and were a prediction based thereon of future events to occur . . . ." As such, the statements fell outside the ambit of C.R.E. 803(1).

B. Excited Utterances: C.R.E. 803(2)

C.R.E. 803(2) provides an exception to the hearsay rule if a statement relates to a startling event or condition and is made while the declarant was under the stress of excitement caused by the event or condition.

More specifically, "a hearsay statement is admissible as an excited utterance if its proponent shows (1) an occurrence or event was sufficiently startling to render inoperative the normal reflective thought processes of an observer; (2) the declarant's statement was a spontaneous reaction to the event and not the result of reflective thought; and (3) direct or circumstantial evidence supports an inference that the declarant had the opportunity to observe the startling event." *People v. Moore*, 117 P.3d 1 (Colo. App. 2004). *See also* *Compan v. People*, 121 P.3d 876 (Colo. 2005); *People v. Martinez*, 18 P.3d 831 (Colo. App. 2000).

1. Statement need not be contemporaneous with startling event or condition

People v. Pernell, 414 P.3d 1 (Colo. App. 2014). Statements made to police after ex-wife drove to her boyfriend's house, spend the night, and told him about the sexual assault permitted thought to intervene between event and report to police and therefore did not satisfy the excited utterance exception (although they were admissible as prior consistent statements).

People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991). In upholding statements made by an assault victim to a friend regarding the assault, made approximately **15 minutes** after she had been beaten by her husband, under circumstances in which the victim was crying, her voice was broken, and she appeared to be in emotional turmoil, the Court of Appeals recognized that C.R.E. 803(2) has been liberally interpreted to include statements made following a lapse of time from the startling event or condition: "[B]ecause the duration of stress will obviously vary with the intensity of the experience and the emotional endowment of the individual, the exception necessarily vests the trial court with broad discretion in applying the rule."

People v. Clements, 732 P.2d 1245 (Colo. App. 1986). Statements made by the four-year-old daughter of the defendant to police officers **nearly two hours** after her father rushed from the house carrying her injured baby sister, to the effect that her father injured the child by placing a pillow over the baby to stop its crying, was properly admissible under C.R.E. 803(2), inasmuch as the child-declarant was very upset and had been crying prior to her statements, she remained under that stress while making the statements, and the statements related to the startling event.

People v. Bolton, 859 P.2d 311 (Colo. App. 1993) (*rev'd on other grounds*). Hearsay statements made by child sexual assault victim to her grandmother and investigating officer **several hours** after assault were properly admitted as excited utterances where, at time statements made, child was "crying," "incoherent" and "hysterical," and statements pertained to circumstances of assault and description of assailant.

Compan v. People, 121 P.3d 876 (Colo. 2005). "While the temporal proximity of the statement to the startling event or condition is important, the two do not have to be contemporaneous if the declarant is still under the stress when the statement is made."

2. Statements may be made in response to questions

People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991). The Court of Appeals recognized that the excited utterance exception extends to statements made in response to general questioning.

People v. Clements, 732 P.2d 1245 (Colo. App. 1986). Statements in response to open-ended questioning that occurred immediately after spontaneous remarks from child-declarant were admissible as excited utterances. *See also* *People v. Moore*, 117 P.3d 1 (Colo. App. 2004); *People v. King*, 121 P.3d 234 (Colo. App. 2005).

People v. Garrison, 109 P.3d 1009 (Colo. App. 2004). Victim's statement to manager after receiving threatening phone calls was admissible as an excited utterance; the fact that the statement was made in response to a question does not preclude it from being an excited utterance.

3. Statement may relate to a past fact

People v. Ojeda, 745 P.2d 274 (Colo. App. 1987). The Court of Appeals upheld the admission of statements made by a burglary and sexual assault victim to a police officer immediately after the assault, in which she related a conversation she had with the defendant five months before the assault, during which the defendant asked questions about her parents' work schedule (thereby ascertaining when the victim would be home alone). "We hold that if the subject matter of the statement is relevant and would likely be evoked by the startling event, even though a portion of the statement relates to a past fact, the entire statement should be admitted . . . . The subject matter of the statement here is relevant and would likely be evoked by the startling event. The statement was made during the victim's report to the officer at the scene, minutes after the attack. It was highly relevant because it enhanced the victim's recognition of the defendant as her neighbor, indicating a reason that she believed the defendant was the person who had attacked her . . . . Thus, even though this small portion of the victim's statement related to a past fact, it was nevertheless an excited utterance because the significance of the past fact was revealed as the result of the excitement of the event."

Compare with *People v. Suazo*, 87 P.3d 124 (Colo. App. 2003). An "officer testified to the victim's statements to him concerning her relationship with defendant and the effect that the alleged

harassment had on her ability to work." This was reversible error because the "statements did not relate to [the] startling event and instead related to events that had occurred weeks previously."

4. The declarant must have had the capacity to observe the startling event or condition

People v. Garcia, 826 P.2d 1259 (Colo. 1992). In considering the admissibility of statements in a homicide case of a child-declarant who stated, "Daddy did it," after seeing his mother's body in a casket, and stating, "Mama crying, mama and daddy fighting, mama bleeding," shortly after seeing his mother's photograph approximately one week after the fatal stabbing, the Colorado Supreme Court recognized that "[b]efore a court may admit a hearsay statement under the excited utterance exception, there must be enough direct or circumstantial evidence to allow the jury to infer that the declarant had an opportunity to observe the event that is the subject of the declarant's statement." In employing a "totality of evidence" test, the Court concluded that the substance of the child's statements, combined with the fact that the child was in close proximity to his mother both before and immediately after the stabbing and was present during part of the argument between his mother and father, constituted sufficient evidence that he observed the fatal stabbing. Given that both of the child's statements were made under conditions that "could be shocking to a two-year old," the Court accordingly held that they were properly admitted as excited utterances.

People v. Green, 884 P.2d 339 (Colo. App. 1994). In a robbery prosecution in which the trial court admitted as an excited utterance a statement to police from a "panicked," "out-of-breath," "nervous" and "angry" declarant that two men had "just knocked down some lady and took her beer," the Court of Appeals recognized that "the threshold for satisfying the requirement that the declarant had an opportunity to observe the event is low, and the declarant's observation of the event may be inferable from sources other than the witness." The court noted sufficient corroborating evidence of the witness' statement that established the necessary foundation for the admission of the statements even though the declarant was both unavailable and unnamed.

5. Defendant's statements may be admissible as excited utterances

People v. Pack, 797 P.2d 774 (Colo. App. 1990). In a robbery prosecution, the trial court excluded a statement made by the defendant to his father immediately after the offense to the effect that the robbery was committed by an acquaintance and that while it was occurring he (the defendant) became scared and ran from the store. In holding that the statement was improperly excluded, the Court of Appeals rejected the trial court's conclusion that the general rule excluding a defendant's self-serving hearsay includes excited utterances under C.R.E. 803(2), and held that "the excited utterance rule is applicable to criminal defendants."

6. Excited utterances by bystanders

Bystanders to an event or condition may, in certain circumstances, be sufficiently affected by its excitement to render their statements admissible as excited utterances. *See People v. Dement*, 661 P.2d 675 (Colo. 1983) (*rev'd on other grounds*); *Williams v. Melton*, 733 F.2d 1492 (11th Cir. 1984). However, the hearsay statement of an unknown bystander is only admissible under C.R.E.

803(2) when the circumstances surrounding the making of the statement would affect the declarant in a way that assures its reliability and trustworthiness.

People v. Mares, 705 P.2d 1013 (Colo. App. 1985). In stabbing case in which paramedic testified he heard someone refer to defendant and say, "that's his friend, but he did it," the Court of Appeals held that foundation for excited utterance not established because there was no evidence of spontaneity or emotion on part of unknown declarant.

People v. Martinez, 83 P.3d 1174 (Colo. App. 2003). The trial court admitted testimony from the victim that a third person entered the room during the sexual assault and remarked, "oh my God." This statement was offered to prove the truth of the matter asserted, that is, that the declarant observed the sexual assault and expressed shock at what was occurring. The Court held that the three requirements for admission as an excited utterance were satisfied. "The victim's testimony constituted direct evidence that the declarant made the statement as a spontaneous reaction to a startling event which she had the opportunity to view." Further, "it was not necessary to produce the declarant herself to lay the foundation to admit the statement."

Compare with People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). Statement of an unidentified declarant on 911 tape was inadmissible. On direct examination of a witness who called 911, the prosecution offered a tape of the 911 call. The caller is heard asking, "The guy that ran by was the guy that did it?" A male voice answered "yes." The caller testified that he did not know who made this statement, and the speaker was never identified. This statement does not meet the excited utterance exception because there is no evidence the declarant had the opportunity to observe the startling event. There is not sufficient corroborating evidence to infer the declarant's personal knowledge.

C. Statement of Then-Existing Mental, Emotional, or Physical Condition: C.R.E. 803(3)

C.R.E. 803(3) exempts from the hearsay rule statements of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of the declarant's will.

The state of mind exception is a firmly rooted exception and therefore the reliability of such statements is implied under *Ohio v. Roberts*. *People v. Gash*, 165 P.3d 779 (Colo. App. 2006).

Practice Tip: Unlike statements offered for the non-hearsay purpose of establishing circumstantially the declarant's state of mind or to show an ensuing state of mind in the hearer, C.R.E. 803(3) applies to statements offered to directly prove the declarant's then-existing mental, emotional, or physical condition, and are thus offered for the truth of the matter asserted.

1. State of mind of the victim in assault and homicide cases: relevancy requirement

People v. Robles, 302 P.3d 269 (Colo. App. 2011). In a kidnapping and murder case, the prosecution offered evidence that the victim had made statements to several individuals including her then boyfriend (a police officer). The statements were to the effect that the victim was afraid of the defendant and believed that he might killer and then kill himself. The Court found the statements to be hearsay, but admissible under 803(1) present sense impression, 803(2) excited utterance, and 803(3) then existing condition. The defense was that the victim had consented to leave the house with him. The statements were relevant to the disputed issue of consent, the victim's relevant state of mind.

People v. Borelli, 624 P.2d 900 (Colo. App. 1980). The Court of Appeals held that the trial court improperly admitted into evidence under the state of mind exception [pre-dating the Rules of Evidence], the victim's hearsay statements that he was afraid of the defendant: "[T]he more recent and better reasoned cases allow hearsay only where the state of mind of the victim is clearly relevant to a material issue in the case. The concern is that the jury will not use the evidence to consider the victim's state of mind, but rather as probative of the defendant's guilty state of mind. These cases apply a balancing test and weigh the probative value of the evidence against the potential for prejudice to the defendant." The Court concluded that the victim's state of mind was not a material issue in the case, and the prejudicial effect of the evidence outweighed its probative value.

People v. Madson, 638 P.2d 18 (Colo. 1981). The defendant's first-degree murder conviction was reversed by the Colorado Supreme Court because hearsay statements of the victim concerning her fear of the defendant were improperly admitted as establishing the defendant's state of mind rather than the victim's state of mind. The Court recognized three situations in which evidence of a victim's fear of the defendant might be relevant in a homicide case: (1) when offered to rebut the assertion that the victim was an initial aggressor; (2) to rebut a claim that suicide was the cause of death; and (3) to rebut a claim that the cause of death was the result of an accident. The Court acknowledged that no such issues were raised by the defendant in this case; the victim's statements were in fact admitted as proof of the defendant's state of mind, i.e., "his intent to kill, the likelihood of his doing so, and his prior homicidal conduct."

Compare with *People v. Haymaker*, 716 P.2d 110 (Colo. 1986). The testimony of the mother of a burglary and sexual assault victim that she (the victim) moved out of her house after the offense because she was fearful and distraught, were properly admissible as relating to the victim's state of mind under C.R.E. 803(3), and was relevant to the issue of whether the victim consented to a sexual relationship with the defendant.

People v. McGrath, 793 P.2d 664 (Colo. App. 1989). Statements by homicide victim and defendant regarding alleged plan to "fake" robbery should not have been excluded from evidence; they showed declarant's state of mind as to plan, intent, or motive.

People v. Gash, 165 P.3d 779 (Colo. App. 2006).The prosecution offered into evidence, for purposes of refuting defendant's contention that the victim committed suicide, statements made

by the victim to her nephew shortly before her death that (1) she did not like defendant and (2) she was not happy living with defendant. The trial court properly admitted the evidence because the statements related to the victim's "then existing state of mind and emotion" as it related to another person and therefore fell within the parameters of C.R.E. 803(3).

2. Other illustrative cases

People v. Phillips, 315 P.3d 136 (Colo. App. 2012). Statements by child abuse victim that he was currently suffering pain in his ear was a then existing condition.

People v. Acosta, 338 P.3d 472 (Colo. App. 2014). When a sexual assault victim was asked by her father how thinking about the incident made her feel, the victim responded it made her sick to her stomach. The Court held that this was a then existing condition pursuant to C.R.E. 803(3).

People v. Parga, 535 P.2d 1127 (Colo. 1975). In a case involving theft of real property, the trial court excluded testimony of two defense witnesses regarding conversations with the defendant after the theft, and offered to show the defendant's lack of intent to convert the property. The Colorado Supreme Court upheld the exclusion of the testimony on the ground that the statements reflected the defendant's past state of mind, and not a present state of mind as the exception requires.

Pine v. People, 455 P.2d 868 (Colo. 1969). The Colorado Supreme Court held that the trial court properly admitted testimony by the victim's wife, under the "state of mind" exception, that the victim came home following a severe beating by the defendant and stated that he had a headache and wanted to go to bed.

D. Statements Made for the Purposes of Medical Diagnosis or Treatment: C.R.E. 803(4)

C.R.E. 803(4) excludes from the rule against hearsay statements made for the purposes of medical diagnosis or treatment that describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

1. Rationale of the exception

The rationale of the medical diagnosis exception is that the reliability of such statements is assured by the likelihood that the patient would believe that the effectiveness of treatment may depend largely upon the accuracy of the information he provides to the physician. McCormick, Evidence, §292 (1972). The corollary rationale, as stated by the Colorado Supreme Court, is that physicians, "by virtue of their training and experience, are quite competent to determine whether particular information given to them in the course of a professional evaluation is 'reasonably pertinent to diagnosis or treatment' and are not prone to rely upon inaccurate or false data in making a diagnosis or in prescribing a course of treatment." *King v. People*, 785 P.2d 596 (Colo. 1990).

People v. Thomas, 962 P.2d 263 (Colo. App. 1997). Trial court properly excluded exhibits which included medical history information because information not furnished in order to obtain diagnosis from health care professional but, rather, as part of jail's routine booking procedure).

People v. Perez, 972 P.2d 1072 (Colo. App. 1998). Trial court properly admitted statements made by victim to physician who examined her.

2. Statement must be necessary for diagnosis and treatment

People v. Allee, 77 P.3d 831 (Colo. App. 2003). "While statements ascribing fault or identifying the perpetrator of an assault are generally not admissible under C.R.E. 803(4), an exception exists where that portion of the statement is itself perceived by the medical provider as necessary for diagnosis and treatment." In this case, "the victim was taken to the hospital where, in response to questioning as to the cause of her injuries, she told the emergency room physician that defendant had attacked her and struck her in the head with a shovel." It was error to admit this statement because "the identification of defendant as the victim's assailant was [not] necessary for or pertinent to the physician's diagnosis or treatment." The Court recognized that in domestic violence situations this evidence may be admissible if such information is used for treatment of such abuse. However, there was no indication that the physician used this information to refer the victim to domestic violence resources or assistance.

3. Statements received as substantive evidence

Because C.R.E. 803(4) is an exception to the hearsay rule, statements that are admissible under the rule are received as substantive evidence. This represents a departure from previous Colorado case law that permitted such statements to be admitted only for the limited purpose of showing the factual basis for the opinion of the medical expert. *See People v. Parks*, 579 P.2d 76 (Colo. 1978); *Houser v. Eckhardt*, 450 P.2d 664 (Colo. 1969).

4. No distinction between "treating" doctor and "non-treating" doctor

People v. King, 785 P.2d 596 (Colo. 1990). The Colorado Supreme Court held that the trial court erroneously excluded statements made by the defendant to a defense-retained psychiatrist concerning his actions and thoughts during and shortly after the homicides, inasmuch as the statements were made for purposes of psychiatric diagnosis and thereby qualified as an exception to the hearsay rule under C.R.E. 803(4).

The Court recognized that a purpose of C.R.E. 803(4) is to abolish the distinction between the doctor who is consulted "for treatment only" and the doctor who is consulted for the purpose of "diagnosis only," even if such diagnosis is in connection with a legal proceeding: "Under C.R.E. 803(4), therefore, the mere fact that a psychiatrist examines a party for the purposes of evaluating the party's mental condition with respect to an issue in pending litigation does not render the party's statements beyond the pale of the hearsay exception when such statements are reasonably pertinent to psychiatric diagnosis. The plain terms of C.R.E. 803(4) speak not only of statements

made for purposes of treatment but also of statements made for purposes of diagnosis, and the obvious intent of the rule is to include within the hearsay exception a party's statement to a non-treating psychiatrist for purposes of diagnosis in connection with pending litigation."

The Court further acknowledged that C.R.E. 803(4) does not require that statements made to a non-treating doctor for purposes of pending litigation to be supported by some independent demonstration of trustworthiness as a condition precedent to admission: "On the contrary, once the proponent of the hearsay statements establishes that they were made to a physician for purposes of either diagnosis or treatment, and that such statements were reasonably pertinent to diagnosis or treatment and were relied upon by the physician in arriving at an expert opinion, the statements themselves qualify for admission under the rule without regard to any independent demonstration of trustworthiness."

5. Limitation on fixing legal responsibility

C.R.E. 803(4) limits testimony concerning the general character or cause of injury to that which is reasonably pertinent to diagnosis or treatment. In this respect, the Rule is consistent with prior case law which provides: "[S]tatements [of patient history] are admissible only insofar as they relate to the patient's symptoms and conditions, but statements concerning the question of responsibility for the injury or physical condition are inadmissible. The responsibility cannot be fixed in this roundabout way as a substitute for legal evidence that is not available." *See* *Clark v. People*, 103 Colo. 371, 86 P.2d 257 (1938). *See also* Advisory Committee's Note to the identical federal rule.

6. Illustrative cases

People v. Tyme, 315 P.3d 1270 (Colo. App. 2013). Statements made to SANE examiner were admissible as statements for medical diagnosis and treatment. When a statement is made to a healthcare profession in preparation for litigation the issue is whether (1) the statements made were reasonably pertinent to diagnosis and (2) was relied upon by the healthcare professional to arrive at an expert opinion. However, where the examination is purely investigator the statements are not admissible.

Kelly v. Haralampopoulos, 327 P.3d 255 (Colo. 2014). While the person seeking treatment does not have to be the declarant, the relationship between the patient and the declarant must be sufficiently close to be reliable. The Court applied a two-part test in determining admissibility:

1. the declarant's motive in making the statement must be consistent with the purpose of promoting treatment and diagnosis, and
2. the content of the statement must be such as is reasonably relied on for treatment or diagnosis.

The Rule's plain language applies to "diagnosis or treatment," and while the term "treatment" has a prospective focus, the term "diagnosis" does not. Instead, diagnosis focuses on the cause of a patient's medical condition, and may or may not involve subsequent treatment. Here, the

statements were made for the purpose of discovering the cause of the patient's failure to react to normal resuscitation efforts, and were thus admissible under Rule 803(4).

People v. Jones, 313 P.3d 626 (Colo. App. 2011), rev'd other grounds, 311 P.3d 274 (Colo. 2013). The victim's statements to the triage nurse and the emergency room doctor about the circumstances of her rape and obtaining the injuries were exceptions to the hearsay rule as statements for medical diagnosis and treatment.

E. Recorded Recollection and Refreshing Memory: C.R.E 803(5) and C.R.E. 612

1. Recorded recollection

C.R.E. 803(5) excludes from the hearsay rule statements that constitute a past recollection recorded, when it appears the witness once had knowledge concerning the matter and (a) can identify the memorandum or record, (b) adequately recalls the making of it at or near the time of the event, either as recorded by the witness or by another, and (c) can testify to its accuracy. The memorandum or record may be read into evidence but may not be received unless offered by an adverse party.

Under the Rule, as under prior case law, the memory of the witness need not be lacking or exhausted as a precondition to the use of a memorandum as recorded recollection.

People v. Miranda, 2014 COA 102 (Colo. App. 2014). A victim's stepmother had written a list of comments of things that the victim had told her. After having exhibited the list on a screen, the trial court noticed that the rule indicated that the item could be read but not received unless offered by the adverse party. The Court held that the foundation of past recollection recorded includes:

(1) The witness can identify it;
(2) The witness adequately recalls the making of the document at or near the time of the event; and
(3) It was accurate (when made).

The Court held that the **two-year lapse** between the first assault and creation of the list did not make the list inadmissible.

2. Refreshing memory

The use of a writing to refresh memory is governed by C.R.E 612, not the Rules on hearsay because the writing used to refresh memory is not evidence and is not offered as evidence. **Any writing** (or other object), whether or not prepared by the witness, may be used to refresh memory. The only requirement is that the writing in fact refresh memory. The use of this device is within the discretion of the trial court, which must determine from the nature of the writing and the nature of the testimony whether the writing will actually refresh memory or unduly suggest testimony. *See generally* McCormick, Evidence, § 9 (1972).

People v. Clary, 950 P.2d 654 (Colo. App. 1997). Court of Appeals rejected defendant's claim that allowing prosecution witness to refresh his recollection with note made seven and a half months after an event did not meet "past recollection recorded" exception, finding no error where trial court properly allowed use of the notation to refresh the witness' memory pursuant to C.R.E. 612.

F. Records of Regularly Conducted Activity (Business Records): C.R.E. 803(6)

C.R.E. 803(6) excludes from the rule against hearsay reports and records kept in the course of regularly conducted activity "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

> ***Practice Tip:*** Colorado has yet to distinguish between business records and public records, but most other jurisdictions have held that a public record cannot be a business record because of the protections provided in the public records exception to the criminal defendant.

The Committee Comment notes that the "rule makes no reference to any objective standard of trustworthiness, *e.g.,* regularity with which records are kept."

People v. Thomas, 962 P.2d 263 (Colo. App. 1997). The trial court did not abuse its discretion by declining to admit into evidence, pursuant to C.R.E. 803(6), exhibits representing information supplied by defendant during his initial booking in the local jail. Because it was supplied by defendant, the information could be properly characterized as self-serving in the context of the case. Thus, the exhibits were properly excluded on the basis of reliability.

People v. Marciano, 411 P.3d 831 (Colo. App. 2014). The trial judge can take judicial notice that documents were bank records and thus admissible as business records.

In re Estate of Fritzler, 413 P.3d 163 (Colo. App. 2017). If medical records meet the requirement for business records, they are admissible. Even if the identity of the person with firsthand knowledge cannot be established, the record custodian's knowledge is sufficient. A custodian is not required to vouch for the credibility of the entries, only the foundation for a business record: (1) made at or near the time of recording; (2) prepared by or from information from a person with knowledge; (3) must have been done as a part of a regularly conducted business activity; and (5) the document must have been kept in the course of regularly conducted business activity.

People v. Flores-Lozano, 410 P.3d 684 (Colo. App. 2016). The Court held that spreadsheets (summaries) prepared by an in-house loss-prevention person qualified for admission under the business records exception.

In *People v. Jaeb*, 434 P.3d 785 (Colo. App. 2018). The Court found that an affidavit from a business was not admissible because it was made over a year after the crime of theft, and therefore not "at or near the time," and the document was request by a witness.

If the record is a compilation of data, and the original data was prepared in compliance with the business record exception, the fact that the data was compiled into a spreadsheet or document for

litigation does not affect its admissibility. In the context of electronically-stored data, the business record is the datum itself, not the format in which it is printed out for trial or other purposes. *See, e.g.*, *State ex rel Coffman v. Robert Hobb & Assoc*., 442 P.3d 986 (Colo. App. 2018).

G. Public Records and Reports: C.R.E. 803(8)

People v. Moore, 321 P.3d 510 (Colo. App. 2010), rev'd other grounds, 318 P.3d 511 (Colo. 2014). In habitual-criminal prosecution, the Court found that **court records and pen packs** may be admissible as business and/or public records without violating the Confrontation Clause.

People v. Gregg, 298 P.3d 983 (Colo. App. 2011). "The proponent of admitting a public record into evidence as an exception to the hearsay rule is not required to provide foundation testimony about the way in which the public record was generated or maintained." **The probation order** was admissible because the order set forth matters the court observed "pursuant to duty imposed by law as to which matters there was a duty to report." Sentencing a defendant is a duty imposed on the courts by law.

People v. Warrick, 284 P.3d 139 (Colo. App. 2011). **Booking reports and *mittimus*** are governed by hearsay exception for public records and not excluded by the "matters observed by police officers" exceptions because the documents were routinely prepared non-adversarial reports.

People v. Carrasco, 85 P.3d 580 (Colo. App. 2003). "C.R.E. 803(8)(A) provides that, unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, are admissible as an exception to the hearsay rule." It was not error for the trial court to enter **the charging documents** of the defendant; they were admissible under C.R.E. 803(8)(A) because they set forth the activities of the District Attorney's Office.

H. The Residual Hearsay Exceptions: C.R.E. 807

C.R.E. 807 is a "catch-all" exception to the hearsay rule that permits the introduction of hearsay that is not covered by any of the enumerated exceptions in C.R.E. 803 and 804, or by other rules or statutes, provided there are substantially equivalent circumstantial guarantees of trustworthiness surrounding the evidence. Prior to admission, the court must find that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of the Rules and the interests of justice will best be served by admission of the statement into evidence. Such a statement may not be admitted under this exception unless the proponent makes it known to the adverse party his intention to offer the statement and the particulars of it sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, including the name and address of the declarant.

People v. Jackson, 474 P.3d 60 (Colo. App. 2018). In a prosecution for murder and conspiracy, the trial court allowed hearsay statement of uncharged co-conspirator to law enforcement under

C.R.E. 807, the residual hearsay exception, and forfeiture by wrongdoing to address confrontation. C.R.E. 807 provides that a statement not specifically covered by the other hearsay exceptions "but having equivalent circumstantial guarantees of trustworthiness" is not excluded by the prohibition against hearsay if certain requirements are met. In considering the trustworthiness of a statement, courts should examine the nature and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which the statement was made. Here the Court found that C.R.E. 807 was satisfied and that there was no confrontation problem.

1. Trial court must make findings regarding five factors

People v. Fuller, 788 P.2d 741 (Colo. 1990). The Colorado Supreme Court held that, prior to admission of hearsay under C.R.E. 804(b)(5), now C.R.E. 807, the trial court must make findings on the record regarding the establishment of the following **five factors**: (1) the statement is supported by circumstantial guarantees of trustworthiness; (2) the statement is offered as evidence of material facts; (3) the statement is more probative on the points for which it is offered than any other evidence which could be reasonably procured; (4) the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and (5) the adverse party had adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence. The Court recognized among the factors to be considered in determining the trustworthiness of the statements are "the nature and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which the statement was made."

a. Notice

People v. Fuller, 788 P.2d 741 (Colo. 1990). Although the record did not indicate that the prosecution specifically notified the defense in advance of trial of its intention to introduce hearsay statements at trial under the residual hearsay exception, it was apparent under the circumstances that the defense had **actual notice** of this intent, which was sufficient to satisfy the notice requirement of the Rule.

b. Note on circumstantial guarantees of trustworthiness

Vasquez v. People, 173 P.3d 1099 (Colo. 2007). "Corroborating evidence" is not an appropriate "circumstantial guarantee" supporting the reliability of statements. "The reliability of the statement should be determined by the circumstances that existed at the time the statement was made."

c. Illustrative cases

People v. Sandoval-Candelaria, 328 P.3d 193 (Colo. App. 2011) (rev'd other grounds, 321 P.3d 487 (Colo. 2014)). **Factors** the court should consider in determining whether the proponent has established that the statement has circumstantial guarantees of trustworthiness include: the nature and character of the statement, the relationship of the parties, the probable motivation of the

declarant in making the statement, and the circumstances under which the statement was made. In the murder trial, the defense offered a transcript of a police interview of a witness who said that the victim's half-sister was not at a particular address the night of the murder. The court held that the statement lacked sufficient circumstantial guarantees of trustworthiness because the witness could not clearly recall basic and crucial facts and times

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). "[D]efendant designated the victim's sister as a witness and asked the court to admit her testimony under C.R.E. 807. The victim's sister had told a detective that someone had paid for her brother's trip to the United States to serve as a drug courier. She said a cousin who could verify this information would not cooperate with authorities because he was afraid of being killed. She named a person she believed had paid defendant to "take the rap" for killing her brother. Further, she told the detective that, at the victim's funeral in Mexico, a drug lord, his bodyguard, and a police officer were gunned down. An article from a Mexican newspaper supported her account of the "blood bath." She was afraid to cooperate openly with police and would not talk to the detective when other relatives were present. She said that, because she was cooperating with authorities, her mother had received threats." The court properly excluded this testimony because it did not have sufficient guarantees of trustworthiness.

Vasquez v. People, 173 P.3d 1099 (Colo. 2007). Statements by defendant's deceased wife in which she identified defendant's voice on messages left on her answering machine and cell phone had sufficient indicia of reliability to satisfy the residual hearsay exception. The wife provided the recordings of messages and gave police an opportunity to independently verify identity of caller.

People v. Davis, 218 P.3d 718 (Colo. App. 2008). Videotaped statement of witness unavailable for trial inadmissible under residual hearsay exception.

People v. Thompson, 413 P.3d 306 (Colo. App. 2017). C.R.E. 807 was utilized in a child abuse resulting in death case to permit a child's forensic interview; another child's statements to his foster parents, and children's admissions at other forensic interviews. In order for such evidence to be admissible it must (1) have circumstantial guarantees of trustworthiness, (2) be material, (3) be more probative than other available evidence, (4) serve justice and the purpose of C.R.E., and (5) notice must be provided.

People v. McFee, 412 P.3d 848 (Colo. App. 2016). Defendant was charged with murder of his girlfriend. The girlfriend had made numerous statements concerning the threats the defendant had made to her to others and also wrote a note indicating that if she should be murdered look to the defendant. Threats made from the defendant to the victim were told by the victim to her mother, her daughter, and her cousin. The Court analyzed the admissibility of these statements through C.R.E. 807. The Court looked to the three parts of the Rule: (1) statement offered on a material fact; (2) statement more probative than any other evidence the proponent can procure; and (3) purpose of rules and interests of justice best served by admission of the statements. When considering trustworthiness the Court looked to the nature and character of the statements, the

relationship of the parties, the probable motivation of the declarant, and the circumstances of the making of the statement. The Court found that the rule had been satisfied as to statements made to family members. As to the note, the Court found that it was testimonial. Thus, the Court found a violation of confrontation in the admission of the note, but found it was harmless error.

15.4 HEARSAY EXCEPTIONS UNDER C.R.E. 804

C.R.E. 804(b) sets forth exceptions to the hearsay rule that are available only when the **declarant is unavailable to testify**. As in the previous section, this section will address several of the C.R.E. 804 exceptions that most commonly arise in criminal cases.

A. Unavailability under C.R.E. 804

A witness is "unavailable" under **C.R.E. 804(a)** if the witness is:

1. exempted from testifying by ruling of court on the ground of privilege from testifying concerning the subject matter of the statement;
2. persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so;
3. testifies to a lack of memory of the subject matter of the statement;
4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
5. is absent from the hearing and the proponent of the statement has been unable to procure his attendance by process or other reasonable means.

People v. Aguirre, 839 P.2d 483 (Colo. App. 1992). Witness not "unavailable" within meaning of C.R.E. 804(a) because she testified extensively, though her memory was selective, and while claiming lack of memory, her testimony benefited defendant with whom she admitted having had close personal relationship.

1. Inability to testify due to then-existing physical illness or infirmity

People v. Lyons, 907 P.2d 708 (Colo. App. 1995). In a sexual assault prosecution, the district court found that a witness was medically unavailable and admitted a transcript of her testimony from a previous hearing into evidence, based upon a note submitted from her physician stating that she was in an "immediate post-partum period and is not physically or emotionally capable of testifying." In making its finding, the district court conducted a telephone conference with the physician, who acknowledged that the witness was physically capable of testifying, would suffer no physical or mental injury by testifying, suffered no difficulty in recalling and relating facts and events within her recollection, and would likely experience her present condition for only a short period of time. In holding that the witness was not "unavailable" within the meaning of C.R.E. 804(a), the Court of Appeals recognized that "not every physical or mental infirmity renders the witness unavailable. A witness is unavailable in the constitutional sense only if the disability

involved is of such a nature that requiring the witness to testify would result in further physical or mental injury to the witness and is of such permanency that the witness would continue to be unavailable even if a reasonable continuance of the trial were to be granted." If the evidence establishes that the disability is only temporary, the court must consider and make findings pertaining to "the relevant circumstances, including the importance of the witness' testimony, the nature of the disability, the expected time of recovery, and any special circumstances that might dictate against any delay."

2. Inability to procure attendance by process or other reasonable means

People v. Hernandez, 899 P.2d 297 (Colo. App. 1995). In a homicide prosecution the district court permitted a videotaped deposition of a witness who was incarcerated on unrelated charges but scheduled for imminent release and deportation to Mexico, but denied both parties' request that the witness be held in custody and not released to immigration authorities pending the conclusion of trial. The witness was subpoenaed by the defense prior to his release, and the prosecution mailed two letters to the witness in Mexico before trial directing him to contact prosecuting authorities upon his return to the United States in accordance with the trial court's order that he testify at trial. In holding that the prosecution demonstrated good faith efforts to secure the witness' attendance for trial, the Court of Appeals recognized that "good faith" does not necessarily require "the exhaustion of every possible means of securing the witness' presence . . . ." Here, the witness was subpoenaed, albeit by the defense, the trial court directly ordered the witness to return to testify, and the prosecutor mailed two letters reminding the witness of his obligation to return in accordance with the court's order. Moreover, although the prosecution's obligation to procure the attendance of the witness includes good faith efforts to keep him within the United States, the Court of Appeals noted the prosecution's vigorous objection to the witness' release from custody following the deposition and declined to adopt "a per se rule precluding a finding of good faith, reasonable efforts unless the prosecution attempts coercively to detain the witness in the United States."

B. Former Testimony

C.R.E. 804(b)(1) exempts from the hearsay rule testimony given by a witness at a former hearing if the declarant is unavailable and the party against whom the statement is offered had, at the prior proceeding, an opportunity and similar motive to develop the testimony by either direct, cross or re-direct examination.

1. No use of preliminary hearing transcript

People v. Smith, 597 P.2d 204 (Colo. 1979) (rev'd on other grounds). The Colorado Supreme Court held that, in view of the limited scope of a preliminary hearing, the preliminary hearing transcript of a witness who has become unavailable may not be used as "former testimony" at trial under C.R.E. 804(b)(1). However, the Court left open the question of what result would obtain if the defendant caused the witness to become unavailable. See *People v. Fry*, 92 P.3d 970 (Colo. 2004).

Compare with People v. Madonna, 651 P.2d 378 (Colo. 1982). It was permissible to admit prior testimony from a suppression hearing upon a showing that the witness had died, where the defendant had fully cross-examined the witness at that hearing.

2. Constitutional implications

People v. Fry, 92 P.3d 970, 981 (Colo. 2004). "We find that the defendant's right to confront the witnesses against him was violated when the trial court admitted the preliminary hearing testimony of an unavailable witness at trial. Pursuant to the United States Supreme Court's decision in *Crawford*, we hold that previous testimony is not admissible at trial unless the witness is unavailable and the defendant had an adequate prior opportunity for cross-examination. Thus, we reiterate our holding in Smith that a preliminary hearing does not present an adequate opportunity for cross-examination. Therefore, we hold that the trial court erred in admitting preliminary hearing testimony of an unavailable witness at trial."

Barber v. Page, 390 U.S. 719 (1968). A witness is not "unavailable" under the 6th amendment's confrontation clause unless the prosecutorial authorities have made a good-faith effort to obtain the witness's presence at trial.

The lengths to which the prosecution must go in order to make a "good faith" effort to obtain witness's presence at trial, such that witness may be deemed "unavailable," is a question of reasonableness. While the law does not require futile acts, if there is a possibility, albeit a remote one, that affirmative measures may procure a witness's presence at trial, then the prosecution is required to pursue those measures. *United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009).

Practice Tip: The definition of unavailability was not changed under *Crawford*; however, even if the unavailability requirement is met under C.R.E. 804(a), the statement may not be admissible under *Crawford*.

3. Depositions

Crim. P. 15 sets forth the rules and procedures for obtaining a deposition upon a showing that a prospective witness may be unable to attend a trial or hearing and that it is necessary to take a deposition to prevent injustice. The use of such a deposition is governed by **Crim. P. 15(e)**, which permits the introduction of a deposition if, *inter alia*, the deposed witness would satisfy the definition of unavailability in C.R.E. 804(a).

C. Statements Against Interest

C.R.E. 804(b)(3) excepts from the hearsay rule a statement that:

(1) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(2) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

This Rule was amended in 2011 to make it consistent with the revised F.R.E. 804(b)(3) and "to clarify that corroborating circumstances are required regardless of whether a statement is offered to inculpate or exculpate an accused." Comment to Subrule (b)(3) (citing *People v. Newton*, 966 P.2d 563 (Colo.1998) as holding that "prosecutors seeking to admit statements against the accused must satisfy the corroboration requirement solely by reference to the circumstances surrounding its making").

Caution Below: The subsections below should be read in light of the 2011 revisions.

1. Unavailability of co-defendants

In *People v. Moore*, 693 P.2d 388 (Colo. App. 1984), a co-defendant gave an inculpatory statement that also implicated the defendant. The Court of Appeals held that the co-defendant's refusal to testify constituted "unavailability" under C.R.E. 803(a), thereby permitting the introduction of the statement into evidence under C.R.E. 804(b)(4).

A court may not presume that a co-defendant will invoke the Fifth Amendment privilege to refrain from testifying; the court must actually ascertain whether the co-defendant will assert the privilege. See *People v. Rosenthal*, 670 P.2d 1254 (Colo. App. 1983).

People v. Barnum, 23 P.3d 1237 (Colo. App. 2001). Under the circumstances, evidence that co-defendant had previously asserted his privilege against self-incrimination was insufficient as a matter of law to satisfy requirement of unavailability under C.R.E. 804(a)(1).

Compare with *People v. Reed*, 216 P.3d 55 (Colo. App. 2008). The issue presented to the court was "whether a declarant's out of court statement inculpating the declarant and a codefendant may be introduced as substantive evidence at their joint trial pursuant to C.R.E. 804(b)(3), when the declarant is present in court but has not yet decided to testify." The court held that "where codefendants are tried together and a declarant who is a codefendant has not decided whether to testify, the trial court must presume the declarant-codefendant is unavailable for the purposes of C.R.E. 804(a), even if that person is present in court."

Blecha v. People, 962 P.2d 931 (Colo. 1998). Although the trial court correctly ruled that the declarant, who was a co-conspirator, was unavailable at the time of the pre-trial hearing, the determinative inquiry was the availability of the witness at the time of trial. When defendant renewed his objection to the admission of the statements at trial, the prosecution failed to show that the witness, who no longer enjoyed the privilege against self- incrimination, was unavailable to testify. Thus, the statements should not have been admitted as statements against interest. The court's error was a constitutional error, but harmless beyond a reasonable doubt.

2. Statements offered to exculpate

a. Co-defendant exculpates the accused

People v. Nyberg, 711 P.2d 719 (Colo. App. 1985). The Court of Appeals held that statements made by an unavailable co-defendant against his penal interest that tended to exculpate the defendant were not admissible in the trial of the defendant, where the statements failed to meet the test of trustworthiness and the tenor of the statement itself suggested falsification.

People v. Shields, 701 P.2d 133 (Colo. App. 1985) The co-defendant's statement that he "found" the stolen wallet was properly excluded because there was no corroboration for the statement.

b. Defendant's statement "exculpates" himself

People v. Atkins, 844 P.2d 1196 (Colo. App. 1992) (*rev'd on other grounds*). Statements by the defendant that he was "sorry" for shooting the victim and that he did not mean for the victim to die were not admissions of criminal liability. To the contrary, "their attempted use was for the purpose of mitigating the first degree murder. Thus, looked at realistically, these statements were for, rather than against, defendant's penal interest."

People v. Orona, 907 P.2d 659 (Colo. App. 1995) (*rev'd on other grounds*). Defendant's statement to cellmate that he had been drunk and "blew it" in killing victim constitutes hearsay not within any exception when offered by defendant; statement was not against defendant's penal interest but was rather made for purpose of mitigating his culpability and there was no other evidence to corroborate reliability of the self-serving statement.

3. Statements that inculpate defendant

People v. Newton, 966 P.2d 563 (Colo. 1998). To determine the admissibility of a third-party witness' statement that inculpates defendant, the trial court should apply a three-part test: **(1) Is the witness unavailable as required by C.R.E. 804(a)?; (2) Does the statement tend to subject the declarant to criminal liability** (i.e., "the trial court must determine whether a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true")?; and (3) **Have the People shown by a preponderance of the evidence that corroborating circumstances demonstrate the trustworthiness of the statement?** "In conducting this third inquiry, a trial court should limit its analysis to the circumstances surrounding the making of the statement and should not rely on other independent evidence that also implicates the defendant. Appropriate factors for a trial court to consider include: where and when the statement was made, to whom the statement was made, what prompted the statement, how the statement was made, and what the statement contained." Note that, in meeting its burden with respect to the third factor, the **prosecution may not rely on any independent corroborating evidence implicating defendant**.

15.5 EXCEPTIONS: CHILD HEARSAY

15. HEARSAY

Section 13-25-129 sets forth a statutory exception to the hearsay rule that is applicable to certain statements made by a child describing acts of sexual conduct, provided that the safeguards in the statute are followed. Section 13-25-129(1) provides:

(1) An out-of-court statement made by a person under thirteen years of age, not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible in any criminal, delinquency, or civil proceeding in which the person is alleged to have been a victim if the conditions of subsection (5) of this section are satisfied.

(2) An out-of-court statement made by a child, as child is defined under the statutes that are the subject of the action, or a person under fifteen years of age if child is undefined under the statutes that are the subject of the action, describing all or part of an offense of unlawful sexual behavior, as defined in § 16-22-102(9), performed or attempted to be performed with, by, on, or in the presence of the child declarant, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible in evidence in any criminal, delinquency, or civil proceeding if the conditions of subsection (5) of this section are satisfied.

(3) An out-of-court statement by a child, as child is defined under the statutes that are the subject of the action, describing any act of child abuse, as defined in § 18-6-401, to which the child declarant was subjected or that the child declarant witnessed, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible in evidence in any criminal, delinquency, or civil proceeding in which a child is a victim of child abuse or the subject of a proceeding alleging that a child is neglected or dependent under § 19-1-104(1)(b), if the conditions of subsection (5) of this section are satisfied.

(4) An out-of-court statement made by a person under thirteen years of age describing all or part of an offense contained in part 1 of article 3 of title 18, or describing an act of domestic violence as defined in § 18-6-800.3(1), and that is not otherwise admissible by statute or court rule that provides an exception to the hearsay objection, is admissible in evidence in any criminal, delinquency, or civil proceeding if the conditions of subsection (5) of this section are satisfied.

(5)(a) The exceptions to the hearsay objection described in subsections (1) to (4) of this section apply only if the court finds in a pretrial hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(b) The child either:

(I) Testifies at the proceedings; or

(II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

The statute also contains **procedural and notice requirements** as a precondition to admission of the statements, and requires the court to **instruct** the jury regarding the weight and credit to be given the statements.

*Chirinos-Raudales v. People***,** 532 P.3d 1200 (Colo. 2023); *Orellana-Leon v. People*, 530 P.3d 636 (Colo. 2023). Under the child hearsay statute, the relevant age of the child is that described in the language establishing the general offense and not the lower age relevant to a specific sentence enhancer with which the defendant is charged. Where SAOC-POT statute defined child as a person under 18, hearsay statements were admissible if made by a person under 18.

People v. Gookins, 111 P.3d 525 (Colo. App. 2004). The statute does not require that the victim be a "child" at the time of trial.

A. Constitutional Considerations

See *People v. District Court*, 776 P.2d 1083 (Colo. 1989) (upholding §13-25-129 in face of confrontation clause challenge).

Practice Tip: Make sure the confrontation requirements of *Crawford* have been met when attempting to admit evidence under the Child Hearsay Exception.

B. Admissibility of Statements

1. Statute is sole basis for admission if no traditional hearsay exception applies

People v. Diefenderfer, 784 P.2d 741 (Colo. 1989). The Colorado Supreme Court recognized that §13-25-129, like the "catch-all" provision of C.R.E. 803(24), is a residuary rule and **applies only if hearsay is not otherwise admissible under any other hearsay exception**. However, because the terms of the statute differ significantly from the standards for admission of hearsay under C.R.E. 803(24), the Court held that, when no other traditional hearsay exception is applicable, "§ 13-25-129 is the **sole basis** upon which hearsay evidence, which otherwise comes within the terms of that statute, may be admitted."

People v. Bowers, 801 P.2d 511 (Colo. 1990). The Colorado Supreme Court reiterated that "§ 13-25-129 constitutes the exclusive basis for admitting a child-victim's hearsay statement of a sexual act committed against the child when such hearsay statement is not otherwise admissible under any other specific hearsay exception created by statute or court rule." However, the Court also recognized that if the child's statement qualifies under a specific hearsay exception, the requirements of §13-25-129 never come into play.

People v. Bolton, 859 P.2d 303 (Colo. App. 1993). When child hearsay statements originally offered pursuant to §13-25-129 were later offered and admitted pursuant to non-statutory hearsay exception, procedural requirements of §13-25-129 were inapplicable.

2. Statement must provide sufficient safeguards of reliability

People v. District Court, 776 P.2d 1083 (Colo. 1989). In considering the statutory requirement that the "time, content, and circumstances of the statement provide sufficient safeguards of reliability," the Colorado Supreme Court recognized a variety of **factors** that may be considered: (1) whether the statement was made spontaneously; (2) whether the statement was made while the child was still upset or in pain from the alleged abuse; (3) whether the language of the statement was likely to have been used by a child the age of the declarant; (4) whether the allegation was made in response to a leading question; (5) whether either the child or the hearsay witness had any bias against the defendant or any motive for lying; (6) whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement; (7) whether more than one person heard the statement; and (8) the general character of the child. The Court stressed, however, that the factors are only to provide guidance and direction to the trial court in assessing reliability, and "are not an immutable set of standards for the trial court in determining that the rather amorphous standard of 'sufficient indicia of reliability' has been met." Moreover, the Court reiterated that the factors should not be used to foreclose admissibility on the basis that one factor was not established. *See People v. Strean*, 74 P.3d 387 (Colo. App. 2002); *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002).

People v. Frost, 5 P.3d 317 (Colo. App. 1999). No abuse of discretion in finding statements of child sex assault victim and her brother reliable and admissible under § 13-25-129 where statements were spontaneous, initial and any follow-up questioning was non-leading, children were frightened and nervous while making statements, language used was age-appropriate, there was no prejudice or bias by children against defendant, and there did not appear to be any event between time of abuse and time of statements that would account for contents of statements.

People v. Juvenile Court, 937 P.2d 758 (Colo. 1997). Juvenile court was obligated to consider reliability of offered out-of-court statements but failed to do so.

People v. Underwood, 53 P.3d 765 (Colo. App. 2002). Trial court did not abuse its discretion in admitting the statement victim made to her mother. "While the victim's statement to her mother was made in response to questioning, the mother's questions were not leading. The charged incident occurred approximately a year before the victim made this statement, and other stressful events had intervened. However, there was evidence that the victim was still very upset over the incident with defendant, and no evidence suggested she had a motive to accuse him falsely."

3. Availability of the child-declarant

In addition to the finding that the child's hearsay statement contains sufficient safeguards of reliability, § 13-25-129 requires that the child either testify at trial or be "unavailable" as a witness.

Unavailability, in a constitutional sense, is established if "the proponent of the hearsay testimony can show that good faith, albeit unsuccessful, efforts have been made to produce the declarant for trial." *See People v. District Court*, 776 P.2d 1083 (Colo. 1989).

People v. Juvenile Court, 937 P.2d 758 (Colo. 1997). When prosecutor represented that child would testify at trial, the availability requirement of §13-25-129(1)(b)(I) was conditionally met and juvenile court abused its discretion by denying prosecutor's motion to admit hearsay statements; child must thus testify at trial, but is not required to testify at any other hearing.

People v. Melendez, 80 P.3d 883 (Colo. App. 2003). Trial court did not abuse its discretion admitting videotaped interview pursuant to §13-25-129. The tape did not have to also meet the requirements under §18-3-413, including a finding of unavailability, in order to be admitted under §13-25-129.

Practice Tip: If the statement is testimonial and the child is unavailable, the defendant must have had a prior opportunity to cross-examine the child in order for the statement to be admissible under *Crawford*.

a. Incompetency

People v. District Court, 776 P.2d 1083 (Colo. 1989). The Colorado Supreme Court held that the determination that a child is incompetent to testify under §13-90-106(1)(b)(II) establishes that the child is "unavailable" within the meaning of the child hearsay statute. In this regard, the Court stressed that "a competency hearing determines only whether a child can accurately recollect and narrate at trial the events of abuse, not whether the child was competent at the time the hearsay statement was made or whether the statement was reliable." Thus, a child's hearsay statement is not automatically barred because the child was unresponsive or uncommunicative at the competency hearing.

People v. Trujillo, 923 P.2d 277 (Colo. App. 1996). While recognizing a split in jurisdictions regarding whether a child-declarant is required to testify regarding the actual events underlying the charged offense at a pre-trial competency hearing, the Court of Appeals held that such testimony is neither required nor precluded before a determination of competency is made by the trial court. "Rather, we conclude that the manner and scope of examination should be left to the sound discretion of the trial court."

b. Medical or emotional unavailability

People v. Diefenderfer, 784 P.2d 741 (Colo. 1989). The Colorado Supreme Court recognized that, while a child may be competent to testify, the traumatic effect of testifying in court regarding the abuse may constitute "unavailability" within the meaning of §13-25-129. While emphasizing that mere inconvenience or discomfort at the prospect of testifying in court does not rise to the level of legal unavailability, the standard is satisfied "when the court makes a particularized finding that

the child's emotional or psychological health would be substantially impaired if she were forced to testify and that such impairment will be long standing rather than transitory in nature."

Practice Tip: Section 13-25-129 specifically provides for the admissibility of child hearsay statements even if the child-declarant is available to testify at trial. *See People v. Williams*, 899 P.2d 306 (Colo. App. 1995) (holding that child hearsay statute specifically provides that child's out-of-court statements about sexual abuse are admissible when child testifies at trial). Nor is the prosecution obliged as a prerequisite to the admissibility of child hearsay statements to first establish that the child-declarant would have difficulty expressing herself while testifying. *See People v. Salas*, 902 P.2d 398 (Colo. App. 1994).

4. Corroborative evidence

If the child-declarant does not testify and is declared "unavailable" within the meaning of § 13-25-129, the court must also find under the statute that there is corroborative evidence of the act which is the subject of the statement.

Stevens v. People, 796 P.2d 946 (Colo. 1990). In construing the term "corroboration," the Colorado Supreme Court held that "corroborative evidence as contemplated by § 13-25-129 is any evidence, direct or by proof of surrounding facts and circumstances, that tends to establish the act described by the child in the statement occurred." The Court distinguished "corroboration" from the statutory requirement that the court find "safeguards of reliability," and stated: "The corroboration requirement is best considered not as a traditional index or guarantee of a statement's reliability, but as a method of objectively establishing the commission of a sexually abusive act." Regarding the **quantum** of corroborative evidence that must be established to warrant admission of hearsay statements under the statute, the Court held that there must be enough "to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief that the sexual abuse that is the subject of the child's hearsay statement occurred."

a. Examples of "corroboration"

People v. Bowers, 801 P.2d 511 (Colo. 1990). "We are convinced that the term corroborative evidence in § 13-25-129(1)(B)(II) was intended to mean what the term clearly denotes—that is, evidence, direct or circumstantial, that is independent and supplementary to the child's hearsay statement and that tends to confirm that the act described in the child's statement actually occurred. **By way of example, and not of limitation**, corroborative evidence may include any of the following: testimony from an **eyewitness**, other than the unavailable child-victim, whose statement is offered into evidence, that the offense occurred; **statements of other children who were present** when the act was committed against the victim; **medical or scientific evidence** indicating that the child was sexually assaulted; **expert opinion evidence that the child-victim experienced post-traumatic stress** consistent with the perpetration of the offense described by the child; evidence of other **similar offenses committed by the defendant**; the **defendant's confession** to

the crime; or other independent evidence, including competent and relevant expert opinion testimony, tending to establish the commission of the act described in the child's statement."

Practice Tip: A child's hearsay statement **may not** be corroborated within the meaning of § 13-25-129 by other hearsay evidence. In *Bowers,* the Court recognized that the child's use of **anatomical dolls** and her gesturing in describing sexual acts during interviews with investigators and counselors was conduct intended to be communicative, and therefore fell within the definition of hearsay under C.R.E. 801(a) and 801(c). "Because the child's use of the dolls and gesturing constituted nonverbal assertions and thus were hearsay, those nonverbal assertions did not qualify as corroborative evidence for purposes of subsection 13-25-129(1)(b)(II)."

C. Procedural Considerations

Section 13-25-129 requires the proponent of the child victim's statement to give the adverse party **reasonable notice** of an intent to offer the statement and the particulars of the statement. § 13-25-129(3). Before admitting the statement, the trial court must conduct a **hearing outside the presence of the jury** to determine whether the time, content, and circumstances provide sufficient safeguards of reliability. § 13-25-129(1)(a). Moreover, when the statement is admitted into evidence, the court is required to **instruct** the jury regarding its role in assessing the weight and credit to be given the statement. § 13-25-129(2)

1. Standard of proof required

In *People v. Bowers*, 801 P.2d 511 (Colo. 1990), the Court held that the **preponderance of the evidence** standard applies to the trial court's ruling on whether the statutory conditions for admitting child hearsay have been satisfied.

2. Notice requirement

People v. Wood, 743 P.2d 422 (Colo. 1987). Although the prosecution failed to provide the defense with formal notice of its intent to offer child hearsay pursuant to § 13-25-129 or supply the defense with the particulars of the statement, the Colorado Supreme Court held that the statements were properly admitted into evidence where the circumstances established that the defense had actual notice of the statements and the likelihood that they would be offered at trial. "The defendant may not use the notice provision of § 13-25-129(3), which was intended to assure that defense counsel is provided with information necessary to defend his client, to complain of the admission of testimony when it is apparent that defense counsel in fact possessed that information."

3. Jury instruction

Section 13-25-129(2) provides that the instruction regarding the credit and weight to be given the child hearsay statements shall be **in the final written instructions to the jury**.

People v. Burgess, 946 P.2d 565 (Colo. App. 1997). Under the 1993 amendment to § 13-25-129(2), the trial court did not err in failing to *sua sponte* give contemporaneous cautionary instruction each

time a prosecution outcry witness testified; fact that prosecution requested and court gave such instruction when one witness testified did not unduly emphasize that witness' testimony.

15.6 OTHER STATUTORY EXCEPTIONS

A. Dying Declarations

Section 13-25-119 excludes from the hearsay rule and permits the introduction into evidence of the dying declarations of a deceased person in criminal proceedings "for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings," provided that:

(1) at the time of the making such declaration the declarant was conscious of approaching death and believed there was no hope of recovery;
(2) such declaration was voluntarily made, and not through the persuasion of any person;
(3) such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement; and (d) the declarant was of sound mind at the time of making the declaration.

People v. Cockrell, 488 P.3d 278 (Colo. App. 2017). Dying declarations are an exception to the Confrontation Clause and Crawford. The statute is, therefore, constitutional.

1. Consciousness of approaching death

Dolan v. People, 449 P.2d 828 (Colo. 1969). The statement by the victim in the emergency room shortly after she had been shot that "John [the defendant] shot me. . . I am not going to make it this time" was admissible as a dying declaration. In so holding, the Colorado Supreme Court recognized that the "consciousness of approaching death" requirement need not be expressly stated by the declarant, but it may appear in any mode, or be inferred from the declarant's evident danger.

2. Dying declaration in response to questions

People v. Mackey, 521 P.2d 910 (Colo. 1974). In a case in which the victim was asked, "Who shot you?," and she replied naming the defendant, the Court held that the statement was properly admitted as a dying declaration, stating: "The fact that the declaration was in response to a question does not, as defendant suggests, violate either subsection [of the previous statute, which is nearly identical to the present statute]. It is the admission of declarations resulting from persuasion or leading questions that the statute seeks to prohibit."

B. Admissibility of Laboratory Reports

Section 16-3-309 provides that any report of the criminalistic laboratory that performed tests in question shall be received in evidence in any court, preliminary hearing, or grand jury proceeding in the same manner and with the same force and effect as if the technician who accomplished the requested analysis had testified in person. The statute also provides that any party may request the

technician to testify in person at the criminal trial by notifying the witness and the other party at least ten days before the date of trial.

Cautionary Note About § 16-3-309: Despite the plain meaning of this statute, absent an *express* waiver by the defendant, the witness must testify, regardless of whether the defendant complies with the 10-day notice requirement. In *Phillips v. People*, 443 P.3d 1016, 1026 (Colo. 2019), the Colorado Supreme Court held that a defendant cannot inadvertently waive the 6th amendment right to confront a witness.

People v. Williams, 183 P.3d 577 (Colo. App. 2007). Defendant filed a written request pursuant to § 16-3-309. At trial, the prosecutor called the supervisor of the CBI lab to testify as an expert in the field of forensic chemistry. The prosecutor moved to introduce the lab report through the supervisor's testimony. Over defense's objection, the trial court erroneously admitted the report. The Court of Appeals held that the prosecution did not comply with defense's request, that the report was not admissible through the testimony of the expert witness under C.R.E. 703, and the report was not admissible under the business records exception because admission of the report was precluded by §16-3-309(5).

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). Certificates of analysis sworn by analysts at state laboratory, attesting that substance analyzed was cocaine, and proffered at drug trafficking trial as *prima facie* evidence of substance's composition, in accordance with state law, were affidavits within core class of testimonial statements covered by Confrontation Clause, and analysts were witnesses for purposes of Clause. The certificates constituted solemn declaration or affirmation made for purpose of proving some fact, and fact in question was precise testimony that analysts would be expected to provide if called at trial. These witnesses were therefore required to testify at trial.

C. Proof of Retail Value

Section 18-4-414 provides that, when a theft occurs at a store, evidence of the retail value of the item stolen shall constitute *prima facie* evidence of the value of the item involved. Evidence of retail value may include affixed labels and tags, signs, shelf tags, and notices. Likewise, the value of an item may be established through the sale price of other similar property, as evidenced by affixed labels and tags, signs, shelf tags and notices. The statute specifically provides that in so establishing the value of retail items, hearsay evidence shall not be excluded.

1. Statute does not violate right of confrontation

People v. Schmidt, 928 P.2d 805 (Colo. App. 1996). In holding that the hearsay exception established by § 18-4-414 does not violate a defendant's constitutional right to confront adverse witnesses, the Court of Appeals recognized that a price tag or other similar evidence of value for a retail item "ordinarily is sufficiently trustworthy so as to speak for itself regarding that item's value and . . . the utility of confrontation is very remote." Moreover, the statute provides that price

tags and labels are merely prima facie evidence of value, thereby permitting an accused to rebut the presumption of value by presenting other competent evidence establishing that the price tag or label was mismarked, subject to negotiation, or otherwise failed to reflect the actual value of the item in question.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). Valuation of stolen automobile found in automobile market report generally used and relied upon by the public was admissible under the market reports exception to the hearsay rule in prosecution for first degree aggravated motor vehicle theft to establish car's value and, thus, determine level of felony offense.

D. Forfeiture by Wrongdoing

Section 13-25-139:

> When a party to a criminal case wrongfully procures the unavailability of a witness, a statement otherwise not admissible pursuant to the Colorado rules of evidence that is offered against the party that was involved in or responsible for the wrongdoing that was intended to, and did, deprive the criminal justice system of evidence is admissible as an exception to the hearsay rule; except that such a statement is not admissible unless the proponent has given to the adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement. In determining the admissibility of the evidence, the court shall determine, prior to the trial, whether the forfeiture by wrongdoing occurred by a preponderance of the evidence.

E. Statements of Persons with Intellectual and Developmental Disabilities

Section 13-25-129.5, like child hearsay, permits the statements of victims as a hearsay exception when certain requirements are met. It applies only to certain charges and the court must, pretrial, find the time, content, and circumstances of the statement provide sufficient safeguards of reliability.

15.7 EXPERT HEARSAY AS OPINION UNDER C.R.E. 703

C.R.E. 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the

proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluation the expert's opinion substantially outweighs their prejudicial effect.

C.R.E. 705

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Experts may testify to inadmissible facts and data including hearsay if that evidence formed the basis of the expert's opinion and is of a type reasonably relied upon by experts in the field. *People ex rel Strodtman,* 293 P.3d 123 (Colo. App. 2011). In *Strodtman*, testimony by medical experts about information learned from a patient's caseworker was admissible in a civil mental health commitment proceeding because the information formed the basis of the experts' opinions because it helped the medical experts properly diagnose her condition and need for treatment. The doctor also testified that information from case managers and outside treatment providers is reasonably relied on in the field because of their daily interactions with the patients and their important collateral input in the doctor's discharge planning.

* * *

2025 Contributions by Catrina Weigel
Chief Trial Deputy District Attorney
20th Judicial District

CHAPTER 16

INSTRUCTIONS AND VERDICTS

16. INSTRUCTIONS AND VERDICTS

16.1 LIMITING AND CAUTIONARY INSTRUCTIONS

A. Limiting Instructions

An instruction that evidence is received for a limited purpose or as to one defendant only may be appropriate in a variety of situations. Such instructions are typically given during trial contemporaneously with the admission of the pertinent evidence and may also be included in the written instructions to the jury. Common examples include hearsay statements received for a limited purpose, *see Bustamonte v. People*, 401 P.2d 597 (Colo. 1965), and a confession proving the guilt of a principal offered to establish a co-defendant's guilt as a complicitor, *see Stewart v. People*, 419 P.2d 650 (Colo. 1966). Moreover, the admission of evidence of other transactions under C.R.E. 404(b) must be accompanied with an instruction as to its limited purpose, which must be repeated in the written instructions to the jury. *See People v. Garner*, 806 P.2d 366 (Colo. 1991).

People v. Rowe, 318 P.3d 57 (Colo. App. 2012). Where the court instructed the jury that evidence was admissible only for specific limited purposes, absent evidence to the contrary, a reviewing court must presume the jury followed the court's limiting instructions and did not rely on the evidence for an improper purpose.

People v. Gutierrez, 499 P.3d 367 (Colo. App. 2021). Where 21 contemporaneous limiting instructions were given in this case, the Court of Appeals found "any curative power a limiting instruction may have had was lost."

People v. Morales, 298 P.3d 1000 (Colo. App. 2012). The Court of Appeals rejected the defendant's claim that the prosecution exploited the prohibited bad character inference during closing argument. In its closing argument, the prosecution specifically reminded the jury of the limiting instruction and the limited purpose the other acts evidence could be used for during a lengthy discussion of the other acts.

People v. Coughlin, 304 P.3d 575 (Colo. App. 2011). The trial court's failure to give a limiting instruction as to the use of a co-defendant's guilty plea to accessory to murder was found to be harmless error. Neither the prosecution nor the defendant supplied the court with a specific limiting instruction as to how a jury could use the co-defendant's guilty plea to accessory to murder. The court's failure to give the limiting instruction *sua sponte* did not rise to the level of plain error. The Court of Appeals did not find the absence of the specific instruction when the general credibility instruction was given would be an error "both obvious and substantial" or a grave error that "seriously affects substantial rights of the accused."

People v. Griffin, 224 P.3d 292 (Colo. App. 2009). "[A]bsent a special statutory requirement, the Supreme Court has consistently held that trial courts have no duty to give limiting instructions *sua sponte*." In this case, defense did not request a limiting instruction and the trial court did not issue one. The Court of Appeals stated that "the notebook entries were damaging, for legitimate reasons. By exposing Griffin's racial animus and her dismissive view of "laws," the entries suggested that

she had acted with intent, not accidentally or in self-defense. And because the entries were so obviously relevant for this legitimate purpose, there is little danger that the jury relied on the less potent, prohibited inference that Griffin had acted in conformity with her poor character generally." The Court of Appeals held that the absence of a limiting instruction did not cast serious doubt on the reliability of the verdict.

People v. Garcia, 981 P.2d 214 (Colo. App. 1998). Advisement of defendant's right to testify that draws attention to the right to request a limiting instruction that prior felony convictions may be considered only as bearing on credibility did not create a "promise" by court to *sua sponte* give such a limiting instruction.

People v. Everett, 250 P.3d 649 (Colo. App. 2010). The trial court violated § 16-10-301(4)(d) (sexual offense similar transactions) by failing to inform the jury in closing instructions the specific limited purpose for which other-act evidence could be used. *See also People v. Underwood*, 53 P.3d 765 (Colo. App. 2002).

People v. Cook, 197 P.3d 269 (Colo. App. 2008). The trial court was not required to give a limiting instruction under § 16-10-301(4)(d) when the defendant's other acts were admitted into evidence because the other acts were evidence of pattern of sexual abuse.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). A court should instruct a jury on the limited purpose served by C.R.E. 404(b) evidence when it is discussed in testimony and again in closing instructions.

People v. Moore, 117 P.3d 1 (Colo. App. 2004). A trial court is required to instruct the jury on the limited purpose for which other domestic violence acts may be considered at the time the evidence is admitted under § 18-6-801.5(5).

People v. Kembel, 524 P.3d 18 (Colo. 2023). Any risk of prejudice in admission of a defendant's prior DUI convictions as a required element of felony DUI, which may not be bifurcated for trial, "may be tempered with contemporaneous and final instructions advising the jury that the evidence in question may be considered only for the limited purpose of determining whether the People have proved beyond a reasonable doubt each prior conviction included in the element of prior convictions and may not be considered for any other reason. *Cf.* COLJI-Crim. D:02 (2021); COLJI-Crim. E:07.2 (2021). Such an instruction could also more specifically state that evidence offered to establish any prior conviction included in the element of prior convictions cannot influence the jury's findings as to the other elements of felony DUI."

B. Colorado Rules of Evidence

C.R.E. 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." The Advisory Committee's Note to the identical federal rule states that a close relationship exists between Rule

105 and Rule 403, and that the effectiveness of a limiting instruction must be taken into consideration in reaching a decision whether to exclude evidence for unfair prejudice under Rule 403. It is also significant that, unlike prior practice, Rule 105 **obligates** the court to provide a limiting instruction upon a proper request by a party.

C. COLJI-Crim.

COLJI-Crim. D:02 and D:03 set forth the instructions to be given during trial when evidence is admissible for a particular purpose or as to one defendant only.

COLJI-Crim. E:07.2 and E:07.5 set forth similar instructions to be given in the closing instructions to the jury.

D. Cautionary Instructions

As is the case with limiting instructions, cautionary instructions may be appropriate in a wide variety of situations. They are commonly required when counsel improperly asks unfairly prejudicial questions, *see People v. Knapp*, 505 P.2d 7 (Colo. 1973), exposes inadmissible evidence before the jury, *see People v. Goff*, 530 P.2d 514 (Colo. 1974), or where a witness volunteers inadmissible and prejudicial testimony, *see Hopper v. People*, 382 P.2d 540 (Colo. 1963). Like limiting instructions, the court should provide a cautionary instruction contemporaneously upon the divulgence of inadmissible or prejudicial testimony, and in some instances repeat the instruction in the general instructions to the jury.

1. Admission of Child Hearsay No Longer Requires Contemporaneous Instruction

Previously, a cautionary instruction on credibility was required to accompany the admission of hearsay testimony of a child victim under § 13-25-129. *See People v. McClure*, 779 P.2d 864 (Colo. 1989); *People v. Mathes*, 703 P.2d 608 (Colo. App. 1985). Upon amendment to § 13-25-129, however, a contemporaneous instruction is no longer required. The statute now requires the court to instruct the jury in the final written instructions that the jury heard evidence repeating a child's out-of-court statement and that it is for the jury to determine the weight and credit to be given that statement. *See People v. Burgess*, 946 P.2d 565 (Colo. App. 1997) (holding that statutory amendment regarding final written instructions on child hearsay eliminated pre-amendment requirement that jury be given contemporaneous instruction with admission of hearsay testimony).

16.2 INSTRUCTION FOR JURY DELIBERATIONS

A. Colorado Rules of Criminal Procedure

Crim. P. 30 provides:

> A party who desires instructions shall tender his proposed instructions to the court in duplicate, the original being unsigned. All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only

> the grounds so specified shall be considered on motion for a new trial or on review. Before argument the court shall read its instructions to the jury, but shall not comment upon the evidence. Such instructions may be read to the jury and commented upon by counsel during the argument, and they shall be taken by the jury when it retires. All instructions offered by the parties, or given by court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as a part of the record of the case.

The requirements for the submission and form of the verdict are set forth in Crim. P. 31.

B. Purpose and Function of Instructions

The purpose of instructions is to define for the jury the legal principles that apply to and govern the facts in the case, and to provide the jury all of the law that is applicable to the pertinent issues in a manner that the jury may understand. *Lewis v. People*, 60 P.2d 1089 (Colo. 1936). It is the duty of the trial court to instruct the jury on all matters of law to be properly considered by it in the determination of the cause. *Owen v. People*, 195 P.2d 953 (Colo. 1948). *See also People v. Mackey*, 521 P.2d 910 (Colo. 1974).

C. Language and Form

1. In writing and viewed as a whole

All instructions must be submitted to the jury in writing, and the failure to do so has been held to be reversible error. *See Nieto v. People*, 415 P.2d 531 (Colo. 1966). Likewise, additional instructions given to the jury after it has retired to deliberate must be in writing. *People v. Langford*, 550 P.2d 329 (Colo. 1976). However, the giving of an oral instruction favorable to the defendant has been held to constitute error without prejudice. *See Martinez v. People*, 235 P.2d 810 (Colo. 1951).

The sufficiency of instructions is generally not determined by the giving or failure to give any one particular instruction, but rather depends on the instructions viewed as a whole. *See People v. Fincham*, 799 P.2d 419 (Colo. App. 1990). If taken as a whole, the instructions adequately inform the jury of the applicable law, there is no reversible error. *People v. Manier*, 518 P.2d 811 (Colo. 1974). *See also People v. Gonyea*, 195 P.3d 1171 (Colo. App. 2008). Thus, it has been held not be error to refuse a defendant's tendered instructions where they are already covered by the instructions given by the court. *People v. Medina*, 522 P.2d 1233 (Colo. 1974). *See also People v. Vanrees*, 125 P.3d 403 (Colo. 2005).

People v. Backus, 952 P.2d 846 (Colo. App. 1998). The trial court gave its own introductory instruction to the jury which included the statement, "It is up to you to determine the inferences which you feel may properly be drawn from the evidence," and failed to mention the presumption of innocence. Based on a totality of the circumstances, the court did not commit plain error by doing so. There was no direct conflict between the court's instruction and the pattern introductory

instruction; the court properly instructed the jury at the close of evidence concerning inferences it could draw; and the court fully advised the potential jurors during *voir dire*, and gave a written instruction to the jury at the close of evidence, about the presumption of innocence.

Tibbles v. People, 501 P.3d 792 (Colo. 2022). "Instructions that lower the prosecution's burden of proof below the reasonable doubt standard constitute structural error and require automatic reversal." Statements regarding the law that a trial court makes either during the jury selection process or otherwise outside the context of the court's formal instructions to the jury. The trial court's hypothetical examples used to explain reasonable doubt impermissibly lowered the prosecution's burden of proof and required reversal.

2. Instructions on elements of offense

People v. Weinreich, 119 P.3d 1073 (Colo. 2005). A jury instruction should substantially track the language of the statute describing the crime.

People v. Benzor, 100 P.3d 542 (Colo. App. 2004). A jury instruction defining an offense that is framed in the language of the statute is generally sufficient and proper.

People v. Lewis, 433 P.3d 70 (Colo. App. 2017). § 18-1-202(11) provides that venue is not an element of a criminal offense and trial court's jury instruction to that effect was proper.

Neder v. United States, 527 U.S. 1 (1999). "[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." The omission of an element from an instruction is an error subject to a constitutional harmless error analysis.

Griego v. People, 19 P.3d 1 (Colo. 2001). The Colorado Supreme Court noted the holding in *Neder* that the "error of omitting an essential element of a crime in jury instructions is not, under the Federal Constitution, amenable to structural error analysis but instead is subject only to harmless or plain error review." The Colorado Supreme Court held that "when a trial court misinstructs the jury on an element of an offense, either by omitting or misdescribing the element, that error is subject to constitutional harmless or plain error analysis and is not reviewable under structural error standards."

But see *Medina v. People*, 163 P.3d 1136 (Colo. 2007). Where the jury was improperly instructed on a lower level of offense than that charged, "the trial court committed structural error in sentencing when it sentenced Medina for a class 4 felony because the jury had convicted her of a class 5 felony. Because this error was confined to Medina's sentencing and did not affect her trial, the jury's conviction of guilt for the class 5 felony need not be disturbed."

But see *People v. Riley*, 380 P.3d 157 (Colo. App. 2015). When the court instructs on an offense different than that charged, it is a constructive amendment and is reversible as structural error.

People v. Bossert, 722 P.2d 998 (Colo. 1986). "Knowingly" when offset from other elements modifies all succeeding conduct elements in the instruction.

People v. Fichtner, 869 P.2d 539 (Colo. 1994). If the trial court gives an erroneous instruction on an element of offense, it does not rise to level of plain error if that element was not at issue in case.

3. Language should be understandable

Instructions should be given in language that is clear and understandable so that the jury may not be misled or fail to understand the issues presented. *Lewis v. People*, 60 P.2d 1089 (Colo. 1936). As a general rule, an instruction which defines an offense in the language of the applicable statute is proper so long as that language is sufficiently clear. *People v. Dago*, 497 P.2d 1261 (Colo. 1972). If the language of a statute is not sufficiently clear, the defendant is entitled to instructions that explain the statutory language. *People v. Hoehl*, 568 P.2d 484 (Colo. 1977); *Bustamonte v. People*, 401 P.2d 597 (Colo. 1965).

People v. Van Meter, 421 P.3d 1222 (Colo. App. 2018). The trial court gave the jury a definition of the term "possession" for the purposes of POWPO. The court's use of this instruction, which was not challenged by the defense, was not plain error because it was based on the word's common and ordinary definition.

4. Instructions to be confined to facts and issues of the case

Rumley v. People, 368 P.2d 197 (Colo. 1962). In a prosecution for involuntary manslaughter arising out of the defendant's operation of an automobile, the Colorado Supreme Court held that the jury was improperly instructed as to certain provisions of the Motor Vehicle Act and other abstract principles of law which, though correctly stated, had no application to the facts of the case. The Court recognized that jury instructions should relate and be confined to issues concerning matters in evidence, and "mere abstract statements of law or excerpts from court opinions generally should not be given as instructions."

a. Excerpts from court opinions

Cohen v. People, 103 P.2d 479 (Colo. 1940). The defendant's conviction for theft by receiving was reversed by the Colorado Supreme Court on grounds that the trial court erroneously instructed the jury with regard to circumstantial evidence based, in part, on a quotation from another court opinion. "The practice of giving excerpts from court opinions as instructions to juries frequently gives rise to difficulties. Opinions are written with the facts and issues of the particular case under consideration in mind. The language used is ordinarily with reference to and should be construed in the light of the issues and the facts of the particular case which are then already determined." The Court further stated that the practice of framing instructions in the language of court opinions, "if indulged in at all, should be [done] with care and discrimination with the object sought to be obtained by the instruction clearly in mind."

People v. Zuniga, 631 P.2d 1157 (Colo. App. 1981). Trial courts should abstain from giving excerpts from court opinions, taken out of context, as jury instructions. See also *People v. Pahl*, 169 P.3d 169 (Colo. App. 2006).

5. Instructions should not emphasize particular portions of the evidence

Lowe v. People, 234 P. 169 (Colo. 1925). In a homicide prosecution, the trial court properly refused to instruct the jury that expressions of good will on the part of the defendant toward the victim are always important evidence: "Whatever importance should have been attached to the evidence here referred to was perfectly obvious. The trial court has no duty to select all the salient points in the evidence, favorable or unfavorable, and specifically call them to the attention of the jurors. The rules of law necessary for their guidance and essential to their comprehension of the questions submitted for their decision should, of course, be given but beyond that point elucidation ends and confusion begins."

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). No error to reject defendant's tendered instruction on "fingerprint evidence rule" that improperly told jury weight it must give certain evidence and failed to inform jury that limitation on use of that evidence only applied when no other evidence connected defendant to crime.

Practice Tip: While the defendant is entitled to an instruction setting forth a **theory of the defense** [*see* § II(F), *below*], such an instruction may be properly refused if it is argumentative, unduly emphasizes particular evidence, or contains statements not supported by the evidence. *See People v. Fleming*, 804 P.2d 231 (Colo. App. 1990) (*rev'd on other grounds*).

6. Duty to correct instructions

People v. Bastin, 937 P.2d 761 (Colo. App. 1996). In this homicide prosecution, the district court instructed as a third element that the defendant "acted alone," because there was no evidence that other persons were directly involved in the homicidal act. Thereafter, in closing argument the defense attorney argued that the prosecution was obligated to prove that the defendant "acted alone" in order for the jury to convict him of felony murder. Following closing argument, the district court found that, in light of the defense attorney's argument, the elemental instruction for felony murder was misleading and re-instructed the jury that the prosecution must prove that the defendant acted "alone or with one or more persons." In holding that the correction of the instruction after closing argument did not constitute reversible error, the Court of Appeals recognized the trial court's duty to not only properly instruct the jury on all the elements of the charged offenses, but also to correct erroneous instructions and misstatements of counsel that are sufficient to mislead the jury regarding the applicable law. "When circumstances require that a change in the instructions be made after closing arguments, reversible error occurs only if defense counsel was unfairly misled in formulating closing argument or prevented from arguing a meritorious defense to the jury."

People v. Jones, 434 P.3d 760 (Colo. App. 2018). Parties' closing arguments are insufficient to cure errors in the court's jury instructions.

D. Special Instructions on Credibility

As a general matter, special instructions regarding the credibility of witnesses are disfavored. See *People v. Rubanowitz*, 688 P.2d 231 (Colo. 1984).

1. Credibility of the defendant

Fernandez v. People, 490 P.2d 690 (Colo. 1971). The Colorado Supreme Court held that, although the trial court did not commit reversible error in giving an instruction as to the credibility of the defendant (which duplicated some of the language set forth in the general credibility instruction), the Court disapproved of the practice: "We choose this time to repeat and emphasize our view that the practice of giving two instructions on the credibility of witnesses is not necessary and is not the modern trend. It is the better practice to give only one instruction as to the credibility of witnesses."

2. Instruction on witnesses' motives

People v. Keelin, 565 P.2d 957 (Colo. App. 1977). The trial court properly rejected the defendant's tendered instruction regarding the motive to fabricate on the part of a prosecution witness. The Court of Appeals noted that there was nothing in the evidence to support the instruction, and it was rendered unnecessary by the submission of the general instruction pertaining to credibility of witnesses. The Court of Appeals also reiterated the principle that "the better practice is to give only one integrated instruction pertaining to credibility."

3. Child witnesses

People v. Estorga, 612 P.2d 520 (Colo. 1980). The trial court did not abuse its discretion in refusing the defendant's tendered instruction to weigh the evidence of the 10-year-old sexual assault victim carefully, even though there was some evidence that the child was mentally retarded to a certain degree.

People v. Cunningham, 570 P.2d 1086 (Colo. 1977). In a murder and kidnapping case, the trial court properly refused the defendant's tendered instruction which specifically addressed the credibility of the 5-year-old child who identified the defendant as the person who abducted the victim. The Colorado Supreme Court stated that the general instruction on credibility sufficiently listed the factors for the jury to consider in evaluating the testimony, and it was within the trial court's discretion to refuse the specific instruction which "might have unnecessarily singled out and emphasized a particular portion of the evidence.

4. Sexual assault victims

Section 18-3-408 prohibits the giving of an instruction in a sexual assault case to examine with caution the testimony of the victim solely because of the nature of the charge. The statute also

prohibits an instruction that a sexual assault charge is easy to make but difficult to defend, or any similar instruction. The statute further provides, however, that the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence its decision.

But see *People v. Johnson*, 870 P.2d 571 (Colo. App. 1993). Failure to so instruct jury was not plain error where defendant neither tendered instruction nor called trial court's attention to requirements of statute, and where absence of instruction did not "affect the 'framework' within which the trial proceeded" as to mandate reversal.

E. Jury Questions: Giving Additional Instructions during Deliberations

1. Court's obligation to clarify

People v. Gilmore, 97 P.3d 123 (Colo. App. 2003). Where the original instructions adequately inform the jury of a definition, no additional instruction is recommended or required when the jury asks for additional information.

Leonardo v. People, 728 P.2d 1252 (Colo. 1986). In a prosecution for theft by receiving, the jury sent a note to the court that read: "Is *Knowing or Believing* in instruction Number 6 The Same as *Having a Suspicion of?*" The trial court, without consulting either party, responded by referring the jury to the original instructions. In holding that the response constituted reversible error, the Colorado Supreme Court cited with approval the *ABA Standards for Criminal Justice,* Standard 15-4.3(a) (2d ed. 1980), which provides that, if a jury during deliberations desires to be informed on any point of law, they shall be so instructed in the courtroom unless (1) they may be adequately informed by directing their attention to the original instructions; (2) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or (3) the request would call upon the judge to express an opinion about factual matters that are properly to be considered by the jury. The Court stated: "We presume that a jury understands the instructions it is given. However, when the jury indicates to the judge that it does not understand an element of the offense charged or some other matter of law central to the guilt or innocence of the accused, the judge has an obligation to clarify that matter for the jury in a concrete and unambiguous manner." In concluding that the juror's inquiry could not be resolved by referring them back to the original instructions, the Court stated, "A jury should be referred back to instructions only when it is apparent that the jury has overlooked some portion of the instructions or when the instructions clearly answer the jury's inquiry."

Compare People v. Schreck, 107 P.3d 1048 (Colo. App. 2004). In a kidnapping case, during deliberations, the jury sent out a note asking the court to "[c]larify the word *carried* . . . . What does it mean? What does it imply? How broad is the definition[?]" The trial court informed the jury that it was "unable to answer [the] question at this time." The Court of Appeals held that "[u]nlike in *Leonardo***,** there was no indication here that the jury misunderstood the meaning of the term "carried," was in danger of misapplying that term in a manner prejudicial to defendant's interests, or was focused on "carried" to the exclusion of the additional requirement that the

carrying be "from one place to another." Nor was there any indication that the jury's concern had anything to do with the distance a victim had to be moved before a second-degree kidnapping was committed. The text of the question suggests that the jury was concerned with how literally it should apply the term "carried," that is, whether the crime could only be committed by physically picking the victim up and carrying her somewhere else. Because any misunderstanding on this point could only have inured to defendant's benefit, no reversible error resulted from the trial court's decision not to substantively respond to the jury's inquiry."

Boothe v. People, 814 P.2d 372 (Colo. 1991). When the trial court received an inquiry from the jury in a sexual assault on a child prosecution asking whether a person may be judged guilty by association, the court properly responded by referring the jurors back to the original instructions. The Court recognized that the defendant was not charged with complicity, that the prosecution presented no evidence regarding complicity, and that referring the jury back to the original instructions would answer the jury's inquiry. The Court further stated that "the jury's question about guilt by association was an abstract question which did not pertain to the law of the case . . . [and] if the judge had instructed the jury on complicity, he would have gone beyond the instructions presented to the jury and expressed an opinion on a matter not in evidence."

People v. Alexis, 806 P.2d 929 (Colo. 1991). Where the jury was instructed at the time a stipulation was admitted into evidence that it should be treated as what the witness told the prosecutor, and the jury was also instructed according to the pattern jury instruction about stipulations, the trial court properly referred the jury back to their instructions when they sent out a question asking whether the defendant knowingly agreed to the stipulation.

People v. Mascarenas, 972 P.2d 717 (Colo. App. 1998). No error to refer jury back to instructions when asked for clarification of "knowing dominion" in possession instruction where dictionary definitions were either inappropriate or incorrect in context, and definition of "possession" had been approved many times.

People v. Wilford, 111 P.3d 512 (Colo. App. 2004). The jury submitted a question during deliberations asking whether "carrying a gun" is the same as "using" a gun, in the context of the phrase "by use of force or threat or intimidation." The trial court responded that merely carrying a gun is not necessarily "use," but "use" does not have to include firing, pointing, or even touching the gun. The court went on to state that the question is whether the defendant or confederate used a gun to force, threaten, or intimidate the victim, and whether the facts rise to that level of "use" is for the jury to decide. This response was proper because the jury indicated it was confused about the meaning of the phrase "use of force . . ." and the court's response was an accurate statement of the law.

2. Defense counsel must be consulted prior to responding to jury question

Leonardo v. People, 728 P.2d 1252 (Colo. 1986). "The defendant in a criminal case has a fundamental right under the Colorado constitution to have counsel present when the judge gives

instructions to the jury or responds to questions from the jury. Implicit within this right is the right of defense counsel to argue to the court concerning possible responses to the jury's inquiries and make objections, if desired, to those responses. It is therefore constitutional error for a trial judge to respond to an inquiry from a jury without first making reasonable efforts to obtain the presence of the defendant's counsel." The Court further held that, in such cases, reversal is required unless the error was harmless beyond a reasonable doubt. It expressly disapproved of prior cases, such as *People v. Lovato*, 507 P.2d 860 (Colo. 1973), which suggest the defendant must demonstrate prejudice as a result of the communication between the court and the jury without the presence of defense counsel or the defendant.

Leonardo Tip: Although the Court in *Leonardo* stated that "if there is a reasonable possibility that the defendant could have been prejudiced, the error cannot be harmless beyond a reasonable doubt," it nevertheless recognized that if the judge properly responds to an inquiry from the jury there is no prejudice to the defendant. The Court also recognized that if the subject matter of the court's response is one that has no reasonable possibility of affecting the verdict, any error in communicating with the jury without consulting defense counsel would be harmless beyond a reasonable doubt.

F. Defendant's Theory of the Case Instruction

All defendants have the right to submit their theory of the case to the jury if there is any evidence to support it. Appellate courts reiterate that the right to a theory of the case instruction is applicable no matter how improbable or unreasonable the theory may be. *See e.g., People v. Shaw*, 646 P.2d 375 (Colo. 1982) (concerning reckless manslaughter and negligent homicide); *People in the Interest of E.S.*, 681 P.2d 528 (Colo. App. 1984) (claiming child's failure to survive may have been caused by physical defect). The courts have nevertheless imposed certain requirements and limitations upon the scope and content of the defendant's theory of the defense instruction. However, such limitations should be considered in connection with the court's affirmative obligation to assist the defense in correcting or reframing an inappropriate instruction.

There is no error when a trial court refuses to give a defendant theory instruction when the contents of other instructions suffice. *People v. Trujillo*, 83 P.3d 642 (Colo. 2004).

1. Instruction must be in proper form and supported by evidence

Sterling v. People, 376 P.2d 676 (Colo. 1962). The trial court properly refused to give the defendant's tendered theory of the case instruction that was based on a factual premise unsupported by the evidence: "While we have repeatedly held that a defendant in a criminal proceeding is entitled to an instruction based on his 'theory of the case,' this does not mean that just any instruction so labeled should be given by the trial court. Such an instruction must be in proper form and based on the evidence in the record, and should not merely reflect the wishful thinking of counsel. We disapprove, of course, of an instruction on a theory of the case which is totally unsupported by evidence, and also we equally condemn an instruction which emphasizes the

evidence deemed helpful to a defendant, but conveniently overlooks undisputed evidence of an incriminating nature."

Compare with People v. T.R., 860 P.2d 559 (Colo. App. 1993). The juvenile's tendered instruction in a vehicular homicide case regarding a driver's duty to yield the right of way upon entering an intersection, though supported by minimal evidence, was more than a mere denial of the charged offense and the trial court's failure to so instruct the jury or assist in the preparation of a more suitable instruction constituted reversible error. In so holding, the Court of Appeals recognized that "[i]t is for the jury, and not the court, to determine the truth of an accused's theory; therefore, a defendant . . . is entitled to a theory of defense instruction if any evidence, even if improbable, supports the theory."

People v. Jones, 990 P.2d 1098 (Colo. App. 1999). No abuse of discretion in refusing to instruct jury on timing of formation of intent to commit robbery, which was the underlying felony to felony murder charge, where there was no evidence that defendant committed robbery after shooting victim and he did not assert that he formed intent to rob after killing victim.

Richardson v. People, 25 P.3d 54 (Colo. 2001). The trial court did not err in refusing defendant's tendered "usable quantity" instruction in this drug case where it did instruct jury on defendant's theory of defense, *i.e.,* lack of knowledge, and "usable quantity" was not an element of the offense.

2. Defendant's theory of the case instruction may be refused if it is covered by other instructions

People v. Mackey, 521 P.2d 910 (Colo. 1974). The trial court properly refused to give three of the defendant's tendered instructions regarding his theory that the prosecution's key witness was unreliable. While recognizing that the defendant is entitled to a theory of the case instruction that is grounded in the evidence, the Court stated: "However, the instructions tendered here were covered by instructions the trial court gave on the presumption of innocence, burden of proof, credibility of witnesses and use of prior inconsistent statements. It is not error to fail to give a tendered instruction covering the same matter already dealt with in other instructions . . . ."

People v. Banks, 804 P.2d 203 (Colo. App. 1990). Defendant's tendered instruction that he was nowhere near location of crime at time of offense was covered by court's instructions and was therefore properly refused.

People v. Young, 710 P.2d 1140 (Colo. App. 1985). Defendant's tendered instruction regarding inferences to be drawn from occurrence of an accident properly refused because theory was covered by court's instructions.

People v. Cole, 926 P.2d 164 (Colo. App. 1996). No abuse of discretion in refusing to submit or reword defendant's tendered theory of case instruction that was merely argumentative denial of guilt pointing to possible weaknesses in prosecution's evidence, particularly where any appropriate legal theories included in instruction were covered by other instructions submitted to jury.

People v. Trujillo, 433 P.3d 78 (Colo. App. 2017). Because the trial court instructed the jury on the defendant's theory of defense and defense counsel argued that same theory of defense in closing argument, the court did not err in rejecting five additional theory-of-defense instructions.

3. Instructions should not merely emphasize particular evidence

People v. McKenna, 585 P.2d 275 (Colo. 1978). In a sexual assault prosecution, it was not error to refuse the defendant's theory of the case instruction regarding consent that was argumentative and improperly emphasized certain portions of the victim's testimony.

People v. Gwinn, 428 P.3d 727 (Colo. App. 2018) (*overruled on other grounds*). Trial court properly refused defendant's tendered jury instruction that law enforcement may obtain a search warrant to compel a driver to submit to a blood test, as argumentative and focusing too much on a single piece of evidence.

People v. Fleming, 804 P.2d 231 (Colo. App. 1990) (*rev'd on other grounds*). A theory of the case instruction that was a lengthy and argumentative restatement of some of the defendant's evidence and which included at least one statement not supported by the evidence was properly refused by the trial court.

4. Instruction must assert a theory and not merely reiterate the defendant's testimony

Marn v. People, 486 P.2d 424 (Colo. 1971). In refusing the defendant's tendered theory of the case instruction, the Colorado Supreme Court stated: "The tendered instruction did not set forth any theory of the case, other than this general denial and was merely a restatement of his evidence, without any resultant theory, and was merely another attempt to reargue the case. This opportunity was afforded to defense counsel in closing argument and he is not entitled to have it reiterated in instructions given by the court."

People v. Holter, 521 P.2d 765 (Colo. 1974). Lengthy self-serving summary of defendant's testimony was properly refused and court properly assisted in preparation of different instruction that set forth defendant's theory of case.

People v. Weiss, 717 P.2d 511 (Colo. App. 1985). The theory of case instruction which contains explanation must be brief, general, and must instruct jury on legal effect of explanation. Defendant's tendered instructions containing detailed recitation of facts in evidence supporting his theory followed by general denial were not in correct form and were properly refused.

5. Instruction must be a correct statement of law

People v. Bossert, 722 P.2d 998 (Colo. 1986). The trial court properly refused the defendant's tendered theory of the case instruction regarding mistake of law, where that defense was not legally available. "Although a defendant is entitled to an instruction on his theory of the case, an instruction may not be given if it embodies an incorrect or misleading statement of the law."

Romero v. People, 460 P.2d 784 (Colo. 1969). "Although a defendant is entitled to an instruction on his theory of the case, such instruction cannot omit the necessary legal elements of his defense.")

Bustamonte v. People, 401 P.2d 597 (Colo. 1965). Defendant's tendered instruction on self-defense setting forth purely subjective test was properly refused as incorrect statement of law.

6. Court's obligation to assist defense counsel in framing a proper instruction

People v. Nunez, 841 P.2d 261 (Colo. 1992). The Colorado Supreme Court held that the trial court committed reversible error in refusing to submit a properly worded instruction on the defendant's theory of alibi. The Court recognized that the instruction tendered by the defendant improperly suggested that alibi was an affirmative defense, which constituted an improper statement of the law. *See People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989). However, the fact that the defendant was not entitled to a separate affirmative defense instruction did not relieve the trial court of its obligation to instruct the jury on the defendant's theory of the case. The Court stated the general rule that the jury must be instructed on the defendant's theory of the case if the record contains any evidence to support it, and "**a trial court has an affirmative obligation to cooperate with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court**."

People v. Moya, 512 P.2d 1155 (Colo. 1973). In reversing the defendant's conviction for failing to give a properly worded instruction embodying the defendant's theory of the case, the Colorado Supreme Court stated: "In *People v. Montague*, 508 P.2d 388 (Colo. 1973), the long-established rule was again reiterated that a properly worded instruction, setting forth defendant's theory of defense, should always be given by the trial court unless the defendant's theory is encompassed in other instructions. The fact that a defense theory instruction may be ineptly worded, grammatically incorrect, or inaccurate in some particulars does not excuse the trial court from properly instructing on the theory of defense, assuming there is evidence to support such an instruction. In *Nora v. People*, 491 P.2d 62 (Colo. 1971), and in *Zarate v. People*, 429 P.2d 309 (Colo. 1967), this Court specifically directed trial courts in cooperation with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such an instruction in one to be drafted by the court."

People v. Weiss, 717 P.2d 511 (Colo. App. 1985). "Although a tendered instruction may be properly rejected, a trial court is under a positive duty to cooperate with counsel either to correct the tendered instruction or to incorporate the substance of such an instruction into one to be drafted by the court."

Compare with *People v. Fleming*, 804 P.2d 231 (Colo. App. 1990) (rev'd on other grounds). "Although a trial court has a duty to cooperate with counsel in drafting a proper theory of the case instruction after refusing an improper one here, defendant rejected the opportunity offered by the

trial court to draft a proper instruction. Thus, the trial court did not err in refusing defendant's offered instruction.

7. Clarification about effect of theory of the case instruction

People v. Hood, 878 P.2d 89 (Colo. App. 1994). In response to the jury's question whether the defendant's theory of the case instruction was "to be used as part of the defense's evidence and considered," the district court informed the jury that "an instruction is not itself evidence of facts" and the jury should make its decision by applying the rules of law that are contained in the instructions to the evidence presented at trial. In rejecting the defendant's assertion that the court's response constituted reversible error, the Court of Appeals stated: "[t]he jury's question demonstrated that it did not understand the purpose of the theory of the case instruction and was confused about whether the instruction was to be considered as evidence in the case. In answering the question, the trial court did not express an opinion as to the factual content of the instruction. Rather its response was a succinct and correct statement of the law and properly informed the jury that instructions are not evidence, but are to be used as guides in applying rules of law to the evidence presented at trial." Moreover, the Court of Appeals recognized that even if the district court was not required to provide a response to the jury's question, its response was a correct statement of law and was therefore proper.

G. Instructions on Lesser Offenses

Under certain conditions the court may instruct the jury on a lesser offense to the one charged. The lesser offense may be one that is either included in the original charge, or one that is not so included. Either party may be entitled to have a lesser included offense submitted to the jury when requested. *People v. Rock*, 402 P.3d 472 (Colo. 2017). A lesser offense, either included or non-included, may be submitted to the jury only if there is some rational basis in the evidence for acquitting the defendant of the original charge and convicting him of the lesser offense.

1. Determination of lesser "included" offense: strict elements, subset, and single distinction tests

Section 18-1-408(5) resurrects the evidentiary standard and establishes a broad definition of what constitutes a "lesser" included offense: "An offense is so included when: (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission."

People v. Reyna-Abarca, 390 P.3d 816 (Colo. 2017). "With respect to the applicable test for determining whether one offense is a lesser included offense of another, we reiterate that the strict elements test is the proper test, but we acknowledge that our prior iterations of that test have arguably been inconsistent." "We thus hold that **an offense is a lesser included offense of another**

offense if the elements of the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense. In our view, this articulation of the test is consistent with applicable statutory law and the plain meaning of 'lesser included,' it harmonizes our previous iterations of the 'statutory elements' or 'strict elements' test, and it can be applied readily and uniformly."

People v. Rock, 402 P.3d 472 (Colo. 2017). "Corollary to, and therefore consistent with, our primary observation in *Reyna-Abarca*—that one offense must be considered included in another offense of which its elements are logically a subset—is the proposition that an offense the commission of which is necessarily established by establishing the elements of a greater offense must also be included in that greater offense. To the extent that a lesser offense is statutorily defined in disjunctive terms, effectively providing alternative ways of being committed, **any set of elements sufficient for commission of that lesser offense that is necessarily established by establishing the statutory elements of a greater offense constitutes an included offense**."

Pellegrin v. People, 539 P.3d 1224, (Colo. 2023). "We now conclude that subsection 408(5)(c) does not create a single distinction test. **Accordingly, an offense is included in another offense under subsection 408(5)(c) if it differs from the offense charged only in the respect that (1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist**. Applying that construction here, we further conclude that because the offenses of harassment and stalking differ in more ways than the two distinctions identified in subsection 408(5)(c), harassment is not an included offense of stalking under that subsection."

Friend v. People, 429 P.3d 1191 (Colo. 2018). In order to be a lesser included offense, alternative ways of committing the lesser offense need not be contained in the statutory definition of the greater offense. To be a lesser included offense it is enough that any particular set of elements sufficient for conviction of that offense be so contained. Although child abuse resulting in death requires proof of pattern it could be committed in a way that is included in child-abuse murder, therefore it constituted a lesser included offense of child-abuse murder.

2. When a lesser included offense instruction may be given

Section 18-1-408(6): "The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

Section 18-1-408(8): "Without the consent of prosecution, no jury shall be instructed to return a guilty verdict on a lesser offense if any juror remains convinced by the facts and law that the defendant is guilty of a greater offense submitted for the jury's consideration, the retrial of which would be barred by conviction of the lesser offense."

People v. Saars, 584 P.2d 622 (Colo. 1978). Where the defendant was charged with three counts of first-degree sexual assault, one count of second-degree burglary, and two counts of felony

menacing, the trial court did not err in refusing to give instructions on the lesser included offenses of second-degree sexual assault and first-degree criminal trespass. "An instruction which permits the jury to find a defendant innocent of the principal charge and guilty of a lesser charge should be given if supported by some evidence. However, if the evidence does not present any rational basis for conviction of the lesser offense, an instruction for the lesser charge should not be tendered to the jury." The court also noted that the mere fact that the jury had the option of declining to believe a witness' uncontroverted testimony did not give rise to an entitlement to a lesser included instruction.

People v. Brown, 218 P.3d 733 (Colo. App. 2009). Defendant was not entitled to jury instructions on offenses less serious than attempted first degree murder. The court reasoned that defendant broke into victim's apartment several hours after argument and deliberately fired four shots at close range using hollow point bullets, defendant left victim bleeding as he fled, and there was indisputable evidence that only medical intervention prevented a fatality, and thus, circumstances of shooting and nature of victim's injuries were such that no rational jury could find shooter acted with anything other than premeditated intent to cause death.

People v. Workman, 885 P.2d 298 (Colo. App. 1994). "[T]he mere chance of the jury's rejection of uncontroverted testimony and conviction on the lesser charge does not require the trial court to instruct the jury on the lesser charge."

Apodaca v. People, 712 P.2d 467 (Colo. 1985). A defendant is entitled to an instruction on a lesser included offense only if there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. However, "**where the evidence is such that the defendant must either be guilty of the greater offense or not guilty of any criminal conduct at all, an instruction on a lesser included offense is inappropriate**."

People v. Castro, 952 P.2d 762 (Colo. App. 1997). Where both counts of second-degree assault were premised on identical evidence, once the trial court concluded there was sufficient evidence to give an instruction regarding third degree assault as a lesser included offense to count one, it was obliged to give the lesser included offense instruction as to count two so that the jury understood third degree assault was a lesser included offense of both the first and second counts. By failing to give the instruction, the trial court committed reversible error.

a. Lesser included offenses in homicide cases

Coston v. People, 633 P.2d 470 (Colo. 1981). Although under the facts of the case the defendant was not entitled to a "heat of passion" manslaughter instruction, the Colorado Supreme Court recognized the general rule that, when determining if a defendant is entitled to a lesser included instruction in a homicide case, **the court must consider whether there is any evidence, however improbable, unreasonable or slight, which tends to reduce the homicide to a lesser degree.**

People v. Garcia, 826 P.2d 1259 (Colo. 1992). While recognizing the general rule that "any credible evidence, no matter how 'improbable, unreasonable or slight,' which tends to reduce a

homicide to manslaughter entitles a criminal defendant to a jury instruction on the lesser included offense," the Colorado Supreme Court held that the defendant was not entitled to such an instruction where he testified at trial that the victim was killed by an intruder and his earlier statement to the effect that he stabbed her during an argument was a fabrication, because his testimony was a binding judicial admission.

People v. Garcia, 28 P.3d 340 (Colo. 2001). Because **provocation** is a mitigating factor and not a separate offense under the second-degree murder statute, the prosecution bears the burden of proving beyond a reasonable doubt a lack of provocation. Here the jury instructions "inaccurately characterized second-degree murder-provocation as a lesser-included offense of first and second-degree murder, rather than as a mitigating factor that could reduce Defendant's sentence. The jury was also incorrectly instructed that the prosecution was required in this case to *prove* the elements of provocation beyond a reasonable doubt, rather than to *disprove* the elements of provocation."

People v. Evans, 987 P.2d 845 (Colo. App. 1998) (*rev'd in part on other grounds*). The trial court did not specify order of priority, but it was not error to instruct jury it could consider any lesser offense to first-degree murder. It was not reversible error to refer to heat of passion manslaughter incorrectly as lesser included offense where defendant expressly referred to it as a lesser included.

People v. Lucero, 985 P.2d 87 (Colo. App. 1999). In a vehicular homicide case where it was undisputed that collision occurred causing three deaths and only issue was whether defendant was intoxicated or impaired, any error in failing to instruct on DUI and DWAI was harmless.

People v. Dooley, 944 P.2d 590 (Colo. App. 1997). Any evidence, however improbable, unreasonable, or slight that tends to establish facts reducing the grade of a homicide entitles a defendant to a jury instruction on a lesser included offense, but, where defendant failed to introduce any evidence tending to establish that alleged provocation was such as would create an irresistible passion in an objectively reasonable person, denial of the tendered lesser-included instruction was proper.

3. When prosecution is entitled to lesser included offense instruction

People v. Cooke, 525 P.2d 426 (Colo. 1974). In a prosecution for possession of narcotics for sale, it was error for the trial court to refuse to give the People's tendered instruction on the lesser included offense of simple possession of a narcotic drug. The Colorado Supreme Court recognized that the information charging possession with intent to sell was sufficient to advise the defendant that he must be prepared to controvert evidence of possession and to defend on that charge, and stated: "Mindful of the primacy of notice within the constitutional guarantee of due process of law and of the duty of the court to safeguard this right, we hold only that where, as here, the lesser included offense upon which the prosecution requested an instruction is (1) easily ascertainable from the charging instrument, and (2) not so remote in degree from the offense charged that the prosecution's request appears to be an attempt to salvage a conviction from a case which has

proven to be weak, the prosecution may obtain a lesser included offense instruction over the defendant's objection." See also *People v. Horrocks*, 549 P.2d 400 (Colo. 1976).

4. When prosecution is entitled to instruction on lesser, uncharged offense

People v. Garcia, 940 P.2d 357 (Colo. 1997). Defendant complained it was error to instruct the jury on first degree criminal trespass at the prosecution's request and over his objection. He argued that, because first-degree criminal trespass contained the element "dwelling of another," it was not a lesser included offense of second-degree burglary and, thus, he was not given sufficient notice of his need to defend against that charge. The Court of Appeals agreed and reversed the conviction, and the Colorado Supreme Court reversed the Court of Appeals' decision. The Court applied the rationale of *Cooke, above,* and found that "**to decide whether a defendant has notice that he might have to defend against a lesser uncharged offense, we must consider the greater offense as charged.**" The information specifically alleged second degree burglary of a dwelling. Because defendant was on notice from the charging documents that the prosecution intended to prove the unlawful entry of a dwelling, it was not error to instruct the jury on the lesser non-included offense of first-degree criminal trespass over defendant's objection.

Compare People v. Satre, 950 P.2d 667 (Colo. App. 1997). "[I]n contrast to the situation in *Garcia,* neither the listing of the charge nor the wording of the information provided sufficient notice to defendant that the structure involved was a dwelling. Therefore, since defendant did not have notice that he would be required to defend against the charge of first-degree criminal trespass, the trial court should not have instructed the jury on that charge over his objection."

5. Defendant's entitlement to lesser non-included offense instruction

People v. Rivera, 525 P.2d 431 (Colo. 1974). "It is well settled in Colorado that a defendant is entitled to have the court instruct the jury on the defense theory of the case as revealed by the evidence. Though the statutory test [for lesser offenses] will preclude the submission of such an instruction at the request of the District Attorney or by the court because of the notice requirement, we see no reason to bar the submission of an instruction of a lesser offense—though not included—where it is supported by the evidence and the defendant wants it. We hold, therefore, that a theory of the case instruction which permits the jury to find a defendant innocent of the principal charge and guilty of a lesser charge should be given when warranted by the evidence."

People v. Naranjo, 401 P.3d 534 (Colo. 2017). Colorado's approach to lesser non-included offenses remains entirely judicially created. The jury should be instructed on a lesser non-included offense only where there exists a rational evidentiary basis for the jury to simultaneously acquit the defendant of the greater charged offense and convict the defendant of the lesser offense. Furthermore: a defendant is not entitled to a lesser non-included offense that contradicts the defendant's sworn testimony at trial (distinguishing *Brown v. People*, 239 P.3d 764 (Colo. 2010)).

People v. Price, 969 P.2d 766 (Colo. App. 1998). No error to reject defendant's tendered lesser included offense instruction on theft where evidence did not provide rational basis for it.

People v. Jompp, 440 P.3d 1166 (Colo. App. 2018). Trial court properly denied defendant's request for a resisting arrest instruction as a lesser non-included offense to the charge of escape because defendant's arrest had already been effectuated before he ran away.

a. Standard for submission

People v. Bustos, 725 P.2d 1174 (Colo. App. 1986). "Before a lesser non-included offense may be submitted to the jury in a theory of the case instruction . . . there must be a rational basis for the jury to acquit the defendant of the offense charged and simultaneously find him guilty of the lesser offense."

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). Because there was no rational basis on which the jury could have acquitted the defendant of stalking but convicted him of telephone harassment, the court properly refused to instruct the jury on the lesser non-included offense.

People v. Jamison, 436 P.3d 569 (Colo. App. 2018). Defendant not entitled to a lesser non-included offense instructions for second degree possession and introduction of contraband because there was no rational evidentiary basis for the jury to conclude that the contraband item—a toothbrush shank—could cut fence or wire.

b. Defendant subject to punishment on original and lesser non-included charge

People v. Will, 730 P.2d 898 (Colo. App. 1986). The Court of Appeals held that by submitting a lesser non-included instruction for consideration by the jury, the defendant consented to an added count being charged and thereby introduced the possibility of being found guilty of both the original and lesser non-included charge.

6. Prerequisite of acquittal of greater offense

Section 18-1-408(8) states that, "[w]ithout the consent of prosecution, no jury shall be instructed to return a guilty verdict on a lesser offense if any juror remains convinced by the facts and law that the defendant is guilty of a greater offense submitted for the jury's consideration, the retrial of which would be barred by conviction of the lesser offense."

People v. Bachicha, 940 P.2d 965 (Colo. App. 1996). In response to the jury's question regarding whether it could properly begin considering the lesser-included offense since it was deadlocked on the principal charge, the court referred the jury to the portion of the elemental instruction that requires a verdict of not guilty if one or more elements of the principal charge are not proved beyond a reasonable doubt, as well as the instruction requiring the jury's verdict to be unanimous. In reversing the judgment of conviction, the Court of Appeals held that "[t]he trial court's direction that the jury's verdict be unanimous and its reference in the supplemental instruction to the original instruction requiring a unanimous verdict of guilt or acquittal erroneously implied to the jury that it would have to acquit defendant of the greater offense by a unanimous vote before it could consider the lesser-included offense."

16.3 ELEMENTS V. ENHANCERS AND MITIGATORS—*APPRENDI*

Apprendi v. New Jersey, 530 U.S. 466 (2000). Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum, must be submitted to a jury, and proved beyond a reasonable doubt.

People v. Cross, 114 P.3d 1 (Colo. App. 2004) (*rev'd in part on other grounds*). Applied *Apprendi* analysis to class 4 felony stalking, holding that a prior conviction does not have to be proven to the jury.

Blakely v. Washington, 542 U.S. 296 (2004). The "statutory maximum" for *Apprendi* purposes is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* additional findings."

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). Neither *Apprendi* nor *Ring v. Arizona*, 536 U.S. 584 (2002), hold that a sentence enhancer is the functional equivalent of an element of a greater offense, which must be proven to a jury beyond a reasonable doubt.

People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005). The trial court did not err in failing to instruct the jury that acting in the absence of "heat of passion" is an element or sentence enhancer of first-degree assault, as provocation is neither an element of that offense, nor is it a sentence enhancer.

People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. App. 2005) (*rev'd in part on other grounds*). Quantity is not an element of the offense of possession with intent to distribute; however, it is a sentence enhancer. Therefore, the quantity must be proven beyond a reasonable doubt, and the jury must find quantity beyond a reasonable doubt.

Linnebur v. People, 476 P.3d 734 (Colo. 2020). The legislature intended to treat felony driving under the influence as a distinct offense that included prior convictions as elements to be tried to a jury and found beyond a reasonable doubt, rather than as a sentencing enhancer to be found by the court.

16.4 OBJECTIONS TO INSTRUCTIONS AND PRESERVING THE RECORD

Crim. P. 30 provides that "all instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on review."

A. Failure to Object or Tender Alternative Instruction

Thomas v. People, 820 P.2d 656 (Colo. 1991). The defendant's failure to expressly object or tender an alternative to an improper instruction that the defense of self-defense did not apply to the charge of heat of passion manslaughter precluded consideration of the error on appeal. The Colorado Supreme Court stated that "a defendant who fails to make a timely, specific objection to a jury instruction or to tender an alternative instruction that more accurately states the law is in general

precluded from claiming error in the instructions." Under such circumstances, the alleged error may be addressed on appeal only if it amounts to plain error under Crim. P. 52(b).

People v. Bercillio, 500 P.2d 975 (Colo. 1972). Where defendant does not object to instruction or tender alternative which might more adequately set forth law, his assignment of error is not valid unless there is manifest prejudice amounting to plain error.

Cruz v. People, 441 P.2d 22 (Colo. 1968). General objection which fails to point out with some reasonable particularity nature of shortcoming of instruction is not entitled to consideration on review.

B. The "Invited Error" Doctrine

People v. Zapata, 779 P.2d 1307 (Colo. 1989). The defendant submitted an instruction on identification that was accepted by the court and given to the jury without change. On appeal, he claimed the instruction misstated the burden of proof in violation of his constitutional rights. The Colorado Supreme Court held that the "invited error doctrine" applies to jury instructions and "under the facts of this case, no reason exists to depart from the longstanding invited error rule. The allegation of constitutional error in the jury instruction does not require us to abandon the strict preclusion of review of invited error. The defendant in a criminal case may waive constitutional rights, and properly be held accountable for his choice . . . ."

People v. Smith, 416 P.3d 886 (Colo. 2018). Because defense counsel did not affirmatively modify, draft, tender or request the instruction challenged on appeal, neither invited error nor waiver applied and plain error review was appropriate.

16.5 SPECIFIC INSTRUCTIONS BY TOPIC

A. Affirmative Defenses

When an affirmative defense is properly raised by the evidence, the trial court must instruct the jury that the affirmative defense must be disproved by the prosecution beyond a reasonable doubt.

B. Burglary

When a defendant is charged with burglary, the jury must be instructed as to the elements of the crime that is the object of the burglary. *People v. Jiron*, 616 P.2d 166 (Colo. App. 1980).

C. Child Sexual Assault—Hearsay

The trial court must instruct the jury regarding its role in evaluating the credibility of child hearsay statements admitted in a sexual assault or child abuse prosecution pursuant to § 13-25-129. *See People v. McClure*, 779 P.2d 864 (Colo. 1989) (decided before recent 2015 amendment of § 13-25-129).

D. Child Sexual Assault

People v. Ramirez, 155 P.3d 371 (Colo. 2007). Sexual assault on a child is a general intent crime requiring only a "knowingly" mental state. See also *People v. Vigil*, 127 P.3d 916 (Colo. 2006).

E. Complicity

People v. Bass, 155 P.3d 547 (Colo. App. 2006). An instruction on complicity is not required to explicitly state that, to be guilty under a complicity theory, a defendant must have shared the principal's intent to commit the underlying crime.

People v. Childress, 363 P.3d 155 (Colo. 2015). The Supreme Court clarified that a complicitor must possess "the intent . . . to aid, abet, advise, or encourage the principal in his criminal act or conduct," and also "an awareness of those circumstances attending the act or conduct he seeks to further that are necessary for commission of the offense in question." The court further explained that "circumstances attending the act or conduct" means "those elements of the offense describing the prohibited act itself and the circumstances surrounding its commission . . . as distinguished from any element requiring that such act have a particular effect, or cause a particular result."

F. Defendant's "No Burden" Instruction

People v. Crawford, 632 P.2d 626 (Colo. App. 1981). The trial court's refusal to give, at the close of the trial, the defendant's tendered instruction that "the defendant never had the burden of testifying or of offering any evidence . . ." constituted reversible error, even though the court initially told the jury panel the same thing.

G. Eyewitness identification

Kostal v. People, 414 P.2d 123 (Colo. 1966). The Colorado Supreme Court held that the defendant's tendered instruction that identification of one stranger by another is merely a statement of opinion and is not a statement of fact was properly refused, stating: "Our attention has been directed to no case where an instruction to this effect has ever even been tendered, let alone actually given to the jury. In our view this is a matter which need not be covered by instruction, but should be left for counsel to argue to the jury, as he did, in his evaluation of the evidence."

People v. Fuller, 791 P.2d 702 (Colo. 1990). "[The defendant] contends that the trial court erred by refusing to submit to the jury any one of the three instructions on eyewitness identification that he tendered to the trial court. In doing so, he urges us to overrule a line of cases in which we have held that, when the defendant's theory of the case was mistaken identity, a jury need not be instructed on the credibility of eyewitness identification where an instruction is given on the credibility of witnesses in general."

People v. Alexander, 797 P.2d 1250 (Colo. 1990). It was not error to refuse specific instruction on credibility of eyewitnesses where trial court gave general credibility instruction.

People v. Thiery, 780 P.2d 8 (Colo. App. 1989). A separate *Telfaire* instruction on eyewitness identification was not needed when general credibility instruction was given.

H. Flight

1. Admissibility of flight evidence generally

Bernard v. People, 238 P.2d 852 (Colo. 1951). In upholding the admission of evidence of the defendant's escape from jail pending trial, the Colorado Supreme Court stated: "Evidence of the escape and flight of a person charged with a crime, from jail or the custody of an officer, or of his attempt to escape is competent, in connection with other facts and circumstances, on the question of his guilt, notwithstanding it has only slight tendency to prove guilt, but an escape or an attempted escape may only be shown where the fact that a crime has been committed, for which the accused is being tried, is shown . . . . Such evidence is admissible upon the theory that flight and escape indicate a guilty conscience, perhaps relates to motive, and is admissible, not in proof of the crime itself, but in corroboration of other evidence thereof, and same may properly go to the jury for such consideration and weight as that body may desire to give it, under instructions of the court properly defining its purpose and effect."

People v. Eggert, 923 P.2d 230 (Colo. App. 1995). Court properly concluded defendant's flight was probative of consciousness of guilt where he absconded shortly before trial after threatening witness and attending several motions hearings where damaging evidence of guilt was presented. *See also People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010).

a. Defendant may explain the reason for flight

Duran v. People, 399 P.2d 412 (Colo. 1965). The prosecution established that the defendant escaped from the county jail where he was being held on the pending charge, and that he remained at large for six weeks. However, the defendant was precluded from offering evidence at trial to establish that the conditions in the county jail were intolerable, which was his reason for escaping. On appeal, the Colorado Supreme Court held that the trial court erred in excluding the defendant's explanation, and recognized that the defendant should have the right to explain the reason for his flight, whether or not such an explanation is plausible.

2. Flight instruction

Gallegos v. People, 444 P.2d 267 (Colo. 1968). In a burglary case, the evidence established that, upon being told by a police officer to stop, the defendant ran toward the front of the building but found it too high to jump. He was thereafter apprehended. The evidence also showed that the co-defendant, prior to his arrest inside the store, attempted to hide by lying on a pipe rack at the furthermost end of the building. In upholding the giving of an instruction on flight, the Colorado Supreme Court recognized the general rule that particular portions of evidence should not be singled out and emphasized by special instructions. However, "where there is evidence of flight as a deliberate attempt to avoid detection and arrest, a flight instruction is proper."

People v. Gonzales, 525 P.2d 1139 (Colo. 1974). Where the evidence established that the defendant attempted to escape from a police officer after his arrest, the Court approved the giving

of the following standard flight instruction: "By Instruction No. 13 . . . the jury was told that if it found that the crimes charged in the information were committed by some person, and that immediately after being apprehended the defendant fled, such flight would be a circumstance, not sufficient in itself to establish guilt, but which, together with all other facts and circumstances proven at the trial, could be considered in determining the guilt or innocence of the defendant; that it was for the jury to determine whether such flight was caused by a consciousness of guilt or by some other and innocent motive."

People v. Rogers, 690 P.2d 886 (Colo. App. 1984). While recognizing that an instruction on flight is generally disfavored, the Court of Appeals stated that "where a defendant has reason to believe that he has committed a crime, that his identity is known, that his pursuit and apprehension would probably ensue, and he flees or conceals himself for any length of time to frustrate his apprehension, the giving of a flight instruction does not constitute error." Given that the case was reversed on other grounds and remanded for a new trial, the Court of Appeals cautioned the trial court regarding the omission of language to the effect that it was for the jury to determine whether such flight was caused by a consciousness of guilt or by some other innocent motive.

3. Flight instruction not favored

People v. Larson, 572 P.2d 815 (Colo. 1977). In a prosecution for aggravated robbery, the defendant was the driver of the get-away car and was apprehended after a high-speed chase from the scene of the robbery. In holding that the giving of a flight instruction did not constitute reversible error, the Colorado Supreme Court stated: "We have expressed our disfavor with the flight instruction because it gives undue influence to one item of evidence. . . . However, the giving of the instruction does not constitute reversible error if 'the defendant had reason to believe that he had committed a crime, that his identity was known, that his pursuit and apprehension would probably ensue, and that he fled or concealed himself for any length of time to frustrate this apprehension."

People v. Morant, 499 P.2d 1173 (Colo. 1972). Disapproving giving of flight instruction but holding it may be considered in circumstantial evidence case to show guilty knowledge.

People v. Cook, 22 P.3d 947 (Colo. App. 2000). It was not reversible error to give flight instruction where evidence supported it.

People v. Garcia, 169 P.3d 223 (Colo. App. 2007). Although flight instructions are generally not favored, it is not reversible error to give such an instruction when the "defendant had reason to believe that he had committed a crime, that his identity was known, that his pursuit and apprehension would probably ensue, and that he fled or concealed himself for any length of time to frustrate his apprehension."

4. Where flight is not immediate

People v. Fletcher, 566 P.2d 345 (Colo. 1977). In a murder case, an accomplice implicated the defendant four months after his arrest, and the defendant was not arrested until eight months later while he was living in New Jersey under an assumed name. In reversing the Court of Appeals' holding that a flight instruction should not have been given, the Colorado Supreme Court stated: "We decline to hold, as the Court of Appeals held, that a flight instruction may not be given unless the evidence affirmatively demonstrates that the defendant fled 'immediately' after the crime was committed. This Court has previously upheld giving flight instructions in situations where the flight was not immediate. See *Vigil v. People*, 421 P.2d 120 (Colo. 1966); *Goldsberry v. People*, 369 P.2d 787 (Colo. 1962); *Mills v. People*, 362 P.2d 152 (Colo. 1961)."

5. Flight during trial

People v. Tafoya, 833 P.2d 841 (Colo. App. 1992). During a recess of a burglary trial, the defendant left the courtroom and did not reappear. After recessing for approximately 4 hours in an effort to locate the defendant, the trial court resumed the trial in the defendant's absence, and later instructed the jury along the lines of the standard flight instruction. The Court of Appeals concluded that, under circumstances in which the defendant voluntarily and knowingly absented himself from the proceedings and the trial court made a reasonable inquiry as to his whereabouts before continuing with the case, the giving of a flight instruction was proper.

I. Insanity and Impaired Mental Condition: Informational Instructions

1. Insanity

a. Jury to be advised of commitment procedures upon a finding of not guilty by reason of insanity

People v. Thomson, 591 P.2d 1031 (Colo. 1979). The Colorado Supreme Court recognized that, although the average juror understands the consequences of either a guilty or a not guilty verdict, the average juror is not aware of the consequences of a verdict of not guilty by reason of insanity. In light of the possible miscarriage of justice if the jury finds a defendant sane based upon a mistaken belief that the defendant would be returned to the community upon a finding of insanity, the Court held that the jury, upon request of the defendant, should be instructed in clear and simple terms of the consequences to the defendant of an insanity verdict, i.e., that he will be committed to the Department of Institutions until it is determined that hospitalization is no longer required because he no longer suffers from a mental disease or defect which is likely to cause him to be dangerous to himself, to others, or to the community in the reasonably foreseeable future. The jury should also be advised that the instruction is informational only and is to have no persuasive bearing on the determination of a proper verdict under the evidence.

b. Jury also to be advised that defendant will never be retried upon finding of not guilty by reason of insanity

People v. Roark, 643 P.2d 756 (Colo. 1982). At the conclusion of a sanity trial, the jury was instructed as to the commitment procedures that would follow a finding of not guilty by reason of insanity and, at the request of the prosecution, was also instructed that if the defendant was so found he would never be tried on the merits of the criminal charges. In upholding the giving of the instruction in its entirety, the Colorado Supreme Court stated: "The instruction given in this case complies with the letter and spirit of our decision in *People v. Thomson* . . . . It advises the jury in plain terms, without embellishment, of the effect of the verdicts available to them, and clearly tells them that it is informational only. The underlined paragraphs merely serve to answer the question that would naturally arise from reading the preceding paragraph, *i.e.,* whether the defendant could be tried on the issue of guilt after release from the state hospital following a verdict of not guilty by reason of insanity. Accordingly, we conclude that the defendant's objection to the instruction to the effect of the jury verdict at the sanity trial is not well taken."

c. Clarification of "distinguishing right from wrong"

People v. Serravo, 823 P.2d 128 (Colo. 1992). In construing the legal definition of insanity contained in §16-8-101[for offenses committed before July 1, 1995], in the context of an allegation that the defendant committed the crime under the delusion that he was so commanded by God, the Colorado Supreme Court held that "[a] clarifying instruction on the definition of legal insanity . . . should clearly state that, as related to the conduct charged as a crime, the phrase 'incapable of distinguishing right from wrong' refers to a person's cognitive inability, due to a mental disease or defect, to distinguish right from wrong as measured by a societal standard of morality, even though the person may be aware that the conduct in question is criminal. Any such instruction should also expressly inform the jury that the phrase 'incapable of distinguishing right from wrong' does not refer to a purely personal and subjective standard of morality."

2. Impaired Mental Condition

a. Informational instruction required

Cordova v. People, 817 P.2d 66 (Colo. 1991). The defendant's conviction for first-degree murder and related counts was reversed by the Colorado Supreme Court on the ground that the trial court's refusal to instruct the jury as to the consequences to the defendant should the jury find him not guilty by reason of impaired mental condition. The Court reasoned that the same dispositional consequences result from findings of not guilty by reason of insanity and impaired mental condition, and the same potential for a miscarriage of justice exists if the jury misunderstands the consequences of its finding regarding the affirmative defense. "Indeed, in light of the common belief that a not guilty verdict generally means that the defendant goes free, . . . the need to inform the jury of the consequences of a not guilty verdict by reason of impaired mental condition is at least as equally compelling as the need for the informational instruction in an insanity trial." Failure to so instruct the jury was therefore error which, under the facts of this case, was not harmless beyond a reasonable doubt.

Cordova did not address the further issue, raised in *Roark,* concerning whether the jury may also be instructed that the defendant will never be retried upon a finding of not guilty by reason of impaired mental condition.

Practice Tip: For offenses committed on or after **July 1, 1995**, the defense of **impaired mental condition** has been incorporated into the affirmative defense of not guilty by reason of insanity. *See* §§ 16-8-101, 16-8-101.3, 16-8-101.5, and 18-1-802.

J. Independent Intervening Cause

People v. Calvaresi, 534 P.2d 316 (Colo. 1975). The Colorado Supreme Court recognized "Wharton's Rule" on intervening cause, which provides: "To warrant a conviction for homicide, the death must be the natural and probable consequence of the unlawful act, and not the result of an independent intervening cause in which the accused does not participate, and which he could not foresee. If it appears that the act of the accused was not the proximate cause of the death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected, and but for which death would not have occurred, such supervening cause is a defense to the charge of homicide." The court acknowledged, however, that Wharton's Rule, standing alone, does not completely define the elements of the defense of independent intervening cause, inasmuch as the simple negligence of another that follows the original unlawful act and which contributes to the death of a victim does not constitute an independent intervening cause. However, "**gross negligence** is abnormal human behavior, [which] would not be reasonably foreseeable, and would constitute a defense, if, but for that gross negligence, death would not have resulted." *See also People v. Gentry*, 738 P.2d 1188 (Colo. 1987); *People v. Garner*, 781 P.2d 87 (Colo. 1989).

People v. Marquez, 107 P.3d 993 (Colo. App. 2004). The trial court did not err in instructing the jury that there can be more than one cause of the victim's death, and in finding that the defendant failed to make the threshold showing necessary to support the affirmative defense of intervening cause. *See also People v. Lopez*, 97 P.3d 277 (Colo. App. 2004).

1. The "sensitive" victim

Hamrick v. People, 624 P.2d 1320 (Colo. 1981). The defendant was convicted of the murder of an epileptic victim who was repeatedly beaten over the head with a club and kicked into a state of unconsciousness. The evidence established that the immediate cause of death was heart failure due to an epileptic seizure brought on by multiple traumas to the head. The defense presented expert testimony that other possible causes of the seizure and cardiac arrest were the victim's failure to take medication for his epileptic condition and the ingestion of alcohol. In upholding the refusal of the defendant's tendered instruction on intervening cause, the Colorado Supreme Court stated: "[A] supervening cause is an independent intervening cause in which the defendant did not participate and which he could not foresee. The defendant must take his victim as he finds him, and it is no defense that the victim is suffering from physical infirmities. The question for the jury's

determination was whether injuries inflicted by the defendant began a chain of events which in their natural and probable consequences caused the victim's death."

K. Intoxication

People v. Sabell, 452 P.3d 91 (Colo. App. 2018). When both voluntary and involuntary intoxication exist, the jury must decide beyond a reasonable doubt whether the defendant was voluntarily or involuntarily intoxicated. Here, the pattern jury instruction contained in COLJI-Crim. H:34 cmt. 7, lessened the prosecution's burden of proof by allowing the jury to decide the threshold question of involuntary intoxication without the burden of proof.

People v. Mion, 544 P.3d 111 (Colo. App. 2023). "Addressing an issue of first impression in Colorado, we hold that the affirmative defense of involuntary intoxication is legally cognizable when (1) a defendant knowingly ingests what he believes to be a particular intoxicant; (2) in so doing, he unknowingly ingests a different intoxicant; and (3) it is the different intoxicant that deprives him of the capacity to conform his conduct to the requirements of the law. Because that was the essence of Mion's involuntary intoxication claim, his defense was legally cognizable. We also hold that Mion presented sufficient evidence—a low threshold—at trial to entitle him to a jury instruction on involuntary intoxication. Because the trial court refused Mion's requested involuntary intoxication instruction, and because we can't conclude that the error was harmless beyond a reasonable doubt, we reverse the judgment and remand for a new trial."

1. Voluntary intoxication

An instruction on voluntary intoxication is proper only if evidence has been introduced to negate the existence of a **specific intent**, if such intent is an element of the crime charged; such an instruction is not available when the offense charged is a general intent crime. §18-1-804. *See People v. DelGuidice*, 606 P.2d 840 (Colo. 1979). *See also People v. Miller*, 113 P.3d 743 (Colo. 2005).

People v. Vigil, 127 P.3d 916 (Colo. 2006). Sexual assault on a child is a general intent crime, notwithstanding the fact that knowing "sexual contact" must be for the "purpose of sexual arousal or gratification;" therefore, intoxication is not a defense.

People v. Lucas, 232 P.3d 155 (Colo. App. 2009). A jury instruction informing the jury that it "may" consider evidence of voluntary intoxication is permissible where separate instructions inform the jury that the prosecution is required to prove all the elements, including the culpable mental state, beyond a reasonable doubt.

People v. Miller, 113 P.3d 743 (Colo. 2005). Where a voluntary intoxication instruction is warranted, the trial court should instruct the jury that "after deliberation" is part of the culpable mental state required for first-degree murder and may be negated by evidence of voluntary intoxication.

Brown v. People, 239 P.3d 764 (Colo. 2010). A criminal defendant who maintains his innocence may receive an inconsistent jury instruction on voluntary intoxication provided there is a rational basis for the instruction in the evidentiary record. Here however, the court properly denied the voluntary intoxication instruction because there was insufficient evidence supporting that instruction in the record.

Practice Tip: Although an instruction on voluntary intoxication is still available under appropriate circumstances, in *People v. Harlan*, 8 P.3d 448 (Colo. 2000) (*rev'd on other grounds*), the Colorado Supreme Court held that voluntary intoxication is not an affirmative defense and, further, that the model jury instruction on voluntary intoxication should not be given.

2. Involuntary intoxication

Evidence and an instruction regarding intoxication may be appropriate if the intoxication was not self-induced and caused the defendant to be unable to conform his conduct to the requirements of the law. §18-1-804(3).

But see *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981). Drug addiction does not constitute involuntary intoxication.

People v. Turner, 680 P.2d 1290 (Colo. App. 1983). Excessive dosage of prescription drug is generally not involuntary intoxication.

L. Kidnapping

Garcia v. People, 503 P.3d 135 (Colo. 2022). "[W]e now hold that a trial court commits error when it presents the jury with a jury instruction that defines the phrase "seizes and carries," in the second-degree kidnapping statute, § 18-3-302(1), as "any movement, however short in distance." Such an instruction is impermissibly misleading because it constitutes a partial definition of asportation and eliminates the seizure requirement from the second-degree kidnapping statute entirely. And, because—as used here—it includes no object, no subject, and no verb, the instruction also risks leading the jury to mistakenly believe the crime has no actus reus or to supply its own, incorrect, actus reus." In response to the jury question, the court should have referred the jury back to the elemental instruction.

M. Missing Witness

People v. Bustos, 725 P.2d 1174 (Colo. App. 1986). The trial court refused to instruct the jury according to the defendant's tendered "missing witness" instruction which informed the jury that if it was within the power of the prosecution to produce witnesses who could give material testimony on an issue in the case, the failure to call such witnesses permits an inference that the testimony would be unfavorable to the prosecution and favorable to the defendant. The Court of Appeals stated that, while the prosecution has a duty to make reasonable efforts to maintain contact with informants in criminal cases, "a missing witness instruction is not warranted unless it is solely within the prosecution's power to call the witness to testify." The Court further acknowledged that

there was "no evidence that the prosecution was trying to withhold exculpatory evidence or that the witness remained peculiarly within its control." As such, the tendered instruction was inappropriate.

N. Multiple Theories

People v. Vigil, 251 P.3d 442 (Colo. App. 2010). The trial court did not err in failing to require the jurors to unanimously agree on the theory supporting theft. See also *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). The verdict form was proper where the jury was not required to agree unanimously on a theory of culpability, but rather, as instructed, it was only required to agree unanimously on the verdict.

People v. Hall, 60 P.3d 728 (Colo. App. 2002). The trial court is not required to give a unanimity instruction on alternative theories of liability. The verdict will be upheld as long as there is sufficient evidence to support both theories.

O. Presumption of Innocence

The failure to give an instruction regarding the presumption of innocence is per se reversible error. *People v. Aragon*, 665 P.2d 137 (Colo. App. 1983).

P. Proximate Cause

People v. Moreland, 567 P.2d 355 (Colo. 1977). The Colorado Supreme Court approved the following "standard" proximate cause instruction in a felony murder case: "Proximate cause means that cause which in natural and probable sequence produced the death of the victim. It is the cause without which the death would not have occurred." See also *People v. Palulmbo*, 555 P.2d 521 (Colo. 1976).

1. Application in vehicular homicide case

People v. Perez, 644 P.2d 40 (Colo. App. 1981). In a vehicular homicide case it was proper to instruct the jury in terms of "proximate cause" rather than "sole proximate cause" as set forth in *Goodell v. People*, 327 P.2d 279 (Colo. 1958). The court noted that Goodell is inapplicable because it interprets the old vehicular homicide statute, while the present statute does not contain the term "sole proximate cause."

Q. Public Indecency

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). The public indecency statute, § 18-7-301(1), employs an objective standard and is applicable to the performance of sexual acts "in a public place or where the conduct may reasonably be expected to be viewed by members of the public." Because this objective standard depends not on what a particular defendant actually knew, but rather on what a reasonable person should have known, the crime of public indecency is a strict

liability offense. The court properly denied defendant's tendered instruction that a person must know they are in a public place for the purposes of public indecency.

R. Reasonable Doubt

People v. Munoz, 240 P.3d 311 (Colo. App. 2009). The reasonable doubt instruction stating, "after considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you *should* find the defendant guilty" and "after considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you *should* find the defendant not guilty" satisfied the requirements of due process.

Johnson v. People, 436 P.3d 529 (Colo. 2019). Trial court provided a nonsensical, confusing, and improper definition of "hesitate to act" as part of reasonable doubt during *voir dire*, but was found not have prejudiced the defendant because it was not referenced again and proper instructions on relevant legal principles were given throughout the rest of trial. Since the improper definition did not lower the prosecution's burden of proof there is no violation of due process.

S. Recent Possession

Wells v. People, 592 P.2d 1321 (Colo. 1979). The Colorado Supreme Court set forth a model instruction recommended for use in theft-related cases regarding the inference that may be drawn regarding the defendant's unexplained and exclusive possession of recently stolen property. The Court stated that "whether there is an adequate evidentiary basis for the giving of the instruction depends on the lapse of time between the crime and the discovery of the possession along with all other facts and circumstances, the type of property, the amount or volume of the property, and the ease or difficulty with which it may be assimilated into trade channels." The determination of whether the theft was "recent" likewise involves a fact-specific determination that could "vary from a few days to two years."

People v. Hampton, 758 P.2d 1344 (Colo. 1988). With respect to the contents of the instruction, the Court reiterated the elements set forth in the *Wells* model: "that the unexplained and exclusive possession of recently stolen goods creates only an inference that the possessor was the robber; that the weight to be given the inference rests entirely with the jury; that the longer the period of time between the robbery and the evidence of possession, the weaker the inference which may be drawn from the evidence of possession; that the evidence of the defendant's possession of recently stolen property does not shift the burden of proof, which remains on the prosecution to prove every element of the crime beyond a reasonable doubt; and that the defendant is not required to take the witness stand or to furnish any explanation whatever of his possession."

1. Instruction creates a permissive inference

People v. Little, 813 P.2d 816 (Colo. App. 1991). An instruction regarding the inference to be drawn from the possession of recently stolen property that was identical to the model set forth in Wells creates a permissive inference only.

2. Exclusiveness of possession

People v. Thorpe, 570 P.2d 1311 (Colo. 1977). "Contrary to the defendant's position, the possession need not be sole to be exclusive, and where, as here, several defendants are apprehended in joint possession of the stolen goods, such an instruction [on recent possession] is proper."

3. Proof required that goods were stolen

People v. Richards, 795 P.2d 1343 (Colo. App. 1989). "With regard to the allegedly stolen weapons, we agree with the defendant's contention that the Wells instruction was inappropriate here since that instruction was intended for the limited situation in which (a) there was no dispute that certain property was stolen and (b) there was no dispute that the defendant was in possession of that particular stolen property. Inasmuch as the defendant asserts, as his defense, that the weapons were not 'stolen' because he lacked the necessary culpable mental state for the crime, we conclude that giving the unmodified *Wells* instruction is inappropriate and prejudicial because of the tendency, under these circumstances, to confuse the jury and potentially relieve the prosecution of a portion of its burden of proof."

T. Robbery

People v. Buell, 442 P.3d 961 (Colo. App. 2017). Trial court properly instructed the jury that for purposes of aggravated robbery the jury could consider the application of force or intimidation against the victim at any time in an encounter leading up to the taking of the victim's property—there is therefore no requirement that the application of force or intimidation be a part of the same moment as the taking of property.

U. Statutory Offenses Not Specifying a Culpable Mental State

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). Legislative silence on the mental state is not to be construed as an indication that no culpable mental state is required. A requisite mental state may be inferred from the statute. However, where the plain language of the statute reflects the General Assembly's intent to make the offense a strict liability crime, no mental state need be proved.

People v. Washburn, 593 P.2d 962 (Colo. 1979). In a theft of rental property case, the Court stated that, although the General Assembly can proscribe an act without regard to culpable mental state pursuant to its police power, offenses which have their base in common law (such as theft) must be construed to require a culpable mental state, and the jury must be instructed accordingly.

People v. Gordon, 160 P.3d 284 (Colo. App. 2007). Willful Destruction of Wildlife § 33-6-117(1)(a) "to abandon the carcass or body of such wildlife; or to take and abandon wildlife," has an implied mental state of "knowingly."

People v. Manzo, 144 P.3d 551 (Colo. 2006). Leaving the Scene of an Accident with Serious Injury, §42-4-1601, constitutes a strict liability offense because the plain language of the statute does not require or imply a culpable mental state.

V. Theft

People v. Bornman, 953 P.2d 952 (Colo. App. 1997). The trial court committed reversible error by failing to instruct the jury that "knowingly" applied to the element of "without authorization" and, in conjunction with that ruling, prohibiting defendant from arguing that he was mistaken as to his right to possess the vehicle.

People v. Price, 969 P.2d 766 (Colo. App. 1998). Where trial court did not properly instruct jury that "knowingly" applied to "without authorization" element of theft, but the element was not entirely omitted, structural error analysis does not apply and no plain error here.

People v. Collie, 995 P.2d 765 (Colo. App. 1999). Though "knowingly" in theft instruction could have been read as inapplicable to deception, it was not structural error, and not plain error because ordinary meaning of deception requires intentional misrepresentation with purpose of misleading.

People v. Gibson, 203 P.3d 571 (Colo. App. 2008). It was error for trial court to give theft instruction which did not make clear that the prosecution had to prove, beyond a reasonable doubt, that defendant knew he did not have authorization to take the store's property.

Auman v. People, 109 P.3d 647 (Colo. 2005). It was error to fail to advise jury in theft instruction that defendant had to know that his taking of another's property was "without authorization," requiring reversal of conviction for felony murder based on burglary with intent to commit theft.

Compare with People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). The Court distinguished *Dunlap* from *Price* and *Bornman*, stating that a special instruction on the element of "knowingly" as applied to the element "without authorization" is not required. The Court relied on the previous holding in *People v. O'Neill*, 803 P.2d 164 (Colo. 1990).

People v. Gibson, 203 P.3d 571 (Colo. App. 2008). Failure to inform the jury that the mental state "knowingly" applied to the element "without authorization" was not structural error, and did not qualify as plain error because authorization was not a contested issue in the case.

W. Unanimity Where Multiple Acts Involved

People v. Gookins, 111 P.3d 525 (Colo. App. 2004). Under *Thomas v. People*, 803 P.2d 144 (Colo. 1990), a trial court need only instruct the jury that it must reach a unanimous decision on the same act or acts committed by the defendant. There is no requirement that the jury identify the particular act or acts upon which it bases its verdict. Where evidence of many acts is presented, any one of

which could constitute the offense charged, and where there is a reasonable likelihood that jurors may disagree on the act the defendant committed, the trial court should instruct the jury that, to convict, it must unanimously agree that the defendant committed the same act or that he committed all the acts included within the period charged.

People v. Carey, 198 P.3d 1223 (Colo. App. 2008). When a defendant is charged with crimes occurring in a single transaction, the prosecution does not have to elect among the acts that constitute the crime and a unanimity instruction need not be given. Here, an instruction requiring the jurors to agree unanimously as to which communications established stalking was not required because the stalking charge required the prosecution to show a course of conduct that constituted a single transaction. The jury had to find beyond a reasonable doubt that such repeated communications took place, but it did not have to agree unanimously on which of them established the stalking offense.

Compare Quintano v. People, 105 P.3d 585 (Colo. 2005). Although the five identically worded counts did not identify particular acts as the basis for each charge, and the prosecution did not elect the specific conduct relied upon for each charge, the unanimity instruction, which required the jury to agree to the same act or acts as the basis for each count, was sufficient to cure the harm resulting from the prosecution's failure to individualize the counts charged.

X. Voluntariness of Confession

Deeds v. People, 747 P.2d 1266 (Colo. 1987). The Colorado Supreme Court expressly disapproved of the giving of an instruction, which instructed the jury that the burden is upon the prosecution to prove the voluntariness of a confession beyond a reasonable doubt and that the jury should disregard the confession if they found that voluntariness was not established by that standard. The Court concluded that the determination of voluntariness is a proper function of the trial court, and not the jury, and therefore a special instruction to the jury on the issue is inappropriate. The Court stated, however, that to avoid the possibility of having the jury give undue weight or emphasis to a confession, the trial court may give a cautionary instruction on the issue: "Accordingly, we hold that the trial judge may properly instruct the jury that, although the confession has been admitted into evidence, it is the sole prerogative of the jury to determine what weight, if any, is to be given to the confession and any testimony directly related to the confession."

16.6 DEADLOCKED JURY

People v. Schwartz, 678 P.2d 1000 (Colo. 1984). In determining whether the jury is unable to reach a unanimous verdict, the Colorado Supreme Court set forth the following **factors** to be considered: (1) the jury's collective opinion that it cannot agree; (2) the length of the trial; (3) the complexity of the issues; (4) the length of time the jury has deliberated; (5) whether the defendant has made timely objections to a mistrial; and (6) the effects of exhaustion or coercion on the jury. After determining whether there is a likelihood of progress towards a unanimous verdict upon further deliberation, the trial court in its discretion may submit an instruction that: "1) jurors have a duty

to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment; 2) each juror must decide the case for himself, but only after an impartial consideration with his fellow jurors; 3) in the course of deliberation, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and 4) no juror should surrender his honest conviction as to the weight and effect of the [evidence] solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict."

Gibbons v. People, 328 P.3d 95 (Colo. 2014). Trial courts are not required to give an advisement that a mistrial will result if the jury is deadlocked. Trial courts have the *discretion* to instruct the jury of the possibility of a mistrial when the instruction will not have a coercive effect on the jury, given the content of the instruction and the context in which it is given.

People v. Lewis, 676 P.2d 682 (Colo. 1984) (*rev'd in part*). Before submitting additional instructions "[t]he court should first ask the jury whether there is a likelihood of progress towards a unanimous verdict upon further deliberation. An affirmative response should require further deliberation without any additional instruction . . . ."

Section 18-1-408(8): "Without the consent of the prosecution, *no jury shall be instructed to return a guilty verdict on a lesser offense* if any juror remains convinced by the facts and law that the defendant is guilty of a greater offense submitted for the jury's consideration, the retrial of which would be barred by conviction of the lesser offense."

"Section 18-1-408(8) expressly prohibits the trial court from alleviating jury deadlock over the degree of guilt by instructing the jury, without the prosecution's consent, to return a guilty verdict on a lesser-included offense. Rather, if *any juror* remains convinced by the facts and the law that the defendant is guilty of a greater offense, the jury cannot be instructed, without the prosecution's consent, to return a verdict on a lesser-included offense." *People v. Richardson*, 184 P.3d 755 (Colo. 2008).

People v. Richardson, 184 P.3d 755 (Colo. 2008). The trial court properly applied §18-1-408(8) and *Lewis*, *above*, when it instructed the jury, "[i]f any juror remains convinced by the facts and law that the defendant is guilty of a greater offense, then the jury has not reached unanimity. You should continue to deliberate if there is a likelihood of progress toward a unanimous verdict on any charge."

People v. Barnard, 12 P.3d 290 (Colo. App. 2000). Where jury notified court after two days of deliberations that it was deadlocked 11 to one over degree of murder, court's concern that *Lewis* instruction might be coercive was reasonable, and court did not err in refusing to give such instruction before declaring mistrial.

16.7 VERDICT FORMS

People v. Gookins, 111 P.3d 525 (Colo. App. 2004). A trial court need only instruct the jury that it must reach a unanimous decision on the same act or acts committed by the defendant. There is no requirement that the jury identify the particular act or acts upon which is bases its verdict.

People v. Tweedy, 126 P.3d 303 (Colo. App. 2005). A trial court has the authority before accepting a verdict and before discharging the jury to send it back to correct a mistake or to clarify an ambiguity in its verdict.

People v. Smith, 416 P.3d 886 (Colo. 2018). Because the instructions, evidence, and statements by counsel, considered together, did not obviously risk a non-unanimous verdict, the simple variance in failing to specifically identify the victim of the menacing charge did not amount to reversible plain error.

16.8 INCONSISTENT VERDICTS

People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010). Although attempted murder and assault require different specific intents, jury's guilty verdicts for these crimes against the same victim were not inconsistent because a defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time.

People v. McGlotten, 166 P.3d 182 (Colo. App. 2007). The defendant's conviction for conspiring to murder the victim was proper despite the fact that he was acquitted of attempting to murder the victim. Evidence of attempted murder was not the "sole evidence" of the conspiracy count within the meaning of § 18-2-206(2).

Candelaria v. People, 148 P.3d 178 (Colo. 2006). In respect to the offense of first-degree murder, a jury's finding of extreme indifference and specific intent with regard to a particular individual are neither logically nor legally inconsistent.

People v. Beatty, 80 P.3d 847 (Colo. App. 2003). Verdicts of attempted extreme indifference murder and attempted first-degree assault are inconsistent where a defendant engaged in only one assaultive act because he cannot simultaneously have a specific intent to harm a particular person and universal malice that is not directed at that person. Acting with universal malice negates the specific intent element of first-degree assault. However, conviction of attempted first-degree murder after deliberation was not inconsistent with conviction for reckless endangerment since the jury's finding that the defendant acted intentionally encompassed its finding that he acted recklessly.

People v. White, 64 P.3d 864 (Colo. App. 2002). Verdicts finding the defendant guilty of first-degree felony murder and second-degree murder were not inconsistent. Defendant's acquittal of first-degree after deliberation murder is not relevant to the intent element of felony murder, which was supplied by his intent to commit the underlying felony.

People v. Jones, 990 P.2d 1098 (Colo. App. 1999). Defendant was convicted of felony murder, reckless manslaughter, robbery, and conspiracy to commit robbery. There is no legal or logical

inconsistency between felony murder and reckless manslaughter, but the defendant can only sustain one homicide conviction for one death.

People v. James, 981 P.2d 637 (Colo. App. 1998). Verdicts for aggravated motor vehicle theft and attempted aggravated robbery for the same act are factually and legally inconsistent because a completed taking is inconsistent with an attempted taking.

People v. Delgado, 410 P.3d 697 (Colo. App. 2016). Verdicts for robbery, requiring a taking by the use of force, and theft from person, requiring a taking by means other than use of force, are inconsistent and amounted to plain error. The proper remedy was remand for a new trial.

16.9 MERGER

Case law pertaining to the rule of merger treats an offense as lesser included when proof of the essential elements of the greater offense necessarily establishes the elements required to prove the lesser offense. *People v. Marquez*, 107 P.3d 993 (Colo. App. 2004).

Reyna-Abarca v. People, 390 P.3d 816 (Colo. 2017). Colorado follows the "elements approach" to define lesser included offenses, which looks to whether the elements of the lesser offense are a "subset" of the elements of the greater offense. Therefore, motor vehicle theft is a lesser-included offense of theft even though "motor vehicle" is not an element of the crime of theft. This is because "motor vehicle" is a subset of "thing of value." Similarly, DUI is a lesser-included offense of Vehicular Assault and Vehicular Homicide.

People v. Portillo, 251 P.3d 483 (Colo. App. 2010). A menacing conviction does not merge into an attempted extreme indifference murder conviction because menacing requires proof of an element that need not be proved for attempted extreme indifference murder.

People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010). Attempted first-degree murder and second-degree assault do not merge because the former requires proof that the accused engaged in conduct constituting a substantial step toward causing another's death, while the latter does not.

People v. Baker, 178 P.3d 1225 (Colo. App. 2007). A sexual assault conviction does not merge into a second-degree kidnapping conviction, even when the kidnapping conviction is enhanced under § 18-3-302(3)(a) based on the person kidnapped being a victim of sexual offense.

Practice Tip: The Colorado Supreme Court's decision in *People v. Henderson*, 810 P.2d 1058 (Colo. 1991), is still good law on this point, even after *Apprendi*. S*ee also People v. Ramirez*, 140 P.3d 169 (Colo. App. 2005).

People v. Lovato, 179 P.3d 208 (Colo. App. 2007). Robbery of an at-risk adult merges with a conviction for aggravated robbery. Based on the reasoning of *People v. McKinney*, 99 P.3d 1038 (Colo. 2004), robbery of an at-risk adult is a penalty enhancer, not a substantive element, and cannot be considered when applying the strict elements test. Because simple robbery is a lesser

included offense of aggravated robbery, robbery of an at-risk adult is a lesser included offense of aggravated robbery.

People v. Petschow, 119 P.3d 495 (Colo. App. 2004). Convictions for attempted first-degree assault and attempted first-degree murder of the same victim do not merge because the use of a deadly weapon is an element of attempted first-degree assault but not attempted first-degree murder.

People v. Delci, 109 P.3d 1035 (Colo. App. 2004). Where a conviction of first-degree burglary is predicated on second-degree assault, the assault conviction merges into the burglary conviction. That the owner of the dwelling named in information is different from the victim of the assault, does not establish separate victims so as to avoid application of the merger doctrine.

People v. Cook, 22 P.3d 947 (Colo. App. 2000). Predicate felony charges merge into felony murder.

People v. Jamison, 436 P.3d 569 (Colo. App. 2018). First-degree possession of contraband is a lesser included offense of first-degree introduction of contraband and must merge when the charges are based on the same item of contraband. However, possession is likely not a lesser included offense of introduction of contraband under 18-8-203(1)(a).

* * *

2025 Contributions by Colleen Lamb

Senior Appellate Deputy District Attorney

1st Judicial District

CHAPTER 17

JOINDER AND SEVERANCE

17. JOINDER AND SEVERANCE

17.1 INTRODUCTION

Joinder and severance implicate the Double Jeopardy clauses of the United States and Colorado Constitutions. United States Constitution, Amendment V; Colorado Constitution, Article II, Section 18. The double jeopardy clauses' purpose is to prevent the government with all its resources and power from repeatedly attempting to convict a defendant thus subjecting the defendant to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity. *People v. Viburg*, 500 P.3d 1123 (Colo. 2021). The Clause protects a defendant from:

1. a second prosecution for the same offense after acquittal,
2. a second prosecution for the same offense after conviction, and
3. multiple punishments for the same offense.

Statutes that may be applicable include:

§ 18-1-408. Prosecution of multiple counts for same act

§ 16-10-301. Sexual offenses—evidence of similar transactions

§ 18-6-801.5. Domestic violence—evidence of similar transactions

Court rules concerning joinder and severance include

Colo. R. Crim. P. 8. Mandatory joinder

Colo. R. Crim. P. 13. Permissive joinder

Colo. R. Crim. P. 14. Relief from prejudicial joinder

C.R.E. 404(b). Other acts.

Washington v. People, 547 P.3d 1087 (Colo. 2024). Misjoinder of charges or defendants require reversal only if it results in actual prejudice because it had substantial and injurious effect or influence in determining the verdict. Unless it amounts to a due process violation, misjoinder is a non-structural error that requires nonconstitutional harmless-error review. To determine whether the misjoinder was harmless the test is whether there is no reasonable probability that it contributed to the conviction. It is a case-by-case, totality-of-the-circumstances assessment. Considerations include (1) whether the evidence was overwhelming; (2) whether the jury was properly instructed to consider the charges separately; and (3) whether there was a split verdict.

17.2 COMPULSORY JOINDER OF OFFENSES

A. Applicable Statute and Rule

Section 18-1-408(2) provides:

If the several offenses are actually known to the district attorney at the time of commencing the prosecution and were committed within the district attorney's judicial district, all such offenses upon which the district attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution; except that, if at the time jeopardy attaches with respect to the first prosecution against the defendant the defendant or counsel for the defendant actually knows of additional pending prosecutions that this subsection (2) requires the district attorney to charge and the defendant or counsel for the defendant fails to object to the prosecution's failure to join the charges, the defendant waives any claim pursuant to this subsection (2) that a subsequent prosecution is prohibited.

Substantially similar provisions are also set forth in Crim. P. 8(a)(1).

B. Purpose

The Colorado Supreme Court recognized that the compulsory joinder rule is intended to provide broader protection than the "same offense" principle of the prohibition against double jeopardy, and serves two basic purposes: "to protect the accused against the oppressive effect of sequential prosecutions based on a series of offenses that are so interrelated as to constitute what can fairly be characterized as one episode; and to conserve judicial and legal resources that otherwise would be wasted in duplicative proceedings." *People v. Marshall*, 348 P.3d 462 (Colo. App. 2014) (citing *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981)).

The mandatory joinder statute "seeks to prevent vexatious prosecution and harassment of a defendant by a district attorney who initiates successive prosecutions for crimes which stem from the same criminal episode." *People v. Leverton*, 405 P.3d 402 (Colo. App. 2017).

C. Elements

Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981). In holding that joinder of third-degree assault and criminal trespass charges was required in a case where the defendant's acts occurred sequentially in a narrow time frame in virtually the same location in furtherance of his plan to assault the victim and remove his child from the victim's trailer, the Colorado Supreme Court held that **five elements** must be satisfied in order for the compulsory joinder bar to apply to a subsequent prosecution:

(1) the several offenses must have been committed within the same judicial district;
(2) there must be a prosecution against the offender;
(3) the district attorney or a member of his staff must have knowledge of the several offenses at the commencement of the prosecution;
(4) the several offenses must arise from the same criminal episode; and

(5) the offender previously must have been subjected to a single prosecution.

1. Offenses committed in the "same judicial district"

People v. Taylor, 732 P.2d 1172 (Colo. 1987). The defendant was charged in two judicial districts with drug-related offenses as the result of an investigation by the Drug Enforcement Agency in Denver and Steamboat Springs. She initially was charged and pleaded guilty to conspiracy to distribute cocaine in Routt County, and was thereafter charged with possession of controlled substances in Denver County, after DEA agents executed a search warrant and discovered marijuana and cocaine in her house. In reversing the trial court's dismissal of the Denver County charges (entered on the theory that the completed Routt County prosecution acted as a bar to further prosecution of the related Denver County charges), the Colorado Supreme Court held that the term "judicial district" within the meaning of the compulsory joinder statute means that offenses must have been committed within the same judicial district in which the defendant has previously been subjected to a completed prosecution. The Court reasoned that the authority of a district attorney to initiate prosecution of a criminal case is limited by the constitution and by statute to crimes committed within that district attorney's judicial district, and the rule does not change where the crime charged in that district is one of a series of acts committed in several districts as part of a single criminal episode. Moreover, the multi-venue provisions of § 18-1-202(7), which permit an accused charged with multiple crimes arising from the same criminal episode and committed in several counties to be tried in any county in which any of the offenses could have been tried, is confined to counties within the same judicial district. Since the possession charges could not have been brought in Routt County, where the defendant had been previously subjected to a completed prosecution, entry of a judgment of dismissal in Denver County based on the compulsory joinder bar was therefore erroneous.

§ 18-1-202(7)(a), as mentioned in *Taylor*, provides:

> When multiple crimes are based upon the same act or series of acts arising from the same criminal episode and are committed in several counties, the offender may be tried in any county in which any one of the individual crimes could have been tried, regardless of whether or not the counties are in the same judicial district.

2. Defendant must be subjected to a "subsequent prosecution"

People v. Marshall, 348 P.3d 462 (Colo. App. 2014): "In the event the accused objects to joinder, and the court denies the prosecutor's motion to join the related cases, § 18-1-408(2) would not bar sequential prosecutions. Under those circumstances, the failure to join two related cases results from the accused's opposition to a joint prosecution, and not from prosecutorial neglect." In this case involving fraud and theft, the defendant's successful objection to the prosecution's motion to join two cases barred his subsequent motion to dismiss the second case because it had not been joined with the first. The Court of Appeals held that the mandatory joinder rules were

not a shield from properly initiated prosecutions. Therefore, the defendant waived his joinder rights under § 18-1-408(2) and Crim. P. 8(a)(1).

People v. Freeman, 583 P.2d 921 (Colo. 1978). "The proscription contained in Crim. P. 8(a) [and, by implication, §18-1-408(2)] is against bringing a 'subsequent prosecution' based on charges known to the prosecutor at the time he commenced the initial prosecution. In *People v. District Court*, 515 P.2d 101 (Colo. 1973), we held that there was no 'subsequent prosecution' until jeopardy attached to the initial prosecution."

3. The prosecutor must have knowledge of the several offenses at commencement of the prosecution

People v. Allen, 944 P.2d 541 (Colo. App. 1996). Where there was no knowledge or participation by the district attorney in the decision to prosecute different offenses, the compulsory joinder statute does not apply. While contempt and criminal trespass arose from same criminal episode, there was no knowledge by the district attorney, therefore the mandatory joinder statute did not apply.

Participation by a prosecutor in the decision to initiate a criminal prosecution is a significant factor in determining whether the prosecution had knowledge pursuant to the statute. *Williamsen v. People*, 735 P.2d 176 (Colo. 1987).

Marquez v. People, 311 P.3d 265 (Colo. 2013). "A criminal episode for purposes of mandatory joinder in a single prosecution, and therefore mandatory concurrent sentencing when the separate offenses arising from such an episode are actually proved by identical evidence, contemplates all those offenses, but only those offenses, arising either from the same conduct or connected in such a manner that their prosecution will involve substantially interrelated proof. Interrelationship of proof, the Colorado Supreme Court has reasoned, properly focuses a trial court's inquiry on the degree to which a defendant is harassed and judicial resources wasted by successive prosecutions, and by contrast, where the proofs of the charges are not interrelated, prejudice to the defendant caused by separate prosecutions will be minimal. Rather than minimizing the significance of factors like time, location, and schematic wholeness in the overall calculus, in the Supreme Court's later and more refined efforts it has described with greater particularity the manner in which these factors bear significance, observing that crimes committed simultaneously or in close sequence, crimes that occur in the same or closely related place, and acts that form part of a schematic whole, generally are crimes that involve interrelated proof . . . . The term "same conduct" in this context refers to "a single act or single behavioral incident that results in the commission of more than one offense," and that proof of different crimes is interrelated if the proof of one crime forms a substantial portion of proof of the other. Applying the concept of a "single behavioral incident."

In re Greene, 302 P.3d 690, 691 (Colo. 2013). "A criminal episode for purposes of barring subsequent prosecution of a criminal defendant contemplates all those offenses arising either

from his same conduct or those offenses connected in such a manner that their prosecution will involve substantially interrelated proof. In this context, the "same conduct" refers to a single act or single behavioral incident that results in the commission of more than one offense, and that proof of different crimes is interrelated if the proof of one crime forms a substantial portion of proof of the other. With regard to the latter in particular, the Colorado Supreme Court has reasoned that a determination of the interrelationship of proof properly focuses a trial court's inquiry on the degree to which the defendant is harassed and judicial resources wasted by successive prosecutions, observing that where the proofs of the charges are not interrelated, prejudice to the defendant caused by separate prosecutions will be minimal. The Supreme Court has also implicitly linked this standard with the Restatement's "transactional view" of a single claim by further observing that crimes that are committed simultaneously or in close sequence; crimes that occur in the same or closely related place; and acts that form part of a schematic whole are generally crimes involving interrelated proof."

Zipse v. County Court for County of Jefferson, 917 P.2d 331 (Colo. App. 1996). Although knowledge of deputy, chief deputy, and assistant district attorney are imputable to the District Attorney for purposes of compulsive joinder, absent evidence to the contrary the actions and knowledge of police officers or non-attorney members of the District Attorney's staff are not.

4. The several offenses must arise from the "same criminal episode"

Included with in the term "same criminal episode" are physical acts that occur in the same place or closely related places, are committed simultaneously or in close sequence, and that form part of a schematic whole. *Marquez v. People*, 311 P.3d 265 (Colo. 2013); *Jeffrey v. District Court*, 626 P.2d 631 (Colo. 1981). Some of the factors in determining whether offenses arise from the "same criminal episode" include the elements of the offenses, the temporal proximity of the underlying acts, the likelihood that the evidence will overlap, the physical location of the acts, the modus operandi of the crime, and the identity of the victim. *Bondsteel v. People*, 439 P.3d 847 (Colo. 2019).

Bondsteel v. People, 439 P.3d 847 (Colo. 2019). Defendant was charged in two cases: (1) three incidents where a male motorcyclist wearing a leather jacket and helmet approached women on the street, showed a gun, and required the victims to move or remove parts of their clothing to expose themselves to him, and demanded the victim give him some of their belongings; and (2) two women in separate incidents were attacked on a hiking trail, he brandished a knife, and he attempted sexual assaults. The Court found that joinder was not an abuse of discretion because the offenses were of the "same or similar character." The Court found that the offenses shared the following factors (1) involved assaults of one or more women; (2) occurred in the open air in relatively isolated places; (3) involved threats with a weapon; (4) occurred with a six-month period; (5) involved a disguised assailant who attempted to view women's private parts by pulling up their shirts, moving or removing their clothing, or demanding that they do so; (6) the case involved common evidence; (7) the investigations were intertwined; and (8) joinder does not

always require the evidence to be cross-admissible if there were separate trials, it is sufficient if the acts are of the "same or similar character." The Court referred to Colo. R. Crim. P.s 8(a)(2); 13; and 14 and statute § 16-10-301.

In re Greene, 302 P.3d 690, 691 (Colo. 2013). "[T]he "same conduct" refers to a single act or single behavioral incident that results in the commission of more than one offense, and that proof of different crimes is interrelated if the proof of one crime forms a substantial portion of proof of the other. With regard to the latter in particular, the Colorado Supreme Court has reasoned that a determination of the interrelationship of proof properly focuses a trial court's inquiry on the degree to which the defendant is harassed and judicial resources wasted by successive prosecutions, observing that where the proofs of the charges are not interrelated, prejudice to the defendant caused by separate prosecutions will be minimal. The Supreme Court has also implicitly linked this standard with the Restatement's "transactional view" of a single claim by further observing that crimes that are committed simultaneously or in close sequence; crimes that occur in the same or closely related place; and acts that form part of a schematic whole are generally crimes involving interrelated proof."

Marquez v. People, 311 P.3d 265 (Colo. 2013). "Interrelationship of proof, the Colorado Supreme Court has reasoned, properly focuses a trial court's inquiry on the degree to which a defendant is harassed and judicial resources wasted by successive prosecutions, and by contrast, where the proofs of the charges are not interrelated, prejudice to the defendant caused by separate prosecutions will be minimal. Rather than minimizing the significance of factors like time, location, and schematic wholeness in the overall calculus, in the Supreme Court's later and more refined efforts it has described with greater particularity the manner in which these factors bear significance, observing that crimes committed simultaneously or in close sequence, crimes that occur in the same or closely related place, and acts that form part of a schematic whole, generally are crimes that involve interrelated proof . . . . The term "same conduct" in this context refers to "a single act or single behavioral incident that results in the commission of more than one offense," and that proof of different crimes is interrelated if the proof of one crime forms a substantial portion of proof of the other. Applying the concept of a "single behavioral incident." *People v. Rogers*, 742 P.2d 912 (Colo. 1987). As the result of a valid search of the defendant's home, police recovered a quantity of marijuana as well as three large bird claws (raptor talons), possession of which constituted a misdemeanor punishable by a fine. The defendant pleaded guilty in county court to possession of the talons, and subsequently moved for dismissal of the felony marijuana charges that were filed in district court. In reversing the order of dismissal, the Colorado Supreme Court construed the "same criminal episode" requirement of the compulsory joinder requirement to include "offenses arising either from the same conduct of the defendant or offenses connected in such a manner that prosecution of the offenses will involve substantially interrelated proof. Although the charges need not be based solely on the same facts, a critical characteristic of the same criminal episode offenses, particularly in cases involving unrelated offenses or offenders, "is the fact that proof of one necessarily involves proof of the others." The

court further recognized that proof of different crimes is interrelated "if the proof of one crime forms a substantial portion of proof of the other." In remanding the case for a determination of whether the proofs of the wildlife charge and the drug charge are interrelated, the Court noted that "[b]ecause the felony and misdemeanor charges are not based on the same conduct, the extent to which the two prosecutions will burden the defendant with repetitive proof is crucial to the resolution of the motion to dismiss."

a. Illustrative cases

People v. Miranda, 754 P.2d 377 (Colo. 1988). The defendant was charged in two separate cases with possession and distribution of cocaine, the first act occurring on July 19, 1985 and the second act occurring on July 25, 1985. The Colorado Supreme Court stated that since the two offenses occurred six days apart, they could not constitute multiple prosecutions arising from the "same conduct" facet of the same criminal episode element, and that "while the charges in both prosecutions have some common characteristics -- that nature of the offenses, the persons involved in the incidents, the circumstances surrounding the distribution of the cocaine -- we cannot say with fair assurance that the charges in each prosecution are so interrelated that proof of the charges alleged in one prosecution would constitute a substantial portion of the proof in the other."

People v. Patrick, 773 P.2d 575 (Colo. 1989). Careless driving offense that was not part of ongoing course of conduct sufficiently connected in time and place to charged offenses of burglary, theft and criminal mischief does not constitute "same criminal episode" as to require dismissal under compulsory joinder statute.

People v. Herr, 868 P.2d 1121 (Colo. App. 1993). Default judgment entered upon speeding violation did not preclude subsequent prosecution for possession of controlled substances recovered following defendant's arrest. Seizure of drugs was not incident to traffic stop but was product of inventory search based on outstanding warrant that had previously been issued for defendant, and seizure did not occur "at practically the same time and the same place" as traffic stop.

b. Charges arising from the "same criminal episode" but prosecuted by different agencies

People v. Wright, 742 P.2d 316 (Colo. 1987) The Colorado Supreme Court held that a prosecution in county court on state driving charges was not barred by the defendant's conviction in municipal court on municipal driving charges by virtue of the compulsory joinder rule, even though the state and municipal charges arose from the same criminal episode. The Court recognized the distinct jurisdiction and authority of the city attorney in prosecuting municipal violations, and reasoned that "[e]xtending the compulsory joinder bar of § 18-1-408(2) to municipal ordinance violations would lead to the absurd result of prohibiting a district attorney from prosecuting an offender for a state offense solely on the basis of a municipal prosecutorial decision which was totally beyond

the control and responsibility of the district attorney." Moreover, prosecution on a counterpart state statute does not violate the prohibition against double jeopardy or the compulsory joinder rule so long as the criminal episode gives rise to separate state and municipal offenses, each which require proof of a fact the other does not.

Williamsen v. People, 735 P.2d 176 (Colo. 1987). Compulsory joinder statute does not act as bar to prosecution of DUI in county court following prosecution for traffic infractions before county court referee because district attorney is precluded by statute from participating in a trial before such a referee.

c. "Prosecution" by private parties

People v. Allen, 944 P.2d 541 (Colo. App. 1996). The compulsory joinder provisions of § 18-1-408(2) did not preclude the prosecution of the defendant for trespass and menacing even though he had been found in contempt of court and sentenced to six months in jail for the same conduct based upon his wife's enforcement of a restraining order by filing a motion for contempt pursuant to C. R. Crim. P. 407. The contempt proceedings, as then in effect, made no provision for participation of the district attorney or any other prosecutorial agency, nor at any time was violation of a restraining order a separate, substantive offense. As such, the process of obtaining sanctions for violation of the restraining order was independent of the authority of the district attorney to file criminal charges. "Thus, even if we were to assume that the district attorney was aware that defendant's wife was seeking a contempt order against defendant, since the district attorney neither participated in the wife's decision to seek sanctions against defendant under C.R.C.P. 407 nor in the contempt proceedings itself, he cannot be barred from the later prosecution of violations of state criminal statutes."

Practice Tip: Although the statutory mandatory joinder provision may not bar a subsequent state prosecution following a municipal prosecution based on the same transaction, under certain circumstances a prosecution may be barred by constitutional double jeopardy prohibitions.

D. Waiver of Compulsory Joinder Provisions

Section 18-1-408(2) provides that a defendant who, at the time jeopardy attaches with respect to a prosecution, is actually aware (either personally or through counsel) of additional pending prosecutions that are subject to the mandatory joinder provisions of the statute but who fails to object to the prosecution's failure to join the charges, waives any challenge that the subsequent prosecution is prohibited. *See People v. Carey*, 198 P.3d 1223 (Colo. App. 2008). Under §18-1-408(2), a defendant waives any claim regarding mandatory joinder if, at the time jeopardy attaches with respect to the first prosecution, the defendant or defense counsel knows of additional pending prosecutions that the DA is required to charge and the defense does not object to the failure to join the charges. A defendant may also waive a mandatory joinder claim by failing to raise an objection prior to the attachment of jeopardy in the second prosecution.

People v. Marshall, 348 P.3d 462 (Colo. App. 2014). The prosecution filed two cases involving securities fraud and theft: (1) in November, 2009; and (2) in February of 2012. The prosecution moved for joinder: the defendant objected to joinder and the court denied the motion. After the defendant was acquitted in the first case, he moved for dismissal of the second case because it should have been joined with the first case. The Court held that the defendant had waived his joinder rights because (1) he objected to the prosecution's motion to join the two cases; (2) the trial court denied the motion; and (3) the joiner rules would not be served if defendant could object to joinder and then get the second case dismissed on the grounds it should have been joined.

In *Marshall*, the Court of Appeals referred to ABA Standard 13-2.3:

Standard 13-2.3 Failure to join certain offenses:

> (c) A defendant who has been tried for one offense may thereafter move to dismiss any additional offense based upon the same conduct or the same criminal episode, unless a motion for joinder of these offenses was previously denied, unless the right of joinder was waived pursuant to paragraph (b), or unless the two offenses are not within the jurisdiction of the same court. The motion to dismiss must be made prior to the second trial, and should be granted unless the court determines that, because the prosecuting attorney did not have sufficient evidence to warrant trying the additional offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted in whole or in part.

People v. Leverton, 405 P.3d 402 (Colo. App. 2017). Defendant was charged in two separate cases with Possession of Paraphernalia and Theft by Receiving arising from a single criminal investigation. Prior to trial on the felony theft charge, the prosecution asked to join the two cases. The defendant objected stating that his client intended to "enter a straight guilty plea" to the paraphernalia charge, and then move to dismiss the felony case "for failure to join." The Court rejected the guilty plea, and granted the motion to join the cases. The Court of Appeals found that courts have the discretion to reject a guilty plea, and that defendants cannot manipulate the criminal justice system to escape additional charges.

17.3 PERMISSIVE JOINDER OF OFFENSES

Colo. R. Crim. P. 13 provides for permissive joinder of offenses and states:

> Subject to the provisions of Rule 14, the court may order two or more indictments, informations, complaints, or summons and complaints to be tried together if the offenses, and the defendants, if there are more than one, could have been joined in a single indictment, information, complaint, or summons and complaint.

Consolidation under Crim. P. 13 is proper if (1) the cases could have initially been joined under Crim. P. 8(a)(2), and (2) the consolidation is not prejudicial within the meaning of Crim. P. 14. When cases are of the same or similar character, joinder under Crim. P. 8(a)(2) is proper

regardless of whether the evidence would be cross-admissible. *Buell v. People*, 439 P.3d 857 (Colo. 2019) (involving joinder of shoplifting charges). Permissive joinder is allowed under any of three circumstances:

(1) they are based on the same or similar character; or

(2) they are based on two or more acts connected together; or

(3) they are based on two or more acts or transactions constituting parts of a common scheme or plan.

People v. Draper, 501 P.3d 262 (Colo. App. 2021). The defendant murdered his wife for having an affair. The next morning, he brandished a gun, hijacked a car, shot at other occupied cars, hitting at least three, menaced police and attempted to elude arrest. The charges were filed in two separate cases: (1) the murder of his wife, and (2) the conduct the next day. The two cases were joined for trial. The Court held that Crim. P. 13 permits joined if the charges could have been brought in a single case. Consolidation requires both that joinder would have been proper under Crim. P. 8(a)(2) and the consolidation would not result in prejudice within the meaning of Crim. P. 14. The Court held that the cases were "connected together" and the evidence was cross admissible. Further, the Court held that the defendant was not prejudiced by the joinder because the evidence was cross admissible and because the triers of fact were able to separate the facts and legal principles shown by the fact the jury convicted the defendant of some charges and acquitted him of others.

People v. Butson, 410 P.3d 744 (Colo. App. 2017). The defendant and his two sons were charged with several bank robberies. The robberies were charged in three separate cases. The prosecution moved to join the cases pursuant to Crim. P. 13. The trial court granted the motion. The Court held that joinder was permissible because the cases were sufficiently similar. It is not essential that the means of committing the other crimes replicate in all respects the manner in which the crimes charged were committed. Additionally, if the other crimes meet the C.R.E. 404(b) requirements, joinder is permissible.

People v. Leverton, 405 P.3d 402 (Colo. App. 2017). The defendant was charged in two separate cases: (1) possession of drug paraphernalia and (2) felony theft by receiving. The victim's car was stolen. The defendant was a passenger in the car when it was stopped several days later. The defendant claimed the victim was his girlfriend and he had permission: she denied it and said she did not know the defendant at all. On the way to the police station, as the defendant sat in the back seat of the police car he kept moving around. When the defendant was removed from the patrol car, the officer searched the back seat, finding a methamphetamine pipe. The defendant was charged in the two cases. The defendant attempted to enter a guilty plea to the petty offense paraphernalia charge, trying to then argue that the felony was barred by the joinder requirement. The Court held that a trial court may permit additions to a criminal information that arise from

the same criminal episode as the original counts so long as the additional counts are filed prior to jeopardy attaching.

People v. Raehal, 401 P.3d 117 (Colo. App. 2017). The defendant was charged in two separate cases with sexual assault on a child with different victims. The Court held that because two or more offenses may be charged in the same charging document if the offenses are of the same of similar character or are based on two or more connected acts or transactions or parts of a larger scheme or plan of action, it was not an abuse of discretion by the trial court to join the two cases. There is no prejudice to the defendant where evidence of each offense would be admissible in separate trials.

People v. George, 405 P.3d 402 (Colo. App. 2017). Joinder was appropriate where initial contact of the two victims was by internet for sexual assault on a child.

People v. Curtis, 350 P.3d 949 (Colo. App. 2014). The trial court did not abuse its discretion in joining the charges involving the two victims, as the evidence of defendant's assaults on the two victims would have been admissible in separate trials under C.R.E. 404(b) and § 16-10-301, and there was no prejudice from defendant's decision not to testify.

Marquez v. People, 311 P.3d 265 (Colo. 2013). "Separate criminal counts may, of course, be discretionarily joined whenever they involve offenses of a similar character or offenses that are connected or based on acts constituting parts of a common scheme or plan . . . There nevertheless remain sound reasons for instead equating "incident" with the more narrow "criminal episode" standard of mandatory joinder. Apart from the fact that the legislature was simultaneously focused on the effects of the mandatory joinder provision of Colo. Rev. Stat. § 18-1-408 and that no permissive joinder rule yet existed for the 1985 amendment to have used as a referent, it is also unlikely that the legislature would have elected to effectively double a defendant's sentence on the basis of joinder which, if not entirely fortuitous, at least resulted from discretionary choices made for tactical reasons unrelated to culpability or jeopardy. Moreover, such an interpretation would have the perverse effect of providing an incentive for prosecutors to join crime-of-violence charges whenever permissible to gain a sentencing advantage and an equally strong incentive for defendants to oppose such joinder, regardless of its merits in terms of expedition and convenience in the presentation of the case." "[W]e find that the phrase "arising out of the same incident" in § 18-1.3-406 was not intended to convey any meaning different from "arising from the same criminal episode" in § 18-1-408."

A. Applicable Rules: Permissive Joinder—Permissive and Mandatory Severance

Crim. P. 13 provides that, "[s]ubject to the provisions of Rule 14, the court may order two or more indictments, informations, complaints or summons and complaints to be tried together if the offenses, and the defendants, if there are more than one, could have been joined in a single indictment, information, complaint, or summons and complaint.

The procedure shall be the same as if the prosecution were under such single indictment, information, complaint, or summons and complaint."

Crim. P. 14 provides:

> If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants in any indictment or information, or by such joinder for trial together, the court **may** order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. However, upon motion any defendant shall be granted a separate trial as of right if the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant, and that such evidence would be prejudicial to those against whom it is not admissible. In ruling on a motion by a defendant for severance, the court may order the prosecuting attorney to deliver to the court for inspection *IN CAMERA* any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

Crim. P. 8(a)(2) provides:

> Two or more offenses **may** be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

1. Illustrative cases

Marquez v. People, 311 P.3d 265 (Colo. 2013). "Separate criminal counts may, of course, be discretionarily joined whenever they involve offenses of a similar character or offenses that are connected or based on acts constituting parts of a common scheme or plan . . . There nevertheless remain sound reasons for instead equating "incident" with the more narrow "criminal episode" standard of mandatory joinder. Apart from the fact that the legislature was simultaneously focused on the effects of the mandatory joinder provision of Colo. Rev. Stat. § 18-1-408 and that no permissive joinder rule yet existed for the 1985 amendment to have used as a referent, it is also unlikely that the legislature would have elected to effectively double a defendant's sentence on the basis of joinder which, if not entirely fortuitous, at least resulted from discretionary choices made for tactical reasons unrelated to culpability or jeopardy. Moreover, such an interpretation would have the perverse effect of providing an incentive for prosecutors to join crime-of-violence charges whenever permissible to gain a sentencing advantage and an equally strong incentive for defendants to oppose such joinder, regardless of its merits in terms of expedition and convenience in the presentation of the case." "[W]e find that the phrase "arising out of the

same incident" in § 18-1.3-406 was not intended to convey any meaning different from "arising from the same criminal episode" in § 18-1-408."

People v. Curtis, 350 P.3d 949 (Colo. App. 2014). The trial court did not abuse its discretion in joining the charges involving the two victims, as the evidence of defendant's assaults on the two victims would have been admissible in separate trials under C.R.E. 404(b) and § 16-10-301, and there was no prejudice from defendant's decision not to testify. "A defendant is not entitled to separate trials based solely on his or her desire to testify on fewer than all of the charged offenses. To prevent joinder of offenses, a defendant must show that he or she has both important testimony to give concerning one count and a strong need to refrain from testifying on the other."

People v. Williams, 899 P.2d 306 (Colo. App. 1995). The Court of Appeals held that the trial court did not abuse its discretion in consolidating two sexual assault cases that occurred several months apart and involved assaults upon two separate children, because evidence regarding each of the incidents would have been admissible in separate trials pursuant to C.R.E. 404(b) as evidence of modus operandi and common plan. In so holding, the Court recognized that there was no evidence suggesting that the jury would be "unable to separate the facts and legal theories applicable to each offense or that [the defendant] was prejudiced because the joinder of the cases prevented him from testifying about his attacks on the second victim while remaining silent about his attack on the first victim."

People v. Bolton, 859 P.2d 311 (Colo. App. 1993) (rev'd on other grounds). It was not error to deny motion to sever sexual assault counts where evidence of each count is admissible as other transaction with respect to other counts and defendant suffers no unfair prejudice from joint trial on all counts.

17.4 SEVERANCE OF DEFENDANTS

A. Applicable Statute and Rule

Section 16-7-101 provides:

When two or more defendants are jointly indicted or informed against for any offense and there is material evidence, not relating to reputation, which is admissible against one or some of them but which is not admissible against all of them if they are tried separately and which is prejudicial to those against whom it is not admissible, those against whom such evidence is admissible shall be tried separately upon motion of any of those against whom the evidence is not admissible. In all other cases, defendants jointly prosecuted shall be tried separately or jointly in the discretion of the court.

See also Crim. P. 14, which sets forth substantially the same provisions.

B. Confessions by Codefendants

Confessions are particularly persuasive evidence. In *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that admission of a codefendant's confession that implicated defendant at a joint trial constituted reversible, prejudicial error even though the trial court gave a clear and understandable instruction that the statement could only be used against the codefendant and must be disregarded as to the defendant. The Court found that the introduction of the codefendant's statement denied the defendant's constitutional right of confrontation. In *Gray v. Maryland*, 523 U.S. 185 (1998), the Court held that the *Bruton* rule extends to redacted confessions in which the name of the defendant was replaced by blank space, word "deleted," or similar symbol.

Severance is not required whether the statement merely denied involvement or where reference to the defendant or another involved has been redacted. When an out-of-court statement of a codefendant does not make reference to the co-defendant, severance should only be granted when necessary to promote a fair determination of guilt or innocence of one or more defendants. *People v. Escano*, 843 P.2d 111 (Colo. App. 1992). A defendant is entitled to a severance as a matter of right if (1) there is material evidence admissible against one but not all defendants, and (2) admission of that evidence is prejudicial to the party against whom the evidence is not admissible. *Peltz v. People*, 728 P.2d 1271 (Colo. 1986).

C. Mandatory Severance of Defendants

People v. Lesney, 855 P.2d 1364 (Colo. 1993). Two defendants are charged together with felony menacing and third-degree assault. Lesney moved for a severance from the co-defendant. The Court held that a trial court has discretion to order severance. A trial court should be guided by:

(1) Whether the number of defendants or the complexity of the evidence is such that the jury will confuse the evidence and the law applicable to each defendant;

(2) Whether, despite cautionary instructions, the evidence admissible against one defendant will be improperly considered against the other defendant; and

(3) Whether the defenses asserted are antagonistic.

The Court held that there was no abuse of discretion in the denial of the severance of defendants. *Lesney* was cited in *Richardson v. Williams*, 2021 WL 37669 (D. Colo. 2021).

Peltz v. People, 728 P.2d 1271 (Colo. 1986). In interpreting the mandatory severance provision of § 16-7-101, the Colorado Supreme Court recognized that separate trials of joint defendants requires more than mere inadmissibility of evidence as to one or more of the co-defendants: "Section 16-7-101, 8A C.R.S. (1986), provides that joint defendants shall be tried separately when 'there is material evidence, not relating to reputation, which is admissible against one or some of them but which is not admissible against all of them if they are tried separately and which is prejudicial to those against whom it is not admissible . . . .' (Emphasis added.) We interpreted § 16-7-101 to mean, in the mandatory severance setting, that the trial court must exercise its

discretion and determine 'whether the admitted evidence was so inherently prejudicial that the jury could not have limited its use to its proper purpose.'"

People v. Gonzales, 601 P.2d 1366 (Colo. 1979). "At the outset, we recognize that the trial court properly advised the jury on the use of the evidence that was admitted [i.e., that it was admissible as to only one defendant]. Moreover, there is a strong presumption that the jury followed the trial court's instructions. Thus, the question to be resolved becomes whether the admitted evidence was so inherently prejudicial that the jury could not have limited its use to its proper purpose. That question is a matter for the sound discretion of the trial court and should not be reversed absent a clear abuse of that discretion."

People v. Maass, 981 P.2d 177 (Colo. App. 1998). Court reviewed the requirement of mandatory severance under Crim. P. 14 and § 16-7-101, noting the rule applies to evidence the prosecutor seeks to introduce and the statute applies to evidence offered by both the prosecutor and codefendant. The court also reviewed discretionary severance, finding no abuse of discretion in the fact that the trial court did not sever the trials prior to jury selection.

People v. Carrillo, 946 P.2d 544 (Colo. App. 1997). Testimony describing the manner of the killing and role of codefendant did not refer to defendant or mention defendant's name, thus it was not so inherently prejudicial as to have required, despite the court's limiting instruction, severance as a matter of right.

1. Evidence admissible as to only one defendant: alternatives

In *People v. Gonzales*, 601 P.2d 1366 (Colo. 1979), the Court cited with approval section 2.3(b)(i) (now 13-3.2) of the American Bar Association Standards on *Joinder and Severance*, which provide:

> (a) when a defendant moves for severance because an out-of-court statement of a co-defendant makes reference to, but is not admissible against, the moving defendant, the court should determine whether the prosecution intends to offer the statement in evidence as part of its case in chief. If so, the court should require the prosecuting attorney to elect one of the following courses:
>
> (1) a joint trial at which the statement is not admitted into evidence;
>
> (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the confession will not prejudice the moving defendant; or
>
> (3) severance of the moving defendant.

People v. Curtis, 350 P.3d 949 (Colo. App. 2014). "A defendant is not entitled to separate trials based solely on his or her desire to testify on fewer than all of the charged offenses. To prevent

joinder of offenses, a defendant must show that he or she has both important testimony to give concerning one count and a strong need to refrain from testifying on the other."

People v. Garcia, 296 P.3d 285 (Colo. App. 2012). "A trial court may order separate trials on the counts charged if joinder of the offenses will prejudice a defendant . . . . Because a court's refusal to sever counts is discretionary, a defendant challenging such a refusal bears the burden of demonstrating: (1) the joinder caused actual prejudice and (2) the trier of fact was unable to separate the facts and legal principles applicable to each offense."

a. Confession with references to moving defendant deleted

Reed v. People, 482 P.2d 110 (Colo. 1971) (*rev'd on other grounds*). Where all references to the defendant in the co- defendant's confession were stricken, and no implication of the defendant could be read into the confession, it was not error for the trial court to deny severance of the defendants and admit the confession into evidence with an instruction that it should be considered only against the confessing co-defendant.

2. Caveats

Mandatory severance rule applicable only to evidence offered by the prosecution

Peltz v. People, 728 P.2d 1271 (Colo. 1986). The Court recognized that a defendant's right to severance from co-defendants is limited to situations where the prosecution, rather than the co-defendant, offers the testimony or evidence that is admissible as to one defendant but inadmissible as to others.

a. Severance not required when references of defendant deleted from confession of co-defendant

Stewart v. People, 419 P.2d 650 (Colo. 1966). In a prosecution in which the defendant was prosecuted under a complicity theory, the Colorado Supreme Court held that severance was not required because a confession of the co-defendant, with all references to the defendant deleted, would be admissible with a limiting instruction in a separate trial of the defendant as a complicitor to prove the co-defendant's guilt as a principal.

b. Statements of co-defendants

People v. Johnson, 30 P.3d 718 (Colo. App. 2000). Police officer's testimony concerning co-defendant's statements was not so inherently prejudicial that the jury could not limit its use to a proper purpose particularly where "the statement, at worst, constituted evidence that defendant was at the scene when the police initially confronted the two men" and, though defendant's theory was that he did not commit the crime, he never denied he was present when the officer approached.

c. Co-conspirators

Severance based on inadmissible evidence is generally not required in conspiracy cases because, if the moving defendant's participation in the conspiracy is established by the statement and/or some other independent evidence, the acts and statements of all conspirators made in the course and in furtherance of the conspiracy are admissible against each co-conspirator, whether tried jointly or separately.

People v. Beck, 593 P.2d 371 (Colo. App. 1979). In a conspiracy prosecution in which the two defendants tried jointly had been severed from other co- conspirators, the Court of Appeals held that the extrajudicial statements of the severed co-conspirators, which occurred prior to the time the defendants entered into the conspiracy, were admissible against the defendants once the existence of the conspiracy was established and the defendants' involvement therein: "The acts and declarations of co-conspirators, even those occurring prior to a defendant's involvement, may be admitted against that defendant. '[E]very person, entering into a conspiracy or common design already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.'"

People v. Trujillo, 509 P.2d 794 (Colo. 1973). In a prosecution for assault on a police officer in which, during the assault, two of the defendants fled while the other two continued to beat the officer, the Colorado Supreme Court held that severance was not required since the flight and the continued assault were admissible against all four defendants as co-conspirator acts in furtherance of the conspiracy.

D. Severance of Defendants

Under the structure of § 16-7-101 and Crim. P. 14, a motion for severance based on grounds other than the criteria for mandatory severance [i.e. material and prejudicial evidence admissible against one but not all parties] is addressed to the sound discretion of the trial court, whose decision will not be reversed absent an abuse of discretion. *See People v. Black,* 524 P.3d 341 (Colo. App. 2022)*; Peltz v. People*, 728 P.2d 1271 (Colo. 1986).

Section 16-7-101 provides:

> When two or more defendants are jointly indicted or informed against for any offense and there is material evidence, not relating to reputation, which is admissible against one or some of them but which is not admissible against all of them if they are tried separately and which is prejudicial to those against whom it is not admissible, those against whom such evidence is admissible shall be tried separately upon motion of any of those against whom the evidence is not admissible. In all other cases, defendants jointly prosecuted shall be tried separately or jointly in the discretion of the court.

1. Factors to be considered

17. JOINDER AND SEVERANCE

People v. Garcia, 296 P.3d 285 (Colo. App. 2012). "A trial court may order separate trials on the counts charged if joinder of the offenses will prejudice a defendant . . . . Because a court's refusal to sever counts is discretionary, a defendant challenging such a refusal bears the burden of demonstrating: (1) the joinder caused actual prejudice and (2) the trier of fact was unable to separate the facts and legal principles applicable to each offense."

People v. Gutierrez, 499 P.3d 367 (Colo. App. 2021); *Peltz v. People*, 728 P.2d 1271 (Colo. 1986). "A trial court may grant a severance if it appears that a defendant . . . is prejudiced by a joinder . . . of defendants." Crim. P. 14.

Factors to be considered in determining whether denial of severance constitutes an abuse of discretion include:

(1) whether the number of defendants or the complexity of evidence is such that the jury will confuse the evidence and the law applicable to each defendant;

(2) whether, despite limiting instructions, evidence admissible against one defendant will improperly be considered against another, and

(3) whether the defenses are antagonistic.

People v. Gonzales, 601 P.2d 1366 (Colo. 1979) (setting forth same general factors, as provided in section 2.3 (now 13-3.2) of American Bar Association Standards on *Joinder and Severance*).

Standard 13-3.2. Severance of Defendants

(1) When a defendant moves for severance because an out-of-court statement of a codefendant makes reference to, but is not admissible against, the moving defendant, the court should determine whether the prosecution intends to offer the statement in evidence as part of its case in chief. If so, the court should require the prosecuting attorney to elect one of the following courses:

   a. a joint trial at which the statement is not admitted into evidence;

   b. a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the statement will not prejudice the moving defendant; or

   c. severance of the moving defendant.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under paragraph (a), should grant a severance of defendants:

(1) before trial, whenever the defendants are not joinable pursuant to standard 13-2.2(a), or whenever severance is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants; or

(2) during trial, whenever, upon consent of the defendant to be severed or upon a finding of manifest necessity, severance is deemed necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

(3) When evaluating whether severance is "appropriate to promote" or "necessary to achieve" a fair determination of one or more defendants' guilt or innocence for each offense, the court should consider among other factors whether, in view of the number of offenses and defendants charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense and as to each defendant.

People v. Gutierrez, 499 P.3d 367 (Colo. App. 2021). Defendants Gutierrez and Sanchez are charged with murder and conspiracy. The victim was shot four times with bullets from one gun. They blame each other, each claiming their own innocence. The Court held that one of the concerns regarding antagonistic defenses is that a defendant will, in effect, have to defend himself against both the prosecutor and the co-defendant. Because of the intertwined evidence, the trial court gave five differing limiting instructions 21 times throughout the two-week trial. Reversal was required where the defenses were antagonistic and the cumulative effect of prejudice from the many times evidence was limited to one but not both defendants.

People v. Black, 524 P.3d 341 (Colo. App. 2022). There was no abuse of discretion in failing to sever defendants' trial where the defendants are charged with murder and conspiracy and certain evidence admissible against one was preceded by a limiting instruction; that certain other evidence was ruled inadmissible; and that certain evidence was cross-admissible.

Eder v. People, 498 P.2d 945 (Colo. 1972), which reversed the defendant's conviction for possession of narcotics on the basis of the trial court's failure to grant a motion for severance where (1) the defenses of the defendants were antagonistic since each blamed possession on the other; (2) the defendant testified and was not permitted to comment on the co-defendant's silence during trial; (3) the co-defendant may have testified in favor of the defendant in a separate trial; and (4) the evidence was stronger against the co-defendant than against the defendant. The Court stated that, while any single factor was not determinative of whether the trial court abused its discretion in denying the severance motion, the factors collectively were such as to deprive the defendant of a fair trial.

2. Antagonistic defenses

People v. Toomer, 604 P.2d 1180 (Colo. App. 1979). The Court of Appeals held that defenses were not antagonistic where they did not specifically contradict each other. The Court also

recognized that the fact that only one co-defendant testifies does not, of itself, mandate a severance where the other co-defendant is allowed full cross-examination as to matters which might implicate him.

People v. Smith, 622 P.2d 90 (Colo. App. 1980). Severance was not required where the admission of evidence against a single defendant was followed by an immediate limiting instruction, and the defenses were not antagonistic, although there was some conflict over the versions of events in the testimony of each of the co-defendants.

People v. Lesney, 855 P.2d 1364 (Colo. 1993). The district court did not abuse its discretion in denying a motion for severance where the case involved only two defendants, was not complex, there was no evidence admissible against one defendant but not the other, and the defenses, though not necessarily complimentary, were not antagonistic.

People v. Johnson, 30 P.3d 718 (Colo. App. 2000). "[W]here joint defendants merely deny participation in the crime and do not present evidence or testimony that the other defendant was solely responsible, mere arguments of counsel suggesting that the other defendant was responsible for the crime do not establish the existence of antagonistic defenses." The evidence actually presented did not establish that the defenses specifically contradicted each other or were antagonistic, and the jury was twice instructed that testimony concerning co-defendant's statements could be considered only as to co-defendant.

Compare with People v. Warren, 582 P.2d 663 (Colo. 1978). The trial court abused its discretion in denying the defendant's motion for severance from two co-defendants where the defendant testified and one of the co-defendants did not, and as a matter of trial tactics counsel for each of the other co-defendants tended to shift the blame for the crime on the defendant. The Court recognized that, although the defenses were not inherently antagonistic since all three defendants denied participation in the crime, the conduct of the defenses at trial clashed seriously, resulting in the defendant being prosecuted by both the district attorney and counsel for the co-defendants.

17.5 SEVERANCE OF OFFENSES

Crim. P. 14 directs trial courts to sever counts or provide other relief if a defendant appears to be prejudiced as a result of joinder. In pertinent part the rule provides:

> If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses, in any indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires.

The defendant challenging a refusal to sever must show that joinder caused actual prejudice and that the trier of fact was unable to separate the facts and legal principles applicable to each offense. *Bondsteel v. People*, 439 P.3d 847 (Colo. 2019). Some of the factors the Court looks at are:

1. Whether the evidence of the crimes would have been admissible in a separate trial of the other case.

2. Whether the jury would be unable to separate the facts and law applicable to each case. There is a presumption the jury followed the instructions. A fact to be considered here is whether the jury acquitted the defendant of charge(s) or found the defendant guilty of lesser charges.

3. Whether the evidence is intertwined and overlapping.

4. Whether the evidence against the defendant was strong.

A. Grounds

People v. Garcia, 296 P.3d 285 (Colo. App. 2012). Sexual assault allegations related to five separate victims were joined for a single trial by the district court. The defendant moved for severance of the charges alleging that he would be unduly prejudiced by continued joinder on the grounds that he had important testimony to give on some charges but wished to remain silent as to other charges. The trial court denied the motion to sever. The Court of Appeals affirmed the denial of the motion to sever and articulated a two-part test to determine when severance of offenses is appropriate. The burden is on the defendant to show: (1) the defendant must demonstrate *actual* prejudice from continued joinder of all offenses at a single trial; and (2) the defendant must demonstrate that the jury will be unable to separate the facts and legal principles applicable to each of the distinct offenses. The Court found that the defendant's acquittal on some of the charges belies any notion that the jury was unable to adequately separate the facts and legal principles for each Count. Further, the Court found no actual prejudice because even assuming he had important testimony to give about some, but not all counts, the trial court offered to limit cross examination to only those counts about which he chose to testify and offered to give the jury a limiting instruction that they should not consider the fact that he did not testify about all charged offenses. The defendant declined the trial court's offer and chose not to testify. The Court of Appeals found that the defendant failed to demonstrate why the trial court's proposed remedy was inadequate, and thus, the defendant suffered no actual prejudice.

People v. Gregg, 298 P.3d 983 (Colo. App.2011). The defendant committed three aggravated robberies of banks. The first two robberies were 10 days apart and the last one was roughly 11 weeks later. The trial court did not abuse its discretion in refusing to sever the robbery charges because evidence of each of the robberies would have been admissible in separate trials. Further, the Court of Appeals rejected the defendant's argument that he was unfairly prejudiced by joinder of the charges because the evidence against him was stronger on some of the charges than others. Last, there was no evidence that the jury was unable to follow the court's instructions to consider the charges separately.

People v. Guffie, 749 P.2d 976 (Colo. App. 1987). "A court may order separate trials of counts if a defendant is prejudiced by a joinder of offenses. Crim. P. 14. A ruling on motion to sever counts

is within the sound discretion of the trial court and will not be disturbed unless an abuse of discretion has been shown. To establish abuse of discretion, more is required than a showing that separate trials might afford the defendant a better chance of acquittal. There must be actual prejudice to the defendant and not just the differences inherent in any trial of different offenses." The Court of Appeals also recognized that the fact that the defendant wishes to testify on one count and not the other does not automatically require a severance of such counts: "The defendant must make a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other."

People v. Rosa, 928 P.2d 1365 (Colo. App. 1996). There was no showing defendant had important testimony to give on one count and strong need to refrain from testifying on another, and jury instructed to convict solely on evidence given for each crime.

People v. Hoefer, 961 P.2d 563 (Colo. App. 1998). The record supported trial court's finding that severance was inappropriate because the narcotics and child sexual assault charges were based on interrelated evidence. Also, evidence of the crimes was gathered in the same search and defendant had not articulated any prejudice from denial of his severance motion.

People v. Knight, 167 P.3d 147 (Colo. App. 2006). Trial court properly denied defendant's motion to sever the charges of first-degree murder and aggravated motor vehicle theft because the record supports the trial court's determination that the two charges involved interrelated proof. "Evidence that Knight drove the stolen vehicle to and from the scene of the homicide was relevant in the prosecution of both offenses: (1) it satisfied the element of aggravated motor theft and (2) it was relevant to the culpable mental state element of first-degree murder because it supported an inference that Knight had consciously acted to avoid detection."

People v. Kendall, 174 P.3d 791 (Colo. App. 2007). Trial court did not abuse its discretion in denying defendant's motion to sever the vehicular eluding count, which occurred two days prior to the kidnapping, from the first-degree kidnapping count because events were part of a common plan and because defendant was unable to articulate any actual prejudice from the joinder.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). In a case involving a charge of possession of a weapon by previous offender, a trial court does not abuse its discretion in denying a motion to sever counts where the jurors are given an instruction limiting the purpose for which they can consider evidence of the defendant's prior conviction, and where the jurors would have heard evidence of the defendant's possession of a weapon with regard to other charges.

People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009). Trial court properly denied defendant's motion to sever the theft and drug charges from the murder charge. The trial court found that the charges were interrelated. Additionally, the defendant failed to show any prejudice. Defendant only argued that his trial strategy (as to when to testify) was impacted.

17.6 MOTION FOR SEVERANCE

17. JOINDER AND SEVERANCE

A. Timeliness and Waiver

Reed v. People, 482 P.2d 110 (Colo. 1971) (*rev'd on other grounds*). The Colorado Supreme Court held that any claim for severance was waived due to the failure to make such a motion when the allegedly inadmissible evidence was admitted, and in failing to renew the motion at the close of all the evidence. The Court cited with approval the ABA Standards Relating to *Joinder and Severance* 2.1 (now 13-3.3), which states:

Standard 13-3.3. Timeliness of motion; waiver, double jeopardy

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known. Severance is waived if the motion is not made at the appropriate time.

(2) On any motion for severance of offenses or defendants, the court should order the prosecution to disclose, *in camera* or otherwise, any information which it intends to introduce as evidence and which would assist the court in ruling on the motion.

(3) If a defendant's pretrial motion for severance was overruled, the motion may be renewed on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(4) Unless consented to by the defendant, or unless granted upon a finding of manifest necessity, a motion by the prosecuting attorney for severance of counts or defendants may be granted only prior to trial.

(5) If a motion for severance is granted during the trial and the motion was made or consented to by the defendant, the granting of the motion shall not bar a subsequent trial of that defendant on the offenses severed.

Bondsteel v. People, 439 P.3d 847 (Colo. 2019). A party need not renew a pretrial motion for severance or a pretrial objection to joinder in order to preserve his opposition to an order joining cases for trial. A pretrial objection to joinder is sufficient to preserve the issue for appeal.

People v. Gross, 39 P.3d 1279 (Colo. App. 2001) The Court of Appeals held that a defendant does not need to renew opposition to the prosecution's pretrial consolidation motion to preserve the issue for appellate review. *See also People v. Dembry*, 91 P.3d 431 (Colo. App. 2003).

B. Sufficiency of the Motion

Padilla v. People, 470 P.2d 846 (Colo. 1970). The Colorado Supreme Court rejected the assertion that the trial court erred in denying the defendant's motion for severance where the grounds stated therein were other than those which he asserted on appeal: "Colorado cases have uniformly held

that a motion for severance must contain the evidence which is claimed to be incompetent toward the moving party so that the court will be given the opportunity to determine whether the one requesting a severance may be prejudiced by testimony admissible against the co-defendant but not admissible as to him."

People v. Aponte, 867 P.2d 183 (Colo. App. 1993). Arguments asserting grounds for severance that were not raised in trial court will not be considered as grounds for reversal on appeal.

17.7 MULTIPLICITY

The Double Jeopardy clauses protect not only against a second trial for the same offense, but also against multiple punishments for the same offense. *Woellhaf v. People*, 105 P.3d 209 (Colo. 2005). Multiplicity is the charging of the same offense in several counts, culminating in multiple punishments. *People v. Meils*, 471 P.3d 1130 (Colo. App. 2019). Although not fatal to charging of multiple counts, multiplicity may improperly suggest to the jury that the defendant has committed more than one crime. Multiplicity arises in three distinct contexts:

(1) Where there are two or more statutory provisions that proscribe the same conduct. Courts determine the number of offenses by comparing only the elements of the offenses at issue without looking to the facts to determine if one requires proof of an additional element. The General Assembly is not prohibited from creating multiple crimes based on one event. To determine whether the legislature meant to create multiple offenses or alternative ways, courts must construe the statute defining the offense.

(2) Where there are a series of repeated acts that are charged as separate crimes even though they are part of a continuous transaction, and, therefore, actually one crime.

(3) Where a statute provides for alternate ways of committing the same offense. Here the court must determine the unit of prosecution proscribed by the legislature. The evidence in support of each offense must justify the charging of distinct offenses. The remedy here is merging the offenses.

Magana v. People, 511 P.3d 585 (Colo. 2022).

An individual's protection from double jeopardy prohibits multiplicitous charges for the same offense but does not insulate a defendant from being prosecuted for distinct offenses under the same statute. It also does not bar punishment for the same criminal conduct under multiple statutes. *People v. Knox*, 467 P.3d 1218 (Colo. App. 2019).

In determining whether offenses are factually distinct considerations include: (1) whether the acts occurred at different times and were separated by intervening events, (2) whether there were separate volitional acts or new volitional departures in the course of conduct, and (3) temporal proximity, location of the victim, the defendant's intent as indicated by his conduct and utterances, and the number of victims. *People v. McMinn*, 412 P.3d 551 (Colo. App. 2013).

Magana v. People, 511 P.3d 585 (Colo. 2022). Magana set fire to his ex-girlfriend's car. The fire spread to another car and then to an adjacent duplex occupied by fourteen people. There were three different ignition points on the car. The prosecution charged the defendant with 18 counts of arson. The Colorado statute provides for four degrees of arson. The Court held that each person and each building damaged necessarily involves different factual proof and, therefore, each creates a distinct unit of prosecution. The key, the Court held, is the damage or danger caused, not the number of fires set.

People v. Bott, 477 P.3d 137 (Colo. 2020). During a search of the defendant's home, officers seized a memory card that contained approximately 294 sexually exploitative images of children. The images depicted at least 250 victims including some infants. The prosecution grouped the images into twelve separate bundles, each containing more than twenty images, and charged the defendant with class 4 felonies each of which required the possession of more than twenty different images. The defendant moved to dismiss counts two through twelve on the grounds that the possession was a single offense. The Court held that it is up to the General Assembly to treat a course of conduct or various acts that it considers related in time, nature, or purpose as one or as more than one offense. The statute proscribes possession or control of "any" sexually exploitative material. Because the language of the statute defines and proscribes the offense that any number of items exceeding twenty qualifies as a single offense, there was only one offense here.

People v. Rigsby, 471 P.3d 1068 (Colo. 2020). The defendant was charged with three counts of second-degree assault for smashing a glass into someone's face. The jury found the defendant guilty of two second degree assault charges and a third for a lesser included offense of third-degree assault. Because the offenses stemmed from the same criminal conduct, the Court held that the charges should merge into one count of second-degree assault.

People v. Torrez, 548 P.3d 685 (Colo. App. 2024). Torrez and her woman friend went out to various parts of town with friends. Torrez and her friend returned to the friend's apartment. The friend asked Torrez to leave: she refused. In attempting to get Torrez out of the apartment, she knocked her down and stabbed her repeatedly with a knife. She was charged with two counts of first-degree burglary, one count of attempted first degree assault, and one count of second-degree assault. The Court held that multiple convictions not based on distinguishable acts must merge. Here, because the burglary was based upon the commission of the assaults, the second count of burglary and the two counts of assault merge into the first count of burglary. Therefore, there should only be one conviction and that is for burglary.

People v. Serna-Lopez, 531 P.3d 410 (Colo. App. 2023). Serna-Lopez robbed one victim with a deadly weapon. He was charged with two counts of aggravated robbery: one count as "by the use of force, threats, or intimidation with a deadly weapon . . ." and the second count as "possesses any article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon . . . ." The jury convicted the defendant of both ways of committing

aggravated robbery. The Court held that the legislature did not define separate offense, but, rather, alternative means of committing the same offense. The offenses must merge.

People v. Knox, 467 P.3d 1218 (Colo. App. 2019). Knox reported to dispatch that she had just been hit by a car and the driver drove away. An officer arrived on the scene and immediately took Knox's statement. As she was being taken to the hospital she gave a more detailed statement to a different officer. It was determined that the accident actually occurred three days before Knox reported it. She was charged with three counts of attempt to influence a public servant for information provided to the dispatcher, to the first officer, and to the second officer. The Court held that the unit of prosecution was for each attempt to influence a public servant. Each of the statements were taken at distinct times, were recited to different public servants, and were separated by intervening events. Thus, the charges were not multiplicitous.

17.8 DUPLICITY

A criminal information is duplicitous if it charges two or more separate and distinct crimes in one count. *Melina v. People*, 161 P.3d 635 (Colo. 2007) (involving solicitation to commit first-degree murder). The charged crimes are separate if each requires the proof of an additional fact that the other does not. Duplicity may be obvious from the information itself, from discovery, or from the prosecution's presentation of evidence. A count charging the commission of more than one distinct and separate criminal offense is duplicitous. *U.S. v. Miller*, 891 F.3d 1220 (10th Cir. 2018).

Where there is evidence of multiple acts, any one which could constitute the offense charged, the prosecution may be compelled to elect the acts or series of acts on which they rely for a conviction. Alternatively, the defendant may be entitled to a special jury instruction requiring the jurors to agree unanimously on which act or acts occurred.

Melina v. People, 161 P.3d 635 (Colo. 2007). Melina was charged with murder, conspiracy to commit murder, and solicitation to commit murder. The solicitation charge included two named individuals and "persons unknown to the District Attorney." The Court held that several communications used to corroborate a defendant's intent to facilitate the crime may constitute a single act of solicitation. Here, although several individuals were named in the count, there was only a single act of solicitation. ***But see*** *People v. Manzanares*, 490 P.3d 919 (Colo. App. 2020), holding solicitation of two separate individuals at different times constituted multiple units of prosecution.

People v. Wester-Gravelle, 465 P.3d 570 (Colo. 2020). The defendant submitted charts requesting payment for work that she did not perform as a certified nursing assistant for three weeks constituting three charts. The prosecution charged her in one count with forgery alleging the entire time period. She never asked the court to require the prosecution to elect a particular chart nor did she ask for a modified unanimity instruction. On appeal she argued that the trial court plainly

erred when it did not require election or give the modified instruction. The Court held that charging the defendant in one count did not constitute plain error.

* * *

2025 Contributions by Dan Edwards
Adjunct Professor, Sturm College of Law
Retired Senior Assistant Attorney General
Colorado Attorney General's Office

CHAPTER 18

JOINT RESPONSIBILITY

18. JOINT RESPONSIBILITY

18.1 THEORIES OF JOINT RESPONSIBILITY

Multiple defendants may be jointly responsible for a single crime under three different legal theories:

1. Complicity ("accomplice") under § 18-1-603,
2. Accessory under § 18-8-105, and
3. Conspiracy under § 18-2-201.

Complicity is a legal theory by which more than one person is guilty of the same crime because they acted jointly. An accomplice is a complicitor. Whatever the historical distinction, the terms are used interchangeably now. *See, e.g.*, *Bogdanov v. People*, 941 P.2d 247, 250 (Colo. 1997) ("Complicity is a theory of law by which *an accomplice* may be held criminally liable for a crime committed by another person if the accomplice aids, abets, or advises the principal, intending thereby to facilitate the commission of the crime.") (emphasis added).

Accessory is the completed crime of helping someone else avoid criminal responsibility for a crime already committed.

Conspiracy is an inchoate version of another crime that involves one person agreeing with another to commit the crime and then someone taking an overt act in furtherance of the agreement.

These theories are not mutually exclusive. A person maybe guilty under all three legal theories depending on the facts of the case.

18.2 COMPLICITY

A. Complicity Defined

Section 18-1-603 defines complicity (accomplice liability):

> A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.

1. "Abets" includes "encourages"

Alonzi v. People, 597 P.2d 560 (Colo. 1979). In affirming the defendant's conviction based upon evidence that he had encouraged another person to steal an automobile, the Colorado Supreme Court construed the term "abet," as set forth in §18-1-603 to include conduct "encouraging" the criminal behavior of another.

2. Distinct from the crime of accessory

People v. Broom, 797 P.2d 754 (Colo. App. 1990). In holding that the defendant, who was found in a garage cleaning debris after marijuana plants had been harvested, could not be found guilty of both cultivation of marijuana and accessory to that offense, the Court of Appeals recognized that the accessory statute is designed to affect a class of offenders different from those who conspire, plan, or aid in the commission of the offense, and stated that "it is generally true that evidence that would support a conviction for complicity will not support a conviction for being an accessory." *See also Montoya v. People*, 394 P.3d 676 (2017) (explaining the history of accessory and why accessory and complicity are now distinct crimes).

3. Distinct from the crime of conspiracy

People v. Rivera, 497 P.2d 990 (Colo. 1972). In holding that the defendants could be convicted as both conspirators and complicitors to the same robbery, the Colorado Supreme Court stated: "We cannot agree that the defendant is being tried for what is really one offense. The essence of the crime of conspiracy is the illegal agreement or combination. The essence of the accessory [complicity] statute establishing guilt equal to that of the principal is to punish for participation in the criminal act. This court has consistently held that the conspiracy and the crime which is the object of the conspiracy are different and distinct offenses." *See also People v. Broom*, 797 P.2d 754 (Colo. App. 1990).

B. Charging Considerations

1. Complicitor may be charged as principal

Martinez v. People, 444 P.2d 641 (Colo. 1968). In holding that there is no statutory distinction between a complicitor and a principal, the Colorado Supreme Court stated: "It is equally clear that with reference to accessories before the fact (by which we mean those who shall be deemed and considered as principal and punished accordingly) [now, complicitors], it is generally held that they may be charged as principal. This is true, because, as stated in *Pacheco v. People,* 43 P.2d 165 (Colo. 1935), there is no statutory distinction between accessories before the fact [complicitors] and principals."

Newton v. People, 41 P.2d 300 (Colo. 1935). In rejecting the defendant's contention that the information was defective in failing to disclose that the defendant was being charged as a complicitor, the court stated: "The particulars in which an accessory aided and abetted, or advised and encouraged the principal, need not be recited."

People v. Rodriguez, 914 P.2d 230 (Colo. 1996). The Court rejected defendant's claim of error in that the information did not charge complicity, finding "the prosecution need not separately charge the crime of complicity." *See also People v. Thompson*, 655 P.2d 416 (Colo. 1982).

2. Principal need not be charged or named when charging complicitor

People v. Martin, 561 P.2d 776 (Colo. 1977). Where the defendant was prosecuted on a complicity theory, the Colorado Supreme Court held that it was error for the trial court to dismiss the count

on the ground that the principal was not named in the information, since it was immaterial whether or not the principal was identified by name in the complicity count.

Britto v. People, 497 P.2d 325 (Colo. 1972). The Court recognized that, while the guilt of the principal must be established in fact as a prerequisite to the conviction of a complicitor [*see* § II(C), *below*], it is immaterial whether the principal is actually charged with the offense.

See McGregor v. People, 490 P.2d 287 (Colo. 1971). In upholding the giving of a complicity instruction based upon a robbery in which the victim was held and beaten by one man, and robbed of jewelry by another, the Colorado Supreme Court recognized that "'it has long been the law in Colorado that an accessory who stands by and aids in the perpetration of a crime may properly be charged as a principal, and in the case of co-defendants it is unnecessary to spell out which one is the principal and which is the accessory [complicitor], nor is it necessary to characterize and classify the specific acts of each.' [quoting *Schreiner v. People*, 360 P.2d 443 (Colo. 1961)]."

People v. Barrientos, 956 P.2d 634 (Colo. App. 1997). The trial court did not commit plain error in failing to give complicity instruction *sua sponte* where evidence would support jury conclusion that defendant guilty as principal.

3. Election between theories of principal or complicitor

People v. Thurman, 948 P.2d 69 (Colo. App. 1997). Neither election between theories that defendant acted as a principal in the offense or as a complicitor in it, nor a modified unanimity instruction for the jury to unanimously find defendant acted as either the principal or complicitor, was required "because complicity is not a separate offense but merely a theory by which defendant could have been convicted of the offense of distribution, and because defendant was charged and convicted of offenses which arose from a single transaction."

McGregor v. People, 490 P.2d 287 (Colo. 1971). It is unnecessary to spell out which co-defendant is principal and which is complicitor, nor characterize and classify specific acts of each.

4. Complicity instruction should be given when evidence supports it

People v. Grant, 30 P.3d 667 (Colo. App. 2000). On appeal, the People sought disapproval of the trial court's refusal to instruct the jury on complicity. The Court of Appeals agreed that a complicity instruction was warranted based on the evidence through which defendant implicitly claimed he was the driver, not the shooter. Witnesses uniformly testified that the incident involved both a shooter and a driver; defendant did not raise the defenses of alibi or mistaken identity, but instead advanced a theory through his expert witness that "defendant had, in making various confessions, switched roles with his co-defendant, the actual shooter."

C. Proof Required Under Complicity Theory

18. JOINT RESPONSIBILITY

The proof requirements for complicity changed after *People v. Childress*, 363 P.3d 155 (Colo. 2015). In interpreting the complicity statute, *Childress* held, after a lengthy discussion an analysis of prior precedent:

Section 18-1-603 therefore dictates that a person is legally accountable as a principal for the behavior of another constituting a criminal offense if he aids, abets, advises, or encourages the other person in planning or committing that offense, and he does so with: (1) the intent to aid, abet, advise, or encourage the other person in his criminal act or conduct, and (2) an awareness of circumstances attending the act or conduct he seeks to further, including a required mental state, if any, that are necessary for commission of the offense in question.

After *Childress*, COLJI changed the complicity instruction to its current form:

Colo. Jury Instr., Criminal J:03

Complicity is not a separate crime. Rather, it is a legal theory by which the defendant may be found guilty of a crime that was committed by another person.

For the defendant to be guilty as a complicitor of the crime of [insert offense], as defined at the end of this Instruction, the prosecution must prove each of the following conditions beyond a reasonable doubt:

1. Another person committed the crime of [insert offense], as defined at the end of this Instruction, and

2. the defendant, with the desire or the purpose or design to aid, abet, advise, or encourage the other person in planning or committing that crime,

3. aided, abetted, advised, or encouraged the other person in planning or committing that crime, and

[4. the defendant was aware of all of the elements of that crime, as defined at the end of this Instruction.]

[4. the defendant was aware of element numbers [identify the appropriate elements, e.g., “1, 2, and 4”—see Comment 2] of that crime, as defined at the end of this Instruction.]

[5. and the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] .]

> For purposes of this Instruction, another person committed the crime of [insert offense] if the prosecution proves each of the following elements beyond a reasonable doubt:
>
> 1. That the other person,
>
> 2. in the State of Colorado, at or about the date and place at issue,
>
> 3. [insert remaining elements of the offense].
>
> After considering all the evidence, if you decide the prosecution has proven each of the conditions of complicity liability beyond a reasonable doubt, you should find the defendant guilty of [insert offense].
>
> After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the conditions of complicity liability beyond a reasonable doubt, you should find the defendant not guilty of [insert offense].

The COLJI comment to this revised instruction explains when the first bracketed [4.] option should be used and when the second bracketed [4.] option should be used. The comment explains that the first bracketed [4.] option should be used when the crime "does not require proof that the prohibited act had a particular effect or caused a particular result," and the second bracketed [4.] option should be used when the crime does require proof of a particular effect or result.

People In Int. of B.D., 477 P.3d 143 (Colo. 2020). A complicitor's awareness of the principal's crime extends only to the elements of the crime, not to facts that give rise to strict-liability sentence enhancers. Here, the People did not need to prove the juvenile complicitor was aware the victim was at-risk because the at-risk status of the victim was fact required by a sentence enhancer and was not an essential element of the underlying crime of Theft. If the principal did not need to be aware of a fact to commit the crime, the complicitor need not be aware of that fact either.

Butler v. People, 450 P.3d 714 (Colo. 2019). "[G]uided by our decision in *Childress*, we conclude that a complicitor is liable for a principal's act of money laundering if the prosecution can prove that: (1) the principal committed an act of money laundering; (2) the complicitor aided, abetted, advised, or encouraged that specific act of money laundering; (3) the complicitor intended to do so;2 (4) the complicitor was aware that the principal knew or believed that the property involved in the specific money laundering transaction represented the proceeds of a criminal offense; and (5) the complicitor was aware that the principal knew or believed that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the criminal offense.

Zapata v. People, 428 P.3d 517 (Colo. 2018). "[I]n order for [the complicitor] to be guilty of the crimes for which he was convicted, there needed to be evidence beyond a reasonable doubt that he

intended to facilitate [the principal] in his criminal act or conduct, and that [the complicitor] did so with an awareness of the actual circumstances, namely an effort to kill the victim, and the specific intent to cause him, at the very least, serious bodily injury by means of a deadly weapon.

People v. Gallegos, 535 P.3d 108 (Colo. App. 2024). "We reject [defendant's] argument that the court's instruction improperly 'direct[ed] the jury's attention to [defendant's] awareness of the facts surrounding the offense rather than to whether [defendant] knew that these facts satisfied the elements of the offense.' Gallegos cites to no authority, nor are we aware of any, holding that a defendant can be convicted of complicity only if he was aware that his acts satisfied the elements of that offense."

People v. Jackson, 474 P.3d 60 (Colo. App. 2020). Held that the following jury instructions, in combination, complied with the requirements of *Childress*.

[Complicity Instruction]

A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:

1. The crime must have been committed,

2. another person must have committed all or part of the crime,

3. the defendant must have had knowledge that the other person intended to commit all or part of the crime,

4. the defendant must have had the intent to promote or facilitate the commission of the crime,

5. the defendant must have aided, abetted, advised, or encouraged the other person(s) in the commission or planning of the crime.

[Murder in the First Degree Instruction]

The elements of the crime of Murder in the First Degree (After Deliberation) are:

1. That the defendant,

2. in the State of Colorado, on or about December 26, 2011,

3. after deliberation, and

4. with the intent,

5. to cause the death of a person other than himself,

6. caused the death of that person or of another person.

Specifically, the Court of Appeals held "'[A]fter deliberation' and 'with the intent' 'to cause the death of a person' are separate elements of 'the crime.' Thus, this instruction, when read with the complicity instruction, accurately required the jury to find that Jackson was aware that the shooter acted after deliberation and with the intent to cause the death of the victim."

In *Jackson*, the Court also held that the trial court need not include a separate complicity instruction for each crime alleged. The Court of Appeals presumed the jury applied the complicity instruction to each count appropriately.

Caution: Many of the cases in the subsections 1-3 below preceded *Childress* and should be considered only in light of *Childress*'s holdings and the current COLJI.

1. Proof that principal committed a crime

Section 18-1-605**:**

> In any prosecution for an offense in which criminal liability is based upon the behavior of another pursuant to sections 18-1-601 to 18-1-604, it is no defense that the other person has not been prosecuted for or convicted of any offense based upon the behavior in question or has been convicted of a different offense or degree of offense, or the defendant belongs to a class of persons who by definition of the offense are legally incapable of committing the offense in an individual capacity.

a. Principal need not commit all of the requisite acts

People v. Mershon, 844 P.2d 1240 (Colo. App. 1992) (*rev'd in part on other grounds*). "It is not necessary that each party perform all the acts necessary to the crime for each or either to be charged and convicted as a principal. It is only necessary that each party intentionally aided the other in the commission of the crime and that the acts of both the principal and the accessory, together, constitute all acts necessary to complete the offense."

b. To instruct on complicity, there must be some evidence that some other person committed all or part of the crime

People v. Gonzales, 728 P.2d 384 (Colo. App. 1986). The defendant was stopped while driving a stolen car with an altered VIN. Although there was no evidence that the defendant personally altered the VIN, the court nevertheless instructed the jury regarding complicity. In reversing the defendant's conviction, the Court of Appeals stated: "In order for a jury to find a defendant guilty of an offense as a complicitor, it must find, among other things, that an offense has been committed, and a person other than the defendant committed all or part of it. Because here there

was *no* evidence with respect to another person, the submission of the complicity instruction was error."

c. Principal's lack of mental capacity

People v. Steele, 563 P.2d 6 (Colo. 1977). The defendant was prosecuted for first-degree murder under the theory that he persuaded an accomplice to kill her husband. In rejecting the defendant's assertion that her conviction should be reversed because the mental capacity of the accomplice was impaired to such a degree as to prevent him from forming the requisite specific intent to commit the crime, the Colorado Supreme Court stated: "While this court has held that it is necessary to prove beyond a reasonable doubt the guilt of the principal as a prerequisite to convicting the accessory, we have also held that an accessory may be convicted of murder even if the principal is found not guilty by reason of insanity where it is shown beyond a reasonable doubt that the principal committed the act which resulted in the homicide." The Court also recognized that, even assuming that the defense could establish that the accomplice was unable to form the requisite specific intent, the defendant's guilt could still have been established on the theory that the accomplice was the instrumentality through which the defendant acted, and it was the defendant's intent that was in issue.

People v. Jones, 518 P.2d 819 (Colo. 1967) (though principal found not guilty by reason of insanity, defendant could be convicted of felony murder where shown beyond a reasonable doubt that, except for the insanity, principal committed murder).

People v. McCoy, 944 P.2d 584 (Colo. App. 1996) (proper to exclude expert testimony regarding principal's mental health as irrelevant to defendant's intent; "it is no defense to the crime charged under a complicity theory or to the crime of conspiracy that the person with whom the defendant acted is legally not responsible for the crime").

d. Principal pleads guilty to lesser offense

Oaks v. People, 424 P.2d 115 (Colo. 1967) (*superseded by rule*). In a first-degree murder case in which the defendant was prosecuted on a complicity theory, the Colorado Supreme Court rejected the claim that the defendant could not be convicted of the charge because the principal pleaded guilty to the lesser offense of manslaughter: "From the wording of the statute and the interpretation that this court has given it in a number of cases, the acts of the principal are the acts of the accessory, and the accessory may be charged and punished accordingly as a principal. This court has held that the conviction of the principal is not a condition precedent to the conviction of an accessory . . ."

e. Confession of principal

Stewart v. People, 419 P.2d 650 (Colo. 1966). "When one is tried as an accessory to the crime, as a prerequisite to his conviction, it is necessary to prove the guilt of the principal. A confession

made by the principal, out of the presence of the accessory, is admissible at the accessory's trial, not as evidence against the accessory, but to establish the guilt of the principal, provided the jury is properly instructed as to this limited purpose. If the principal's statement implicates the accessory, that portion of the statement is not admissible, and only the portion that pertains to the principal's guilt may be admitted in evidence."

People v. Lankford, 819 P.2d 520 (Colo. App. 1991). In a sexual assault prosecution in which the defendant held the victim down while an accomplice sexually assaulted her, the Court of Appeals held that, although the accomplice denied that he sexually penetrated the victim, his testimony **at the time of pleading guilty** to the offense constituted substantive evidence of the element of penetration.

f. Principal's hearsay statement

People v. Scheidt, 513 P.2d 446 (Colo. 1973). In an aggravated robbery and murder case in which an accomplice shot and killed the victim, an incriminating statement made by the accomplice to a third party was properly admitted for the purpose of proving the guilt of the principal: "[B]efore defendant may be convicted as an accessory, the jury must be convinced beyond a reasonable doubt that his accomplice, as the principal, is also guilty of the crime. In order to satisfy that burden of proof, the prosecution is allowed to introduce evidence otherwise inadmissible at the defendant-accessory's trial for the limited purpose of establishing the guilt of the absent principal."

g. Co-defendant's statements at joint trial of both principal and accomplice

See [Chapter 9: Confrontation] for a discussion on use of co-defendant statements during joint trials. Use of statements of a co-defendant at a joint trial likely requires a special analysis under *Bruton v. United States*, 391 U.S. 123, 137 (1968) to avoid violating a co-defendant's confrontation rights when the other defendant invokes their 5th amendment right against self-incrimination and cannot be cross-examined.

2. Requirement that complicitor have knowledge of the principal's intent to commit a crime

People v. Alvarado, 284 P.3d 99 (Colo. App. 2011). There is no requirement that a complicitor have advance knowledge of the principal's intent to commit a crime. "[R]oughly contemporaneous knowledge by the complicitor of the principal's intent is sufficient." The jury posed the following question: "On complicity—does someone have to have knowledge of the intent prior to the act being committed or can the person watching the act happen be complicit by observing the act happen know [sic] that at the time the act is occurring that they [sic] are intending to do the act[?]" In response, the trial court properly gave the following supplemental instruction: "The defendant must have had knowledge of the other person's intent to commit all or part of the crime either before or at the time the other person committed all or part of the crime."

People v. Arrington, 843 P.2d 62 (Colo. App. 1992). "Under the complicitor statute, an offender must know when he encourages the illegal act that the other person intends to commit the crime. Pursuant to this standard, defendant is held liable only for those acts which he intended to assist."

a. "Some" knowledge sufficient

People v. Wilson, 791 P.2d 1247 (Colo. App. 1990). "Prior knowledge may be shown by circumstantial evidence. *See People v. Larson*, 572 P.2d 815 (Colo. 1977); *People v. Marques*, 520 P.2d 113 (Colo. 1974). Proof that the complicitor had *some* knowledge of the principal's offense may be sufficient. *See Dressel v. People*, 495 P.2d 544 (Colo. 1972) (under former accessory statute)." ***But see*** discussion of *Childress* in section **C. Proof Required Under Complicity Theory**, *above*.

b. Complicitor liability for strict liability crimes

People v. Childress, 363 P.3d 155 (Colo. 2015). A complicity instruction may be given in a Vehicular Assault—DUI case when the evidence supported that the defendant was aware of the son's drinking and driving and encouraged the son to speed and disregard traffic signals resulting in a crash. The Supreme Court held that complicitor liability is not limited to crimes defined as containing a culpable mental state, so complicitor liability can extend to strict liability offenses.

People v. Fisher, 9 P.3d 1189 (Colo. App. 2000). A complicity instruction may be given in a felony murder trial when the evidence supports a complicity theory. A "defendant who acts as a complicitor in the underlying felony may be held criminally liable for a death that occurs during its commission pursuant to § 18-3-102(1)(b)."

3. Intent requirement under complicity statute

People v. Hunt, 412 P.3d 835 (Colo. App. 2016). "[S]ome jurisdictions have complicity statutes that would hold an accomplice liable for any crimes that are a reasonably foreseeable consequence of the crime which the accomplice intended to aid or encourage. The Colorado General Assembly chose not to extend accomplice liability to reasonably foreseeable crimes, but rather limited such liability to those particular crimes which the accomplice intended to promote or facilitate."

Caution: *Childress* acknowledged and attempted to resolve the tension between much of the Colorado Supreme Court's precedent on the dual-intent requirement under the complicity statute. Most of the references to caselaw previously included in this subsection have, therefore, been removed. *Childress* and its progeny (discussed *above*) now govern this area of law and should be cited instead of prior precedent.

a. Acts performed "voluntarily" vs. acts performed "with intent"

People v. Moore, 877 P.2d 840 (Colo. 1994). The defendant was convicted of sexual assault on a child based upon a complicity theory that was predicated upon an incident wherein he forcibly

required his wife to perform sexual acts upon their 12-year old daughter while he watched. In reversing the conviction, the Court of Appeals inferred a voluntariness standard with respect to the complicity statute and held that the defendant could not be found guilty as a complicitor because the conduct of the principal was not performed "voluntarily." In reversing the Court of Appeals, the Colorado Supreme Court held that the determination of whether the acts of a principal are voluntary is dependent upon whether such acts are performed consciously as a result of effort or determination. Thus, despite the fact that the wife's acts as the principal may have been performed under duress, they were nevertheless performed with an awareness of the fact that she was performing them and were the result of her effort. Inasmuch as the principal possessed the requisite culpable mental state necessary to commit the offense, and the defendant knew she acted with that culpable mental state, the requisite elements establishing complicitor liability were proven.

D. Exemptions from Liability as a Complicitor

Section 18-1-604 provides several circumstances under which an actor may not be criminally liable as a complicitor:

> Unless otherwise provided by the statute defining the offense, a person shall not be legally accountable for behavior of another constituting an offense if he is a victim of that offense or the offense is so defined that his conduct is inevitably incidental to its commission." The statute also provides that it is an affirmative defense to a charge based on a complicity theory if, "prior to the commission of the offense, the defendant terminated his effort to promote or facilitate its commission and either gave timely warning to law enforcement authorities or gave timely warning to the intended victim.

People v. Hart, 787 P.2d 186 (Colo. App. 1989). The defendant, who purchased cocaine from another person, was exempt from liability as a complicitor for the crime of distribution of controlled substances. "[T]he conduct of one who takes delivery of the controlled substance is 'inevitably incident' to the criminal conduct of one who delivers the controlled substance. Hence, a person who takes delivery of a controlled substance by purchase is exempt from liability as a complicitor for the crime of distribution committed by a person delivering the controlled substance to him."

E. Sentencing Complicitor as Special Offender

People v. Ramirez, 997 P.2d 1200 (Colo. App. 1999). "Because complicity is a theory of law by which a defendant may be held accountable for a crime committed by another, punishment is imposed for the underlying crime and not for complicity."

F. *Apprendi*

People v. Rivas, 77 P.3d 882 (Colo. App. 2003). *Apprendi* does not apply to accomplice liability because it does not increase the penalty for a crime.

18.3 ACCOMPLICES AS WITNESSES

A. Accomplices as Witnesses

Burns v. People, 365 P.2d 698 (Colo. 1961). In holding that receipt of stolen goods is a distinct offense from the original theft, and that the prosecution witness who committed the original theft was not an accomplice to the crime of theft by receiving, the Colorado Supreme Court recognized that the determination of the status of an "accomplice" is dependent upon whether "the witness himself could be indicted for the offense with which the defendant is charged." *See also Velasquez v. People*, 425 P.2d 708 (Colo. 1975) (adopting *Burns* test and holding that prosecution witness who assisted defendant after crime was completed was not an accomplice).

B. Accomplice Status as a Witness Goes to Credibility

People v. Martinez, 531 P.2d 964 (Colo. 1975). "In Colorado, an accomplice is not *per se* an unworthy witness. His status as an accomplice goes to credibility, but not to competency. This is true even though the accomplice has been promised immunity from prosecution by appearing as a witness against the defendant." The Court further recognized that a jury may convict upon the uncorroborated testimony of an accomplice alone, if such testimony shows guilt beyond a reasonable doubt, provided that an instruction is given to review the testimony with great caution. Otherwise, such testimony requires "corroboration which convinces the jury beyond a reasonable doubt."

C. Instruction on Uncorroborated Testimony of an Accomplice

COLJI-Crim. D:05 sets forth the following instruction that should be given when the prosecution's case is based solely upon the uncorroborated testimony of an accomplice:

> The prosecution has presented a witness who claims to have been a participant with the defendant in the crime charged. There is no evidence other than the testimony of this witness which tends to establish the participation of the defendant in the crime.
>
> While you may convict upon this testimony alone, you should act upon it with great caution, subjecting it to a careful examination in the light of other evidence in the case. You are not to convict upon this testimony alone, unless convinced beyond a reasonable doubt of its truth.

See also Davis v. People, 490 P.2d 948 (Colo. 1971) (setting forth a similar, though more detailed instruction).

1. Trial court to initially weigh corroboration

The trial court bears the initial responsibility to weigh the corroboration of accomplice testimony to determine whether the instruction should be given. In cases in which there is no, or insufficient,

corroboration, the court must thereafter instruct the jury as to its function in determining what evidentiary weight is to be placed upon the accomplice testimony. *See People v. Hutto*, 509 P.2d 298 (Colo. 1973). However, in cases in which there is sufficient corroboration, the instruction is not only unnecessary, but may be misleading in the sense that it suggests the accomplice testimony is uncorroborated. *See People v. Martinez*, 531 P.2d 964 (Colo. 1975).

2. Type and sufficiency of corroboration

People v. Martinez, 531 P.2d 964 (Colo. 1975). "The corroborating evidence may be direct or circumstantial, and must establish the participation of the defendant with the commission of the offense. It may come from outside sources, or may be in the form of one accomplice corroborating another. However, the evidence of an accomplice need not be verified in every part. Corroboration of some portion of the accomplice testimony which is material to the issue is sufficient." *See also* COLJI-Crim. D:05, Notes on Use.

People v. Montoya, 942 P.2d 1287 (Colo. App. 1996). Defendant's admissions and physical evidence from crime scene corroborated testimony of defendant's accomplices, connecting him sufficiently with crime; instruction regarding uncorroborated accomplice testimony was therefore properly refused.

D. Testimony by an Accomplice with a Criminal Record

1. Improper to elicit conviction or guilty plea

People v. Craig, 498 P.2d 942 (Colo. 1972). In affirming the defendant's murder and conspiracy convictions, the Colorado Supreme Court stated: "It is true that where the prosecution puts on the stand and directly and deliberately elicits from [an accomplice] answers concerning his guilty plea to charges arising out of the same event that the defendant is charged with, such testimony may be prejudicial and inadmissible against the defendant. *Leech v. People*, 146 P.2d 346 (Colo. 1944); *Paine v. People*, 103 P.2d 686 (Colo. 1940). It is also true, however, that this testimony must be considered in light of the entire case in order to determine its prejudicial effect, if any. In our view, while the prosecutor should not have elicited testimony concerning the witness' guilty plea, the evidence of defendant's guilt was so overwhelming as to make reference to the guilty plea harmless error in this case."

a. May be admissible for other purposes

People v. Brunner, 797 P.2d 788 (Colo. App. 1990). In upholding the admission of testimony by an accomplice about his guilty plea to charges stemming from the same drug transaction for which the defendant was on trial, the Court of Appeals recognized the general rule that the guilty plea or conviction of an accomplice may not be used as substantive evidence of the defendant's guilt, and that the prosecution generally may not deliberately elicit testimony regarding an accomplice's guilty plea or prior conviction based on the same transaction as the charged offense. The Court of Appeals acknowledged, however, that evidence of the accomplice's guilty plea may be admissible

for other purposes: "Such evidence may be used to show acknowledgement by the accomplice of participation in the offense. Further, evidence of an accomplice's plea agreement is relevant to impeach the credibility of the accomplice. It is also proper for the prosecution to elicit testimony of an accomplice's guilty plea to blunt an expected attack on the credibility of the accomplice as a witness." In cases in which such evidence is properly admitted, the trial court should instruct the jury as to its limited purpose and that it may not be considered as substantive evidence of another's guilt.

James v. People, 420 P.2d 229 (Colo. 1966). The trial court properly denied defendant's motion for mistrial based on unresponsive testimony of defense witness who, in attempting to take blame for defendant, stated he had pleaded guilty to same charge for which defendant was on trial.

People v. Gallegos, 950 P.2d 629 (Colo. App. 1997). Under § 13-90-101, evidence of prior felony conviction admissible to impeach credibility of witness, and statute makes no exception for guilty pleas by alleged accomplice based on same incident leading to charges against defendant.

18.4 ACCESSORY TO CRIME

A. Definition

Section 18-8-105(1):

> A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person.

The term "**render assistance**" is defined in § 18-8-105(2) and means:

> (a) to harbor or conceal the other;
>
> (a.5) harbor or conceal the victim or witness to the crime;
>
> (b) to warn the person of impending discovery or apprehension;
>
> (c) to provide the person with money, transportation, a weapon, disguise, or other thing to be used in avoiding discovery or apprehension;
>
> (d) to, by force, intimidation, or deception, obstruct anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of the person; or
>
> (e) to conceal, destroy, or alter any physical evidence that might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). Under §18-8-105(2)(d), "render assistance" does not mean that a person has to actually obstruct a person from detecting the principal, but only commit an act that obstructs a person in the performance of any act which might aid in detection of the principal. In this case the defendant initially told police that the victim shot himself but then said that he accidentally shot the victim even though a third person was the actual killer. The court held that this was sufficient to support a conviction for accessory because the defendant concealed information, specifically the existence of the third person who actually killed the victim, which might have aided police.

B. Knowledge Requirement

People v. Young, 555 P.2d 1160 (Colo. 1976). The Colorado Supreme Court held that the knowledge element of the accessory statute was met by evidence that the defendant knew a gun had been fired in the course of the robbery: "The relevant standard for knowledge in regard to the accessory statute is whether the defendant knew the principal had committed a crime. It is not necessary for the defendant to have known that the crime committed was of a particular class. The statutory classification of the crime committed by the principal is only relevant in determining the degree of the accessory charge."

1. "Some" knowledge sufficient

People v. Barreras, 618 P.2d 704 (Colo. App. 1980). The Court of Appeals interpreted *Young* such "that the current accessory to crime statute does not necessarily require proof of the [the accessory's] full knowledge of the underlying offense."

2. Mere silence is not sufficient

Lowe v. People, 309 P.2d 601 (Colo. 1957). Mere silence as to one's knowledge of a felony, with no intent to aid the felon, or mere failure to inform public authorities, does not establish a person as an accessory.

Compare with People v. Sandoval, 791 P.2d 1211 (Colo. App. 1990). "Any assistance whatever given to one known to be a felon, including the harboring and protection of the wrongdoer, constitutes 'rendering assistance' within the meaning of our statute. Although the mere failure to inform public authorities of one's knowledge of a felon may not be sufficient to establish that an accused is an accessory to the crime, the offense can be established by proving the defendant was of personal help to, or aided, the offender in avoiding arrest and prosecution.

C. Complicity to Accessory

People v. Ager, 928 P.2d 784 (Colo. App. 1996). In upholding the defendant's convictions for first-degree murder and accessory to first-degree murder, the Court of Appeals explained how a person can be guilty as an accessory under a theory of complicity. "A defendant may be a complicitor to the crime of accessory by rendering assistance to another who is engaged in destroying evidence of a crime, even though the crime underlying the accessory charge may have

been committed by the defendant. In contrast to *People v. Broom*, 797 P.2d 754 (Colo. App. 1990), in which the defendant's conviction as both accessory and principal was reversed because the defendant's single act could not support both a conviction as a complicitor and an accessory, the evidence in this case demonstrates that defendant's conviction for accessory was based on his conduct in rendering assistance to his companions' efforts to conceal or destroy evidence."

D. Jury Instructions

People v. Petschow, 119 P.3d 495 (Colo. App. 2004). An instruction that directs the jury to use caution when considering accomplice testimony, is to be given only when the prosecution's case is based on uncorroborated testimony of an accomplice. Corroborating testimony need only identify the defendant and show his connection with the crime; it is not required to corroborate every aspect of the accomplice's testimony.

People v. Broom, 797 P.2d 754 (Colo. App. 1990). Since the term "rendering assistance" carries a specific statutory definition, that portion of the definition applicable to the case must be instructed upon. "Failure to do so here may have led the jurors to conclude that mere presence is 'assistance' under the statute."

18.5 CONSPIRACY

A. Conspiracy Defined: Elements

Section 18-2-201:

> A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime." In addition to proving the agreement to commit a crime with one or more persons, the prosecution must also prove that the defendant or one or more co-conspirators committed an overt act in pursuance of the conspiracy.

People v. Robinson, 226 P.3d 1145 (Colo. App. 2009). The defendant was convicted of conspiracy to distribute. The court held that there was sufficient evidence to prove a conspiracy. "[T]he evidence at trial showed that (1) the police instructed the informant to conduct a drug transaction with two people; and (2) defendant and [the co-conspirator] arrived together at the location identified by the informant with an amount of cocaine consistent with the amount of money the informant was instructed by the police to offer them. There were also scales found in the vehicle. From this evidence, a reasonable trier of fact could infer both an agreement between defendant and [the co-conspirator] to sell cocaine and at least one overt act (i.e., traveling to the location) in furtherance of that agreement." The court reiterated the rule that the existence of a conspiracy may be proved by "circumstantial evidence which indicates that the conspirators, by their acts, pursue

th[e] same objective, with a view toward obtaining a common goal." (citing *People v. Flowers*, 128 P.3d 285 (Colo. App. 2005) and *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980)).

People v. Flowers, 128 P.3d 285 (Colo. App. 2005). The court held that there was sufficient evidence to support that the defendant and the contact had agreed to commit a crime and that an overt act had been committed in furtherance of the conspiracy; therefore, there was sufficient evidence to support defendant's conviction of conspiracy to sell drugs. Police observed defendant's truck follow the informant's contact's vehicle into a parking lot at the approximate time of the arranged drug deal; the defendant parked his truck next to the contact's vehicle and waited while he made contact with the informant, and after the informant gave the contact $200 in marked money for the drugs, police heard the contact state that he had to go "to the truck" to get the drugs; he got into defendant's truck and then entered his own vehicle and delivered drugs to the informant, after which police observed the defendant and the contact leaving the parking lot at the same time. After the deal was completed, the defendant had $180 of the marked money in his possession as well as cocaine in his vehicle, and the contact had the remaining $20.

People v. Shannon, 539 P.2d 480 (Colo. 1975). "Although no direct evidence establishes an agreement in this case, sufficient circumstantial evidence appears in the record to support the jury's verdict. Conspiracies by their very nature are often covert and surreptitious in nature, and for that reason, conspiracies may be established by circumstantial evidence alone."

Palmer v. People, 964 P.2d 524 (Colo. 1998). Conspiracy requires two mental states: (1) "defendant must possess the specific intent to agree to commit a particular crime," and (2) "defendant must possess the specific intent to cause the result of the crime that is the subject of the agreement." The Colorado Supreme Court thus held that conspiracy to commit reckless manslaughter was not a cognizable crime because of the logical conflict between the mental states required for conspiracy and that required for reckless manslaughter, and it reversed the Court of Appeals decision in *People v. Palmer*, 944 P.2d 634 (Colo. App. 1997), as to that issue. The Court distinguished the mental states required for conspiracy, attempt, and complicity, noting *inter alia* that, unlike complicity, conspiracy and attempt are substantive crimes.

1. Conspiracy requires substantive crime "Conspiracy to commit [crime]. . ."

People v. Finnessey, 747 P.2d 673 (Colo. 1987). "As we have stated in other cases, 'conspiracy has legal significance only with respect to some other crime which is the object of the conspiracy.' *Watkins v. People*, 655 P.2d 834 (Colo. 1982). Section 18-2-201 contains the general definition of conspiracy but, standing alone, it does not charge a crime. *Cf. Olde v. People*, 145 P.2d 100 (Colo. 1944) (conviction of 'conspiracy' without more is invalid)."

People v. Pleasant, 511 P.2d 488 (Colo. 1973). A conspiracy verdict which fails to specify the crime that is the object of the conspiracy is a nullity.

2. "Overt act" is readily understandable

People v. Schruder, 735 P.2d 905 (Colo. App. 1986). In holding that the trial court did not commit plain error in failing to instruct the jury with respect to the meaning of the term "overt act," the Court of Appeals recognized that, although "overt act" is a legal term of art, its "plain meaning is not so abstruse as to be incomprehensible to the average juror. The jury was properly instructed in the essential elements of the offense of conspiracy in understandable language; the law does not require more."

3. "Overt act" and unanimity

People v. Davis, 488 P.3d 186 (Colo. App. 2017). Where the People charge a single conspiracy, the jury must agree unanimously that the defendant committed an overt act in furtherance of the conspiracy, but the jury need not agree unanimously that the defendant committed a particular overt act. Though the prosecution in this case alleged many overt acts in furtherance of a single conspiracy, the jurors were not required to unanimously agree on each of those particular acts.

4. Charging considerations

Co-conspirators may be alleged to be unknown in a conspiracy count. *People v. Holter*, 521 P.2d 765 (Colo. 1974). Moreover, one may be convicted of conspiracy even though co-conspirators are not charged, or charges against them have been dismissed before trial. *See Bradley v. People*, 403 P.2d 876 (Colo. 1965). Likewise, the co-conspirators need not be specifically named in the instructions to the jury. *See People v. Kurz*, 847 P.2d 194 (Colo. App. 1992).

5. Affirmative defense

Section 18-2-203 provides an affirmative defense to the charge of conspiracy if the defendant, after conspiring to commit a crime, thwarted the success of the conspiracy "under circumstances manifesting a complete and voluntary renunciation of his criminal intent."

B. Parties to Conspiracy

1. "Wharton Rule"

The "Wharton Rule" states generally that one may not be convicted of conspiracy when the principal crime charged is one that must necessarily be committed by two or more persons agreeing among themselves. *See People v. Ganatta*, 638 P.2d 268 (Colo. 1981). Historical examples include such crimes as dueling, bigamy, and adultery. Among the exceptions to the Wharton Rule are (1) cases in which the substantive crime is one that can be committed by one person, even if the crime, in most instances, is committed by more than one person, and (2) cases in which more or different people participate in the conspiracy than are necessary to commit the substantive offense. *See People v. Bloom*, 577 P.2d 288 (Colo. 1978).

2. Government agents as co-conspirators

A defendant cannot not be convicted of criminal conspiracy if the *only* other "co-conspirator" is a government agent whose intentions are to frustrate the unlawful plan. *See United States v. Chase*, 372 F.2d 453 (4th Cir. 1967).

United States v. Mahkimetas, 991 F.2d 379, 383 (7th Cir. 1993). Joining nine other circuits to hold that a conspiracy cannot be formed between a criminally-motivated person and a government agent or informer because in such a situation there is no real agreement)

United States v. Barboa, 777 F.2d 1420, 1422 (10th Cir. 1985) "A conspiracy is an agreement between two or more people to commit an unlawful act, and there is no real agreement when one "conspires" to break the law only with government agents or informants. The elements of the crime are not satisfied unless one conspires with at least one true co-conspirator."

3. Corporate employees

Since a conviction for criminal conspiracy requires an unlawful agreement between two or more *persons*, a conspiracy cannot exist between a corporation and its employees if those employees are acting as agents of the corporation. *See People ex rel Kinsey v. Sumner*, 525 P.2d 512 (Colo. App. 1974).

4. Husband and wife

Dalton v. People, 189 P. 37 (Colo. 1920). A husband and wife may be convicted as co-conspirators. Letter written to husband from wife, however, was privileged and inadmissible. *See* § 13-90-107(1) (establishing marital privilege and its limitations).

5. "Unknown" co-conspirators

Section 18-2-201(3) provides that if a person knows that a co-conspirator has conspired with another person to commit the same crime, he may be convicted of conspiracy with that other person, whether or not he knows the identity of that person.

6. Conspirator and complicitor

Since conspiracy and the crime which is the object of the conspiracy are different and distinct offenses, one may be found guilty both as a complicitor and a conspirator. *See People v. Shannon*, 539 P.2d 480 (Colo. 1975); *People v. Rivera*, 497 P.2d 990 (Colo. 1972).

C. Single v. Multiple Conspiracies

Section 18-2-201(4) provides that a person may be convicted of only one conspiracy even though the person conspired to commit a number of crimes so long as those crimes were all a part of one single criminal episode.

1. Factors to be considered

Pinelli v. District Court, 595 P.2d 225 (Colo. 1979). In a gambling prosecution in which the defendants were charged in two different counties with different co-conspirators in each county,

the Colorado Supreme Court concluded that each indictment involved a separate and distinct agreement, and remanded the cases for a determination of whether the two conspiracies were part of a single criminal episode. The Court stated that the factors, "among others, which indicate that both indictments referred to a single criminal episode are: (1) the petitioners are charged in both indictments; (2) the acts alleged in both indictments occurred during the same time period; (3) the type of overt act alleged in those indictments is the same; (4) the unlawful objective of the conspiracy in both indictments is the same; (5) the *modus operandi* alleged in the indictments is the same; (6) the same evidence would be relevant to both charges." Factors indicating the indictments referred to different criminal episodes include that: "the [defendants] are charged with conspiring (1) with different parties; (2) in different counties; (3) in different agreements; and with allegations of different overt acts."

People v. Woodyard, 540 P.3d 278 (Colo. App. 2023). Citing the *Pinelli* factors, the Court of Appeals held that an agreement between co-conspirators during a single phone call to distribute methamphetamine and heroin to the sole recipient was a single agreement and therefore a single criminal episode. "Supplying [the recipient of the drugs] with the two types of drugs was discussed in the same telephone call mere seconds apart. The conspirators were the same. There was only one overt act—[the co-conspirator's] delivery of both methamphetamine and cocaine to [the recipient]. [The co-conspirator who delivered the drugs] played the same role with respect to both drugs—he was the supplier. And the evidence proving both charges was essentially the same.

2. "Wheel and hub" conspiracy

People v. Serrano, 804 P.2d 253 (Colo. App. 1990). In a prosecution for conspiracy to distribute cocaine involving a "wheel and hub" conspiracy, *i.e.,* a conspiracy involving headquarters as the "hub" and numerous drug dealers as "spokes," the Court of Appeals recognized that evidence of an agreement among all of the actors is required to prove that the conspiracy is a single conspiracy, rather than multiple conspiracies. "However, there need not be evidence of a formal agreement; rather, it is sufficient to show that each conspirator knew or had reason to know of the existence and scope of the conspiracy and that each had reason to believe that *his* benefit depended upon the success of the entire venture. Further, it is not necessary to prove that each conspirator knew every other conspirator so long as an overall plan with a common object is shown." The Court of Appeals held that, under the facts of this case, the evidence established a single "wheel and hub" conspiracy, thereby permitting the admissibility of transactions between "headquarters" and other drug dealers in the defendant's trial, since there was sufficient evidence regarding the operation to permit the inference that the defendant's success in his criminal activity was dependent upon the operation of "headquarters." *See also* *People v. Quintana*, 540 P.2d 1097 (Colo. 1975).

D. Admissibility of Acts and Declarations of Co-Conspirators

1. Admissibility generally

People v. Beck, 593 P.2d 371 (Colo. App. 1979). "The acts and declarations of co-conspirators, even those occurring prior to a defendant's involvement, may be admitted against that defendant. '[E]very person entering into a conspiracy or common design already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.' *Smaldone v. People*, 88 P.2d 103 (Colo. 1938)."

Practice Tip: The admissibility of the acts or declarations of a co-conspirator is conditioned upon proof of the establishment of a conspiracy.

2. Hearsay considerations

C.R.E. 801(d)(2)(E) provides that a statement offered against a party is not hearsay if the statement is made by a co-conspirator of the party during the course and in furtherance of the conspiracy. To admit a statement under C.R.E. 801(d)(2)(E), the prosecution, as the proponent of a co-conspirator's statement, must establish by a preponderance of the evidence that there was a conspiracy, that the defendant and the declarant were members of the conspiracy, and that the declarant made the statement during the course and in furtherance of the conspiracy. *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

a. Statements must be "during the course of" and "in furtherance of" the conspiracy

People v. Robinson, 874 P.2d 453 (Colo. App. 1993). In holding that certain inculpatory statements admitted at trial were made by the defendant prior to the formation of a conspiracy and after the conspiracy had ended, the Court of Appeals recognized that "[s]tatements which constitute casual comments or idle conversation, not intended to further the purpose and objectives of the conspiracy, are not admissible under the co-conspirator exception." Under the specific facts of this case, however, the Court concluded that the admission of the hearsay statements was harmless error.

People v. Dunlap, 124 P.3d 780 (Colo. App. 2004). "Co-conspirators statements made after the conspirators attain the object of the conspiracy are not admissible under this exception unless the proponent demonstrates an express original agreement among the conspirators to continue to act in concert to cover up, for their self-protection, traces of the crime after its commission."

People v. Fausset, 409 P.3d 477 (Colo. App. 2016). Co-conspirator statements made after the conspirators attain the object of the conspiracy are not admissible under the co-conspirator exception unless the proponent demonstrates "an express original agreement among the conspirators to continue to act in concert." The proponent of the evidence "can satisfy this requirement by showing that the objectives of the original conspiracy include such an agreement or there exists a separate conspiracy to conceal." In this case, while the express agreement was to steal a scooter, the record supports the conclusion that the object of the conspiracy was to sell and obtain the proceeds of the sale as well

3. Acts or declarations of uncharged or "unknown" conspirators

The acts and declarations of co-conspirators are admissible, even in the absence of a formal charge of conspiracy, where there is independent evidence showing a concert of action by the defendant sufficient to support a determination by the trial court that a conspiracy exists. *See People v. Akins*, 541 P.2d 338 (Colo. App. 1975). Such acts or declarations are likewise admissible even though they occurred or were made out of the defendant's presence. *See People v. Schlepp*, 518 P.2d 824 (Colo. 1974) (reversed on other grounds). Moreover, admissibility of the evidence does not require that the defendant meet or have knowledge of all of the alleged co-conspirators, so long as the other acts and declarations occur in the course and in furtherance of the conspiracy of which the defendant is a part. *See People v. Quintana*, 540 P.2d 1097 (Colo. 1975).

4. Acts or declarations occurring before the defendant's involvement with the conspiracy or after completion of the object crime

a. Before defendant's involvement

Although acts and declarations of co-conspirators were made prior to the time the defendant joined the conspiracy, such acts and declarations may be admissible against the defendant if performed in furtherance of the conspiracy. *See People v. Beck*, 593 P.2d 371 (Colo. App. 1979).

b. After completion of the object crime

Blecha v. People, 962 P.2d 931 (Colo. 1998). "[I]t is well-settled under Colorado and federal law that co-conspirator statements made after the conspirators attain the object of the conspiracy are not admissible under this exception unless the proponent demonstrates 'an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.' It is also well-settled that 'secrecy plus overt acts of concealment' do not establish an express agreement to act in concert in order to conceal the crime." Such statements are only admissible if the prosecution demonstrates there was an "express agreement among the conspirators to continue to act in concert in order to conceal the crime." Here, the trial court erred by admitting the statements under the co-conspirator exception because there was no evidence that concealment was an explicit objective of the murder conspiracy, nor any evidence of a separate conspiracy with the explicit objective of concealing the murder. *See also People v. Burke*, 549 P.2d 419 (Colo. App. 1976).

People v. Orr, 566 P.2d 1361 (Colo. App. 1977). The Court of Appeals upheld the admission of testimony of a third party who was told by a co-conspirator shortly after the robbery and homicide the events surrounding the crime (including the defendant's involvement) and the subsequent efforts to conceal the fruits of the crime. "While the statements here were made after the actual robbery and homicide, the court found them to have been made during a conspiracy to conceal these crimes, and found prima facie independent evidence of the conspiracy. The agreement to conceal made the co-conspirator exception to the hearsay rule applicable.

5. Requirement of proof of conspiracy as condition precedent to admission

a. Standard under the Colorado Rules of Evidence

People v. Montoya, 753 P.2d 729 (Colo. 1988). The Colorado Supreme Court recognized that, under the Colorado Rules of Evidence, questions regarding preliminary questions of admissibility, including questions regarding the admissibility of co-conspirator's statements under C.R.E. 801(d)(2)(e), are to be resolved by the trial court pursuant to C.R.E. 104(a), and the applicable standard of proof is by a preponderance of the evidence. "The prosecution, therefore, as the proponent of a co-conspirator's statement, bears the burden of establishing by a preponderance of the evidence that the defendant and the declarant were members of a conspiracy and that the declarant's statement was made during the course and in furtherance of the conspiracy." Unlike the pre-C.R.E. rule, however, the Court held that a trial court may consider the statement of an alleged co-conspirator in determining whether the prosecution has established the evidentiary conditions for admissibility, although the statement may not be the sole basis for establishing those foundational requirements. Therefore, before a statement may be admissible under C.R.E. 801(d)(2)(E), the prosecution must present "some evidence," apart from the co-conspirator's statement itself, which corroborates the defendant's and declarant's membership in the conspiracy. "This corroborating evidence may take many forms, including circumstantial evidence of the conspiracy." *See also People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

b. Recommended procedure for determining admissibility

People v. Montoya, 753 P.2d 729 (Colo. 1988). "Although C.R.E. 104(b) authorizes a trial court to admit a co-conspirator's statement conditionally—that is, subject to 'the introduction of evidence sufficient to support a finding of the fulfillment of the condition'—the preferred procedure, in our view, is to require the prosecution to establish the foundational requirements for the admission of a co-conspirator's statement prior to any offer of the statement into evidence before the jury. This procedure avoids the danger of exposing to the jury evidence which ultimately might be ruled inadmissible." With respect to this determination, the Court recognized that the issue is best resolved in the context of the actual state of the record at the time the evidence is offered, rather than by way of offer of proof prior to the commencement of trial.

E. Effect of Acquittal on the Object Crime or of Co-Conspirators

1. Acquittal of object crime: the *Robles* rule

Robles v. People, 417 P.2d 232 (Colo. 1966). When a charge of conspiracy is based solely on the commission of the object crime and the jury acquits the defendant of the object crime, then defendant cannot simultaneously be convicted of conspiracy to commit that crime. In other words, a defendant cannot be convicted of conspiracy to commit a crime when the sole evidence to support that crime is the commission of the crime itself and the jury acquits the defendant of that crime. This "inconsistent verdicts" rule is limited to conspiracy. *People v. Frye*, 898 P.2d 559 (Colo. 1995).

People v. Harrison, 746 P.2d 66 (Colo. App. 1987). Contrary verdicts on object offense and related conspiracy charge are not inconsistent if there is evidence implicating defendant in conspiracy and which is separate and independent from that of participation in substantive offense.

People v. Hood, 878 P.2d 89 (Colo. App. 1994). In a homicide prosecution, a co-participant testified that on several occasions she and the defendant discussed various methods of killing the defendant's wife, one of which included killing her in the course of a staged robbery of a convenience store. Although plans to effect the murder during the staged robbery were frustrated, several months later (and after further discussions with the defendant) the co-participant completed the homicide by shooting her as she was leaving a support-group meeting. In upholding the defendant's conviction for conspiracy to commit murder, despite his acquittal on the substantive murder charge, the Court of Appeals distinguished complicity, which imposes criminal liability for participation with another who is engaged in criminal activity, from conspiracy, which is predicated upon an illegal agreement with another, plus an overt act in furtherance of the agreement. In light of the facts of the case, the Court recognized that "separate parts of [the co-participant's] testimony independently supported conspiracy and complicity [such that] the jury could have believed those parts of the testimony relating to the conspiracy [*i.e.,* the agreement and overt acts committed in furtherance of the frustrated staged robbery], but rejected the portions relating to defendant's participation in the murder as a complicitor."

2. Acquittal of co-conspirators: the "rule of consistency"

Marquiz v. People, 726 P.2d 1105 (Colo. 1986). The acquittal of the defendant's co-conspirators on the conspiracy charge did not bar the defendant's conviction on the conspiracy charge based on the same offense in a separate trial. The Colorado Supreme Court recognized the general "rule of consistency," which states that where all alleged co-conspirators but one are acquitted of conspiracy, the remaining alleged co-conspirator may not be convicted of conspiracy (since one cannot logically conspire with oneself). The Court, however adopted a corollary rule that the rule of consistency is inapplicable where the alleged conspirators are not tried in the same proceeding. The Court reasoned that "[t]here is no inherent inconsistency when different juries return different verdicts in separate trials, because the acquittal of one of the conspirators 'could [result] from a multiplicity of factors completely unrelated to the actual existence of a conspiracy.'"

Compare with People v. Nichols, 920 P.2d 901 (Colo. App. 1996). Despite the fact that the defendant and his co-defendant were tried together and his co-defendant was acquitted on the conspiracy charge, the Court of Appeals nevertheless held that the defendant's conviction for conspiracy was proper. In light of the co-defendant's defense of misidentification, the jury could rationally conclude that, although the defendant did not conspire with the co-defendant, he may have conspired with another party in the commission of the crime. "Here, although the two alleged conspirators were tried together, we nevertheless conclude that this case falls within the *Marquiz* exception because, based upon the evidence presented, the acquittal of [the co-defendant] could result despite the actual existence of a conspiracy."

3. Jury deadlock on object crime is not the same as acquittal

People v. Espinoza, 989 P.2d 178 (Colo. App. 1999). After the jury became hopelessly deadlocked on the first-degree arson charge, the court accepted a unanimous guilty verdict on the conspiracy charge, and the prosecutor then dismissed the arson charge. Where acquittal is the trier of fact's determination that either the prosecution failed to prove defendant's guilt beyond a reasonable doubt or that there was insufficient evidence to warrant a conviction, deadlock is not. Also, unlike acquittal or the prosecution's dismissal of a charge, when a jury becomes deadlocked the prosecution is not barred by double jeopardy from re-prosecuting the charge. Here, defendant was not acquitted of the object crime, and his conspiracy conviction was therefore not precluded. The Court of Appeals noted, in the event defendant is re-tried and acquitted of the object crime, that could form the basis of a collateral attack on his conspiracy conviction.

F. Sentencing: Conspiracy to Commit Crime of Violence is a Crime of Violence

People v. Terry, 961 P.2d 500 (Colo. App. 1997). Section 18-2-201 was amended in 1995 to include the following provision: "Conspiracy to commit any crime for which a court is required to sentence a defendant for a crime of violence in accordance with § 18-1.3-406 is itself a crime of violence for the purposes of that section." The amendment requires automatic crime of violence sentencing for conspiracy.

CHAPTER 19

JURY SELECTION

19. JURY SELECTION

19.1 INTRODUCTION

Every criminal defendant has a fundamental constitutional right to a trial by a fair and impartial jury. Colo. Const. Art. II, §§ 16, 23; U.S. Const. amend. VI. *See also Duncan v. Louisiana*, 391 U.S. 145 (1968); *People v. Collins,* 730 P.2d 293 (Colo. 1986). The law and process of selecting a jury for criminal cases is governed by Crim. P. 24 and § 16-10-103. *See also People v. O'Neill*, 803 P.2d 164 (Colo. 1990).

Jurors may be excused "for cause," as established in Crim. P. 24 and § 16-10-103 by a party's use of a peremptory challenge per Crim. P. 24 and § 16-10-104. A juror may be excused for hardship or inconvenience. § 13-71-121. Other procedures concerning jury selection are provided in the Colorado Uniform Jury Selection and Service Act. § 13-71-101 et seq.

19.2 VOIR DIRE GENERALLY

A. Purpose of Voir Dire

The purpose of *voir dire* is "to enable counsel to determine whether any prospective jurors are possessed of beliefs which would cause them to be biased in such a manner as to prevent the [defendant] from obtaining a fair and impartial trial." *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996); *People v. Garcia*, 527 P.3d 410 (Colo. App. 2022). *See People v. Shockey*, 545 P.3d 984 (Colo. App. 2024) ("The purpose of *voir dire* is to test whether the jurors possess any beliefs that would deny the defendant a fair trial.").

B. Jury Selection and Service

The Sixth Amendment guarantees a defendant the right to a jury selected from a representative cross-section of the community. *Washington v. People*, 186 P.3d 594 (Colo. 2008); *People v. Luong*, 378 P.3d 843 (Colo. App. 2016).

To establish that the composition of a jury pool constitutes a *prima facie* violation of the Sixth Amendment's fair cross-section guarantee, the defendant must prove:

(1) that the group alleged to be excluded is a "distinctive" group in the community;
(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
(3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357 (1979). If the defendant satisfies all three prongs, then the burden shifts to the prosecution to justify "this infringement by showing attainment of a fair cross-section to be incompatible with a significant state interest." *Washington v. People*, 186 P.3d 594 (Colo. 2008).

Nothing in the Colorado Uniform Jury Selection and Service Act dictates how a court must seat jurors after they check in for jury duty. *People v. Garcia*, 527 P.3d 410 (Colo. App. 2022).

The Colorado Uniform Jury Selection and Service Act does not bar jurors from serving in both stages of a bifurcated trial. *People v. Barajas*, 497 P.3d 1078 (Colo. App. 2021).

There is no federal constitutional right to a sworn jury, nor is there any Colorado statutory right to a sworn jury; thus, when a defendant is found guilty by an unsworn jury, structural error does not apply. *People v. Torrez*, 548 P.3d 685 (Colo. App. 2024).

C. Trial Court and Counsel's Participation

In order "to facilitate an intelligent exercise of challenges for cause and peremptory challenges," the trial court is required to question jurors about their qualifications and to allow the parties or their counsel to ask the prospective jurors additional questions, subject to the court's control. Crim. P. 24(a)(3). Because counsel's right to question prospective jurors directly is a procedural right, rather than a constitutional right, it may be waived by counsel. *See People v. O'Neill*, 803 P.2d 164 (Colo. 1990); *People v. Mumford,* 275 P.3d 667 (Colo. App. 2010) (holding that the defendant "waived" any challenge to the seated juror by not raising any objection until after the jury was sworn).

The trial court is not required to independently raise the issue of racial bias during its *voir dire* of prospective jurors. *People v. Owens*, 544 P.3d 1202 (Colo. 2024).

A trial court is not required to ask a race or ethnicity question, and it is not required to provide an implicit bias instruction. Rather, the decision whether to ask such a question or provide an implicit bias instruction is entrusted to the trial court's sound discretion. *People v. Toro-Ospino*, 535 P.3d 132 (Colo. App. 2023) (holding that a trial court did not abuse its discretion by declining to ask race or ethnicity question or give implicit bias instruction).

Requiring or permitting jurors to wear masks during trial does not violate a defendant's constitutional rights. *People v. Garcia*, 527 P.3d 410 (Colo. App. 2022).

When a prospective juror makes a potentially prejudicial remark during *voir dire*, the trial court may issue a curative instruction, canvass the jury, or declare a mistrial. *People v. Avila*, 457 P.3d 771 (Colo. App. 2019). *See People v. Van Meter*, 421 P.3d 1222 (Colo. App. 2018) (holding that statements during *voir dire* by a prospective juror who was also a deputy sheriff and had transported the defendant to court did not deprive defendant of a fair trial or due process and a mistrial was not warranted).

People v. Estes, 296 P.3d 189 (Colo. App. 2012). During *voir dire*, the trial court improperly attempted to explain to jurors the difference between "not guilty" and "innocent" by stating that the defendant "did something" and that the question was whether what defendant did was an illegal act. This improperly suggested to the jurors that the court believed the suspicion against defendant, and thus, the charges leveled by the prosecution were warranted, especially considered together

with the court's use of word "we." As a result, this statement improperly aligned the court with the prosecution, implying that it found evidence against defendant sufficient to justify him standing trial.

19.3 CHALLENGE FOR CAUSE

After the court and counsel have questioned the prospective jurors, either the court *sua sponte* or counsel may "challenge" or reject an unlimited number of potential jurors based on specific, provable, legal grounds as set forth in § 16-10-103 and Crim. P. 24(b).

> ***Practice Tip:*** A trial court retains discretion to conduct challenges for cause in open court. However, if the trial court employs this practice, it must proceed with caution. The trial court may abuse its discretion depending on the reason underlying the challenge for cause, the content of the questioning leading up to the challenge for cause, the overall tenor or contentiousness of *voir dire* examination, and any other facts or circumstances pertinent to the issue. *People v. Flockhart*, 304 P.3d 227 (Colo. 2013).

A trial court must grant a challenge for cause if "a prospective juror is unwilling or unable to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions." *Morrison v. People,* 19 P.3d 668 (Colo. 2000). If the court has a "genuine doubt" about the juror's ability to be impartial, it should resolve the doubt by sustaining the challenge. *Id.* To protect a defendant's right to an impartial jury, a trial court must excuse prejudiced or biased persons from the jury. *People v. Ambrose*, 506 P.3d 57 (Colo. App. 2021).

It is normal for a prospective juror to arrive for jury duty without knowing the relevant law and with some preconceived expectations. A juror who initially misunderstands the law should not be removed for cause if, after explanation and rehabilitative efforts, the court believes that she can render a fair and impartial verdict based on the instructions given by the judge and the evidence presented at trial. *People v. Clemens*, 401 P.3d 525 (Colo. 2017).

Even "a prospective juror's silence in response to rehabilitative questioning constitutes evidence that the juror has been rehabilitated when the context of that silence indicates that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." *People v. Clemens*, 401 P.3d 525 (Colo. 2017).

A challenge for cause may be sustained either because there is actual bias or implied bias. *People v. Pasillas-Sanchez,* 214 P.3d 520 (Colo. App. 2009).

Actual bias "is a state of mind that prevents a juror from deciding the case impartially and without prejudice to a substantial right of one of the parties." *People v. Macrander,* 828 P.2d 234 (Colo. 1992) (*overruled on other grounds*). Actual bias encompasses beliefs grounded in personal knowledge or a personal relationship, as well as beliefs grounded in the juror's feelings regarding

the race, religion, and ethnic or other group to which the defendant belongs. An indication by the juror that he has a biased state of mind can cause the trial judge to excuse that juror.

Implied bias arises out of external factors, such as a personal relationship between the juror and a participant in the criminal trial. Crim. P. 24(b)(1)(1)-(IX), (XII) and § 16-10-103(1)(a)-(k) outline implied bias. The trial court must dismiss a juror who falls under any of these provisions in order to maintain the appearance of impartiality in the justice system. Implied bias is not rooted in what the juror thinks about matters related to the case, but rather in his or her relationships or circumstances. Therefore, answers to a written questionnaire may disclose enough information, without additional questioning, to warrant dismissal of that juror. Further questioning could also reveal implied bias. An impliedly biased juror is not susceptible to rehabilitation through further questioning because implied bias, once established, cannot be ameliorated by the juror's assurances that she nonetheless can be fair. *People v. Lefebre*, 5 P.3d 295 (Colo. 2000) (*overruled on other grounds*).

People v. Abu-Nantambu-El, 454 P.3d 1044 (Colo. 2019). If the trial court erroneously denied a challenge for cause, the defendant exhausted his peremptory challenges, and the challenged juror ultimately served on the jury, it is structural error requiring reversal.

A. Grounds for Challenges for Cause

1. Section 16-10-103

This statute states that the court "shall sustain a challenge for cause" on one or more of the following 11 possible grounds:

(a) Absence of any qualification prescribed by statute to render a person competent as a juror

> Any person who is a United States citizen and resides in the county or lives in the county more than fifty percent of the time is qualified pursuant to § 13-71-105(1). However, pursuant to § 13-71-105(2)(e), a person is disqualified if he has a residence outside of the county with no intention of returning to the county within the next twelve months.
>
> *People v. White,* 242 P.3d 1121 (Colo. 2010). A juror was qualified to serve because he continued to maintain a domicile at father's home in Teller County; although he moved to El Paso County after receiving a jury summons and intended to remain outside Teller County until he completed vocational training 18 to 24 months later. Juror had not moved his furniture or changed his mailing address since moving in with his sister; he expressed subjective intent to return to Teller County if and when that became a viable option; and there was no evidence that he had taken any steps objectively evidencing a change in his legal address).
>
> If a party fails to raise a matter pertaining to the qualifications and competency of a prospective juror before the jury is sworn in, the matter "shall be deemed waived." Crim. P. 24(b)(2).

(b) Relationship to the defendant or any attorney of record or attorney "engaged in the trial"

(c) The juror has been in one of several specific relationships with the defendant, including employee-employer, landlord-tenant, and debtor-creditor

(d) The juror has been an adverse party to defendant in a civil suit or has either complained against or been accused by defendant in a criminal case

(e) The juror has served on the grand jury which returned the indictment against defendant, or on a coroner's jury, or any other investigatory body which inquired into the facts of the crime charged

(f) The juror was "a juror at a former trial arising out of the same factual situation or involving the same defendant"

(g) The juror was "a juror in a civil action against the defendant arising out of the act charged as a crime"

(h) The juror was a witness to any matter related to the crime or its prosecution

(i) The juror occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime of the person on whose complaint the prosecution was instituted

(j) The juror has a state of mind "evincing enmity or bias toward the defendant or the state

> "However, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from the other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at trial[.]"
>
> A prospective juror's indication of concern about the ability to set aside a prejudice or preconceived belief about some facet of the case does not automatically warrant exclusion for cause. *Medina v. People*, 114 P.3d 845 (Colo. 2005). Disqualification is not required if the trial court is reasonably satisfied that the prospective juror is willing and able to be fair and follow instructions. *Carrillo v. People*, 974 P.2d 478 (Colo. 1999).
>
> "Where a prospective juror is challenged on grounds of actual bias, the trial court must consider whether the juror will render an impartial verdict based on the law and the evidence. The trial court must grant the challenge if the prospective juror is unwilling or unable to render an impartial verdict based upon the court's instructions and the evidence admitted at trial." *People v. Chavez*, 313 P.3d 594 (Colo. App. 2011) (*rev'd on other grounds*).
>
> "A trial court must grant a challenge for cause if a prospective juror is unwilling or unable to accept the basic principles of criminal law and to render a fair and impartial verdict based

upon the evidence admitted at trial and the court's instructions." *Morrison v. People,* 19 P.3d 668 (Colo. 2000).

People v. Lucas, 232 P.3d 155 (Colo. App. 2009). A challenge for cause is properly denied where juror is properly rehabilitated or indicates that, although he might struggle with the court's instructions, he can follow them.

Marco v. People, 432 P.3d 607 (Colo. 2018). In determining whether to remove a prospective juror for cause, a trial court must evaluate the juror's state of mind by assessing the juror's responses to questions and the demeanor and body language of the juror throughout *voir dire*. Removal of a prospective juror for cause was not warranted even though prospective juror's initial comments during *voir dire* about whether defendants plead not guilty by reason of insanity to avoid punishment. The trial court sufficiently rehabilitated through further questioning.

People v. Roldan, 353 P.3d 387 (Colo. App. 2011) (*rev'd on other grounds*). Although a close association with law enforcement is insufficient to require dismissal for cause, in this case, the juror's opinion on police officer testimony, combined with her express statements that she might be "biased," as well as answering a query of her capacity for fairness and impartiality as a juror with, "I think I probably can," was sufficient to support dismissal for cause, and the trial court's denial of such challenge for cause was an abuse of discretion.

(k) The juror is a "compensated employee of a public law enforcement agency or a public defender's office"

"[T]he statute and rule express concern for the nature of the employing agency rather than the specific duties of the venireman in question, and therefore the fact that the job description of any particular venireman may not directly involve law enforcement functions is not dispositive of his ability to sit. By the same token, however, a prospective juror's governmental employer does not become a public law enforcement agency solely because the prospective juror in question, or any other of his co-employees for that matter, performs law enforcement functions ….[W]e have inferred that the legislature intended to include within the category of public law enforcement agency only agencies enforcing the criminal law, and we have interpreted the statutory designation to include not only those agencies specifically identified but also other agencies performing similar functions… It is [] incumbent upon any party asserting a challenge for cause under this subsection of the statute not only to make timely objection but to provide the court, through examination of the prospective juror or request for judicial notice, with adequate evidence of the nature of the employing unit in question." Even if special units within an agency has authority to carry firearms, make arrests, and seek and execute warrants, their status as public law enforcement would not affect the classification of the broader agencies of which they are sub-divisions or sub-agencies. *People v. Speer,* 255 P.3d 1115 (Colo. 2011).

Mulberger v. People, 366 P.3d 143 (Colo. 2016), The Supreme Court held that a compensated employee of a public law enforcement agency is a person who provides labor and services to, is paid by, and receives direction from a public law enforcement agency. Here, a contract nurse at the El Paso County Jail was not a compensated employee of a public law enforcement agency because she was not paid by the jail and there was no evidence that she was subject to the jail personnel's direction and control.

People v. Bonvicini, 366 P.3d 151 (Colo. 2016). The Supreme Court held a private company that operates a prison is not a "public law enforcement agency."

People v. Novotny, 320 P.3d 1194 (Colo. 2014). The office of the state attorney general is a public law enforcement agency. The office of the state attorney general has been specifically included in a number of different statutory provisions defining the term "law enforcement agency.".

People v. Avila, 457 P.3d 771 (Colo. App. 2019). The Court of Appeals holds that a prospective juror who is employed by the Colorado Office of Prevention and Security's "fusion center" is not a "compensated employee of a public law enforcement agency."

People v. Sommerfeld, 214 P.3d 570 (Colo. App. 2009). A "public law enforcement agency" is a "police-like division of government that has the authority to investigate crimes and to arrest, to prosecute, or to detain suspected criminals." The Division of Youth Corrections, like the Department of Corrections and Community Corrections programs, is a public law enforcement agency.

People v. Romero, 197 P.3d 302 (Colo. App. 2008). The actual job responsibilities of the compensated employee of a public law enforcement agency are irrelevant. An employee of a community corrections facility is an employee of a public law enforcement agency.

People v. Speer, 216 P.3d 18 (Colo. App. 2007) (*rev'd on other grounds*). Simply because an agency has investigative powers or has contact with law enforcement does not render it a "public law enforcement agency." TSA employees who work for airport security are not employees of a "public law enforcement agency," as they do not have the authority to make an arrest, or to prosecute, or detain suspected criminals. *See also Ma v. People,* 121 P.3d 205 (Colo. 2005) (holding that the Army Military Police Corps is a public law enforcement agency); *People v. Carter*, 403 P.3d 480 (Colo. App. 2015) (holding that the Colorado Public Utilities Commission is not a public law enforcement agency); *People v. Simon,* 100 P.3d 487 (Colo. App. 2004) (EPA is not a law enforcement agency).

People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. App. 2005) (*rev'd on other grounds)*. A trial court does not have to dismiss a prospective juror who is an employee of a public law enforcement agency *sua sponte*.

2. Crim. P. 24(b)

This Rule sets forth essentially the same criteria on which a juror may be challenged for cause. Note, however, that a challenge under the rule on the basis of the juror's employment with a public law enforcement agency or public defender's office does not specify that the employee must be a "compensated" employee. Crim. P. 24(b)(1)(XII).

3. Hardship or Inconvenience

A trial court is not limited to the grounds set forth in § 16-10-103 for challenges for cause. Section 13-71-119 (2), (3) provides for the excusal of a juror upon a finding of extreme hardship in a trial lasting three days or less.

Pursuant to § 13-71-121, the court may excuse a juror for "hardship or inconvenience" in a trial lasting more than three days. "Before a jury is impaneled, the court shall inform the jurors if a trial is expected to last more than three trial days and may excuse a juror from performing juror service in that trial upon a finding of hardship or inconvenience, taking into account the expected length of the trial. Any juror so excused shall otherwise complete the term of juror service." *See People v. Isom*, 140 P.3d 100 (Colo. App. 2005).

People v. Kinney, 148 P.3d 318 (Colo. 2006) (*rev'd on other grounds*). The trial court properly excused a juror who was a teacher that could not get a substitute for more than three days and who was scheduled to do assessment testing that a substitute could not handle.

Section 13-71-119.5(2)(a)(I) permits the temporary excusal of a person from jury service where the service would cause undue or extreme physical hardship to him or her or another person under his or her care. This decision can be made by either the jury commissioner or the trial court. § 13-71-119.5(2)(b).

B. Standard of Review: Abuse of Discretion

The standard of review for a trial court's ruling on a challenge for cause is whether the trial court abused its discretion. *Carrillo v. People,* 974 P.2d 478 (Colo. 1999).

People v. Young, 16 P.3d 821 (Colo. 2001). "Reversals on juror challenges . . . should be rare. If the juror's recorded responses are unclear only the trial court can assess accurately the juror's intent from the juror's tone of voice, facial expressions, and general demeanor."

C. Illustrative Cases

Vigil v. People, 455 P.3d 332 (Colo. 2019). The trial court denied the defendant's for-cause challenge to Juror C.A. but granted the prosecutor's challenge to Juror D.K. The Supreme Court affirmed, ruling that (1) the trial court did not abuse its discretion in denying the defendant's challenge to Juror C.A. despite his prior relationship with the victim's family because he expressly gave his assurance that he could evaluate the victim's testimony just like any other witness; and (2) granting the prosecution's challenge to prospective Juror D.K., even if it amounted to an abuse of discretion, could not have deprived the defendant of his right to a fair and impartial jury because D.K. did not sit on the jury.

19. JURY SELECTION

People v. Young, 16 P.3d 821 (Colo. 2001). Although the challenged juror's initial responses, including that "he would 'jump to the conclusion' that a person charged with a crime would be guilty," raised questions about his understanding of the presumption of innocence, the record as a whole supported the trial court's conclusion that the juror could be fair and impartial. It is "not unusual for a juror to be confused or uncertain about the presumption of innocence." Although the record was "somewhat ambiguous," the trial court was in the best position to evaluate the challenged juror and did not abuse its discretion in denying defendant's challenge for cause.

Morrison v. People, 19 P.3d 668 (Colo. 2000). No abuse of discretion in denying challenge for cause on asserted grounds that juror was predisposed to find defendant guilty and that she rejected the prosecutor's burden of proof by stating she would have to hear "both sides" to reach a decision.

Carrillo v. People, 974 P.2d 478 (Colo. 1999). Defendant exercised a challenge for cause against a prospective juror who worked with the murder victim's father. Even though the prospective juror agreed he would not want himself on the jury if he were defendant and stated he had some preconceived ideas about the case, the trial court did not abuse its discretion in denying defendant's challenge for cause where the prospective juror also stated that he could listen to the evidence and decide the case based on that evidence.

People v. Vecchiarelli-McLaughlin, 984 P.2d 72 (Colo. 1999). Reversing the Court of Appeals' decision, the Colorado Supreme Court held that the trial court did not abuse its discretion in denying a challenge for cause to a prospective juror who stated he "believed a person who is not guilty should testify in his or her own defense" because, later, the prospective juror confirmed that he would not be biased and, if defendant did not testify, he would not consider that during deliberations.

People v. Gulyas, 512 P.3d 1049 (Colo. App. 2022). Defendant was convicted of sexual assault on a child, and the Court of Appeals concluded that the trial court abused its discretion by denying a challenge for cause to a juror who acknowledged a bias in favor of child witnesses and was not rehabilitated by the prosecution or the court.

People v. Clark, 512 P.3d 1074 (Colo. App. 2022), aff'd by *Clark v. People*, 553 P.3d 215 (Colo., 2024), cert. to U.S. Supreme Court granted**.** This case involves a Black man convicted of sexually assaulting a white woman. In this context, the Court of Appeals concluded that the trial court erred in refusing to dismiss the challenged juror who expressed racial bias but held that because the prospective juror was later removed and since no other biased juror sat on the panel, the error was ultimately harmless and did not warrant automatic reversal.

People v. Chavez, 313 P.3d 594 (Colo. App. 2011) (*rev'd on other grounds*). Trial court abused its discretion in sexual assault prosecution by denying challenges for cause to prospective jurors who indicated that evidence that defendant had shot someone other than the alleged sexual assault victim would color their opinions and ease the prosecution's burden. In the full context of the *voir dire*, the juror's responses that someone who had acted violently in the past would be more likely

to act criminally again showed that the juror had not been sufficiently rehabilitated and should have been removed for cause.

People v. Collins, 250 P.3d 668 (Colo. App. 2010). Trial court did not abuse its discretion in denying challenge for cause to a juror where defendant alleged juror's answers indicated that she would give in to other jurors. The juror stated that she would tell the other jurors if she "saw it a different way" and would advise the other jurors of her opinion, and she never indicated she could not render a fair and impartial verdict based on the evidence presented and the applicable law.

People v. Rabes, 258 P.3d 937 (Colo. App. 2010). In prosecution for sexual exploitation of a child, the trial court did not abuse its discretion in denying a challenge for case to juror who conceded a danger that he would convict based on his reaction to explicit photos. The juror also affirmatively stated that he "would like to think" he was capable of separating his distaste from his duty as a juror. Trial court did not abuse its discretion in denying challenge for cause to juror who stated that unless the authenticity of the images was placed in issue, he would not assume that the evidence presented by the People was fake. That statement did not indicate a misunderstanding of the burden of proof.

People v. Hancock, 220 P.3d 1015 (Colo. App. 2009). Trial court abused its discretion in denying defense's challenge for cause because the court neither rehabilitated the juror nor explained why the juror's statements of unwillingness or inability to follow the court's instructions regarding the presumption of innocence and the prosecution's burden of proof should be disregarded.

People v. Phillips, 219 P.3d 798 (Colo. App. 2009). Trial court properly denied challenge for cause where the juror indicated that, although he might have concerns that the defendant had something to hide if the defendant chose not to testify, he wished to be fair and impartial and would be able to follow the law.

People v. Mondragon, 217 P.3d 936 (Colo. App. 2009) not abuse of discretion to deny defendant's challenge for cause to a prospective juror who had an aversion to blood because the prospective juror stated he could consider the evidence and would not be so uncomfortable by it that he would lose focus.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). Prospective juror's association with a victim advocacy group was not enough to remove her for cause where: (1) she was not familiar with the case; (2) she did not have a working relationship with law enforcement; (3) her current involvement with the agency was administrative; and (4) she did not participate in criminal prosecutions on behalf of the victims.

People v. Wilson, 114 P.3d 19 (Colo. App. 2004). A trial court may not deny a defendant's challenge for cause to a prospective juror who has expressed bias solely because the court believes that the juror is seeking to avoid jury service. The court must either excuse the juror or ask for and receive assurance from the juror that he is willing and able to render a fair and impartial verdict.

People v. Hoskay, 87 P.3d 194 (Colo. App. 2003). Although juror initially expressed a religious objection to homosexuality and stated that, if she were the defendant, she would be concerned about having a person such as herself on the jury, the trial court properly denied the challenge for cause because juror stated she would base her verdict solely on the evidence.

People v. Medina, 72 P.3d 405 (Colo. App. 2003). Trial court did not abuse its discretion in denying challenge for cause to a prospective juror who attended same church as victim's family and who initially stated that he had formed an opinion about the defendant's guilt. Upon additional questioning, juror changed his answer and said he had not formed an opinion about defendant's guilt and agreed that defendant was presumed innocent until proven guilty.

People v. Pigford, 17 P.3d 172 (Colo. App. 2000). The court has discretion to determine if juror can adequately perform when challenge for cause is based on disability, and there was no indication that juror with hearing problem could not perform his duties.

People v. Martinez, 18 P.3d 831 (Colo. App. 2000). It was not abuse of discretion to deny defendant's challenge for cause to a prospective juror who initially said "if the complaining witness did not appear at trial, she would presume it would be because the witness was afraid of defendant" because answers to further inquiry did not demonstrate bias and showed she would follow the law.

People v. Luman, 994 P.2d 432 (Colo. App. 1999). The trial court abused its discretion in denying challenge where prospective juror indicated her "personal, professional, and family history and experience would make it difficult, if not impossible, to view the evidence . . . in an objective and unbiased manner," and nothing in record to support trial court's finding that juror eventually showed she could be fair and impartial.

People v. Fears, 962 P.2d 272 (Colo. App. 1997). During trial, a juror informed the court that he had heard that a prior mistrial occurred when jury was threatened and intimidated; no abuse of discretion to deny challenge for cause where juror did not consider information reliable, did not tell other jurors, and insisted he would be impartial, and court explained basis for prior mistrial, that there were no threats or intimidation to jury, and that mistrial was not defendant's fault.

People v. Dooley, 944 P.2d 590 (Colo. App. 1997). The defendant challenged two prospective jurors who expressed difficulty given nature of crimes and "negative notions" concerning defendant based on prior telephone contact with him; no abuse of discretion by denying those challenges where, after court's instructions and questions, both indicated they could be impartial and follow instructions.

D. Waiver of Challenges for Cause

Unless a party is aware that his initial opportunity to challenge will be his only opportunity to do so, a party need not make his objections to a juror's qualifications and competency when the court initially questions the juror. *Ma v. People*, 121 P.3d 205 (Colo. 2005). To preserve the issue for

appeal, a party needs to raise the objection before the jurors are sworn, otherwise it is waived. Crim. P. 24(b)(2). Defense counsel must "challenge an allegedly biased juror to preserve the issue for appellate review." *People v. Abu-Nantambu-El*, 454 P.3d 1044 (Colo. 2019).

A party may waive a challenge for cause if he does not use reasonable diligence during jury selection to determine whether grounds exist. *Richardson v. People*, 481 P.3d 1 (Colo. 2020); *Ma*, 121 P.3d at 209; Crim. P. 24(b)(2). Counsel is reasonably diligent if the opportunity to question a prospective juror is adequately taken. *Id.*

While "the erroneous seating of an impliedly biased juror is . . . structural error," defense counsel must nevertheless challenge an allegedly biased juror as a prerequisite to appellate review. *Richardson v. People*, 481 P.3d 1, 6 (Colo. 2020).

1. Examples of Waiver:

People v. Vergari, 521 P.3d 391 (Colo. App. 2022). The division holds that a defendant waives a claim of error arising from the denial of a challenge for cause to a juror when the defendant declines to excuse that juror with a peremptory challenge and does not exhaust their peremptory challenges.

Richardson v. People, 481 P.3d 1 (Colo. 2020). Defense counsel waived challenge to juror on basis that juror was trial judge's wife where counsel did not challenge juror for cause, ask juror any questions, or attempt to remove juror by peremptory challenge.

People v. Cevallos-Acosta, 140 P.3d 116 (Colo. App. 2005). The defendant abandoned his challenge for cause to a prospective juror by failing to renew his claim that the juror was an employee of a public law enforcement agency and request a ruling before exercising a peremptory challenge to excuse her.

People v. Crespin, 635 P.2d 918 (Colo. App. 1981). The defendant waived his objection to a prospective juror where his counsel failed to use reasonable diligence to question the juror during *voir dire* and failed to challenge the juror for cause.

People v. Lewis, 506 P.2d 125 (Colo. 1973). The defendant waived a statutory objection to a juror who had previously been convicted of a felony, when he did not use reasonable diligence to question the jurors during *voir dire* about their criminal records and when he waiting to bring the information to the court's attention until *after* the verdict had been rendered, gambling on the outcome of the trial.

E. Examples Where Denials of Challenges for Cause were Reversed Because Jurors Demonstrated Bias and Were not Rehabilitated

Morgan v. People, 624 P.2d 1331 (Colo. 1981). Although juror indicated he could "go along" with the presumption of innocence and the right to remain silent, he repeatedly indicated that he would have difficulty applying the principle that the burden of proof rests solely on the prosecution.

Nailor v. People, 612 P.2d 79 (Colo. 1980). It was error to deny challenge for cause where juror's "final position was that there was a serious doubt in her own mind about her ability to be fair and impartial."

People v. Wilson, 114 P.3d 19 (Colo. App. 2004). It was error to deny challenge for cause where juror stated that defendant had "a strike against him" because of his alcohol abuse.

People v. Luman, 994 P.2d 432 (Colo. App. 1999). Where juror said her history would make it difficult to be fair in case involving sexual assault on a child, and she only reluctantly and equivocally agreed that her empathy for the victim would not work against defendant, it was error to deny the challenge for cause.

People v. Blackmer, 888 P.2d 343 (Colo. App. 1994). Where juror indicated she would have difficulty applying principles of law unless she heard the defendant testify, it was error to deny the challenge for cause.

People v. Zurenko, 833 P.2d 794 (Colo. App. 1991). Where juror indicated significant bias in favor of a prosecution witness, and no attempt was made to determine whether she would be capable of rendering a verdict based on the law and evidence, it was error to deny the challenge for cause.

19.3 PEREMPTORY CHALLENGES

A. Peremptory Challenges Request that a Juror be Excused Without Need for Justification

The number of peremptory challenges is specified in Crim. P. 24 (d) and § 16-10-104 as follows:

Type of offense	Number Peremptories Per Party
Petty Offense and Misdemeanor	3
Each additional defendant	+1 not to exceed 10
Felony	5
Each additional defendant	+2 not to exceed 15
Each additional defendant	+3 not to exceed 20
Additional peremptories	For good cause shown Crim. P. Rule 24(3)

B. Discriminatory Use of Peremptory Challenges

19. JURY SELECTION

1. Three-step *Batson* analysis: *Batson v. Kentucky,* 476 U.S. 79 (1986)

(1) The objecting party must make a *prima facie* showing that the peremptory strike was based on the prospective juror's race or gender:

- To raise the necessary inference of purposeful discrimination, the objecting party may rely on all relevant circumstances.
- One example is a pattern of strikes against a cognizable group, but a pattern is not necessary to make a *prima facie* showing. *People v. Owens*, 544 P.3d 1202 (Colo. 2024) (holding the Constitution forbids striking even a single prospective juror for a discriminatory purpose).
- As long as totality of the relevant circumstances give rise to an inference of purposeful discrimination, the objecting party has satisfied the step-one burden.

(2) If the objecting party establishes a *prima facie* case, then the striking party must provide a non-discriminatory explanation for the strike. *See People v. Ojeda*, 503 P.3d 856 (Colo. 2022) (holding that a prosecutor's race-neutral explanation "need not rise to the level justifying exercise of a challenge for cause.").

- The reason need not be persuasive, and the court must accept the reason as true. *See Hernandez v. New York*, 500 U.S. 352 (1991) (holding that a neutral explanation is "an explanation based on something other than the race of the juror.").
- The trial court may not, however, provide "its own plausible reasons behind the peremptory strikes at issue." *Valdez v. People*, 966 P.2d 587 (Colo. 1998).
- If a discriminatory purpose is inherent in the proponent's explanation, the reason offered cannot be deemed race-neutral. *See Purkett v. Elem*, 514 U.S. 765 (1995).

(3) After the objecting party has been given the opportunity to rebut the striking party's non-discriminatory explanation, the trial court must decide whether the objecting party has established purposeful discrimination. A peremptory strike is purposely discriminatory for purposes of step three if the strike was motivated in substantial part by discriminatory intent. The persuasiveness of the proffered justification becomes pertinent at this step. Other evidence that may be relevant at this step includes:

- a prosecutor's use of peremptory strikes against Black, as compared to white, prospective jurors;
- disparate questioning and investigation of Black and white jurors in a case;
- side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were not; and
- misrepresentations of the record in defending strikes during a Batson hearing.

See People v. Owens, 544 P.3d 1202 (Colo. 2024).

2. Cases extending *Batson*:

Georgia v. McCollum, 505 U.S. 42 (1992). Prosecutors can assert *Batson* to prevent defendants from exercising peremptory strikes based on purposeful discrimination; the three-step analysis applies.

J.E.B. v. Alabama, 511 U.S. 127 (1994). This case extends *Batson* to prevent purposeful discrimination based on gender; the three-step analysis applies. Neither the prosecution nor the defense can exercise a peremptory strike based solely on a prospective juror's gender.

3. Cases applying *Batson*:

People v. Owens, 544 P.3d 1202 (Colo. 2024). The prosecution's use of a peremptory strike to excuse a Black prospective juror who expressed views about the death penalty and his distrust of police was not purposefully discriminatory under *Batson*, nor was the prosecution's use of a peremptory strike to excuse a Black prospective juror who initially stated that she could never impose death penalty due to her religious background.

People v. Madrid, 526 P.3d 185 (Colo. 2023). When a party has been provided with an adequate opportunity to present race-neutral justifications for a challenged peremptory strike under the second step of *Batson*, that party is later barred from introducing new race-neutral justifications on remand.

People v. Ojeda, 503 P.3d 856 (Colo. 2022). The trial court erred in denying the defendant's *Batson* challenge. Because the prosecution offered an explicitly race-based reason for striking Juror RP, it did not meet its burden of providing a race-neutral explanation for the strike, as required under step two of *Batson*. Additionally, the trial court improperly provided its own race-neutral reasons to justify the strike.

People v. Beauvais, 393 P.3d 509 (Colo. 2017). A trial court need not make express credibility findings as to demeanor-based reasons for striking prospective jurors. And appellate courts may conduct comparative juror analyses despite an objecting party's failure to argue a comparison to the trial court, but *only* where the record facilitates a comparison of whether the jurors are similarly situated. An empaneled juror is similarly situated to a dismissed potential juror for the purposes of an appellate court's comparative juror analysis if the empaneled juror shares the same characteristics for which the striking party dismissed the potential juror.

People v. Toro-Ospino, 535 P.3d 132 (Colo. App. 2023). The trial court did not clearly err by denying the defendant's *Batson* challenge to two prospective jurors, where the prosecutor provided race neutral reasons for the challenges: prospective juror R did not trust police, and prospective juror V believed it was appropriate to use a gun in defense of her children, which was similar to the fact pattern in the defendant's case.

People v. Romero, 535 P.3d 1010 (Colo. App. 2022). The trial court's ruling, denying the defendant's *Batson* challenge was clear error because (1) there was nothing in the record supporting the trial court's decision to credit the prosecution's subjective assessment that the juror appeared disinterested, not even an identification of the juror's behavior that led the prosecution

to believe he was disinterested; and (2) other parts of the record tended to undermine the credibility of the prosecution's assessment that the juror appeared disinterested.

People v. Johnson, 549 P.3d 985 (Colo., 2024). Black prospective juror's perceived distrust of law enforcement was a valid, race-neutral explanation for prosecution's use of peremptory challenge.

People v. Valera-Castillo, 497 P.3d 24 (Colo. App. 2021). An objection to a peremptory challenge based on *Batson* must be made before the peremptorily struck jurors are released from jury service because this allows the trial court to provide a meaningful remedy if a *Batson* violation is sustained. Here, the defendant waited until after the struck juror was dismissed to raise a *Batson* challenge; this was not timely. However, the trial court should not release peremptorily struck jurors until all peremptory strikes are exercised because reseating is the only effective way to protect the equal protection rights of all parties involved.

People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010). Comparison of Hispanic prospective juror, who was struck from jury, to unchallenged white jurors, did not indicate pretext or a discriminatory intent by the prosecutor. The prosecutor exercised a peremptory strike against the minority juror because she worked at an alcohol and drug rehabilitation center, stating that "she may be sympathetic to people that are on drugs," and the record did not indicate that any of the non-minority jurors worked with people who use drugs, and at least one of them worked with young children.

4. Prohibiting Discrimination under § 13-71-104

Section 13-71-104 prohibits discrimination by exemption or exclusion based upon "race, color, religion, sex, sexual orientation, marital status, national original, ancestry, economic status, or occupation." Courts must "strictly enforce the provisions" of the UJSSA. § 13-71-104(4); *People v. Abu-Nantambu-El*, 454 P.3d 1044 (Colo. 2019).

The *Batson* analysis is applicable to discrimination in violation of the statute. *Cerrone v. People,* 900 P.2d 45 (Colo. 1995) ("Because the statute requires a defendant to establish purposeful discrimination, a *Batson* analysis is the appropriate standard for evaluating violations of § 13-71-103"). In *Cerrone*, the court found that the state's systematic exclusion of hourly wage earners was most likely motivated by concerns of administrative convenience and an intent to protect hourly wage earners from economic hardship. Despite their well-intentioned motives, the state rejected jurors "on account of" their economic status. However, the violation did not require reversal of the defendant's conviction as there was no indication that the defendants suffered any prejudice.

a. Discrimination based on a juror's disability

A person with a physical disability is obligated to serve as a juror subject to three limited statutory exceptions. § 13-71-104(3)(b).

> First, a person shall not serve if he or she is disqualified based on an "[i]nability, by reason of a physical or mental disability, to render satisfactory juror service." § 13-71-105(2)(c)

(providing as a guideline that "[a] person shall be capable of rendering satisfactory juror service if the person is able to perform a sedentary job requiring close attention for three consecutive business days for six hours per day, with short breaks").

Second, a person shall not serve if jury service would cause him or her "undue or extreme physical hardship." § 13-71-119.5(2) (limiting "undue or extreme physical hardship" to circumstances in which the juror would suffer physical hardship possibly resulting in illness or disease).

Third, a person shall not serve if "the court finds that such person's disability prevents the person from performing the duties and responsibilities of a juror." § 13-71-104(3)(b)(II).

When there is a challenge based on a physical disability, a trial court has discretion to determine whether the challenged juror can adequately perform, and a reviewing court will not disturb the court's determination if it finds support in the record. *People v. Coughlin*, 304 P.3d 575 (Colo. App. 2011).

* * *

2025 Contributions by Rebecca Adams

Senior Deputy District Attorney

1st Judicial District

CHAPTER 20

MISTRIAL

20. MISTRIAL

20.1 GENERAL PRINCIPLES

A. Granting or Denying Mistrial is within the Discretion of the Trial Court

Virtually every case which considers alleged error on the basis of the granting or denying a mistrial articulates the basic proposition that the declaration of a mistrial is "the most drastic of remedies," to be invoked only when the prejudice to the defendant is too substantial to be cured by other means. *See* *People v. Collins,* 730 P.2d 293 (Colo. 1986); *People v. Pagan*, 165 P.3d 724 (Colo. App. 2006).

The determination of whether to invoke such a remedy is a matter within the sound discretion of the trial court, which will not be overturned absent a gross abuse of discretion which prejudices the defendant. *See, e.g.*, *People v. Abbott,* 690 P.2d 1263 (Colo. 1984); *People v. Schwartz,* 678 P.2d 1000 (Colo. 1984). Further, a mistrial is only warranted where the prejudice to the accused is too substantial to be remedied by other means. *People v. Abbott,* 690 P.2d 1263 (Colo. 1984).

1. Case-by-case determination

Brown v. People, 291 P.2d 680 (Colo. 1955). In rejecting defendant's claim of jeopardy on the basis that the trial court was not "legally justified" in declaring a mistrial because of an irregularity in jury selection, the Colorado Supreme Court stated: "The elements entering into the question of when a trial court is justified in declaring a mistrial are not so specific and circumscribed that the issue may be decided as a matter of law nor are there established standards in adequate detail to enable the court to do so. Nor do the decisions of the appellate courts of this jurisdiction, nor of others, require such exacting fineness, they being content to leave the matter to the sound discretion of the trial court. Its determination will not be disturbed on review unless it clearly appears that its discretion has been abused and, as held by this Court, with resulting prejudice to petitioner, or under such circumstances that it may be said that it amounts to a denial of justice."

2. Mistrial incident is viewed in the context of the record as a whole

Valley v. People, 441 P.2d 14 (Colo. 1968). The Colorado Supreme Court concluded that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial based on a prosecution witness' volunteered testimony that he showed a number of "**mug shots**" to a witness who identified the defendant's picture, noting that "when the entire record is reviewed and considered as a whole, this incident is really only incidental and does not appear to be of any great moment."

3. Trial court is in the best position to assess the impact of any irregularity on the jury

People v. Knapp, 505 P.2d 7 (Colo. 1973). In holding that the trial court did not abuse its discretion in denying the defendant's motion for mistrial based upon **improper questions by the prosecutor**, the Court acknowledged that "[i]n considering whether a motion for a mistrial should be granted, we recognize that the trial judge is best qualified to assess the impact of the remarks or the conduct on the jury."

Hafer v. People, 492 P.2d 847 (Colo. 1972). No abuse of discretion in denying motion for mistrial based on **applause from courtroom audience** at one point in trial, inasmuch as trial judge was in best position to judge effect the impropriety may have had on jury.

People v. McGuire, 751 P.2d 1011 (Colo. App. 1987). Appellate court would not "second guess" trial court's denial of motion for mistrial based upon a **disruption by victim** during defense counsel's closing argument.

B. Standards of Review—Generally

Although the Colorado Supreme Court has been less than consistent in articulating standards by which the trial court should exercise its discretion in determining whether to declare a mistrial, *see, e.g.*, *People v. Baca*, 562 P.2d 411 (Colo. 1977), the following standards of review generally apply:

1. Denial of defense motion

When a defendant asserts on appeal that the trial court abused its discretion in refusing to declare a mistrial, the commonly stated standard of review is whether the prejudice was so substantial that the effect on the jury could not be remedied by anything less than a mistrial. *See, e.g.*, *Hamrick v. People,* 624 P.2d 1320 (Colo. 1981); *People v. Goff*, 530 P.2d 514 (Colo. 1974); *People v. Saathoff*, 837 P.2d 239 (Colo. App. 1992). Typically, the appellate courts analyze such issues with an eye toward whether the alleged error drew a contemporaneous objection and whether such error was cured, or could have been cured, by a cautionary instruction. *People v. Thornton*, 251 P.3d 1147 (Colo. App. 2010); *People v. Tillery*, 231 P.3d 36 (Colo. App. 2009).

2. Mistrial declared over defense objection

When a mistrial is declared over the objection of a defendant who subsequently claims that retrial is barred by the prohibition against double jeopardy, the standard is whether the mistrial was legally justified as a matter of "manifest necessity." *See, e.g.*, *People v. Castro*, 657 P.2d 932 (Colo. 1983) (rev'd on other grounds); *Maes v. District Court*, 503 P.2d 621 (Colo. 1972); *People v. Baca*, 562 P.2d 411 (Colo. 1977). This standard prohibits a trial court from declaring a mistrial based on a "whimsical notion or frivolous impulse." *People v. Berreth*, 13 P.3d 1214 (Colo. 2000). The basis for declaring a mistrial must be "substantial and real." *Id.*

People v. Jackson, 474 P.3d 60 (Colo. App. 2018), a trial court granted the prosecution's request for a mistrial over the defendant's objection, after the **defendant failed to provide notice of an alibi defense**. The defendant claimed the trial court failed to consider less drastic alternatives. The Court found no abuse of discretion, because the trial court carefully considered the parties' arguments and its available options, and because it was in the best position to assess the prejudicial impact. "To deprive trial courts of their ability to declare mistrials in circumstances such as these would cripple their ability to control and sanction counsel's conduct in their courtroom."

20. MISTRIAL

Doumbouya v. Cnty. Ct. of City & Cnty. of Denver, 224 P.3d 425, 426 (Colo. App. 2009). A trial court granted a mistrial during cross-examination of an alleged victim in a misdemeanor assault case, over the defendant's objections. The defendant contended that retrial would violate double jeopardy. The Court of Appeals reversed and remanded for entry of an order precluding retrial on the basis that the mistrial was not manifestly necessary. Because the cross-examination question that prompted the prosecution's request for mistrial was not improper, the prosecution failed to carry its heavy burden of showing manifest necessity for the retrial.

20.2 DEFENDANT'S MOTION FOR MISTRIAL

A. Generally

A mistrial is a drastic remedy and is warranted only if the prejudice to the accused it too great to be remedied by other means. *See People v. Abbott,* 690 P.2d 1263 (Colo. 1984); *People v. Anderson,* 518 P.2d 828, 830 (1974). The trial court has broad discretion to grant or deny a mistrial, and its decision will not be disturbed on appeal absent gross abuse of discretion and prejudice to the defendant. *People v. Hodges,* 624 P.2d 1308, 1311 (Colo. 1981). A mistrial is only warranted where the prejudice to the accused is too substantial to be remedied by other means. *People v. Smith*, 620 P.2d 232 (Colo. 1980).

B. Illustrative Cases

1. Testimony as to other criminal conduct

People v. Salas, 405 P.3d 446 (Colo. App. 2017). Trial court did not abuse its discretion in denying defendant's motion for a mistrial in trial for sexual assault on a child by one in a position of trust and sexual assault on a child, pattern of abuse, based on witness' comment regarding court proceedings and an alcohol problem. **Grandmother's comment regarding "court proceedings on an alcohol problem"** referred ambiguously to possible past criminality. It was a single, fleeting, nonresponsive comment. It did not necessarily reference any criminal behavior on the part of Salas, since "court proceedings" on an "alcohol problem" could also refer to civil and administrative proceedings involving alcohol consumption. The possibility that a reasonable juror inferred Salas' guilt based on grandmother's reference to an "alcohol problem" is highly attenuated. If such a comment had an impact on the jury, it was not "so prejudicial that, but for its exposure, the jury might not have found against the defendant." Further, the trial court immediately instructed the jurors to disregard grandmother's comment, and, absent exceptional circumstances, we presume that the jury followed such an instruction.

People v. Johnson, 446 P.3d 826 (Colo. App. 2017). Trial court did not abuse its discretion by denying defendant's motion for mistrial, which alleged that defendant was unfairly prejudiced by **reference to defendant's acts of domestic violence** made by prosecution's witness during direct examination. During the prosecution's direct examination of the witness, the prosecutor asked her why Johnson and his girlfriend "decided not to keep your company anymore?" The witness started

to respond, stating, "[Johnson] was beating [his girlfriend], and . . . ." Johnson's counsel immediately objected and moved for a mistrial. The trial court denied the mistrial request but instructed the jury to "disregard the witness's last statement and you may not consider her last statement as evidence for any purpose." On this record, the Court of Appeals concluded that the trial court did not abuse its discretion. The statement was fleeting and no details were discussed. There is no indication in the record that the prosecutor intentionally elicited this information. Rather, the prosecutor explained to the court that he had instructed the witness not to mention prior domestic violence.

People v. Helms, 396 P.3d 1133 (Colo. App. 2016). Sergeant's testimony that defendant had admitted being investigated for sexual assault of child 20 to 25 years ago, which **evidence prosecutor had stated would not be admitted**, did not warrant mistrial on charges for internet child exploitation. Testimony was in response to the vague question of whether the sergeant had "come across any real victims in this time period." There was no indication that the sergeant was purposefully trying to include defendant's prior bad act in his testimony. It was defense counsel, not prosecutor, who elicited the testimony. The trial court offered to give a curative instruction, and it was unlikely that testimony was overly prejudicial to defendant such that it substantially affected verdict, given the weight of admissible evidence of guilt.

People ex rel. J.G., 409 P.3d 403 (Colo. App. 2014) (rev'd on other grounds). Court found no abuse of discretion where trial court (1) allowed a county attorney to use a 2010 misdemeanor domestic violence charge (ultimately reversed as part of a deferred sentence) to impeach her, and (2) denied a motion for mistrial on that basis. "The decision to grant or deny a motion for a mistrial is directed to the sound discretion of the trial court, and the court's decision will not be disturbed absent a clear showing of an abuse of discretion and prejudice to the moving party. A reviewing court may conclude that the trial court abused its discretion only if the trial court's ruling is manifestly arbitrary, unreasonable, or unfair." Here, the county attorney stated that the evidence "goes to the environment." The defense attorney objected on the ground that the evidence sought was not relevant and that the prejudice that would result from admitting it outweighed any probative value that it might have. The court overruled the objection. In the absence of more specific findings by the trial court, no abuse of discretion could be determined.

People v. Lahr, 316 P.3d 74 (Colo. App. 2013). Trial court did not abuse its discretion by denying defendant's motion for a new trial, after **the trial court read the words "previous offender" on a verdict form**, then immediately told the jurors that the form was a mistake and to hand their copies in. A mere reference to a defendant's past criminal act is not per se prejudicial, and an ambiguous reference to evidence of a defendant's criminality does not necessitate a new trial. Here, the trial court's reference to the defendant's possible criminal past was fleeting. And it was ambiguous because it did not name a crime. Further, under the circumstances, the jurors may have considered the reference a mere clerical error. "[The reference was clearly not so prejudicial that any prejudice derived therefrom could not have been remedied by the instruction. And even if the

court did not so instruct, we do not view the fleeting, ambiguous reference as so prejudicial that the drastic remedy of declaring a mistrial was required."

People v. Reed, 338 P.3d 364 (Colo. App. 2013). The trial court did not abuse its discretion in denying the defendant's motion for a new trial on the basis of prosecutorial misconduct. During a bench conference after a police officer's testimony, defense counsel moved for a mistrial. The trial court learned that the **prosecutor had failed to advise the officer not to mention the defendant's criminal history, including his probation or parole status.** The prosecutor apologized for delegating that responsibility to a victim's advocate, who did not understand that she had to give the advisement to expert witnesses as well, including the testifying officers. The trial court did not decide whether the failure to advise the office was prosecutorial misconduct. Regardless, the testimony was not sufficiently prejudicial to warrant a new trial. Any prejudice could have been remedied by a curative instruction or by striking the improper statement. Moreover, the trial court instructed the jury, after jury selection and in its first written jury instruction, that the jury should base its verdict only on the evidence admitted at trial, and not consider answers provided by witnesses prior to a sustained objection. "We presume the jury followed the court's instructions."

People v. Krueger, 296 P.3d 294 (Colo. App. 2012). Trial court did not abuse its discretion by denying a defendant's motion for a mistrial based on the **defendant's wife's testimony that she had met with him in jail.** On direct examination, the prosecutor asked defendant's wife whether she "had several meetings with the defendant prior to your testimony today recently." She replied, "No. I brought my kids to see him for the first time in six months because the jail won't let them see three kids." The wife did not refer to the defendant's incarceration again. The defendant moved for a mistrial, asserting that the prosecutor had elicited his wife's testimony about visiting him in jail because the prosecutor had asked about specific dates on which his wife could only have met with him at the jail. The court denied the motion, ruling that, although the prosecutor could have worded the questions differently, she had not elicited the testimony. The defendant's wife made only a single, brief reference to having met with defendant in jail, and the defendant declined the court's later offer to give a curative instruction.

People v. Williams, 297 P.3d 1011 (Colo. App. 2012). Trial court did not err in denying defendant's motion for mistrial, wherein a **witness made a statement that the defendant threatened him**. A single remark about a defendant's past criminality does not necessitate a mistrial per se. "Even assuming, without deciding, the statement was subject to 404(b) and was inadmissible, we conclude the statement was not substantially prejudicial because it was cumulative of other admissible testimony from witnesses who feared retaliation from Williams for testifying at his trial."

People v. Vigil, 718 P.2d 496 (Colo. 1986). In response to the prosecutor's direct examination concerning the results of a search of the defendant's home, **a police officer stated that an "item of contraband" had been recovered**. In upholding the denial of the defendant's motion for mistrial, the Colorado Supreme Court stated that when inadmissible evidence of other crimes is

elicited before the jury, the **factors** to be considered by the trial court in exercising its discretion to declare a mistrial include the **nature** of the inadmissible evidence, the **weight of admissible evidence of guilt**, and the **value of a cautionary instruction**. The Court concluded that the potential impact of the reference to "contraband" was fleeting and minimal, the evidence of the defendant's guilt was substantial, and there was little reason to suspect that the comment influenced the jury's determination of guilt. The Court also recognized that the trial court offered to instruct the jury to disregard the comment, and that the offer was declined by the defendant.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). A mistrial was not required where a **police officer testified that the defendant had an extensive criminal history**, and the trial court struck the testimony. The mere reference to an accused's past criminal act is not *per se* prejudicial. The trial court remedied any possible prejudice by striking the testimony.

People v. St. James, 75 P.3d 1122 (Colo. App. 2002). Trial court properly denied defense's motion for a mistrial based on **testimony elicited from the prosecution that the defendant was involved in a "residential placement" program**. "[B]ecause residential placement programs exist for any number of legitimate treatment purposes, the challenged evidence would not have required, or even naturally led, the jury to infer that defendant was in custody or guilty of committing prior bad acts."

People v. Abbott, 690 P.2d 1263 (Colo. 1984). Upon being shown a number of photographs which included the defendant, and in response to the prosecutor's inquiry of "Who were the photographs of? What type of people," a witness responded, "Criminals." In upholding the denial of the defendant's motion for mistrial, the Court recognized that the mere reference to an accused's past criminal act is not *per se* prejudicial, and stated: "The defendant did not object to the answer at the time it was given, did not move to strike the answer, and did not request the court to instruct the jury to disregard it. When an accused believes he is prejudiced by an unresponsive answer, he must take at least one of these steps." The Court concluded that denial of the motion for mistrial was within the trial court's discretion given that the remark was isolated and unsolicited, no details of any past crime were discussed, and the statement was in no way highlighted before the jury.

People v. Lafferty, 9 P.3d 1132 (Colo. App. 1999). Mistrial not required where victim's **testimony that defendant traded places with her during traffic stop to avoid citation** did not focus on defendant's acts or statements, but established that victim had lied to protect defendant.

People v. Saathoff, 837 P.2d 239 (Colo. App. 1992). Admission of **testimony that defendant had offered to give marihuana to people at a bar in return for buying him a beer** did not warrant drastic remedy of mistrial, particularly in absence of contemporaneous objection and where defendant refused an offer for cautionary instruction.

People v. Haynie, 826 P.2d 371 (Colo. App. 1991). Mistrial not required due to **defendant's wife's response that she met defendant in jail.** Trial court found response was not deliberately elicited by prosecutor and gave cautionary instruction which jury is presumed to have followed.

Kostal v. People, 414 P.2d 123 (Colo. 1966). Trial court did not abuse its discretion in refusing to declare mistrial after **police officer testified that defendant told him he acquired a gun from a shop in Los Angeles after breaking a window**. The jury was quickly cautioned to disregard comment and comment itself was of no great import in face of strong evidence showing defendant's guilt.

People v. Salcedo, 985 P.2d 7 (Colo. App. 1998) (*rev'd on other grounds*). Mistrial not required after **detective testified that five-dollar bill found on defendant was counterfeit** where comment was not solicited by prosecutor, was peripheral to issues of case, and was addressed by appropriate curative instruction.

People v. Jones, 851 P.2d 247 (Colo. App. 1993). Mistrial not required in sexual assault on child case following **examining physician's reference to second potential victim** where reference was fleeting, focus of testimony was upon physical findings and description of events regarding victim, and trial court supplied jury with curative instruction.

People v. Salazar, 920 P.2d 893 (Colo. App. 1996). It was not an abuse of discretion to deny mistrial after **one witness incorrectly mentioned that defendant had been in jail and another witness suggested he had been involved in prior domestic assault upon victim**. The first witness made only a passing remark to other criminality and the second witness, while making numerous allusions to another crime, mentioned an incident that was already part of the jury's knowledge. The prosecutor did not deliberately elicit either improper statement, and each was followed by a curative instruction.

People v. Peoples, 8 P.3d 577 (Colo. App. 2000). **Witness' reference to defendant's prior assaults** was not so prejudicial that trial court should have *sua sponte* declared mistrial, and case manager's reference to witness' safety concerns, either alone or in combination with witness' statement, did not require drastic remedy of mistrial.

People v. Scott, 10 P.3d 686 (Colo. App. 2000). Witness' testimony that **victim remarked he was tired of defendant "doing this"** did not require mistrial where statement was ambiguous, did not explicitly refer to any prior assault, and was not deliberately elicited.

People v. Lowe, 969 P.2d 746 (Colo. App. 1998). To rebut the inference that the weapon used to kill the horse may have been stolen from defendant's residence, the prosecutor asked the detective whether, during 1995, the defendant reported any thefts. The detective answered that he had not, then added that the name "Lowe" appeared in the sheriff's department records 26 times. The trial court did not err in denying defendant's motion for mistrial where the detective did not testify regarding any criminal activity by defendant, the remark was unsolicited and the prosecutor stopped the witness from completing the statement, and the court instructed the jury to disregard the statement and not speculate as to its meaning.

People v. Blackmon, 20 P.3d 1215 (Colo. App. 2000). On cross-examination, defense counsel asked officer if he knew at time of arrest that defendant limped and had limited use of right side

of his body; prosecutor asked officer on redirect **if he knew of defendant's disability before the night in question**, to which officer answered, "Yes." Mistrial not required because prosecutor's question served to clarify issue raised by defense inquiry and officer's response did not indicate any prior contacts with defendant occurred in connection with criminal activities.

People v. Laurson, 15 P.3d 791 (Colo. App. 2000). The trial court properly denied mistrial request based on **witness' statement that defendant had case pending against him at time of shootings**. The remark was only one isolated reference and jurors already knew defendant previously engaged in criminal activity.

People v. Griffin, 985 P.2d 15 (Colo. App. 1998). It was not abuse of discretion to deny mistrial request based on **witness' allusion to fact that defendant was "in detention."**

People v. Fears, 962 P.2d 272 (Colo. App. 1997). Witness's inadvertent statement that **there had been earlier trial** did not require mistrial.

But see *People v. Goldsberry*, 509 P.2d 801 (Colo. 1973). The trial court **abused its discretion** in denying the defendant's motion for mistrial where **the prosecutor knowingly elicited from a prosecution witness that the defendant, charged with receiving stolen property, planned on going to Texas to make an investment in drugs with the proceeds from the stolen property**. The Court stated that, despite the trial court's cautionary instruction to disregard the testimony, it was conceivable that, but for this testimony, the jury may not have found the defendant guilty: "In a case like this where the evidence of guilt is not overwhelming and proof of at least one of the essential elements of the crime charged is entirely circumstantial, the trial court's cautionary instruction to disregard [the testimony] will not suffice."

Salas v. People, 493 P.2d 1356 (Colo. 1972). The defendant's initial conviction for assault to rob was reversed on appeal, and during the retrial **a witness made two volunteered references to the defendant's previous conviction for the same offense**. The Colorado Supreme Court subsequently held that **the testimony was so prejudicial that it was not curable** by an instruction to disregard and that the defendant's motion for a mistrial should have been granted.

Edmisten v. People, 490 P.2d 58 (Colo. 1971). A mistrial was warranted in a prosecution for aggravated robbery where the **prosecutor deliberately attempted to elicit from the defendant that he had been involved in other burglaries**.

> ***Practice Tip:*** The issue of whether the prosecutor acted deliberately or in bad faith becomes significant in the determination of whether a retrial is barred by double jeopardy principles.

2. Inadmissible evidence

People v. Pernell, 414 P.3d 1 (Colo. App. 2018) (aff'd by *Pernell v. People*, 411 P.3d 669 (Colo. 2018)). Trial court did not err in denying defendant's motion for mistrial based on an officer's recounting a witness's description of an incident twelve hours after it occurred. To lay a foundation

for admitting the statements as excited utterances under C.R.E. 803(2), the prosecutor questioned the officer about the defendant's ex-wife's demeanor during her interview. According to the officer, the ex-wife was "visibly distraught" with her "head and eyes down," and "[s]he appeared traumatized, to still be traumatized from the event that had happened [twelve] hours prior." The trial court erred in admitting the statements as excited utterances. However, reversal was not required because the statements were admissible on an alternative basis as prior consistent statements of the ex-wife, to rehabilitate her credibility after the defendant had attacked it. "A defendant's conviction will not be reversed if a trial court reaches the correct result although by an incorrect analysis."

Bloom v. People, 185 P.3d 797 (Colo. 2008). **A witness's inadvertent statement that defendant's boyfriend failed a polygraph test** was not so unduly prejudicial as to violate the defendant's right to trial by an impartial jury, nor did the reference violate the defendant's right to confront the witnesses against her. The jury had already heard that the polygraphed witness was a convicted felon and had observed videotapes of his police interviews, and he testified at trial. As such, the jury had sufficient evidence with which to evaluate the boyfriend's credibility regarding his prior statement implicating the defendant. Further, the jury was not told which statements had failed the polygraph test, the trial court gave curative instructions both at the time of the reference and in writing prior to deliberations, and there was sufficient other evidence of the defendant's guilt.

People v. Kerber, 64 P.3d 930 (Colo. App. 2002) (rev'd on other grounds). A prosecution **witness inadvertently testified that he failed a lie detector test**. Defendant requested a mistrial because the credibility of that witness, who was a member of defendant's group during the altercation, was damaged by the testimony and the witness substantially corroborated defendant's version of events. The trial court did not err in denying defendant's motion. The Court of Appeals discussed several factors that should be considered in determining whether a reversal is required: "(1) whether the defendant objected or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than only the fact that a test was conducted."

People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002). **Witness's reference to the fact that defendant took a polygraph test** did not require a mistrial.

People v. Wood, 230 P.3d 1223 (Colo. App. 2009). Defendant was not entitled to a mistrial after **prosecutor began his cross-examination of defendant by characterizing his direct testimony as a nice story**.

People v. Pagan, 165 P.3d 724 (Colo. App. 2006). Defendant was convicted of theft from an at-risk adult of over $500. During direct examination of an investigator, the prosecutor asked whether there were other categories of withdrawals from defendant's account, to which the investigator answered, "I had a category for garnishments." The Court of Appeals held that "considering the

speculative nature of any prejudice to defendant, the fact that the prosecution did not intentionally elicit the remark, the brief nature of the comment, the trial court's immediate admonition to the witness not to refer to the garnishments…the court's offer to provide a curative instruction, the court's order prohibiting any further reference to the garnishments, and the overwhelming evidence of defendant's guilt, we cannot conclude that its refusal to grant a mistrial was an abuse of discretion."

People v. Fincham, 799 P.2d 419 (Colo. App. 1990). A witness' testimony regarding the **discovery of sexual paraphernalia and magazines in the defendant's home**, although ruled inadmissible prior to trial, did not warrant the declaration of a mistrial where the testimony was not aggravated or intentional and the defense rejected the offer of a cautionary instruction.

People v. Haynie, 826 P.2d 371 (Colo. App. 1991). Testimony by an **expert witness indicating that he believed the child sexual assault victim was telling the truth**, although a "close situation," did not mandate a mistrial because it is presumed the jury understood and heeded the court's instruction to disregard the testimony.

Valley v. People, 441 P.2d 14 (Colo. 1968). The trial court did not abuse its discretion in refusing to declare a mistrial and instead instructing the jury to disregard a prosecution witness' reference to "**mug shots**." *See also People v. Bozeman*, 624 P.2d 916 (Colo. App. 1980) (holding that momentary display of defendant's "**mug shot**" in open court did not warrant mistrial where it was doubtful that jury could in fact identify photographs as "mug shots").

People v. Mejia, 534 P.2d 779 (Colo. 1975). An unresponsive answer by a narcotics agent suggesting that he **had previously purchased drugs from the defendant's son** did not warrant the declaration of a mistrial where the statement did not refer to the defendant and a cautionary instruction was given.

3. Discovery violations

People v. Williams, 297 P.3d 1011 (Colo. App. 2012). Trial court did not err in denying the defendant's motion for mistrial on the basis of a **witness's testimony at trial that the defendant made a threatening statement to him**. The statement was not a discovery violation. Because the challenged statement was not made by the accused to the police or prosecution, the prosecution was not required to disclose it under Rule 16. The statement was not substantially prejudicial because it was cumulative of other admissible testimony from witnesses who feared retaliation from defendant for testifying at his trial. Further, the defendant did not explain how knowledge of the threat would have helped him make an informed trial decision.

People v. Stevenson, 228 P.3d 161 (Colo. App. 2009). Trial court did not abuse its discretion by dismissing two counts instead of granting a mistrial **where prosecutor failed to disclose the victim's inconsistent pretrial preparation session statements**. "A trial court's paramount obligation is 'to restore 'a level playing field'' so as 'to advance the search for truth.' It can do so by ordering production of the withheld material and, if necessary, granting a continuance to allow

its effective use. If necessary, the court may impose a deterrent sanction, but it generally 'should impose the least severe sanction that will ensure that there is full compliance with the court's discovery orders.'"

4. Improper display of physical evidence

Zamora v. People, 487 P.2d 1116 (Colo. 1971). The trial court acted within its discretion in denying the defendant's motion for mistrial in a prosecution for possession of marijuana after the prosecutor inadvertently displayed two other bags of marijuana that had not been admitted into evidence.

People v. Goff, 530 P.2d 514 (Colo. 1974). A mistrial was not mandated when the prosecutor opened an envelope in the jury's presence which contained a knife that had no connection to the robbery charge.

People v. Bowman, 738 P.2d 387 (Colo. App. 1987). The trial court did not abuse its discretion in failing, *sua sponte*, to declare a mistrial after the prosecutor displayed to the jury a highly prejudicial exhibit that was not admitted into evidence, where the exhibit was largely cumulative of other evidence and the defendant failed to object and refused the offer of a cautionary instruction.

5. Miscellaneous circumstances

People v. Garcia, 527 P.3d 410 (Colo. App. 2022). No error found **in trial court's decision to require prospective and impaneled jurors to wear masks** during jury selection and at trial. During questioning of prospective jurors who are masked, counsel and the court can still observe the jurors' body language, tone of voice, eye contact, and other elements of their demeanor. Moreover, even if the prospective jurors' masks made assessing their demeanor marginally more difficult, both the defense and the prosecution were equally burdened by this challenge. The jurors "were masked for all parties and the court, and the marginal diminution of everyone's ability to see the lower halves of the potential jurors' faces didn't affect the answers they gave or the court's ability to evaluate and rule on motions to exclude them."

People v. Van Meter, 421 P.3d 1222 (Colo. App. 2018). Statements during *voir dire* from a deputy sheriff who was a member of the venire did not warrant a mistrial. Further, the defendant did not request any lesser remedies than a mistrial, and the trial court was not required to *sua sponte* offer a lesser remedy where none was requested.

People v. Manyik, 383 P.3d 77 (Colo. App. 2016). **A prosecutor's technique of speaking to the jury in the first person during opening statement, as though he were the murder victim,** violated the prohibition against using tactics calculated to inflame the passions or prejudice of the jury, and the prohibition against a prosecutor expressing his belief in the guilt of the defendant; but prosecutor's misconduct did not constitute plain error.

20. MISTRIAL

People v. Moon, 411 P.3d 130 (Colo. App. 2015). The trial court did not abuse its discretion in denying the defendant's request to excuse a juror and declare a mistrial on the basis that the **juror revealed during trial that she recognized the name of a pharmacist witness**. The record contained no evidence that Juror H. deliberately concealed her relationship with the pharmacist. The juror did not recognize the pharmacist's name when the court read the witness list, and told the court when she realized that she knew him. The record does not reveal that the juror held any bias because of her past encounters with the pharmacist. She maintained that she could be fair and impartial, and said that her previous interactions with the pharmacist would not affect her ability to evaluate the pharmacist's credibility. Although the defendant asserts on appeal that she likely would have used a peremptory challenge to excuse the juror if she had known earlier, the defendant did not make this representation to the court after disclosed her relationship with the pharmacist. Even if she had done so, allowing a defendant fewer peremptory challenges than authorized does not, in and of itself, require reversal.

People v. Lovato, 357 P.3d 212 (Colo. App. 2014). The trial court did not abuse its discretion in denying defendant's motion for a mistrial on the basis of a prosecutor's statements in closing argument. Defense counsel repeatedly stated in closing that "No one likes child abuse." **In rebuttal closing argument, the prosecutor stated, "Here's a possibility: [Defendant] likes child abuse."** The trial court denied the defendant's motion for a mistrial, but sustained the objection and instructed the jury to disregard the statement. "Absent evidence to the contrary, we presume that the jury understood and followed the court's instructions. . . . Here, any potential prejudice was cured by the trial court's ruling and instruction to the jury to disregard the remark." Defendant also asserted that the prosecution committed reversible misconduct by making improper appeals to the community. **The prosecutor said that the community "heard" the victim in its response to the crime; and urged the jurors (as part of the community) to tell the defendant "[victim], we hear you."** "Statements that encourage a jury to convict the defendant in order to carry out the wishes of the community are improper." However, the statements did not rise to the level of plain error requiring reversal of defendant's convictions. Several of the prosecutor's comments were a proper characterization of the evidence regarding the response of authorities to the victim's situation.

People v. Rhea, 349 P.3d 280 (Colo. App. 2014). The **prosecutor's numerous references to "public corruption"** did not necessitate a new trial, as the charged criminal actions, including an attempt to influence a public servant, fell within the generally accepted non-legal layman's definition of public corruption. Further, the prosecutor's comment suggesting that defendant made payments "under the table" to public officials, while erroneous, was harmless, and the reference was isolated. While the prosecutor's comment that the "taxpayers" were the victims of defendant's conduct was improper, it did not amount to plain error, as it was an isolated portion of the prosecution's closing argument.

20. MISTRIAL

People v. Chastain, 733 P.2d 1206 (Colo. 1987). The trial court did not abuse its discretion in denying the defendant's request for a mistrial after a **subpoenaed witness failed to appear**, where the witness' proposed testimony would be immaterial and largely cumulative.

People v. Hickam, 684 P.2d 228 (Colo. 1984). **A statement by the prosecutor during *voir dire* that the death penalty was not being sought**, although improper, did not mandate the declaration of a mistrial in light of the trial court's determination that the error could be cured by a cautionary instruction.

Scott v. People, 444 P.2d 388 (Colo. 1968). Mistrial was not required where **two jurors inadvertently viewed the defendant in handcuffs**, where great care had been exercised to prevent such a viewing in the courtroom, the viewing occurred in a hallway when the jurors were believed to have been in the jury room, and there was no likelihood that the defendant suffered any prejudice as a result of the incident.

People v. Dillon, 655 P.2d 841 (Colo. 1982). Concerning a mistrial based on jury's exposure to defendant being **escorted by police** during his trial.

People v. Garcia, 17 P.3d 820 (Colo. App. 2000). Holding no mistrial required when twice **jurors saw defendant escorted by police**, but defendant not under visible restraint, was dressed professionally, and no showing that exposure unnecessary or that any juror was actually prejudiced).

Deck v. Missouri, 544 U.S. 622 (2005). Where a court, without adequate justification, **orders a defendant to wear shackles that will be seen by the jury**, a heightened constitutional harmless error standard applies. The State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained).

Hoang v. People, 323 P.3d 780 (Colo. 2014). If restraints are apparent to jurors, the prosecution bears the burden to prove that the error did not affect the outcome of the trial. But *Deck's* heightened constitutional standard only applies to visible shackling. When the record does not show the restraints were plainly visible, the burden is on the defendant to point to something in the record justifying a reasonable inference that at least one juror saw or heard them.

People v. Conley, 804 P.2d 240 (Colo. App. 1990). Allegedly **hostile facial expressions by the trial judge** during the testimony of the defendant's alibi witness did not warrant a mistrial where it was apparent that the jury was not in a position to observe such expressions, if they in fact existed.

People v. Lafferty, 9 P.3d 1132 (Colo. App. 1999). The **prosecutor's failure to disclose victim's statement**, found in an investigator's report, that defendant "didn't hit me that hard" did not require the sanction of mistrial where the failure was inadvertent and the court gave defendant an opportunity to recall any prosecution witness and any witness who had not been endorsed.

People v. Clary, 950 P.2d 654 (Colo. App. 1997). No abuse of discretion in refusing to declare mistrial based on **claim prosecutor failed to provide legible copy of payroll record** and that defendant was surprised by witness' testimony and denied right to effectively cross-examine on issue.

People v. Zamora, 13 P.3d 813 (Colo. App. 2000). The trial court did not abuse its discretion in refusing to declare mistrial based on the **detective's testimony that he did not include in his report defendant's initial denials because they were lies**. The testimony was not credibility opinion evidence; the detective merely testified that he did not believe defendant's early denials after defendant later confessed.

People v. Johnson, 987 P.2d 855 (Colo. App. 1998). Mistrial was not required after the **prosecutor mistakenly entered into an illegal plea agreement** with the co-defendant in exchange for his testimony.

People v. Evans, 987 P.2d 845 (Colo. App. 1998) *(rev'd in part on other grounds*). To the extent the prosecutor's closing argument was incorrect or misleading in **suggesting that defense counsel "agreed" with prosecutor**, the statement was not so prejudicial in the context of the entire argument that refusal to grant a mistrial was an abuse of discretion.

6. Reference to Gang Affiliation or Activity

People v. Mendoza, 876 P.2d 98 (Colo. App. 1994). The prosecutor's comment during closing argument that "Bloods and Crips do not get along peaceably" was not so unfairly prejudicial as to require a mistrial where the relationship between the two gangs was relevant to the prosecution's theory of the case and evidence supporting the hostile relationship was admitted during the trial.

People v. Fernandez, 883 P.2d 491 (Colo. App. 1994). Although the Court of Appeals disapproved of the prosecutor's attempt to elicit testimony regarding whether the defendant or his friends were associated with gangs, it nevertheless held that the trial court acted within its discretion in denying the defendant's motion for mistrial since it was in the best position to evaluate what effect, if any, the irregularity had upon the jury.

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). Where victim knew defendant only by his "street name," and an officer testified that he contacted the gang intervention unit for a database of street names, trial court did not abuse its discretion in denying motion for mistrial.

People v. Clark, 370 P.3d 197 (Colo. App. 2015), aff'd in part in 370 P.3d 197 (Colo. App. 2015). Evidence regarding defendant's gang affiliation was relevant.

7. Juror Misconduct

People v. Dominguez-Castor, 469 P.3d 514 (Colo. App. 2020). Trial court properly denied mistrial where juror fainted after viewing admissible autopsy photographs. The photos were admissible to show the victim's cause of death and the killer's culpable mental state. The court carefully

managed the fainting incident by canvassing the jury and determining on an individual basis whether each juror could continue to be fair and impartial. The court determined that the jury, including the juror who fainted, would not base its decision on any sympathy toward the victim or prejudice to the defendant.

People v. Marko, 434 P.3d 618 (Colo. App. 2015) (aff'd by 432 P.3d 607 (Colo. 2018)). Statements made by prospective juror during *voir dire*, expressing his unwillingness to find defendant not guilty by reason of insanity (NGRI) due to an unfounded belief that insanity acquittees are prematurely released from custody, though constituting extraneous information improperly before the jury, did not incurably taint the other jurors so as to require declaration of mistrial, in murder prosecution in which defendant asserted an insanity defense. Juror's statements did not indicate that he had any personal knowledge regarding how long those found NGRI were committed, and both defense counsel and trial court informed the panel multiple times that there was no way to know in advance how long defendant would be committed if the jury found him NGRI.

People v. Tunis, 318 P.3d 524 (Colo. App. 2013). The trial court's decision to replace a sleeping juror was not an abuse of discretion. During trial, the court noticed that one of the jurors seemed to be having trouble staying awake. When questioned by the court, the juror indicated that he was having trouble staying awake and admitted to nodding off during the trial. The court then released the juror and replaced him with an alternate juror. Defendant moved for a mistrial based on being denied a jury of his choice, and argued the alternate juror was biased. The defendant relied on an equivocal statement made by the alternate juror during *voir dire* that he may have "some sort of bias, either positively or negatively" about DNA evidence. However, the alternate juror went on to say that he "would make every effort to be fair and impartial." "Thus, in the absence of any other assertion of bias, the trial court was well within its discretion to dismiss the sleeping juror and to replace him with the alternate juror."

People v. Dahl, 160 P.3d 301 (Colo. App. 2007). Trial court abused its discretion in denying defense motion for a mistrial because the court's actions "detrimentally affected [a] juror's ability or inclination to participate fully in the deliberations." When a juror failed to appear for deliberations, trial court issued a warrant for his arrest. Juror was arrested and brought before the court, the court cited him for contempt, and on three separate occasions severely admonished him and identified the serious consequences he faced, including 180 days in jail and a $1000 fine.

People v. Fox, 862 P.2d 1000 (Colo. App. 1993). The trial court in a homicide prosecution abused its discretion in denying the defendant's motion for mistrial upon discovering during the course of jury deliberations that the jury foreman had engaged in a discussion with a gunsmith regarding the mechanics and abilities of a .25 caliber automatic pistol, which was the type of weapon used during the commission of the charged offense. The Court of Appeals recognized that the extraneous information obtained by the juror pertained to the credibility of the defendant's self-defense claim, which was key to his defense, the information was not obtained "innocently" by the juror but rather was affirmatively sought out by him, and "it was the jury foreman, whom the other jurors had

elected as their spokesperson, who obtained and disseminated the information, thereby increasing the likelihood that the information could have affected the verdict."

People v. Dore, 997 P.2d 1214 (Colo. App. 1999). Defendant claimed the trial court erred in denying his motion for mistrial based on the allegation that he heard one prospective juror tell another that he was sure defendant "had the intent, not sure he had premeditation." The prospective jurors testified they were "generally discussing the intent element of crimes, and specifically a hypothetical not related to the case." They assured the court they would "not rely on their conversation in reaching their verdicts but would follow the court's instructions as to the element of intent and otherwise." The trial court did not abuse its discretion in denying the motion.

People v. Herrera, 1 P.3d 234 (Colo. App. 1999). The evidence conflicted regarding whether one or more jurors were inattentive or sleeping. Defense counsel did not ask for mistrial but asked the court to admonish the jury to pay attention, which the court did. The court did not abuse its discretion by failing to declare a mistrial *sua sponte*.

a. Substitution of alternate juror during deliberations

James v. People, 426 P.3d 336 (Colo. 2018). The trial court failed to discharge the alternate juror, who deliberated for about ten minutes before the court realized its mistake. The court recalled and dismissed the alternate, instructed the jury, and denied a defense motion for mistrial. The Court of Appeals concluded that the trial court's error in allowing the alternate to retire with the jury was harmless beyond a reasonable doubt. The Supreme Court agreed, holding that the evidence of guilt was overwhelming, therefore the trial court's failure to recall the alternate juror was harmless under the facts of the case.

People v. Montoya, 942 P.2d 1287 (Colo. App. 1996). The Court of Appeals held that the trial court erred in denying the defendant's motion for mistrial and by replacing a juror with an alternate during jury deliberations when it became apparent that the original juror could no longer participate in the jury's deliberations. The court recognized the apparent conflict between Crim. P. 24(e), which permits replacement of a discharged juror any time prior to a verdict, and section 16-10-105, which precludes the replacement of an original juror with an alternate after deliberations have commenced. Since section 16-10-105 regulates substantive matters and implicates important policy considerations, the court concluded that the statute prevails over the rule, and the trial court erroneously relied upon Crim. P. 24(e) in permitting the substitution of the alternate juror. While recognizing that the replacement of a juror during deliberations presumptively prejudices a defendant's right to a fair trial, *see People v. Burnette*, 775 P.2d 583 (Colo. 1989), the Court of Appeals nevertheless concluded that "the trial court successfully undertook the extraordinary precautions necessary to rebut the presumption . . . and its findings that the presumption of prejudice had been overcome are supported by the record."

b. Consideration of extraneous information

"For a court to set aside a verdict because jurors were exposed to extraneous prejudicial material, the moving party must show 'both that extraneous information was improperly before the jury and that the extraneous information posed the reasonable possibility of prejudice to the defendant.'" *People v. Holt*, 266 P.3d 442 (Colo. App. 2011).

"When a party offers affidavits to impeach a verdict, the trial court must examine the information in the affidavits and determine if the testimony is admissible under C.R.E. 606(b). The trial court may consider testimony that the jury was exposed to information not properly received into evidence or not included in the court's instructions because such information is extraneous to the case and improper for juror consideration. But C.R.E. 606(b) prohibits consideration of testimony regarding the jury's deliberations, a juror's mental processes leading to his or her decision, or whether the extraneous information swung the vote of any juror . . .testimony that jurors held discussions based on a juror's general knowledge or personal experiences cannot be offered to impeach a verdict under C.R.E. 606(b)." Id.

"Legal content and specific factual information learned from outside the record and relevant to the issues in a case constitute extraneous prejudicial information improperly before a jury." Id.; *People v. Kendrick*, 396 P.3d 1124 (Colo. 2017). Juror's statement during deliberations that the penalty for the charged offense of vehicular eluding was a "slap on the wrist" did not constitute extraneous information, and therefore testimony that jurors held discussions based on information shared by juror could not be offered to impeach the verdict. The juror's statement was based solely upon juror's own personal knowledge unrelated to any professional or educational expertise, and thus was permissible as part of jury's internal discussions.

People v. Fox, 862 P.2d 1000 (Colo. App. 1993). The trial court in a homicide prosecution abused its discretion in denying the defendant's motion for mistrial upon discovering during the course of jury deliberations that the jury foreman had engaged in a discussion with a gunsmith regarding the mechanics and abilities of a .25 caliber automatic pistol, which was the type of weapon used during the commission of the charged offense. The Court of Appeals recognized that the extraneous information obtained by the juror pertained to the credibility of the defendant's self-defense claim, which was key to his defense, the information was not obtained "innocently" by the juror but rather was affirmatively sought out by him, and "it was the jury foreman, whom the other jurors had elected as their spokesperson, who obtained and disseminated the information, thereby increasing

People v. Bondurant, 296 P.3d 200 (Colo. App. 2012). Defendant argued that the trial court committed reversible error in improperly addressing separate allegations made by him at trial that the jury was, or may have been, improperly exposed to extraneous information (1) in a news clip concerning a criminal defendant previously acquitted on a finding of NGRI and (2) during a face-to-face encounter with a judicial staff member. Here, on the second day of trial, the defendant brought to the trial court's attention a news story, published online, likely in print, and possibly on television, regarding a man previously acquitted of attempted murder on a finding of NGRI who later attacked a victim. Stating his concern that jurors exposed to this story might be hesitant to

find him not guilty for lack of mens rea for fear of future tragic events, he requested the trial court poll the jury to determine the extent of any prejudice. The trial court refused, stating, "I don't see a tie [between the news story and this case] and I don't see the appropriateness of any action based on that." No error was perceived in the trial court's handling of either allegation. Colorado courts must utilize a three-part test to determine whether midtrial media reports unfairly prejudiced the jury: (1) determine whether the coverage had the potential for unfair prejudice; (2) poll the [35] jury to determine if it learned of the publicity; and (3) interview individual jurors to determine their knowledge of the report and its effect on them. In implementing the first step of this test, a trial court should consider "whether the content of the media report is inherently prejudicial" as well as "whether the report contained information that would not be admissible at trial or that was not in fact adduced before the jury and how closely related the publicity is to the matters at issue in the trial." Based on its finding that the news story was irrelevant to Bondurant's case, the trial court did not abuse its discretion in not polling the jury under the second step of Harper.

c. Miscellaneous cases

People v. Dahl, 160 P.3d 301 (Colo. App. 2007). Trial court abused its discretion in denying defense motion for a mistrial because the court's actions "detrimentally affected [a] juror's ability or inclination to participate fully in the deliberations." When a juror failed to appear for deliberations, trial court issued a warrant for his arrest. Juror was arrested and brought before the court, the court cited him for contempt, and on three separate occasions severely admonished him and identified the serious consequences he faced, including 180 days in jail and a $1000 fine.

People v. Dore, 997 P.2d 1214 (Colo. App. 1999). Defendant claimed the trial court erred in denying his motion for mistrial based on the allegation that he heard one prospective juror tell another that he was sure defendant "had the intent, not sure he had premeditation." The prospective jurors testified they were "generally discussing the intent element of crimes, and specifically a hypothetical not related to the case." They assured the court they would "not rely on their conversation in reaching their verdicts but would follow the court's instructions as to the element of intent and otherwise." The trial court did not abuse its discretion in denying the motion.

People v. Herrera, 1 P.3d 234 (Colo. App. 1999). The evidence conflicted regarding whether one or more jurors were inattentive or sleeping. Defense counsel did not ask for mistrial but asked the court to admonish the jury to pay attention, which the court did. The court did not abuse its discretion by failing to declare a mistrial *sua sponte*.

8. Comment about defendant's refusal to speak with police

People v. Krueger, 296 P.3d 294 (Colo. App. 2012). Prosecutor's references during voir dire and opening statement in murder prosecution to fact that accomplice would not be testifying did not rise to level of misconduct where prosecutor never directly referenced accomplice's invocation of Fifth Amendment. The trial court instructed jury as to burden of proof and presumption of innocence at beginning of voir dire, before opening statements, and at close of evidence.

People v. Rosa, 928 P.2d 1365 (Colo. App. 1996). Despite the fact that an investigating detective testified that the defendant, following his arrest, was advised of his rights but "declined to make any statements," the Court of Appeals nevertheless held that the district court did not abuse its discretion under the circumstances in denying the drastic remedy of a mistrial. While recognizing that comment by the prosecution upon the defendant's exercise of his right to remain silent effectively penalizes the defendant for exercising a constitutional right, **reversible error occurs only in instances in which the defendant's post-arrest silence is used as an inference of guilt**. "Here, in our view, the testimony elicited by the prosecution did not so prejudice defendant as to warrant a mistrial. The investigator made only one remark about defendant's silence and the trial court admonished the jury not to make any inference about defendant's guilt based on his refusal to speak with police. Absent a contrary showing, the jury is presumed to follow the court's instructions and admonitions."

9. Displays of Emotion

People v. Owens, 544. P.3d 1202 (Colo. 2024). Mistrial was properly denied following key prosecution witness's emotional outbursts and repeated declarations where the outbursts were unexpected, steps were taken by the trial court to address them, and those steps were taken quickly. The trial court recessed for the rest of the afternoon, ordered the prosecution to ask the witness to explain why she had been emotional, allowed the defendant to cross-examine her on that issue, and instructed the jury to disregard the witness's opinions as to the defendant's guilt. Under these circumstances, declarations that the defendant was guilty did not render the trial fundamentally unfair.

People v. Friend, 431 P.3d 614 (Colo. App. 2014) (rev'd in part on other issues by 429 P.3d 1191 (Colo. 2018)). No abuse of discretion where trial court denied the defendant's motion for mistrial and admitted evidence testimony of a detective who became emotional while recounting the removal of life support from the victim. When the prosecutor asked the detective whether she was present when the victim died, the detective stopped speaking, choked up, and could not answer the question. The court denied the motion for a mistrial because it did not observe any overwhelming display of emotion. While the court acknowledged that the detective had used a tissue to daub her eyes, it did not see any tears or an excessive display of emotion. Even though the trial court acknowledged that an overwhelming display of emotion would be inappropriate, it overruled the objection because the detective had not yet displayed any emotion. Further, the court noted that the evidence was relevant to describe the victim's death and that its probative value was not substantially outweighed by its prejudicial impact. "Colorado courts have held that displays of emotion do not constitute reversible error." "Here, the trial court was in the best position to determine that Detective Thrumston's emotional display was minimal, brief, and appropriate."

People v. Ned, 923 P.2d 271 (Colo. App. 1996). The district court did not abuse its discretion in denying a motion for mistrial following an incident where the mother of a homicide victim, while testifying as to the circumstances of her son's death, began to cry, thrashed about in the witness

chair, shook back and forth, screamed and stamped her feet. The incident, while emotional, lasted no more than thirty seconds before the witness was removed from the courtroom and a recess was called, and the defendant was unable to demonstrate any actual prejudice that resulted from the outburst. The Court of Appeals recognized that, "although we have found no appellate decisions addressing when outbursts by a family member-witness while testifying adversely impact a defendant's constitutional right to a fair trial, there are analogous decisions involving audience demonstrations that are instructive." The Court cited *People v. McGuire*, 751 P.2d 1011 (Colo. App. 1987) as holding that a mistrial was not required after the complaining witness audibly stated, "You're a liar" during defense counsel's closing argument." The Court also cited *People v. Thatcher,* 638 P.2d 760 (Colo. 1981) as holding there was no abuse of discretion in failing to grant a mistrial after victim's husband made emotional displays during closing arguments. Finally the Court cited *Hafer v. People,* 492 P.2d 847 (Colo. 1972) as holding that there was no abuse of discretion in failing to grant mistrial because of audience applause, and *People v. Montgomery*, 743 P.2d 439 (Colo. App. 1987) as holding that there was no abuse of discretion in trial court's failure *sua sponte* to grant motion for mistrial after victim began to cry during defense counsel's closing argument."

a. Outbursts by the defendant

People v. Burke, 937 P.2d 886 (Colo. App. 1996). The trial court did not abuse its discretion in denying the defendant's motion for mistrial where, during the testimony of his paralyzed ex-wife and within the presence of the jury, he disregarded the court's directive to come to order and began cursing and violently fighting with officers whom the court had instructed to remove him from the courtroom. "When a defendant has invited or injected error into the case, he may not complain of error on appeal, for he is expected to abide the consequences of his acts. Thus, **a defendant may not by his own conduct force a declaration of mistrial.**"

Compare with People v. Aug., 375 P.3d 140 (Colo. App. 2016). In determining whether prosecution acted with intent to provoke defendant into an outburst that would result in a mistrial, a court may consider whether there was a sequence of overreaching or error before the error resulting in the mistrial, the timing of the error, whether the prosecutor resisted the motion for a mistrial, whether the prosecutor proffered some plausible justification for his or her actions, whether the prosecutor testified that there was no intent to cause a mistrial, whether the record contains any indication that the prosecutor believed the defendant would be acquitted, and, whether another trial would be desirable for the government.

10. Burden shifting

People v. Santana, 255 P.3d 1126 (Colo. 2011). When assessing the strength of the prosecution's burden-shifting actions and whether they have shifted the burden of proof, courts mainly consider the degree to which: (1) the prosecutor specifically argued or intended to establish that the defendant carried the burden of proof; (2) the prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) the jury is informed by counsel and the

court about the defendant's presumption of innocence and the prosecution's burden of proof. Further, the prosecutor's cross-examination of defense expert, and his closing argument references to expert's testimony, did not impermissibly shift the burden of proof to drug distribution defendant. Although the prosecutor asked the expert, who had testified that the prosecutor's tests on the substance alleged to be crack cocaine were only screening tests, about his ability to perform conclusive tests, the prosecutor's actions seemed designed to clarify expert's testimony and rebut the defense's implication that the prosecution failed to offer conclusive tests results because those results would exonerate defendant and highlight the strength of the prosecution's case.

People v. Krueger, 296 P.3d 294 (Colo. App. 2012). The prosecutor did not engage in impermissible burden shifting when she stated that defendant's accomplice would not be testifying; none of the prosecutor's remarks suggested that the accomplice's absence required defendant to present more evidence or prove anything.

People v. Lahmkuhl, 117 P.3d 98 (Colo. App. 2004). Witness's testimony that his lab addresses the possibility of false positive results by making the evidence available for retesting, did not shift the burden of proof to the defendant. The witness never testified that the evidence was retained for use by the defendant, and thus, never alluded to the defendant's failure to test the evidence.

People v. Payne, 461 P.3d 630 (Colo. App. 2019). Prosecutor's rebuttal remarks did not prejudice defendant, and thus, trial court did not abuse its discretion by allowing prosecutor to reserve her closing statement until rebuttal, in prosecution for second degree assault; prosecutor's rebuttal responded only to defense counsel's closing arguments, prosecutor's rebuttal remarks were tied to evidence admitted during trial or to reasonable inferences from admitted evidence, prosecutor properly reminded jury that closing arguments did not constitute evidence, and defense counsel could have but did not object, request surrebuttal, request a curative instruction, or move for mistrial.

11. Mischaracterization of evidence

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). Trial court did not abuse its discretion in denying defense's motion for mistrial where prosecution repeatedly characterized a decree by National Association of Securities Dealers as "barring defendant from the securities industry" even though the evidence presented at trial showed that the defendant had not been barred from engaging in the buying and selling of securities. The prosecution did not mischaracterize the evidence in bad faith. "The cumulative, prejudicial effect of prosecutorial misconduct that so undermines the fundamental fairness of a trial as to cause serious doubt upon the reliability of the judgment of conviction may constitute plain error."

12. Newly discovered evidence

"Motions for a new trial based on newly discovered evidence are looked on with great disfavor, and we will not overturn denials of such motions absent clear abuse of discretion. Evidence is considered newly discovered 'only if it was both unknown to the defendant and his counsel in time

to be meaningfully confronted at trial and unknowable through the exercise of due diligence.'" *People v. Hopper*, 284 P.3d 87 (Colo. App. 2011) (citing *Farrar v. People*, 208 P.3d 702 (Colo. 2009)).

"To succeed on a motion for new trial based on newly discovered evidence, a defendant must show that (1) the evidence was discovered after the trial; (2) the defendant and his counsel exercised diligence to discover all possible evidence favorable to the defendant prior to and during the trial; (3) the newly discovered evidence is material to the issues involved, and not merely cumulative or impeaching; and (4) on retrial the newly discovered evidence would probably produce an acquittal." *Id.*

"[N]ewly discovered evidence must be of sufficient consequence for reasons other than its ability to impeach, or cast doubt upon, the evidence already presented at trial. It must be consequential in the sense of being affirmatively probative of the defendant's innocence . . . ." *Farrar v. People*, 208 P.3d 702 (Colo. 2009).

People v. Hopper, 284 P.3d 87 (Colo. App. 2011). Newly discovered evidence was not material in a drug prosecution. The proposed testimony that defendant's passenger at the time defendant's vehicle was searched had told fellow inmates that the passenger was going to place blame on defendant for drugs and firearms found during the search and that defendant was "going down" for something the passenger had done, was merely cumulative of trial testimony by another fellow inmate. Newly discovered evidence that defendant's passenger at the time that defendant's vehicle was searched had told fellow inmates that he had transferred guns and drugs to defendant's vehicle, was not probative of defendant's innocence on drug possession charges, as necessary for a grant of new trial. If those guns and drugs were transferred, they would have been visible to defendant, thus placing him on notice that the items were present.

13. Defendant's presence during trial

Crim. P. 43 codifies the requirements regarding a defendant's presence during criminal proceedings. Crim. P. 43(b) codifies when a defendant is considered to have waived his right to be present: 1) whenever a defendant, initially present, voluntarily absents himself; or 2) after being warned by the court that disruptive conduct will cause him to be removed, persists in such conduct.

"As with other constitutional rights, the right to be present during trial is not absolute and may be waived." "Although the preferred method of establishing a waiver is through colloquy with the defendant, a defendant may waive his or her right to be present by his or her actions, including voluntary absence, after the trial has been commenced in his or her presence." *People v. Price*, 240 P.3d 557 (Colo. App. 2010).

People v. Tee, 446 P.3d 875 (Colo. App. 2018). Defense counsel moved for a mistrial because members of the jury had inappropriate pre-deliberation discussions. Defense counsel chose not to seek a mistrial. The court held that defense counsel's affirmative statements constitute a waiver,

citing case law holding that a defendant's personal consent to a mistrial was not necessary, and his counsel's decision to move for a mistrial was binding on the defendant."

People v. Price, 240 P.3d 557 (Colo. App. 2010). Defendant voluntarily absented himself from trial with suicide attempt, thereby waiving his right to be present and the corresponding right to testify on his own behalf.

People v. Cohn, 160 P.3d 336, 341 (Colo. App. 2007). "The means chosen to control obstreperous defendants are committed to the trial court's discretion."

People v. Davis, 85 P.2d 239 (Colo. App. 1993). "A defendant may lost [the right to be present in the courtroom] if, after he has been warned, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."

14. Partial Courtroom Closures

People v. Bialas, 535 P.3d 999 (Colo. App. 2024). Defendant argued that the trial court's removal of her family from the courtroom, despite their being able to view the trial via a live video and audio stream, constituted a nontrivial partial closure of the courtroom and a violation of the defendant's right to a public trial. Neither party asked for a mistrial at the time. The Court subsequently found that the exclusion of her family during the defendant's testimony cut against the assurance of a public trial. Even if the family could still view a livestream of the trial, the jury, the judge, and counsel were unable to see the family. "[T]he presence of interested spectators" is important to remind the triers of "the importance of their functions."

Once a closure is determined to be nontrivial, it is unconstitutional unless justified under the test articulated in *Waller v. Georgia*, 467 U.S. 39 (1984). *Waller* requires that (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced"; (2) "the closure must be no *1003 broader than necessary to protect that interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"; and (4) the trial court "must make findings adequate to support the closure."

20.3 MISTRIAL OCCASIONED BY THE PROSECUTION OR COURT

A. Public Health Crisis

Crim. P. 24(c)(4) permits a trial court, by a party's motion or on its own, to declare a mistrial at any time before trial "on the ground that a fair jury pool cannot be safely assembled in that particular case due to a public health crisis or limitations brought about by such crisis." Declaring a mistrial under this rule must be supported by specific findings. *See also People v. Sherwood*, 489 P.3d 1233 (Colo. 2021) (describing the addition of Crim. P. 24(c)(4)).

People v. Eason, 516 P.3d 546 (Colo. App. 2022). Trial court did not err in declaring mistrial where courthouse was limited to one jury trial per week due to public health orders imposed during

the COVID-19 pandemic. The trial court made the requisite specific findings in order to declare a mistrial on grounds that a fair jury pool could not be safely assembled due to a public health crisis, despite defendant's contention the specific findings did not concern his particular case charging him with assault and menacing. The had court made specific findings regarding the governor declaring a disaster emergency due to the COVID-19 pandemic and the various requirements and limitations imposed on the courthouse, and defendant did not explain why the limitations imposed by the COVID-19 pandemic and the various public safety orders did not apply to his case. Mistrial was not declared because of "docket congestion" but because of the COVID-19 pandemic and related public health orders, which imposed limitations on the use of the courthouse, which were matters beyond the court's control.

People v. Burdette, 552 P.3d 1108 (Colo. App. 2024). Trial court did not err in declaring mistrials pursuant to Crim. P. 24(c)(4) due to the COVID-19 pandemic. The district court made findings that the second and third mistrials were caused solely by the COVID-19 pandemic; specifically, the court was unable to safely assemble a jury due to social distancing requirements imposed by public health officials. Such requirements constitute a "limitation brought about" by the COVID-19 pandemic pursuant to Crim. P. 24(c)(4). Although a limited number of trials were able to proceed in the one courthouse space large enough to accommodate socially distanced jurors, the court found that space was unavailable due to other scheduled trials. The mistrials were not caused by mere "docket congestion."

People v. Segovia, 196 P.3d 1126 (Colo. 2008). A district court is justified in declaring a mistrial when present circumstances amount to "manifest necessity" or when "the ends of public justice would not be served by a continuation of the proceedings."

B. Double Jeopardy

If a case is terminated before its completion, double jeopardy bars retrial unless the trial court has sufficient legal justification—manifest necessity—to declare a mistrial over the defendant's objection. *People v. Berreth*, 13 P.3d 1214 (Colo. 2000).

A controlling principle embodied in double jeopardy protection is that the accused is entitled to have trial completed by a particular tribunal. *See Ortiz v. District Court*, 626 P.2d 642 (Colo. 1981). Therefore, under certain circumstances, the prohibition against double jeopardy may bar the retrial of a defendant following the declaration of a mistrial. To successfully claim jeopardy, the defendant must show either:

(a) That the trial court granted a mistrial over the objection of the defense and that the mistrial was not legally justified as matter of manifest necessity, or
(b) That, although the defendant did not object to the mistrial (or in fact moved for it), the mistrial was the result of bad faith conduct on the part of the prosecutor or the court.

1. When jeopardy attaches

Jeopardy attaches after the jury is sworn if the case is tried by a jury or after the first prosecution witness is sworn in a trial to the court following a waiver of jury trial. § 18-1-301(1)(d). An exception exists when there is a jurisdictional defect in the proceedings. *See People v. Garner*, 530 P.2d 496 (Colo. 1975). *See also* §§ 18-1-301 through 18-1-304; *People v. Clark*, 705 P.2d 1017 (Colo. App. 1985).

2. Deadlocked Jury

People v. Aguilar, 317 P.3d 1255 (Colo. App. 2012). When a jury deadlocks on a greater charge but convicts on a lesser included charge, the hung jury rule, and not the implied acquittal doctrine, applies. Here, the jury convicted defendant of burglary but deadlocked on felony murder, and the trial court granted a mistrial on that charge. Burglary is a lesser included offense of felony murder. However, burglary was not presented to the jury as a lesser included offense of felony murder; instead, it was a separately charged crime. Therefore, a retrial for felony murder would not violate defendant's double jeopardy rights.

3. Retrial

People v. August, 375 P.3d 140 (Colo. App. 2016). Where the defendant did not prove prosecutor acted with intent to provoke a mistrial, double jeopardy did not prohibit retrial. A mistrial resulted after the prosecutor displayed a slide during closing argument that said "history repeats itself," in reference to separate sexual assault of by the defendant on the victim. "Double jeopardy bars retrial in the mistrial context only where the prosecution's intent is to avoid a jury verdict." The defendant has the burden of establishing that the prosecutor acted with the intent to provoke the defense into obtaining a mistrial, and this is an extremely exacting standard which is met only in rare circumstances. "Double jeopardy does not bar retrial of a defendant based on a mistrial brought about by a prosecutor's intent to obtain a conviction, by hook or crook, by means fair or foul; instead, double jeopardy bars retrial in the mistrial context only where the prosecution's intent is to avoid a jury verdict."

C. Mistrial Over the Objection of the Defense: The "Manifest Necessity" Doctrine

1. Policy considerations

People v. Baca, 562 P.2d 411 (Colo. 1977). The "manifest necessity" principle stems from a balance between considerations underlying the double jeopardy clause of the Fifth Amendment and the societal interest in obtaining a fair trial: "Two related considerations lie at the heart of the double jeopardy clause of the Fifth Amendment. One focuses upon the impropriety of giving the government repeated chances to secure a conviction . . . . The other consideration embraces the defendant's 'valued right to have his trial completed by a particular tribunal' . . . . Balanced against this solicitude for the defendant is a legitimate concern for the 'public's interest in fair trials designed to end in just judgments' . . . . As a means of reaching this balance, the doctrine of 'manifest necessity' was designed to guide the trial court's broad discretion in declaring a mistrial *over the objection of the defendant*. [Emphasis in original.]" Thus, where a manifest necessity for

declaring a mistrial is demonstrated, "the public interest in a fair trial and a just verdict outweighs the defendant's dual interest in proceeding to a verdict or avoiding retrial for the same offense."

People v. Schwartz, 678 P.2d 1000 (Colo. 1984). Although the defendant has a substantial and legitimate interest in completing trial before a particular tribunal, if a mistrial is properly declared the trial may be terminated before the issue of the defendant's guilt has been resolved by that tribunal. The doctrine of manifest thereby exists to protect the defendant's interests "against bad faith conduct by the judge or prosecutor which results in a mistrial being declared and gives the prosecution a more favorable opportunity to convict the defendant."

2. General standards

People v. Castro, 657 P.2d 932 (Colo. 1983) (rev'd on other grounds by *West v. People,* 341 P.3d 520 (Colo. 2015)). "Appellate review of the propriety of a mistrial declaration under the 'manifest necessity' standard 'abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a trial.' To be sure, the decision to abort a criminal proceeding after jeopardy already has attached is not one to be made lightly, implicating as it does the weighty interest of the accused in having the charged determined by the jury already impaneled and sworn. This is not to say, however, that the 'manifest necessity' standard prohibits a trial court from declaring a mistrial except under circumstances where the refusal to do so would constitute reversible error. Nor is the trial court constitutionally required to make explicit findings on manifest necessity. Manifest necessity encompasses those situations, substantial and real, that interfere with or retard 'the administration of honest, fair, even-handed justice to either, both, or any of the parties to the proceeding.'"

People v. Segovia, 196 P.3d 1126 (Colo. 2008). "[A] mistrial is justified only where other reasonable alternatives are no longer available."

3. Illustrative cases

a. Mistrial occasioned by jury deadlock

People v. Dinapoli, 369 P.3d 680 (Colo. App. 2015). No error found where trial court did not tell the jurors that it would excuse them and declare a mistrial if they could not reach a unanimous verdict on every count. Trial courts are not required to supplement a modified-Allen instruction with a mistrial advisement.

Fain v. People, 329 P.3d 270 (Colo. 2014). The trial court was not required to provide a mistrial advisement when giving a modified-Allen instruction, but did have discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is given, the instruction would not have had a coercive effect on the jury.

20. MISTRIAL

Martin v. People, 329 P.3d 247 (Colo. 2014). "The trial court has discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is given, the instruction will not have a coercive effect on the jury. The court should consider exercising its discretion in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations."

Gibbons v. People, 328 P.3d 95 (Colo. 2014). "When a jury is deadlocked, the court may provide a "modified-*Allen*" instruction informing the jury that it should attempt to reach a unanimous verdict; that each juror should decide the case for himself or herself; that the jurors should not hesitate to reconsider their views; and that they should not surrender their honest convictions solely because of others' opinions or to return a verdict. The purpose of this instruction is to encourage jurors to reach a verdict without coercing them into doing so." However, "a trial court is not required to provide a mistrial advisement when giving a modified-*Allen* instruction. The trial court has discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is given, the instruction will not have a coercive effect on the jury. The court should consider exercising its discretion in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations."

Martin v. People, 329 P.3d 247 (Colo. 2014). The trial court did not err by failing to instruct the jury about the possibility of a mistrial. Here, after about a day of deliberations, the jury told the clerk that it was "having difficulty" reaching a verdict. The court did not respond. Later that day, the jury again told the clerk that it was having trouble reaching a verdict. The court instructed the jury to "continue to deliberate, reviewing all of the evidence, and applying the instructions of law to the facts as you determine them to be." The next day, the jury informed the court that it was in a "hopeless deadlock," and without objection the court then read a modified-*Allen* instruction. The jury continued deliberating and then told the court it had reached a verdict. A few minutes past 5:00 p.m. on March 24, the jury found the defendant guilty of second-degree murder. A trial court is not required to give mistrial advisement. "Instead, it should consider exercising its discretion to do so in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations." There is no evidence to support the defendant's claim that the court's failure to read the instruction coerced the jury into reaching a compromise verdict. The court had commented to the jury about that the anticipated length of the trial and that it should conclude by March 24. However, this was not a deadline or coercive.

People v. Cox, 528 P.3d 204 (Colo. App. 2023). Where the jury asked only what would happen *if* it did not reach a unanimous verdict, this type of hypothetical question falls well short of the explicit declarations of impasse that would typically trigger further inquiry or instruction.

People v. Schwartz, 678 P.2d 1000 (Colo. 1984). Manifest necessity exists and a criminal trial may be terminated if the jury is deadlocked and cannot reach a verdict. "In determining whether the jury is unable to reach a unanimous verdict and thus whether a mistrial should be declared, the

trial court should consider the following factors: (1) the jury's collective opinion that it cannot agree; (2) the length of the trial; (3) the complexity of the issues; (4) the length of time the jury has deliberated; (5) whether the defendant has made timely objections to a mistrial; and (6) the effects of exhaustion or coercion on the jury."

People v. Urrutia, 893 P.2d 1338 (Colo. App. 1994). It is an abuse of discretion for the trial court to declare a mistrial upon jury disagreement without first determining on the record whether the jury is in fact deadlocked. However, where the court was informed through a Friday afternoon communication that the jury would know by Monday whether further deliberations would be productive, the court did not abuse its discretion in declaring a mistrial without further communication when on Monday it received a note from the jury stating that it was deadlocked as to all of the charges. Moreover, there is no requirement that the court provide a deadlocked jury with a "modified Allen charge" as a prerequisite for finding that a manifest necessity exists for declaring a mistrial.

People v. Harris, 914 P.2d 434 (Colo. App. 1995). Rejecting proposition that a court is obliged to declare mistrial any time jury states late Friday evening that it is deadlocked 11 to 1.

b. Other circumstances

People v. Nunez, 486 P.3d 1149 (Colo. 2021). A trial court must declare a mistrial before the speedy trial deadline expires; it cannot retroactively due so. Charges dismissed with prejudice where the prosecution asked the court to declare a mistrial due to recent amendments to Crim. P. 24(c) and the COVID-19 pandemic, but where the court failed to declare the mistrial until after speedy trial had expired. "The court cannot "effectively" declare a mistrial; it must explicitly do so."

People v. Kendrick, 396 P.3d 1124 (Colo. 2017). Prosecutors brought the defendant, Maurice Dee Kendrick, to trial on numerous charges related to allegations that he threatened several women with a gun and then fired the gun at two occupied houses. Each trial ended in a mistrial, and after ordering the second mistrial, the district court found, pursuant to § 20-1-107(2), that "special circumstances" rendered it unlikely that Kendrick would receive a fair trial if he were again tried by the District Attorney. Accordingly, the court disqualified the District Attorney from re-prosecuting the case and ordered that a special prosecutor be appointed to try Kendrick a third time. The People then filed what they deemed an interlocutory appeal pursuant to C.A.R. 4.1, requesting that that the court reverse the disqualification order. The Court of Appeals held that district attorney disqualification is not a ground for interlocutory appeals in criminal cases. However, the court held that § 16-12-102(2), specifically allows the People to file an interlocutory appeal in the circumstances presented here. The court concluded that the district court misinterpreted the "special circumstances" prong of § 20-1-107(2) in finding that the circumstances of this case satisfy the high burden required to bar an entire district attorney's office from prosecuting a defendant. "Accordingly, we conclude that the district court abused its

discretion in disqualifying the District Attorney, and we therefore reverse the district court's order and remand this case for further proceedings consistent with this opinion."

People v. Hassen, 351 P.3d 418 (Colo. 2015). **Complete closure of courtroom during testimony of two undercover officers violated defendant's right to public trial**, resulting in structural error and necessitating a new trial. The trial court excluded the entire public, including the defendant's family, from the courtroom. The trial court failed to consider any potential alternatives to closing the courtroom, and made no specific findings in support of the closure, instead simply stating, "I'll close the courtroom for this witness over [defendant's] objection."

People v. Castro, 657 P.2d 932 (Colo. 1983) (rev'd on other grounds by *West v. People*, 341 P.3d 520 (Colo. 2015)). A mistrial over the defendant's objection was justified on the basis of manifest necessity due to the **sudden hospitalization of the victim**, who was the principal eyewitness to the shooting, where it was apparent that a continuance or other remedy would not serve as a suitable remedy.

People v. Berreth, 13 P.3d 1214 (Colo. 2000). **The resignation of a key staff member of the court, the overcrowding of the court's docket, and the fact that the trial was running longer than anticipated** were not substantial enough to amount to "manifest necessity," and double jeopardy bars retrial of defendant. Even if the slow pace of the trial were the main reason for declaring a mistrial, it was the trial court's responsibility to manage the case.

Maes v. District Court, 503 P.2d 621 (Colo. 1972). The prosecution moved for a mistrial on the grounds that **defense counsel made statements during *voir dire* about the defendant's racial background that were not later substantiated with evidence**. The defense initially consented to the court's declaration of a mistrial, but before the jury was discharged changed its position and objected to the mistrial. The trial court declined to reconsider its mistrial declaration. On appeal, the Colorado Supreme Court held that further retrial of the defendant was barred by double jeopardy because the mistrial was not occasioned by a manifest necessity. The trial court's mistrial declaration over the defendant's objection consequently constituted an abuse of discretion.

c. Defense misconduct

People v. Owens, 183 P.3d 568 (Colo. App. 2007). Defense counsel's willful violation of court's order not to discuss sexual relationship between the victim and a third party warranted a mistrial.

Paul v. People, 105 P.3d 628 (Colo. 2005). There was no manifest necessity for a mistrial in this case where there was inadequate discovery disclosures by the defense.

D. Statutory Circumstances When Mistrial is Justified

Section 18-1-301(2)(b) lists a number of circumstances where a mistrial is justified. "While the list is not exhaustive, the statute and case law clearly establish that manifest necessity arises where circumstances are serious and outside the control of the trial court." *People v. Segovia*, 196 P.3d 1126 (Colo. 2008).

(1) The defendant consents to the termination or waives his right to object to the termination. The defendant is deemed to have waived all objections to a termination of the trial unless his objections to the orders of termination are made of record at the time of the entry thereof.

(2) The trial court finds that:

a. the termination is necessary because it is physically impossible to proceed with the trial in conformity with the law; or

b. there is a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law; or

c. prejudicial conduct has occurred in or outside the courtroom making it unjust either to the defendant or to the state to proceed with the trial; or

d. the jury is unable to agree upon a verdict; or

e. false statements of a juror on *voir dire* prevent a fair trial.

E. Mistrial with the Acquiescence or Consent of the Defense

Ortiz v. District Court, 626 P.2d 642 (Colo. 1981). The trial court declared a mistrial because a police officer unexpectedly testified to statements made by the defendant, which had been obtained in violation of the Fifth Amendment. There was no evidence in the record to indicate that the defendant objected when the mistrial was declared. The sole issue on appeal was whether the district court erred in refusing to set the case for a new trial on grounds that jeopardy precluded another trial. In holding that retrial of the defendant was not barred on double jeopardy grounds, the Colorado Supreme Court stated: "The first inquiry must be whether the defendant moved for, or consented to, the mistrial. If she did so move or consent retrial is not barred unless the prosecution in bad faith precipitated the mistrial." The Court concluded that nothing in the record justified a finding that the prosecutor precipitated the mistrial in bad faith, and recognized, among other things, that the prosecutor requested a cautionary instruction and protested the trial court's declaration of a mistrial.

People v. Baca, 562 P.2d 411 (Colo. 1977). The defendant's initial murder trial was terminated by a mistrial on the defendant's motion on the basis that the prosecutor implied during questioning that the defendant had attempted to persuade a prosecution witness to commit perjury but failed to follow up and substantiate the implication with evidence. On appeal, the Colorado Supreme Court restated the general rule that where a mistrial is granted on the defendant's motion the accused is thereafter precluded from claiming jeopardy. The Court further recognized the exception to the general rule which permits the defendant to claim jeopardy where the mistrial is precipitated by the prosecution (or the court) in bad faith. Under this exception, the focus is on the motivation of

the party causing the mistrial rather than the gravity of the error: "Accordingly, while the nature and gravity of the error may be relevant to the motivation of the party committing the error, or may be given additional weight to a finding of bad faith, the crucial focus must remain upon that motivation." The Court concluded that the record did not support a finding of bad faith inasmuch as "[t]here is no basis in the record for showing that the prosecution was attempting to save its case for another day by triggering a mistrial. In fact, the prosecution argued vigorously against the mistrial motion."

People v. Espinoza, 666 P.2d 555 (Colo. 1983). Although prosecutor was arguably negligent in stating in opening statement that other sexual offenses would be introduced when it was learned the next day that such offenses occurred two to three years earlier than originally thought, prosecutor's conduct was not a bad faith act and retrial following declaration of mistrial was not barred.

People v. Clark, 705 P.2d 1017 (Colo. App. 1985) Retrial permissible following mistrial after fingerprint, which prosecutor told jury would be presented, was ruled inadmissible for lack of proper foundation, since there was no bad faith or overreaching by prosecutor.

20.4 COMPUTATION OF SPEEDY TRIAL AFTER MISTRIAL

People v. Valles, 412 P.3d 537 (Colo. App. 2013). A defendant has a statutory right to be brought to trial within six months from the date he or she enters a not guilty plea, and within three months of a declared mistrial. Generally, where a trial is not brought within these periods, the charges against the defendant must be dismissed. However, § 18-1-405(6)(g)(I) provides an additional delay of up to six months is allowed at the request of the prosecution, without the consent of the defendant, if the prosecution demonstrates (1) that evidence material to the state's case is unavailable, (2) that the prosecution has exercised due diligence to obtain the evidence, and (3) that there exist reasonable grounds to believe the evidence will be available at a later date. The prosecution has the burden of proving that the elements of the exception have been met.

Section 18-1-405(6)(e) provides that the period of delay caused by any mistrial, not to exceed three months, may be excluded from the calculation in determining the time in which a defendant must be brought to trial. *See also People v. Pipkin,* 655 P.2d 1360 (Colo. 1983) (holding that the prosecution has as much as three months to retry defendant after mistrial, provided delay is reasonable).

People v. Thimmes, 643 P.2d 780 (Colo. App. 1982). The Court of Appeals construed the provisions of § 18-1-405(1) and 18-1-405(6)(e) to require that the entire period of delay caused by a mistrial be excluded from the computation of the time within which the defendant must be tried, although the maximum amount of time which can be excluded is three months. Thus, a defendant does not necessarily have to be retried within three months of the order of mistrial if there is time remaining on the statutory six months speedy trial limit.

20. MISTRIAL

Mason v. People, 932 P.2d 1377 (Colo. 1997). Rejecting assertion that § 18-1-405(6)(e) sets an absolute new speedy trial time limit within three months of declaration of mistrial; "[t]he plain language of the statute can only be read to create an exclusion, not a new time period within which the defendant must be tried")

People v. Sherwood, 489 P.3d 1233 (Colo. 2021). Mistrial due to Covid-19 pandemic merely tolled the six-month speedy trial period for up to three months from the mistrial date. And, because the delay between the date of the mistrial (March 1) and the new trial date (April 26) was reasonable, attributable to the mistrial, and not in excess of three months, it must be excluded in its entirety from the speedy trial period. Under the circumstances present here, the speedy trial period was tolled (i.e., the speedy trial period was on time-out).

* * *

2025 Contributions by Crystal Littrell

First Assistant Attorney General

Colorado Attorney General's Office

CHAPTER 21

MOTIVE

21. MOTIVE

21.1 INTRODUCTION

Courts have described "motive" as "the 'reason that nudges the will and prods the mind to indulge the criminal intent,' an 'inducement or state of feeling that impels and tempts the mind to indulge in a criminal act,' and 'the moving force which impels to action for a definite result.' While intent accompanies the actus reus, the motive comes into play before the actus reus. **The motive is the cause, and the actus resus is the effect.**'" *People v. Cousins*, 181 P.3d 365 (Colo. 2007) (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 3.15, at 35-36 (1996)). Motive is "a state of mind personal to the party harboring it and is a circumstance tending to establish the requisite *mens rea* for a criminal act." *See People v. Elkhatib,* 632 P.2d 275 (Colo. 1981).

"It is permissible to prove a defendant's motive for committing a crime." *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007). Motive evidence is relevant to prove that a crime was committed. *People v. Cousins*, 181 P.3d 365 (Colo. 2007). If otherwise relevant, evidence of motive will not be excluded merely because it may be prejudicial to defendant, *Candelaria v. People*, 493 P.2d 355 (Colo. 1972), reflects adversely on defendant's character, *see Moss v. People*, 18 P.2d 316 (Colo. 1932), or shows the commission of other crimes, *Wooley v. People*, 367 P.2d 903 (Colo. 1961), though evidence of other crimes, wrongs, or acts must satisfy C.R.E. 404(b) and the test set forth in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). Evidence of motive must be established by competent evidence, and may not be established by inadmissible hearsay evidence. *See People v. Garner*, 806 P.2d 366 (Colo. 1991). Moreover, while evidence of motive may be relevant as having a tendency to make the existence of any fact of consequence more probable, it may be excluded under C.R.E. 403 if, in the trial court's discretion, its probative value is substantially outweighed by the danger of unfair prejudice. *See People v. Clark*, 370 P.3d 197 (Colo. 2015).

Evidence of absence of motive may also be relevant and admissible, often to rebut or disprove an inference of motive in the prosecution's case. *See Graves v. People*, 32 P. 63 (Colo. 1893). However, "proof of motive is not necessary to prove the commission of a crime." *People v. Oliver*, 480 P.3d 737 (Colo. App. 2020). Absence of motive is not grounds for granting a motion for judgment of acquittal. *See People v. Spinuzzi*, 369 P.2d 427 (Colo. 1962) (overruled in part on other grounds). Moreover, evidence that another person had motive to commit the crime for which the defendant has been charged may be admissible, but only if other evidence links the alternate suspect to the charged crime. "In short, mere motive or opportunity is insufficient; a defendant must proffer something 'more' to establish the non-speculative connection."). *People v. Elmarr*, 351 P.3d 431 (Colo. 2015).

Practice Tip: To admit evidence of other crimes, wrongs, or acts under C.R.E. 404(b), the evidence must meet the criteria set forth in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

21.2 ADMISSIBILITY OF MOTIVE EVIDENCE

A. Admissibility Generally

21. MOTIVE

"It is permissible to prove a defendant's motive for committing a crime . . . . Further, evidence of motive is relevant to prove a crime was committed." *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

Warford v. People, 96 P. 556 (Colo. 1908). In upholding the admission of evidence of an assault and escape from a sheriff, to establish the defendant's motive for assault with intent to kill in a transaction that occurred later in the day, the Colorado Supreme Court stated:

It is always proper to show the motive which may have prompted the accused to commit the crime for which he is being tried, and the intent with which he committed the acts which it is claimed constitute that crime; and evidence which tends to prove either of these facts is relevant to establish the commission of the crime for which he is on trial, even though such evidence, for the purpose indicated, may tend to show the commission of similar and independent crimes by him.

1. Evidence of motive not inadmissible merely because it is prejudicial or shows the commission of other crimes

Candelaria v. People, 493 P.2d 355 (Colo. 1972). Where the defendant was charged with the robbery of a drugstore in which money and codeine tablets were taken, evidence that he had previously made frequent purchases of cough medicine containing codeine was admissible to establish the motive for the robbery: "proof of motive will not be excluded merely because it may be prejudicial to the defendant, as long as it is relevant and material."

Wooley v. People, 367 P.2d 903 (Colo. 1961). Evidence that, after the homicide, defendant took two checks from victim's residence and then forged and cashed them was admissible to establish motive for homicide, even though it showed that defendant committed the other crimes.

People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000). Where charges arose from defendant's use of a falsified receipt at driver's license revocation hearing to attack the credibility of a witness, evidence of defendant's demeanor, behavior, and use of profanity during and after arrest was relevant to show, *inter alia,* defendant's motive for later producing a falsified receipt, and the evidence was not unfairly prejudicial.

Practice Tip: Just like any other type of evidence, however, motive evidence may still be excluded under C.R.E. 403 if "its probative value is substantially outweighed by the danger of unfair prejudice." *People v. Clark*, 370 P.3d 197 (Colo. App. 2015).

2. Remoteness of motive evidence

Berger v. People, 224 P.2d 228 (Colo. 1950). In a prosecution of the defendant for the murder of his wife, the Colorado Supreme Court held that evidence that the defendant habitually mistreated and beat her for approximately five years preceding the homicide was admissible for the purpose of showing motive and malice. The Court stated that the remoteness of the motive evidence went to **weight rather than admissibility**. *See also People v. Gordon*, 765 P.2d 633 (Colo. App. 1988); *People v. Fields*, 697 P.2d 749 (Colo. App. 1984).

B. Manner of Proof: Relevancy and Hearsay Considerations

In homicide and assault cases, evidence of motive is frequently established by means of extrajudicial statements of the defendant and the victim. To be admissible, such evidence must be **competent** (not subject to an exclusionary rule such as hearsay) and **relevant** to a material issue in the case.

1. Defendant's extrajudicial statements

a. Relevancy

Prior threats, antecedent grudges, or expressions of hostility or ill-will toward a victim by a defendant are generally relevant and admissible to show motive. *See People v. Gladney*, 570 P.2d 231 (Colo. 1977); *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001).

b. Hearsay

A defendant's extrajudicial statements offered by the prosecution are admissions, and are, thus, not hearsay. *See* C.R.E. 801(d)(2)(A). Such statements must nevertheless be admitted through a perceiving witness. For example, testimony by a third party who was told by the victim that she (the victim) had been threatened would be excluded as hearsay, unless an exception to the hearsay rule is established. *See People v. Madson*, 638 P.2d 18 (Colo. 1981). If, however, evidence of such a threat was offered only to show the effect the threat had upon the victim or explain her subsequent actions, it would not constitute inadmissible hearsay. *See People v. Gladney*, 570 P.2d 231 (Colo. 1977).

2. Victim's extrajudicial statements

a. Relevancy

To be admissible, the extrajudicial statements of a victim expressing fear of the defendant, or prior threats of violence, must be clearly relevant to a material issue in the case, due to the danger that the jury will consider the statement for the improper purpose of proving the defendant's guilty state of mind, rather than the proper purpose of the victim's state of mind. *People v. Madson*, 638 P.2d 18 (Colo. 1981). The defendant's first-degree murder conviction was reversed by the Colorado Supreme Court because hearsay statements of the victim concerning her fear of the defendant were improperly admitted to establish *the defendant's* state of mind, rather than the victim's state of mind. The Court recognized **three situations** in which evidence of a victim's fear of the defendant might be relevant in a homicide case:

When evidence raises the issue **whether the victim first attacked the defendant**, evidence that the victim feared the defendant is highly probative of the declarant's future conduct, namely that the victim was not the aggressor. In such cases the relevant state of mind may be established by the victim's statement of fear or by other evidence circumstantially probative of that condition. A second category is represented by those cases where the **defendant claims suicide as the cause**

of death. In such cases, evidence of the victim's fear of the defendant tends to refute the defendant's evidence of a suicidal bent. A third category involves the **defendant's claim of accidental death**, for example an accidental shooting arising out of a struggle instigated by the victim. Here evidence of the victim's fear of the defendant tends to rebut a contention that the victim initiated the confrontation.

The Court acknowledged that no such issues were raised by the defendant in this case; the victim's statements were in fact admitted as proof of the defendant's state of mind, *i.e.,* "his intent to kill, the likelihood of his doing so, and his prior homicidal conduct."

b. Hearsay

Where the victim's extrajudicial statement is offered as evidence of state of mind, it is subject to exclusion unless it falls within an exception to the hearsay rule (C.R.E. 803(3)), or is offered for the non-hearsay purpose of showing the effect of the threat or violent act upon the declarant. *People v. Fuller*, 788 P.2d 741 (Colo. 1990) (holding that although trial court erred in failing to make specific findings regarding reliability of statements by friends of victim that defendant had been violent to victim in the past, error was harmless pursuant to residual exception to hearsay rule (C.R.E. 804(b)(5))).

People v. Gladney, 570 P.2d 231 (Colo. 1977). Third party testimony regarding defendant's threats toward victim admissible for non-hearsay purpose (not for the truth of the matter asserted) of explaining victim's subsequent action of carrying gun, where defendant claimed victim was initial aggressor.

C. Illustrative Cases by Topic

1. Financial gain

People v. Calvaresi, 600 P.2d 57 (Colo. 1979). Evidence that the defendant's nightclub was in **severe financial trouble** and was insured for $65,000.00 was admissible to show the defendant's motive in a first-degree arson case. *See also People v. Elkhatib*, 632 P.2d 275 (Colo. 1981); *Militello v. People*, 37 P.2d 527 (Colo. 1934).

Moss v. People, 18 P.2d 316 (Colo. 1932). Evidence that the defendant **gambled heavily** was admissible to show his motive for killing the victim, whom he knew kept large sums of money at her house.

Van Wyk v. People, 99 P. 1009 (Colo. 1909). Evidence that the defendant obtained a **life insurance policy** on the victim for the benefit of his wife, and was unable to pay the premiums, was admissible to show his motive for murdering the victim within a short time after the policy was issued.

2. Malice toward the victim of homicide or assault

21. MOTIVE

People v. Miller, 529 P.2d 648 (Colo. 1974). Holding that evidence of **an argument** between the accused and the victim that occurred approximately two months before the homicide was admissible to show motive.

People v. Gladney, 570 P.2d 231 (Colo. 1977). Testimony showing victim's **fear of defendant and defendant's prior threats to kill her** were relevant and admissible to explain victim's subsequent actions and to disprove that victim was initial aggressor.

People v. Skinner, 53 P.3d 720 (Colo. App. 2002). Trial court did not abuse its discretion in admitting a photograph of defendant's tattoo, which stated "death to n[***]ers." This evidence was relevant to the issue of intent and motive for attempted murder and assault, where the victim was an African-American who testified that he confronted the defendant about the tattoo two days before defendant assaulted him.

a. Threats, assaults, ill-will

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). Evidence of other crimes established defendant's **animus toward women** as the motive for his attack on the female victim.

People v. Pacheco, 553 P.2d 817 (Colo. 1976). In a prosecution for menacing by the use of a deadly weapon, the Colorado Supreme Court held that evidence of a **prior altercation in the same bar** approximately five weeks prior to the crime charged, during which the defendant was armed with a knife and threatened the victim, was admissible to establish intent, identity and motive.

Duran v. People, 399 P.2d 412 (Colo. 1965). In a prosecution for assault with a deadly weapon, evidence that the defendant had **previously assaulted or threatened to assault the victim** was admissible for the purpose of establishing his motive and intent.

b. Husband or wife homicide

Romero v. People, 460 P.2d 784 (Colo. 1969). Where the defendant was charged with second-degree murder of his wife but claimed that the shooting was accidental, admission of the defendant's statement to police in which he admitted his **jealousy, as well as prior threats and beatings** inflicted upon his wife, was admissible to show motive and malice: "In marital homicide cases, any fact or circumstance relating to ill-feeling, ill-treatment, jealousy, prior assaults, personal violence, threats, or any similar conduct or attitude by the husband toward the wife is relevant to show motive and malice in such crimes."

Wright v. People, 171 P.2d 990 (Colo. 1946). A packet of fifty **affectionate letters** that the defendant's wife had received **from her boyfriend**, and which the defendant had read, were admissible in a prosecution for the murder of the wife as tending to "establish a cause for jealousy on the part of the defendant and thus furnish a motive for the killing."

People v. King, 765 P.2d 608 (Colo. App. 1988). In a spousal homicide case, evidence regarding the **closing of the joint bank account** by the deceased wife was relevant to establish the deterioration of the marital relationship.

3. Jealously as motive

People v. Munoz, 240 P.3d 311 (Colo. App. 2009). Defendant was convicted of, *inter alia*, first-degree murder, first-degree burglary and felony menacing. Defendant's burglary of his wife's storage unit in order to take [third person's] belongings was evidence of defendant's motive for committing the crimes against [third person] and the victim. There was evidence that defendant previously had an intimate relationship with [the third person] and may have been jealous of her relationship with the victim.

4. Revenge as motive

People v. Reaud, 821 P.2d 870 (Colo. App. 1991). In a prosecution for making a false report of explosives, the Court of Appeals held that evidence of the **discharge of the defendant by his employer**, against whom the threat had been made, was admissible as tending to establish the defendant's motive for making the threat.

Zipperian v. People, 79 P. 1018 (Colo. 1905). In a homicide prosecution, the Colorado Supreme Court stated: "The prosecution . . . showed that before the homicide, [the victim] had caused to be filed an information against defendant for burglary, which was pending when the shooting occurred. This was competent evidence, tending to show motive for the killing."

5. Avoiding arrest as a motive for assault on a peace officer

Swift v. People, 465 P.2d 391 (Colo. 1970). The police received a call on a suspicious person in an unimproved area of open land early in the morning, and when they saw the defendant, he began to run. He was ordered to stop, but he fired at the officers instead. A recently stolen safe, which the defendant was attempting to open with a sledgehammer and crowbar, as well as the hammer and crowbar, were later admitted into evidence: "Certainly it could be reasonably inferred from this evidence that the defendant was not simply firing shots into the air but was firing at the officers in an effort to avoid detection and arrest for the theft of the safe."

6. Avoiding presentation of evidence in civil suit

People v. Coit, 961 P.2d 524 (Colo. App. 1997). Evidence regarding defendant's civil lawsuit with victim, including that of defendant's allegedly bigamous marriage, false claims of pregnancy and other fraudulent activities which "portrayed defendant as an evil, conniving, and manipulative person" was properly admitted, with limiting instructions, to show defendant killed the victim to avoid presentation of this evidence in the civil trial.

7. Eliminating identification witnesses

People v. Corbett, 611 P.2d 965 (Colo. 1980). The defendant was charged with the murder of a young man whom he took to a deserted area for the supposed purpose of engaging in a drug transaction. In affirming his conviction, the Colorado Supreme Court held that the defendant's discussion with friends ten days before the murder about eliminating any witnesses to robberies they were involved in was admissible to establish his motive and intent in committing the murder for which he was on trial.

8. Gang affiliation

"Evidence about gang culture is admissible if relevant to explain a circumstance of the crime, to show a motive for the crime itself, or to understand a witness's change in statement or reluctance to testify." *People v. James,* 117 P.3d 91 (Colo. App. 2004).

People v. Mendoza, 876 P.2d 98 (Colo. App. 1994). The Court of Appeals held that the admission of certain photographs, a notebook containing "rap" music, lyrics, and a drawing of a gun, all having a tendency to link the defendant to the "Bloods" street gang, was relevant and admissible to establish the defendant's motive for killing the victim: "[T]he evidence of gang affiliation, therefore, was necessary for the prosecution's case of first-degree murder."

People v. Nicholas, 950 P.2d 634 (Colo. App. 1997) (rev'd on other grounds. Evidence of defendant's gang affiliation relevant to possible motives and properly admitted where offered to show that defendant's accomplice attempted robbery in order to be allowed in defendant's gang.

People v. Webster, 987 P.2d 836 (Colo. App. 1998). Hearsay evidence of defendant's gang activity admissible to show shooting was motivated by gang rivalry.

People v.Clark, 370 P.3d 197 (Colo. App. 2015). Defendant's affiliation with a specific gang "could have shown motive to commit the crimes[s] charged" requiring specific intent.

9. Motive in sexual assault cases

People v. Leonard, 872 P.2d 1325 (Colo. App. 1993). In upholding the trial court's admission of evidence of similar sexual transactions between the victim and the defendant, the Court of Appeals rejected the assertion that the only motive that can be established in a sexual assault case is that which can be directly inferred from the act itself, namely, sexual gratification. "In our view, the concept of motive in a sexual assault case may also address other relevant factors such as why a particular type of behavior is involved or why a particular victim is selected for the assault. Thus, evidence of motive as reflected in the occurrence of prior uncharged conduct may tend to establish the charged offense."

People v. Whitlock, 412 P.3d 667 (Colo. App. 2014). Defendant was convicted of sexual assault on a child and sexual assault on a child by one in a position of trust. Evidence that defendant had sex with the victim's mother at night while she was sleeping had some tendency to make it more probable that defendant had the motive or intent to sexually assault the victim at night while she

was sleeping, it was defendant who committed the offense, and the victim did not fabricate the allegation.

10. Miscellaneous

People v. Beilke, 232 P.3d 146 (Colo. App. 2009). Defendant was convicted of violating a custody order. Trial court did not abuse its discretion in **admitting a prior custody order** that contained uncharged misconduct and prior bad acts because the order tended to prove that the defendant wanted to remove his daughter from the country, because he would likely lose custody of her for the reasons stated in the prior order.

People v. Sandoval-Candelaria, 328 P.3d 193 (Colo. App. 2011). (rev'd on other grounds). Defendant was charged with one count of first-degree murder, and a jury convicted defendant of the lesser included offense of manslaughter. Trial court did not abuse its discretion in admitting evidence of the defendant's **prior drug dealing** to show why he argued with the victim. The evidence of prior drug dealing by defendant was probative of both motive and intent to kill the victim.

People v. Douglas, 296 P.3d 234 (Colo. App. 2012). The trial court did not err when it admitted evidence of **transcripts of defendant's internet chats with minor girls** and **photographs of minor girls engaged in sex acts** found on defendant's computer was proper as proof of intent and motive, for the purposes of showing whether defendant intended to lure a child for sex and whether his motive was to seek a sexual relationship with a child.

People v. Dean, 292 P.3d 1066 (Colo. App. 2012). Defendant was charged with first-degree murder and was convicted of the lesser included offense of second-degree murder. Evidence of defendant's **prior use of crack cocaine** was properly admitted to prove motive and identity.

21.3 ABSENCE OF MOTIVE

A. Admissible to Rebut or Disprove Prosecution's Evidence of Motive

Graves v. People, 32 P. 63 (Colo. 1893). Where the prosecution presented evidence that the defendant had converted and squandered a substantial amount of the victim's property, thereby tending to show a motive for the victim's murder, it was error for the trial court to exclude evidence on behalf of the defendant that he had returned some of the property to the victim's estate after her death and that, because his office had been burglarized, he was unable to account for any of the victim's other property. The weight of such evidence is for the jury, not the court, to decide.

B. Not Basis for Granting Motion for Judgment of Acquittal

People v. Spinuzzi, 369 P.2d 427 (Colo. 1962) (overruled in part on other grounds). Where the defendant was charged with murder under a statute requiring proof of malice, the trial court erred in granting the defendant's motion for directed verdict on the ground that the prosecution failed to

establish any motive. The Colorado Supreme Court recognized that motive and malice are not synonymous, and motive is not an essential part of the prosecution's case.

C. Instruction on Absence of Motive

Armijo v. People, 304 P.2d 633 (Colo. 1956). In a second-degree murder prosecution, the trial court properly rejected the defendant's tendered instruction to the effect that absence of motive could be regarded as a circumstance favorable to the accused: "The fact that the evidence may not have disclosed a motive for the crime should not have been emphasized above other portions of the evidence by a special instruction directed to that subject. It is not necessary to prove a motive as an essential element in the crime of murder. Absence of a motive is no defense to the charge of murder."

21.4 EVIDENCE OF ANOTHER PERSON'S MOTIVE

A. Alternate Suspects

People v. Mulligan, 568 P.2d 449 (Colo. 1977). In upholding the exclusion of evidence offered by the defendant that other parties had a motive to set one of the fires at issue in the arson prosecution, the Colorado Supreme Court stated the general rule: "Evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime."

Evidence of alternate suspects may be excluded if it only creates an unsupported inference or a possible ground for suspicion. "When the asserted direct connection is the alternate suspect's commission of a similar crime, the evidence of the alternate suspect's motive or opportunity is admissible only if '[t]he details of the two crimes [are] distinctive enough to represent a 'signature' of a single individual.'" *People v. Perez,* 972 P.2d 1072 (Colo. App. 1998).

People v. Elmarr, 351 P.3d 431 (Colo. 2015). *Mulligan* did not establish a specific test (a direct-connection test) for admission of evidence of an alternate suspect's motive or opportunity. Rather, to be admissible, such evidence must establish a non-speculative connection or nexus between the alternate suspect and the crime charged. Thus, admissibility of alternate suspect evidence depends on the strength of the connection between the alternate suspect and the charged crime, and is subject to review under C.R.E. 401, 403, 404(b), and 804(b)(3) (for alternate suspect's statements).

1. Illustrative Cases

People v. Schwartz, 678 P.2d 1000 (Colo. 1984). The defendant was charged with child abuse resulting in the death of an 11-month-old child she was babysitting. Medical testimony established that the time of the trauma which caused the infant's death could have ranged from a few hours to a few days prior to her death. In upholding the admission of evidence of the drinking habits of the victim's father, arguments between her parents, and an incident of abuse upon the mother by the father, the Colorado Supreme Court held that the custody of the victim with three individuals (the

defendant and the two parents) during the time frame when the death-producing injuries were inflicted constituted sufficient direct and circumstantial evidence to permit the introduction of evidence of other suspects under *Mulligan*.

People in the Interest of R.L., 660 P.2d 26 (Colo. App. 1983). The minor-child, who was charged with arson, sought to implicate a former owner who retained a security interest in the building which was burned, by offering testimony from a witness who observed a truck leave the crime scene at high speed with its headlights off. The minor-child also sought to inquire into the former owner's financial records, the disposition of the insurance proceeds, and question him regarding a fire that occurred in another building he owned nearby. The Colorado Court of Appeals recognized that evidence of an alternate suspect must "create more than an unsupported inference, or a possible ground for possible suspicion," and that "when evidence amounts only to proof of opportunity or motive, then it is still in the realm of suspicion and should not be admitted." However, the Court concluded that the "disinterested witness' account of seeing the truck, which was registered to the former owner, speeding down the alley without headlights near the time of the fire is tangible evidence connecting him with the crime," and exclusion of the testimony was therefore erroneous.

Compare with People v. Romero, 593 P.2d 365 (Colo. App. 1978). The defendant in a homicide prosecution sought to introduce a statement by the victim that on a prior occasion her husband had attacked her with a kitchen knife. The statement was made several months before she was stabbed to death. In affirming the refusal to admit the evidence, the Court of Appeals concluded that, although the evidence was offered to establish that the victim's husband had an opportunity or motive to commit the homicide, the husband was not living with the victim at the time of the crime and there was no tangible evidence to otherwise link him with the crime.

People v. Armstrong, 704 P.2d 877 (Colo. App. 1985). In aggravated robbery prosecution, it was proper to exclude evidence that witness saw two unidentified black men in parking lot adjacent to crime scene 50 minutes before robbery.

People v. Owens, 97 P.3d 227 (Colo. App. 2004); *People v. Bueno*, 626 P.2d 1167 (Colo. App. 1981). Where there is an issue as to the identity of the perpetrator, and the defendant desires to present alternate suspect evidence that bears on that issue, rather than merely showing motive or opportunity, evidence directly connecting the alternate suspect to the crime is not required; the test of admissibility in that context is "one of relevancy".

B. Motive of Co-Defendant and Co-Conspirators

Smaldone v. People, 88 P.2d 103 (Colo. 1938). Three of the four defendants charged with assault with intent to commit murder and conspiracy were tried jointly. The crimes were motivated by the fact that the victim, who had been involved in gambling activities with the defendants, had refused to give one of the defendants as large a cut in a particular gambling enterprise as that defendant desired. The prosecution's evidence showed a complete history of the gambling activities of the victim and one of the co-defendants, including a robbery of the victim's gambling establishment

by two of the other defendants. In upholding the admission of such evidence, the Colorado Supreme Court acknowledged that, generally, motive for committing a crime is personal to the possessor. "But in a conspiracy case, or in a case of a crime proceeding out of a conspiracy, the several criminal intents of the participators are ingredients of the crime of conspiracy and of the crime constituting its objective. Hence evidence admissible to prove the criminal intent, including the motives of each individual participant, is properly admissible against all whether tried jointly or severally."

* * *

2025 Contributions by Cameron Munier
Senior Lead Deputy District Attorney
17th Judicial District

CHAPTER 22

MULTIPLE COUNTS FOR THE SAME ACT

22. MULTIPLE COUNTS FOR THE SAME ACT

22.1 INTRODUCTION

A single transaction may give rise to the violation of more than one statutory provision defining a criminal offense, each of which may be subject to prosecution. Section 18-1-408 outlines the requirements for the prosecution of multiple of counts for the same act. In addition to the statutory limitation on such prosecutions, the Double Jeopardy Clauses of the state and federal constitutions prevent the prosecution of the accused twice for the same offense.

22.2 DOUBLE JEOPARDY IMPLICATIONS

The Double Jeopardy Clauses of the United States and Colorado Constitutions protect an accused against multiple punishments for the same crime where the General Assembly has not authorized multiple punishments based upon the same criminal conduct. *Woellhaf v. People,* 105 P.3d 209, 214 (Colo. 2005).

A defendant's double jeopardy rights are violated if the trial court imposes consecutive sentences for multiple convictions that arise from the same episode **if the convictions are supported by identical evidence.** *People v. Shepard*, 98 P.3d 905 (Colo. App. 2004).

Magana v. People, 511 P.3d 585 (Colo. 2022). No double jeopardy violation for multiple arson convictions from setting a single fire where the "unit of prosecution" is defined by each dwelling or structure damaged in first degree arson, each separate owner of personal property in second degree arson, and each person put in jeopardy for fourth degree arson.

People v. Zadra, 396 P.3d 34 (Colo. App. 2013). Determining whether charges are multiplicitous and run afoul of the Double Jeopardy Clause involves a two-part inquiry: (1) identifying the allowable unit of prosecution; and (2) reviewing the evidence to determine whether the charges are factually distinct.

Practice Tip: You must consider not only the caselaw supporting § 18-1-408, but also the caselaw on double jeopardy and unit of prosecution issues.

A. Identical Evidence

A single transaction may give rise to the violation of more than one statutory provision defining a criminal offense, each of which may be subject to prosecution. Section 18-1-408(3) provides that when two or more such offenses are charged in a single information and the charges are supported by **identical evidence**, the court, upon the request of the defendant, may require the prosecution, upon the conclusion of the evidence, to elect the count which will be submitted to the jury. In the event that more than one guilty verdict is returned as to any defendant in a case in which such multiple counts are tried, the sentences imposed must run **concurrently**. Where multiple victims are involved, however, the court may, within its discretion, impose consecutive sentences. *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

22. MULTIPLE COUNTS FOR THE SAME ACT

1. Multiple victims

Concurrent sentences are required for offenses committed against a single victim when (1) the counts are based on the same act or series of acts arising from the same criminal episode; and (2) the evidence supporting the counts is identical. In order to determine whether multiple convictions relied on "identical evidence," courts must consider if the acts underlying the convictions were sufficiently separate. If the acts that form the basis of the two charges are sufficiently distinct, the convictions are not supported by identical evidence. *Juhl v. People*, 172 P.3d 896 (Colo. 2007).

People v. Espinoza, 463 P.3d 855 (Colo. 2020). Where offenses are defined in terms of their victimization of another and committed against different victims, they cannot be proven by "identical evidence" or trigger concurrent sentencing under 18-1-408(3).

Allman v. People, 451 P.3d 826 (Colo. 2019). Identity theft is not a continuing offense. The unit of prosecution for identity theft under § 18-5-902(1)(a) is based on each "use" of the victim's personal or financial identifying information, rather than for each "identity" stolen. Accordingly, a defendant may be properly convicted of multiple counts of identity theft for using a single victim's information.

2. Mere possibility of jury relying on identical evidence

People v. Thompson, 471 P.3d 1045 (Colo. 2020). "The mere possibility that the jury may have relied on identical evidence in returning more than one conviction is not alone sufficient to trigger the mandatory concurrent sentencing provision."

People v. Muckle, 107 P.3d 380 (Colo. 2005). If the evidence the jury relied on in its reaching its verdict for more than one count could have been identical, but also could have been different, then the court retains discretion to sentence consecutively or concurrently.

People v. McAfee, 160 P.3d 277 (Colo. App. 2007).''The trial court has the discretion to impose concurrent or consecutive sentences when a defendant is convicted of multiple offenses unless the 'evidence supports no other conclusion than that the charges are based on identical evidence.' Thus, the mere possibility that identical evidence may support two convictions is not sufficient to deprive the court of its discretion to impose consecutive sentences." (citing *People v. Muckle*, 107 P.3d 380 (Colo. 2005)).

3. Time, place, location analysis

If two crimes are separated by time and place, there may be different evidence based on one or more distinct acts. *People v. Glasser*, 293 P.3d 68 (Colo. App. 2011) (pulling woman off street and into van one crime, sufficiently separated by time and place from sex assault that took place in van so as to permit consecutive sentencing).

In determining whether offenses are factually distinct, we look at all the evidence and may consider: (1) whether the acts occurred at different times and were separated by intervening events;

(2) whether there were separate volitional acts in the defendant's course of conduct; and (3) factors such as temporal proximity, the location of the victim, the defendant's intent as indicated by his conduct and utterances, and the number of victims. People v. Lowe, 486 P.3d 397 (Colo. App. 2020).

Multiple counts supported by different evidence if the defendant's conduct is separated by time, location, intervening events, or adequate time for the defendant to reflect between crimes. *Quintano v. People*, 105 P.3d 585 (Colo. 2005).

People v. O'Shaughnessy, 275 P.3d 687 (Colo. App. 2010). The trial court erred in imposing consecutive sentences for the offenses of attempted murder, attempted aggravated robbery and second-degree assault because all three offenses were based on identical evidence and occurred in a single criminal episode lasting less than sixty seconds.

4. Different volitions

People v. Valera-Castillo, 497 P.3d 24 (Colo. App. 2021). Though acts of assault occurred in the same location, against the same victim, and somewhat close in time, they constituted separate acts based on a new volitional departure by the defendant—and thus supported separate convictions for both second and third degree assault.

Schneider v. People, 382 P.3d 835 (Colo. 2016). Single act of sexual penetration supported separate sexual assault convictions under different theories—physically helpless (assault on unconscious victim) and overcoming will (use of force when victim woke). Given the volitional differences between these acts, these convictions were not supported by "identical evidence," thus permitting consecutive sentences.

5. Common elements

People v. Jurado, 30 P.3d 769 (Colo. App. 2001). "The mere fact that the offenses took place during one continuous criminal episode does not establish that they were supported by identical evidence. Further, offenses are not necessarily supported by identical evidence even though there are some common elements of proof."

Chirinos-Raudales v. People, 532 P.3d 1200 (Colo. 2023). Convictions for sexual assault position of trust and sexual assault position of trust as part of a pattern of abuse were not based on "identical evidence" despite one identified act being part of the basis for the pattern count. Because the "pattern of abuse" count required two acts, it could not be based on the act underlying the separate charge alone and thus the evidence was not identical. ***But see*** *People v. Aldridge*, 446 P.3d 897 (Colo. App. 2018) (finding the prosecution relied on identical evidence that required concurrent sentences by seeking to establish sexual assault on a child and aggravated incest without identifying distinct acts of sexual abuse).

6. Different acts

22. MULTIPLE COUNTS FOR THE SAME ACT

People v. Muckle, 107 P.3d 380 (Colo. 2005). Defendant was convicted of first-degree assault and attempted first-degree murder for acts against the same victim. Defendant shot the victim once in the abdomen while the victim was seated and then fired a second shot, hitting the victim in the arm, as the victim was fleeing the room. The Court held that the convictions corresponded to two separate acts; therefore, the trial court was permitted to impose consecutive sentences.

Qureshi v. District Court, 727 P.2d 45 (Colo. 1986). Defendant was convicted of attempted manslaughter and first-degree assault for acts against the same victim. The Court found that the convictions were not supported by identical evidence. The defendant stabbed the victim twice in the kitchen. Following a struggle, the victim asked to use the bathroom. She went to the bathroom and closed the door; the defendant then forced his way into the bathroom, pushed the victim against the wall, and brought the knife down toward the victim's throat or heart, which the victim blocked, suffering a serious cut to her hand. The trial court found that the first-degree assault was based on the first stabbings in the kitchen, and attempted manslaughter was based on the later attack.

People v. Rabes, 258 P.3d 937 (Colo. App. 2010). The trial court did not err in running defendant's sentences for felony sexual exploitation of a child consecutive to one another because the evidence for the multiple counts was not identical. The prosecution presented multiple and distinct images of victim and defendant involved in sexually explicit conduct.

7. Transferred intent

People v. Jackson, 472 P.3d 553 (Colo. 2020). Court plainly erred and violated double jeopardy by convicting a defendant of both first-degree murder and attempted first-degree murder in a mistaken identity case where the defendant intended to kill one person but mistakenly shot and killed a different person that he believed to be his target.

8. Different legal theories for same conduct

People v. Torrez, 316 P.3d 25 (Colo. App. 2013). Defendant was charged with two sex crimes for each incident of sex assault resulting in 10 counts from 5 separate incidents. The court held the sex offenses based on identical evidence must be sentenced concurrently. In so doing, the court determined consecutive sentencing mandated by § 18-1.3-1004(5) was inapplicable where charges were supported by identical evidence.

People v. Serna-Lopez, 531 P.3d 410 (Colo. App. 2023). Aggravated robbery statute generally proscribes alternative means of committing one offense. Thus, were a single victim, location, and event is involved, only one conviction may enter.

People v. Denhartog, 452 P.3d 148 (Colo. App. 2019). Like first-degree assault, different provisions of second-degree assault constitute alternative means of committing a single crime. Accordingly, multiple counts based on the same act must merge.

People v. Wagner, 434 P.3d 731 (Colo. App. 2018). Where a single time period with factually inseparable incidents are alleged, §§ 18-3-602(1)(a), (1)(b), and (1)(c) provide alternative theories for committing stalking. Accordingly, such convictions are multiplicitous and must be merged.

People v. Patton, 425 P.3d 1152 (Colo. App. 2016). Finding convictions for unauthorized use of a financial device (a debit card) and theft (of electronics from a store using that debit card) were supported by "identical evidence," thus mandating concurrent sentences.

B. Unit of Prosecution

People v. Magana, 511 P.3d 585 (Colo. 2022). The "unit of prosecution" is the way the General Assembly, in drafting a statute, divides a defendant's conduct into discrete acts for purposes of prosecution multiple offenses. Applying the plain language of the arson statutes, the act of setting a single fire can properly support multiple arson convictions where the legislature defined this crime by each building damaged (1st degree), each owner's personal property (2nd degree), and each person put at risk by the fire (4th degree).

Allman v. People, 451 P.3d 826 (Colo. 2019). "Use" identity theft is not a continuing offense, and its unit of prosecution is defined by each discrete act of using the information of another to obtain a benefit. Thus, concurrent sentences are not required where, here, the defendant repeatedly used the information to obtain a benefit and each count captured each different act.

Friend v. People, 429 P.3d 1191 (Colo. 2018). The child abuse resulting in death statute describes alternative means of committing a single offense. To charge multiple units of prosecution for violating a single criminal statute, the People must allege facts supporting each count and present sufficient evidence to support each unit of prosecution.

People v. Tanner, 542 P.3d 263 (Colo. App. 2023). Careless driving offense is defined by the act of driving in the manner described, not the number of victims harmed.

People v. Robinson, 524 P.3d 300 (Colo. App. 2022). Insurance fraud statute defines multiple means of committing a single offense and where a defendant commits multiple acts of fraud in support of a single insurance claim, it supports only one conviction.

People v. Snider, 491 P.3d 423 (Colo. App. 2021). Unit of prosecution for obstruction of a peace officer is not based on the number of officers obstructed, but rather in terms of the discrete volitional acts of obstruction the defendant commits.

People v. Lowe, 486 P.3d 397 (Colo. App. 2020). Unit of prosecution for resisting arrest is not based on the number of victim-officers or number of arrests resisted—it is defined by the number of discrete volitional acts of resisting arrest.

People v. Meils, 471 P.3d 1130 (Colo. App. 2019). Sexual exploitation of a child statute proscribes alternative means of committing the offense. Applying this unit of prosecution, a defendant cannot be convicted both for possessing and creating the same material.

People v. Knox, 467 P.3d 1218 (Colo. App. 2018). Unit of prosecution for attempt to influence a public servant defined by volitional acts seeking to influence a decision, not by the number of public servants impacted by those acts.

People v. Harris, 405 P.3d 361 (Colo. App. 2016). Animal cruelty is not a continuing offense, and its unit of prosecution is defined by each individual animal victim.

People v. Zadra, 396 P.3d 34 (Colo. App. 2013). Unit of prosecution for perjury is defined by each factually distinct false statement. Separate perjury charges are permissible if they require different factual proof of falsity, even if they are related and arise out of the same transaction or subject matter.

People v. McMinn, 412 P.3d 551 (Colo. App. 2013). Unit of prosecution for vehicular eluding defined by discrete volitional acts of eluding one or more peace officers.

People v. Arzabala, 317 P.3d 1196 (Colo. App. 2012). Unit of prosecution for leaving the scene of an accident defined by number of accident scenes, not number of victims.

People v. Fuentes, 258 P.3d 320 (Colo. App. 2011). Burglary offenses defined by each entry. "A single entry can support only one conviction of first-degree burglary, even if multiple assaults occur." *Accord People v. Carter*, 402 P.3d 480 (Colo. App. 2015)

C. Charging Possession and Distribution in Drug Cases

People v. Abiodun, 111 P.3d 462 (Colo. 2005). Defendant was convicted of two counts of possession of a controlled substance and two counts of distribution of a controlled substance arising from two occasions when he sold cocaine to an undercover officer. The Court held that § 18-18-405 defines a single offense for double jeopardy purposes, and there was insufficient evidence at trial to support convictions for more than one commission of that offense on each of the dates charged. Possessing drugs, acquiring it for sale, and then selling the drugs, constituted a single unit of prosecution contemplated by statute, and therefore a single offense.

People v. Davis, 352 P.3d 950 (Colo. 2015). Double jeopardy prohibits convictions for both possession and distribution of the same quantum of drugs. While the evidence might suggest different quantities were involved, the record did not establish that inference beyond a reasonable doubt as needed to show sufficient evidence for two counts.

People v. Gilmore, 97 P.3d 123 (Colo. App. 2003). Double jeopardy prohibits convictions for both possession and possession with intent to distribute the same quantum of drugs.

D. Multiple Acts Where Statutes May Require Consecutive Sentences

If one of the multiple crimes charged is a sex offense, § 18-1.3-1004 may apply. If there is more than one crime of violence, § 18-1.3-406 may apply. Although both statute's sentencing schemes are still subject to the "identical evidence" provision of § 18-1-408(3), so long as the counts can be supported by any different evidence, the sentencing court must sentence the counts

consecutively. *See People v. Cordova*, 199 P.3d 1 (Colo. App. 2007) (holding that sex offense and additional crimes must be sentenced consecutively); *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001) (concluding that separate crimes of violence not supported by identical evidence require consecutive sentencing).

People v. Espinoza, 463 P.3d 855 (Colo. 2020). The defendant setting a single fire resulted in multiple convictions for attempted first-degree murder and mandated consecutive sentences because the unit of prosecution was defined by each victim and, therefore, the identical evidence limitation in § 18-1-408(3) did not apply.

People v. Wiseman, 413 P.3d 233 (Colo. App. 2017). Consecutive sentences were not required where defendant was convicted of more than one count of sexual assault on a child that arose in discrete incidents. Concurrent or consecutive sentencing was discretionary.

22.3 PRACTICAL IMPLICATIONS

A. Election of Counts is Discretionary

People v. Anderson, 529 P.2d 310 (Colo. 1974). "In our view, sub-section (3) [of the predecessor to § 18-1-408] relates to the discretionary power of the trial court, upon motion of the defendant at the conclusion of all of the evidence, to require the prosecution to elect between multiple counts when they are supported by identical evidence; if, under this discretionary authority, the trial court chooses not to require the prosecution to so elect, and the defendant is convicted of multiple counts based on identical evidence, then . . . the sentences imposed must run concurrently." *See also People v. Mayfield,* 520 P.2d 748 (Colo. 1974).

People v. Rhea, 349 P.3d 280 (Colo. App. 2014). When faced with multiplicitous charges, a trial court may take one of two courses: (1) it may exercise its discretion to require the prosecution to elect between the multiplicitous counts; or (2) it may address the issue at sentencing by merging or vacating multiplicitous convictions.

People v. Snider, 491 P.3d 423 (Colo. App. 2021). No election or unanimity instruction required as to obstruction of peace officer charge because the jury was not required to unanimously agree which officer was the target or recipient of the defendant's actions.

People v. Metcalf, 926 P.2d 133 (Colo. App. 1996). Defendant was convicted of second-degree kidnapping and violation of custody in the abduction of his daughter from the home of his former wife. The trial court did not abuse its discretion in denying defendant's motion for election between the charged offenses or, in the alternative, for the court to instruct the jury that it could find him guilty of only one of the charges. Unlike *People v. Tippett,* 733 P.2d 1183 (Colo. 1987), relied upon by the defendant, the defendant never attempted to contact any authority regarding his supposed concerns for his child's safety and welfare and never initiated any custody proceeding. Further, the evidence indicated defendant was not motivated by concerns for his child's safety but, rather, that he was attempting to punish his former wife for the divorce.

But see *People v. Broom,* 797 P.2d 754 (Colo. App. 1990). Where the defendant was charged with both complicity in the possession and cultivation of marijuana and being an accessory to those crimes (accessory after the fact) for the same act of holding a broom in the garage near marijuana debris, it was error to deny the defendant's motion to force an election between the crimes or to instruct the jury that it could convict of only one of the crimes. *Broom's* continued vitality is doubtful after *Montoya v. People*, 394 P.3d 676 (Colo. 2017), which recognized that a defendant may be prosecuted for all such offenses but can have a conviction enter for only one of them if they constitute included offenses under 18-1-408.

B. Alternatives to Requiring Prosecution to Elect

1. Concurrent sentences

People v. Hardin, 607 P.2d 1291 (Colo. 1980). "If the offenses charged are supported by identical evidence, the court may require the State to elect the count upon which the issue will be tried. As an alternative, the statute requires that sentences imposed after guilty verdicts on multiple counts based on the same act or series of acts arising from the same criminal episode must run concurrently."

People v. Blankenship, 30 P.3d 698 (Colo. App. 2000). Concurrent sentences were required for aggravated robbery and robbery of an at-risk adult because, though elements of charges not identical, the act giving rise to charges was identical.

People v. Phong Le, 74 P.3d 431 (Colo. App. 2003). The conspiracy and solicitation convictions arose out of the same acts and were based on the same criminal episode, specifically, the planning session held among the four members of the group before the burglary. "Although the crime of solicitation requires proof of inducement, and conspiracy requires proof of an agreement and of an in furtherance thereof, the convictions here were based on the same acts. The evidence supporting both convictions was identical; therefore, concurrent sentencing was required."

2. Election by jury under appropriate instructions

People v. Lamirato, 504 P.2d 661 (Colo. 1972). "Although the defendant was properly charged in separate counts with theft (by taking), conspiracy to commit theft (by taking), theft (by receiving) and conspiracy to commit theft (by receiving), and although there was sufficient evidence to support conviction on each of the counts, the trial court should have taken one of two courses: It could have required the People to elect between theft (by taking) and related conspiracy count on the one hand, and theft (by receiving) and related conspiracy count on the other, or it could have instructed the jury that it could find the defendant guilty of theft (by taking) or theft (by receiving), but not both, and, if it found the defendant guilty of one theft count, it might find him guilty of the related conspiracy count but not the other conspiracy count." *See also* *People v. Jackson,* 627 P.2d 741 (Colo. 1981).

C. Prosecutor May Charge Different Legal Theories for the Same Acts

22. MULTIPLE COUNTS FOR THE SAME ACT

People v. Glenn, 615 P.2d 700 (Colo. 1980). In a case in which the defendant was charged with both first-degree murder "after deliberation" and felony murder, the trial court properly instructed the jury that it was entitled to find the defendant guilty of both murder after deliberation and felony murder. *See also People v. Salas,* 538 P.2d 437 (Colo. 1975) (concluding the trial court did not abuse its discretion for refusing to compel election between counts of murder after deliberation and felony murder); *People v. Thurman,* 948 P.2d 69 (Colo. App. 1997) (holding no error in trial court permitting prosecutor to elect between theories and refusing to provide modified unanimity instruction to the jury).

People v. Archuleta, 467 P.3d 307 (Colo. 2020). Neither prosecutorial election nor a modified unanimity instruction is required, however, where a defendant is charged with engaging in a single transaction of criminal conduct—including where a statute includes alternative means of committing that crime.

22.4 ELECTION OF SPECIFIC ACT WHERE SINGLE COUNT IS BASED ON MULTIPLE ACTS

A. General Rule

People v. Estorga, 612 P.2d 520 (Colo. 1980). When there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction. Although the prosecution is not required to specify the exact date the offense took place, it must specify a particular act. The rule is predicated upon the dual need to ensure unanimous jury agreement that the defendant committed the same act and to enable the defendant to prepare a defense to the specific act charged. *See also Roelker v. People,* 804 P.2d 1336 (Colo. 1991).

B. Thomas Exception

Thomas v. People, 803 P.2d 144 (Colo. 1990). "[W]hen the evidence does not present a reasonable likelihood that jurors may disagree on which acts the defendant committed, the prosecution need not designate a particular instance. If the prosecutor decides not to designate a particular instance, the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged. Necessarily, the determination whether there is a reasonable likelihood that jurors may disagree on which acts the defendant committed requires the exercise of discretion by the trial court. In some instances, special verdicts may be advisable to provide assurance that a verdict is supported by unanimous jury agreement."

Practice Tip: Although enabling the defendant to prepare a defense is one rationale articulated in the requirement to elect or individualize a specific act, *see Kogan v. People*, 756 P.2d 945 (Colo.

1988) (rev'd on other grounds), *Thomas* suggests that such a rationale has been over-emphasized, and an election, if required, need not be made before the conclusion of the prosecution's case.

Quintano v. People, 105 P.3d 585 (Colo. 2005). No error where the court did not require the prosecution to elect which acts of sexual assault related to each of five counts submitted to the jury because a modified unanimity *Thomas* instruction ensured the jury was unanimous in finding the same act of sexual conduct underlying each count.

People v. Archuleta, 467 P.3d 307 (Colo. 2020). Neither prosecutorial elections nor a modified unanimity instruction is required, however, where a defendant is charged with engaging in a single transaction of criminal conduct—including where a statute includes alternative means of committing that crime.

Melina v. People, 161 P.3d 635 (Colo. 2007). Considering a solicitation charge and concluding that no unanimity instruction was required when the prosecution did not present two discrete, mutually exclusive, and independent crimes but rather the prosecution's theory of the case was that the defendant had engaged in a single transaction of solicitation to murder another person allegedly by asking two different people to commit that crime.

Woertman v. People, 804 P.2d 188 (Colo. 1991). Reversible error not to require the prosecution to elect a specific act of sexual assault on a child or, in the alternative, to provide a modified unanimity instruction, where the prosecution introduced evidence of over 50 incidents of sexual contact to support three counts of sexual abuse.

C. Several Acts in a Single Transaction

People v. Archuleta, 467 P.3d 307 (Colo. 2020). No election or unanimity instruction required where child abuse resulting in death is charged as having been committed in a single transaction because the jury need not be unanimous as to what evidence or theory by which a particular element is established.

People v. Torres, 224 P.3d 268 (Colo. App. 2009). No election or unanimity instruction was required where the criminal conduct underlying an attempted extreme indifference murder charge encompassed a lengthy transaction that constituted a single criminal episode.

People v. Hanson, 928 P.2d 776 (Colo. App. 1996). The Court of Appeals recognized that, while *Estorga* and *Thomas* apply to situations in which criminal charges are supported by allegations of numerous acts occurring over an extended time period, the prosecution is not required to specify the acts that constitute the basis for separate counts when the charged offenses occur in a single transaction. *See People v. Collins,* 730 P.2d 293 (Colo. 1986). "Here, although the record reflects that defendant and his cousin had engaged in two separate confrontations with the victim and his father, the confrontations occurred in the same location and within a few minutes of each other, and arose out of the same set of circumstances and in conjunction with the same dispute. Thus, all of defendant's actions, and the charges stemming therefrom, arose out of a single transaction.

Under these circumstances, we conclude that, as in *Collins*, the trial court did not commit plain error in not requiring the prosecution to specify the acts which were the basis for the separate counts charged against the defendant."

* * *

2025 Contributions by Kevin McReynolds
Senior Appellate Deputy District Attorney
1st Judicial District

CHAPTER 23

OPENING STATEMENT

23. OPENING STATEMENT

23.1 INTRODUCTION

People v. Bustos, 725 P.2d 1174 (Colo. App. 1986). "The primary purpose of an opening statement is to provide the jury with a brief introductory outline, without argument, of what counsel expects the evidence will show. There are no rigid requirements on the content of an opening statement in a criminal case, and the judgment of the trial court as to what will be allowed will not be overturned absent an abuse of discretion."

ABA Criminal Justice Standards for the Prosecution Function 4th Edition (2017), Standard 3-6.5 Opening Statement at Trial:

> The prosecutor's opening statement at trial should be confined to a fair statement of the case from the prosecutor's perspective, and discussion of evidence that the prosecutor reasonably believes will be available, offered and admitted to support the prosecution case. The prosecutor's opening should avoid speculating about what defenses might be raised by the defense unless the prosecutor knows they will be raised. The prosecutor's opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel. The prosecutor should scrupulously avoid any comment on a defendant's right to remain silent.

23.2 SCOPE AND CONTENT

A. Scope Within Trial Court's Discretion

People v. Rodriguez, 799 P.2d 452 (Colo. App. 1990). "A trial court's determination of what will be allowed in an opening statement will not be overturned absent an abuse of discretion."

People v. Marion, 941 P.2d 287 (Colo. App. 1996). When the trial court instructs the jury to disregard an improper comment in opening statements, "[w]e presume the jury followed the court's curative instructions."

B. Remarks Calculated to Invoke Bias or Prejudice Impermissible

People v. Robinson, 454 P.3d 229 (Colo. 2019). Improper to use arguments "calculated to inflame the passions or prejudice of the jury" or arguments that tend to influence jurors to reach a verdict based on preexisting biases rather than on the facts in evidence and the reasonable inferences to be drawn from those facts. An appeal to racial bias should be treated with added precaution.

C. Display or Preview of Admissible Evidence at the Court's Discretion

People v. Harmon, 284 P.3d 124 (Colo. App. 2011). Trial courts do not abuse their discretion when they permit a party to display photographs or other items of tangible evidence during opening statements, when such items were relevant and were ultimately admitted in evidence at trial.

Spence v. State, 129 A.3d 212 (Del. 2015). **No Colorado case on point, but cases from other jurisdictions generally have this holding:** As a general matter, PowerPoint presentations are not inherently good or bad. Rather, their content and application determine their propriety. A PowerPoint may not be used to make an argument visually that could not be made orally.

D. Commentary on Inadmissible Evidence is Impermissible

People v. Bustos, 725 P.2d 1174 (Colo. App. 1986). "Objections to any comments made referring to inadmissible evidence in an opening argument should be sustained."

E. Commentary on Missing Evidence or Witness

People v. Krueger, 296 P.3d 294 (Colo. App. 2012). Prosecutor's comment that a witness would not be testifying was not improper because the prosecutor did not refer to the witness's privilege against self-incrimination and did not suggest the witness's absence required the defendant to prove anything.

People v. Fortson, 421 P.3d 1236 (Colo. App. 2018). "A prosecutor must not 'intimate that she has personal knowledge of evidence unknown to the jury.'" "During her opening statement, the prosecutor told the jury, 'I can't tell you that [the two charged instances of sexual assault] are the only incidents that occurred of Fortson sexually assaulting [J.W.], but I can tell you that these are the two clearest incidences that she, thus far, has been willing to talk about.' This remark to the jury was impermissible."

People in Interest of J.R., 495 P.3d 346 (Colo. App. 2021). Prosecutor's comments that "testifying about sexual abuse was hard for young children," "girls do not want to be victims of sexual assault", and "it would be 'cruel' for the girls to fabricate sex assault allegations against J.R." did not imply personal knowledge of evidence unknown to the jury. The prosecutor was speaking about everyday experience and common sense.

F. Proper to Make Reasonable Inference from Admissible Evidence

People v. Pigford, 17 P.3d 172 (Colo. App. 2000). During opening statement, the prosecutor said "defendant waited for an 'opportune time' to 'steal from somebody when they were . . . most vulnerable.'" The facts presented at trial showed that defendant trespassed by entering the victim's unlocked vehicle in the parking lot of a medical clinic while the victim was inside that clinic seeking care for her children. The Court of Appeals held it was "a reasonable inference from this evidence that the defendant took advantage of this opportunity to attempt to steal from the victim's vehicle." A prosecutor may draw inferences from the evidence during argument, and the opening statement did not constitute misconduct nor deprive defendant of a fair trial.

People v. Banks, 983 P.2d 102 (Colo. App. 1999) (overruled on other grounds). Upholding prosecutor's opening statement that evidence would show police officers were advised by dispatcher that defendant was "dangerous" and to "use caution" when approaching defendant

because it called jury's attention to evidence properly admitted later to show state of mind of officers*)*

People v. Merchant, 983 P.2d 108 (Colo. App. 1999). Upholding prosecutor's remark, "[t]hat's not the way he does it," because, when read in context, it was a proper comment on evidence to be adduced at trial and not an implication that defendant had committed previous crimes.

People v. Estes, 296 P.3d 189 (Colo. App. 2012). Prosecutor's comments describing the defendant's statements to police as "making up" a story to explain his presence was found to be a proper comment on the evidence to be presented at trial.

G. Prosecutor May Not Offer Personal Opinion on Evidence or Guilt

People v. Rogers, 220 P.3d 931 (Colo. App. 2008). The prosecutor's opening statement that "the People's opinion support[s] those charges having been filed and support[s] our request for a guilty verdict from you" was a comment on the evidence when read in context, and therefore was not an improper expression of opinion.

People v. Sellers, 521 P.3d 1066 (Colo. App. 2022). No misconduct where prosecutor's statements that "[t]he defendant is guilty" and "[h]e did this" were not preceded by a phrase like "I believe." A prosecutor would effectively be prohibited from arguing their case if they could not even express that the admitted evidence was sufficient to convict the defendant.

People v. Garcia, 527 P.3d 410 (Colo. App. 2022). In opening statement, prosecutor referred to the victim as "our victim." A DA's reference to an alleged victim as "our victim," is not misconduct per se, and nothing about the context here renders it such. *See also People v. Williams,* 961 P.2d 533, 536 (Colo. App. 1997) (holding that a DA's references to "our victim," "my victim," and "your witnesses" were not improper).

Wend v. People, 235 P.3d 1089 (Colo. 2010). Categorically improper to use the word "lie" or any of its forms to refer to a defendant's or a witness's veracity during opening statement.

H. Rhetoric Permissible When Not Prejudicial or Inflammatory

People v. Douglas, 296 P.3d 234 (Colo. App. 2012). Prosecutor's comment in a December trial that "it's Christmas season, but this is not a Hallmark moment" was found to be mere rhetoric and not error. "The comment was a mere rhetorical device. A prosecutor may properly employ a rhetorical device so long as he or she does not thereby induce the jury to determine guilt on the basis of passion or prejudice or attempt to inject irrelevant issues into the case."

People v. Hernandez, 829 P.2d 394 (Colo. App. 1991). Prosecutor's statement in opening that "sometimes it takes a rat to catch a rat" was impermissible, derogatory, and inflammatory. "These statements not only improperly dehumanize the defendant but incorrectly focus the jury's determination of the case away from the evidence and onto the defendant's supposed non-human status. Furthermore, such remarks are inconsistent with the proper role and dignity expected of the

prosecutor for the government and, therefore, cannot be permitted." Error, however, did not warrant reversal due to overwhelming evidence of guilt.

People v. Bowles, 226 P.3d 1125 (Colo. App. 2009). Statement improper that "with friends like the defendant, who needs enemies. This case is about the selfish act of the defendant who used the identity of a friend . . . to try to get out of being arrested." The references to "selfish" and "enemies" focused on the defendant's character and injected an irrelevant issue into the case.

People v. Cordova, 293 P.3d 114 (Colo. App. 2011). After pre-trial ruling precluding the parties from using the word "gang," prosecutor's comments calling the defendant an outlaw were found to be permissible oratory. The Court of Appeals, however, found that "statements implying that, as an outlaw, Defendant respected few and feared none were improper attributions of traits of character."

People v. Carian, 414 P.3d 34 (Colo. App. 2017). Prosecutor's statement in opening was improper. Prosecutor stated that "the evidence will show you that he squandered his opportunity on probation and wasted valuable resources because the probation department had to investigate this. At the end of this case, I'm going to ask you to hold him accountable for his actions." This diverted the jury's attention away from the charges, and instead on squandering resources.

People v. Manyik, 383 P.3d 77 (Colo. App. 2016). Prosecutor's opening statement in first person as though he were murder victim is misconduct because it is calculated to inflame passions or prejudice of jury. It did not, however, constitute plain error.

People v. Sandoval, 709 P.2d 90 (Colo. App. 1985). During opening statement, the prosecutor improperly made statements that were argumentative and designed to appeal to the jury's sympathy for the child victim. The comments, however, were brief in nature and were cured by the court's cautionary instruction.

People v. Dunlap, 975 P.2d 723 (Colo. 1999). Improper for prosecutor to say at conclusion of opening statement: "In the name of those who perished at Chuck E Cheese, we will ask you to hold the defendant accountable for these most vicious crimes by finding him guilty as charged." Such a "golden rule" argument, "which ask[s] jurors to imagine themselves in the place of the victim," was inappropriate in the guilt phase of the trial. "Indeed, the prosecutor was encouraging the jury to depart from its duty to decide the case on the evidence, and was asking the jury to memorialize or pay tribute to the victims by its verdict. By invoking the victims almost in the fashion of a prayer, the prosecutor exceeded proper bounds of argument." Due to overwhelming evidence of guilt, comments nonetheless held the error was harmless.

People v. Griffin, 867 P.2d 27 (Colo. App. 1993). Reference to non-prejudicial nicknames or aliases is proper. Prosecutor referred to defendant's alias of "Casanova." The Court of Appeals concluded that the nickname was not of the type that implied past violent or criminal behavior, nor did it imply that the defendant was a member of a "criminal class" that might be inherently suspect.

"Rather, it was a name by which the defendant was known to people who might not have known his real name and its use was solely for that purpose."

I. Opening Statement May Open the Door to Otherwise Inadmissible Evidence

People v. Davis, 312 P.3d 193 (Colo. App. 2010). "It is widely recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party."

23.3 WAIVER OF OPENING STATEMENT

A. Prosecutor has Discretion to Waive Opening Statement

People v. Gomez, 283 P.2d 949 (Colo. 1955). "[T]here is no statute nor rule of court in this jurisdiction requiring the prosecuting attorney in the trial of any criminal case to make any opening statement whatever to the jury, and it is within [the prosecutor's] discretion to do or not to do so." *See also Mora v. People*, 472 P.2d 142 (Colo. 1970).

B. Defense Opening Precluded When Defense Initially Reserves Opening and Then Presents No Evidence

Thompson v. People, 336 P.2d 93 (Colo. 1959). The district court acted within its discretion in refusing to permit defense counsel, who had reserved the right to make an opening statement at the conclusion of the prosecution's case-in-chief, to make an opening statement where defense counsel advised the court that he would introduce no evidence.

23.4 VARIANCE BETWEEN OPENING AND EVIDENCE AT TRIAL

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). "A prosecutor's opening statement is limited to the evidence that will be adduced at trial. Remarks later proven unsupported by the evidence will ordinarily constitute reversible error if there has been an affirmative showing of bad faith and manifest prejudice."

People v. Jacobs, 499 P.2d 615 (Colo. 1972). "We adhere to the general rule that error cannot ordinarily be predicated upon an opening statement of the prosecuting attorney as to what he expects to prove, when, for some reason he later fails to support some part of that statement, unless the unsupported portion of this statement was made in bad faith or was manifestly prejudicial . . . Thus, absent an affirmative showing of prejudice or bad faith on the part of counsel making the statement, the decision of the trial judge controlling such remarks will not ordinarily be disturbed."

People v. Allee, 77 P.3d 831 (Colo. App. 2003). In opening statement, prosecutor misstated that the victim suffered a broken arm, but it was her hand that was broken. The Court of Appeals held that there was no plain error where the misstatement was brief, the jury heard testimony and other evidence that showed victim suffered a broken bone in her hand, not her arm, and the misstatement was corrected in closing argument.

* * *

2025 Contributions by Garrik Storgaard
Chief Deputy District Attorney
23rd Judicial District

CHAPTER 24

OTHER ACTS EVIDENCE

24. OTHER ACTS EVIDENCE

24.1 INTRODUCTION

As a general rule, evidence of other crimes, wrongs, or acts is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character. C.R.E. 404(b). The rule is based on the principle that, when evidence is admitted to establish the propensity of the accused to commit crime, the prejudicial effect of the evidence always outweighs its probative value. When offered for other relevant purposes, however, evidence of other crimes, wrongs, or acts may be admissible. C.R.E. 404(b) enumerates several examples under which such evidence may be relevant and admissible in a criminal trial. The examples cited in the Rule, however, "are neither mutually exclusive nor collectively exhaustive." McCormick on Evidence, §190, at 558 (E. Cleary 3d Ed. 1984). There are numerous other purposes for which evidence of other transactions may be relevant and admissible.

Prior to the adoption of the Colorado Rules of Evidence, Colorado law governing the admissibility of evidence of other transactions was largely exclusionary. Other-crimes evidence was regarded as presumptively inadmissible, and subject to admission only under certain narrowly defined exceptions. *See People v. Honey*, 596 P.2d 751 (Colo. 1979); *Stull v. People*, 344 P.2d 455 (Colo. 1959). The adoption of the Colorado Rules of Evidence, however, significantly changed the pre-existing law regarding the admissibility of other-crimes evidence. *See People v. Spoto*, 795 P.2d 1314 (Colo. 1990); *People v. Garner*, 806 P.2d 366 (Colo. 1991). The Rules ushered in an analysis favoring the admission of relevant evidence, including of other-crimes evidence, unless the Constitution, statutes, or other Rules require otherwise, or unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or delay. C.R.E. 402-403. *See People v. Quintana*, 882 P.2d 1366 (Colo. 1994) (C.R.E. 403 strongly favors admission of relevant evidence, and under the Rules, evidence should be accorded its maximal probative weight and its minimal prejudicial effect; *People v. Gardner*, 919 P.2d 850 (Colo. App. 1995) (same). Colorado appellate courts nevertheless remain fearful of other-crimes evidence, and continue to impose a number of substantive and procedural restrictions on its admission.

24.2 IDENTIFICATION OF OTHER-ACTS EVIDENCE

A. *Rojas* and the Abolition of *Res Gestae*

For over ninety years prior to *Rojas v. People*, 504 P.3d 296 (Colo. 2022), Colorado courts regularly admitted "other acts" or "prior bad acts" evidence based on a factual, contextual relevance rather than on elemental relevance or C.R.E. 404(b). Under the doctrine of "*res gestae*," other bad acts might be admissible if they were considered necessary factual context or "part-and-parcel" of the charged criminal acts, regardless of their admissibility under C.R.E. 404(b). *See, e.g.*, *People v. Quintana*, 882 P.2d 1366 (Colo. 1994); *People v. Lucas*, 992 P.2d 619 (Colo. App. 1999); *People v. Gladney*, 250 P.3d 762 (Colo. App. 2010). *Res gestae* was evidence closely related in time, nature, and circumstances to the charged offense and was admissible to provide

the fact finder with a complete understanding of the events surrounding the crime in the context in which the charged crime occurred. *People v. Rollins*, 892 P.2d 866 (Colo. 1995).

In *Rojas*, however, the Colorado Supreme Court departed from precedent and "abolished" the doctrine of *res gestae*. Courts must now decide where the charged acts end and the defendant's "other acts" begin using a new, charged-acts-focused framework announced in *Rojas*.

If the proposed evidence, or "uncharged misconduct," involves acts by the defendant "intrinsic" to the crimes charged, then the court must evaluate the evidence using the traditional C.R.E. 401 and 403 balancing test. Acts are intrinsic to the crimes charged if they 1) "directly prove the charged offense" or 2) "occur contemporaneously with the charged offense and facilitate the commission of it." Intrinsic acts are exempt from Rule 404(b) because they are not "other" acts. All other "uncharged misconduct" is an extrinsic act. When this extrinsic evidence "suggests bad character (and thus a propensity to commit the charged offense)" then courts must evaluate the admissibility of that evidence using 404(b) and *Spoto*.

In summary, *Rojas* holds that courts must apply a two-step analysis in determining whether evidence of "other" acts is admissible. During the first step, the court must determine whether the acts are, in fact, other acts or are intrinsic to the crimes charged. Under *Rojas*, evidence is intrinsic if it 1) directly proves the charged offense or 2) occurs contemporaneously with the offense and facilitated the offense. If the evidence is not intrinsic, it is extrinsic, and the court proceeds to the second step. During the second step, the court determines whether the "other acts" implicates bad character or implies propensity. If it does, then the Court must analyze the admissibility of the evidence using 404(b). In all other cases, the evidence is analyzed under the classic C.R.E. 401-403 balancing test.

The *Rojas* Court acknowledged that this framework does not eliminate the difficult line-drawing problems trial courts face when deciding how to evaluate the admissibility of evidence. "We recognize that abolishing the *res gestae* doctrine offers no magic wand. It won't eliminate the line-drawing problems inherent in deciding what evidence warrants 404(b) review." The concurring opinions of Justices Boatright and Berkenkotter emphasized this point:

> . . . I disagree with the majority's conclusion that jettisoning the doctrine will solve any problems — it won't. Regardless of whether we call evidence *res gestae*, intrinsic evidence, or other-acts evidence under C.R.E. 404(b), courts will always be confronted with the difficult question of when the crime starts and stops. In other words, no matter what the doctrine is called, courts still must parse out when an act begins to constitute an "other act."

The *Rojas* majority attempted to give some guidance on how to apply this new framework with two examples, one coming from *United States v. Shea*, 159 F.3d 37 (1st Cir. 1998), and the second a hypothetical addition to *Shea*. The Court gave the example of a robber who robs a bank with a black revolver and then subsequently robs another bank with the same revolver. The Court stated

the evidence of a subsequent robbery was admissible in the trial of the first robbery under C.R.E. 401 and 403, not 404(b), because the same black revolver in the subsequent robbery was "intrinsic, direct evidence" that the defendant had committed the prior crime. Conversely, the Court stated that hypothetical evidence that the defendant had cased the bank the day before by cashing a check would not be intrinsic because it did not "directly prove" the robberies and did not "occur contemporaneously with them and facilitate their commission." The Court nevertheless stated that evidence that the defendant had cashed the check at the same bank the day before should be analyzed for admissibility under C.R.E. 401 and 403, not 404(b). The Court reasoned that merely cashing a check, despite the allegation that it was evidence of casing, did not implicate the defendant's character and therefore did not trigger 404(b).

Rojas itself involved a woman charged with theft of food-stamp benefits. She applied for food stamps twice, once in February 2013 and again in August 2013. She was charged with two counts of theft with a date of offense range of February 2013 to July 2013. At trial, the prosecution sought to introduce her August 2013 application, which fell outside the charges, as *res gestae* evidence to show how the investigation began and to show her intent to steal benefits. Applying its new framework, the *Rojas* majority held that the proposed evidence should have been examined under 404(b). It reasoned that the evidence of her subsequent application was not intrinsic because it did not directly prove the charges and did not occur contemporaneously and facilitate the charged offenses. It concluded that a subsequent application for benefits after the charged conduct must be analyzed under 404(b) because applying for food stamp benefits "containing false information about her income invites the inference that she is a 'bad' person who lies on applications and so she must have knowingly lied on the applications at issue in her trial."

The *Rojas* Court provided no further explanation of what it means by "directly proving" or "facilitating." Its robbery examples suggest, however, that "directly proving" can include not only circumstantial evidence, but evidence that is relevant to only a single element of a crime. The use of a black revolver in a subsequent robbery, even if unquestionably the same gun as in the prior robbery, is circumstantial evidence that the man in the subsequent robbery committed the prior robbery. Yes, he may have had the gun from the first robbery in the second robbery, but that doesn't necessarily mean he was the person who robbed the first bank. Indeed, the case *Rojas* was citing with approval as an example, *Shea*, analyzed the admissibility of the gun under C.R.E. 401-403, and found that the defendant's possession of that gun at a subsequent robbery was "directly relevant" specifically because it made "his participation in the robbery more probable than it would be without the evidence." In other words, the gun was "directly relevant" because it helped identify the defendant. The *Shea* Court then recognized the circumstantial nature of this evidence: "a jury would still be entitled to infer either that Shea was in fact the robber in possession of the black revolver during the course of the robbery or that Shea was not in possession of the black revolver during the robbery but somehow came into possession of the gun at some point after the robbery." Further, identification is but one element of the crime of robbery. The fact that the defendant had

the same gun does not directly prove several of the other elements of robbery, such as the value of the money taken, or the presence of people during the robbery.

Caution About Cases Prior to Rojas: The cases in which evidence was admitted pursuant to a *res gestae* doctrine have not been officially overturned. Attorneys should use caution in citing these cases as illustrations of admissibility of other-acts evidence. At the time of publishing of this manual, limited caselaw exists providing additional guidance on the distinction between 404(b) evidence and other admissible evidence.

People v. Owens, 544 P.3d 1202 (Colo. 2024). The Court concluded that evidence in a homicide trial concerning the defendant's involvement in a prior shooting was properly analyzed under C.R.E. 404(b), rather than C.R.E. 401-403. The prosecution's theory was that the defendant had murdered the two victims because of their anticipated testimony in a trial of another, previous shooting. The Court determined that evidence of the prior shooting was not intrinsic evidence to the current murders because the prior shooting did not directly prove nor was it contemporaneous with the act of murdering the victims in the current case, and that 404(b) was therefore the rule governing admission of the prior shooting evidence.

24.3 REGARDLESS OF THE CRIME CHARGED

A. "Other Acts" Under C.R.E. 404(b)

C.R.E. 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

This rule provides that evidence of specific acts cannot be used to prove a person's character to show the person acted in conformity with it on a particular occasion. However, evidence of other acts may be admissible for another purpose, including those on the nonexclusive list outlined in 404(b) itself. *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

"C.R.E. 404(b) only requires the exclusion of evidence of other crimes, wrongs, or acts offered for the purpose of proving the character of a person in order to show that he acted in conformity therewith. Although the prosecution must articulate a precise evidential hypothesis by which a material fact can be permissibly inferred from the prior act that is independent of the inference forbidden by C.R.E. 404(b), upon a showing of logical (C.R.E. 401) and legal (C.R.E. 403) relevance under that hypothesis, evidence of other crimes will not be excluded under the rules of relevance." *People v. Rath*, 44 P.3d 1033 (Colo. 2002).

Although such evidence is often referred to as "similar transactions" evidence, the term "similar transaction" is in fact a misnomer. "[T]here is generally no similarity of conduct requirement concerning evidence of other crimes, wrongs or acts offered for permissible purposes such as proof

of intent, preparation, plan or accident under C.R.E. 404(b)" unless similarity of acts or other crimes supplies the logical relevance that is the condition precedent to admission of the evidence. *See People v. Spoto*, 795 P.2d 1314 (Colo. 1990). "C.R.E. 404(b) contains no separate requirement of similarity. When evidence of other crimes is offered to show a defendant's motive for committing a charged offense or to show that other crimes were part of the preparation or plan to commit a charged offense, similarity of the crimes often has no significance whatsoever." *People v. Rath*, 44 P.3d 1033 (Colo. 2002).

B. Admitting Other-Acts Evidence

1. The *Spoto* Admissibility Analysis

People v. Spoto, 795 P.2d 1314 (Colo. 1990). In a first-degree murder prosecution in which the defendant and a friend entered the victim's bedroom and ultimately shot him with a gun against his neck, the trial court admitted evidence of a prior uncharged incident in which the defendant put a gun to a person's neck and threatened (but did not shoot) him. In evaluating the admissibility of the other-crimes evidence, the Colorado Supreme Court recognized that the appropriate standards are governed by the Rules of Evidence, which establish a four-part analysis:

- Does the proffered evidence relate to a material fact? Is the fact "of consequence to the determination of the action," such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident? C.R.E. 401 and 404(b).

- Is the evidence logically relevant? Does it have "any tendency to make the existence of [the material fact] more probable or less probable than it would be without the evidence?" C.R.E. 401.

- Is the proposed logical relevance independent of the inference that the defendant acted in conformity with bad character? Is the evidence probative for some logical reason other than the defendant committed the crime charged because of the likelihood he acted in conformity with his bad character? *People v. Rath*, 44 P.3d 1033 (Colo. 2002).

- Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice? C.R.E. 403.

In *Spoto,* the Colorado Supreme Court held that the admission of the prior uncharged incident constituted reversible error. The Court acknowledged that the prior act related to a material issue [the defendant's intent] and was logically relevant to that material issue, but concluded that the logical relevance of the evidence was not independent of the inference prohibited by C.R.E. 404(b) and that the unfair prejudicial effect of such evidence substantially outweighed any probative value it may have had for legitimate 404(b) purposes.

a. Probative value v. prejudicial effect

When determining whether the probative value of 404(b) evidence is substantially outweighed by the danger of unfair prejudice, the trial court must analyze the weight to be added to the prosecution's case, considering its probative force and the prosecution's need for it, in light of other admissible evidence. *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

People v. Nuanez, 973 P.2d 1260 (Colo. 1999). The trial court acted within its discretion by admitting evidence of defendant's deferred judgment for burglary as relevant to defendant's motive for assaulting the police officer who stopped him. The probative value was not outweighed by prejudicial effect where the evidence was a minor part of the prosecutor's case, the prosecutor mentioned it only briefly in opening and closing statements, and the court gave appropriate limiting instructions.

People v. Silva, 987 P.2d 909 (Colo. App. 1999). The court must still must weigh probative value of a stipulation against its prejudicial effect. Because the defendant was willing to stipulate to mental state element of the offense, evidence of previous fight had minimal probative value and should not have been admitted.

2. Notice and Particularity

In a criminal case, the prosecutor must provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice. C.R.E. 404(b)(3)(A-C).

It is not appropriate for the prosecution to file a stock 404(b) motion stating the laundry list of permissible uses listed under 404(b) without analyzing each purpose separately under *Spoto*. *Yusem v. People*, 210 P.3d 458 (Colo. 2009). A C.R.E. 404(b) motion "must identify the specific purpose for which the evidence will be used and explain how the proffered evidence establishes that purpose independent of the inference forbidden by C.R.E. 404(b)." *Id.*

In *Yusem*, the Colorado Supreme Court criticized the prosecution: "the People never articulated a precise evidential hypothesis explaining how the prior act evidence tended to prove motive, knowledge, or absence of mistake. In addition, the prior act evidence was offered and admitted for purposes that were carelessly grouped together, without consideration of whether the prior act evidence was admissible for each purpose. For instance, mental state, motive and knowledge—while all potentially probative of *mens rea*—are separate purposes that should be individually analyzed under *Spoto*."

3. Threshold Burden under C.R.E. 104(a)

As a preliminary matter, the proponent must demonstrate, by a preponderance of the evidence, that the other act occurred and that the defendant committed the act. C.R.E. 104(a); *People v. Rath*, 44 P.3d 1033 (Colo. 2002); *People v. Garner*, 806 P.2d 366 (Colo. 1991).

People v. Garner, 806 P.2d 366 (Colo. 1991). In a homicide prosecution, the Colorado Supreme Court upheld the admission of evidence establishing that the defendant had committed two other murders. In all three instances (the charged offense and the two other crimes), the defendant had been involved in an intimate relationship with the victim which was deteriorating or being terminated by the victim; the defendant had access to the victim's residence and was the last person seen with her alive; and each victim was strangled to death and discovered nude or semi-nude and covered to the neck with bed clothing. The Court concluded that the admissibility of other-crime evidence must be determined as a preliminary matter by the trial court pursuant to C.R.E. 104(a) and held that, before admitting such evidence, the trial court must be satisfied by a preponderance of the evidence that the other crime occurred and that the defendant committed it. The Court also rejected the Court of Appeals' holding that each of the other crimes must be proved independently, without consideration of the others or the pattern formed by them: "In ruling on the admissibility of other crime evidence, the trial court must consider the totality of all the evidence in the case, except evidence relating to privileged information, and must apply the preponderance-of-the evidence standard in deciding whether it is more likely than not that the factual conditions precedent to admitting other-crime evidence have been satisfied and then must consider the technical and policy concerns inherent in the other-crime evidence." *Garner*, 806 P.2d at 371-72.

4. No hearing required

"The [trial] court is not required to hold a hearing if it can determine from the offer of proof that the other acts occurred by a preponderance of the evidence." *People v. Ma*, 104 P.3d 273 (Colo. App. 2004) (rev'd on other grounds); *People v. Moore*, 117 P.3d 1 (Colo. App. 2004).

The trial court is permitted to make its preliminary determination of the admissibility of other transactions evidence in any reasonable manner, including by means of offer of proof. *See People v. Groves*, 854 P.2d 1310 (Colo. App. 1992); *People v. Davis*, 218 P.3d 718 (Colo. App. 2008).

Defendant doesn't have a right to cross examine a witness at the hearing in a sexual assault case. *People v. Baker*, 178 P.3d 1225 (Colo. App. 2007).

5. Contemporaneous limiting jury instruction

People v. Cousins, 181 P.3d 365 (Colo. App. 2007). A court should instruct a jury on the limited purpose served by 404(b) evidence when it is discussed in testimony and again in closing instructions. The court held that where the jury received an instruction contemporaneous to one witness's testimony and again in the closing charge, any error in failing to give the instruction during the testimony of another witness was harmless.

People v. Garner, 806 P.2d 366 (Colo. 1991). An instruction regarding the limited purpose of the other-crimes evidence must accompany the admission of such evidence, see C.R.E. 105, and that the limited-purpose instruction should be repeated in the court's written instructions to the jury. The Court further acknowledged that, "for reasons stated in Stull, the court should refer to the

other-crime evidence as a 'transaction,' 'act,' or 'conduct,' and should avoid such terms as 'offense' or 'crime.'"

People v. Copeland, 976 P.2d 334 (Colo. App. 1998). It is better practice to give limiting instruction contemporaneously with evidence admitted under C.R.E. 404(b), but when such instruction is not requested, failure to give one is not reversible error.

4. Other considerations

a. Statute of limitations

Although the situation would rarely arise, evidence of other crimes or acts is not rendered inadmissible by the fact that prosecution would be barred by the statute of limitations. *See Perry v. People*, 181 P.2d 439 (Colo. 1947).

b. Double Jeopardy

Jeopardy does not attach by proof of crimes other than the one for which the defendant is on trial, and the defendant may be subsequently prosecuted for such other crimes. *See People v. Moen*, 526 P.2d 654 (Colo. 1974) (holding as admissible in two trials the evidence of the defendant's burglary in the other trial).

c. Effect of acquittal on other transaction

"Prior act evidence can be admitted even though the defendant was acquitted of the criminal charges arising out of the act, provided that the trial court is satisfied by a preponderance of the evidence that the prior act occurred and the evidence otherwise complies with the four-prong test for admissibility under C.R.E. 404(b), laid out in." *Kinney v. People*, 187 P.3d 548 (Colo. 2008).

d. Other acts of third parties

People v. Harris, 892 P.2d 378 (Colo. App. 1994). In a robbery prosecution where the defendant asserted he was unaware that his companion and co-conspirator intended to commit a convenience store robbery, evidence elicited on cross-examination of the defendant that he was aware that his companion had committed a convenience store robbery one week prior to the charged offense was properly admissible. In construing C.R.E. 404(b), the Court of Appeals held that the language in the rule referring to acts of a "person" cannot be limited solely to other acts of the "accused," and "hence, the language of C.R.E. 404(b) does not limit uncharged misconduct evidence to the defendant's own acts." The Court reasoned that the other-acts evidence was logically relevant to the issues of complicity and conspiracy to commit the charged offenses, as well as the issue of the defendant's culpable mental state regarding his knowledge of his companion's actions. Likewise, the logical relevance of the evidence was independent of any intermediate inference that the defendant or his companion had a bad character.

C. Illustrative Cases

24. OTHER ACTS EVIDENCE

Caution Below: While there are a number of post-*Spoto* cases listed below, many of the following cases were decided prior to the adoption of the Rules of Evidence and/or the decisions in *Spoto* and *Garner* and therefore may not reflect the rules and standard of admissibility that presently govern the admission of other-crime evidence. The cases may be helpful, however, in illustrating the variety of circumstances in which evidence of other "wholly independent" crimes, wrongs or acts may be relevant to a material issue in a criminal case. The Rules of Evidence changed judicial analysis of other-acts evidence by lowering the threshold to a "preponderance of the evidence" (the previous burden was "clear and convincing evidence"), through inclusionary balancing (evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice and before the Rules of Evidence this standard was the other way around), and through a wider interpretation of relevance (the Rules of Evidence limited admission of other acts to certain narrowly circumscribed categories). *People v. Rath*, 44 P.3d 1033 (Colo. 2002).

1. Burglary, theft, and robbery cases

People v. Ray, 626 P.2d 167 (Colo. 1981). In a burglary prosecution, the Colorado Supreme Court disapproved the exclusion of evidence of two similar burglaries that occurred one week after the charged crime, were within four blocks of the victim's house, and in which similar items were taken, since such facts were relevant to show that all three burglaries were part of a continuing plan and were probative of the defendant's identity, motive and intent.

People v. Casper, 641 P.2d 274 (Colo. 1982). The Colorado Supreme Court upheld the admission in a robbery prosecution of another robbery that occurred eight days prior to the charged offense, which occurred at a similar business establishment (a Dependable Cleaners) and was executed in a similar manner. In conducting an analysis under *People v. Honey*, 596 P.2d 751 (Colo. 1979), the Court acknowledged that the prior act was admitted for the valid purpose of establishing identification, the issue was relevant since the defendant claimed misidentification as a defense, and the probative value of the evidence outweighed any potentially prejudicial impact.

People v. Herrera, 633 P.2d 1091 (Colo. App. 1981). Defendant's admission to undercover agent that he burglarized same building and sold stolen items was relevant to material issue of identity.

People v. Crawford, 632 P.2d 626 (Colo. App. 1981). In prosecution for theft of funds from ice rink which defendant managed, evidence that defendant wrongfully withheld revenues collected at ice rink he managed in New York six months earlier was admissible because there was sufficient nexus to consider the transactions part of common scheme.

People v. White, 680 P.2d 1318 (Colo. App. 1984). Other robberies were admissible to prove identity.

People v. Hogan, 703 P.2d 634 (Colo. App. 1985). Other thefts were admissible to prove identity.

People v. Farrell, 10 P.3d 672 (Colo. App. 2000) (rev'd on other grounds). Evidence that defendant had stolen cars in the past was "admissible to rebut defendant's contention that, because

of a mental condition, he was unable to form the requisite culpable mental state for the charged offenses. The evidence made it more probable than not that he had the conscious objective to steal the victim's car and that he intended the consequences of his actions."

People v. Madrid, 908 P.2d 1167 (Colo. App. 1995). Evidence of prior robberies of similar establishments, where the actions, demands, and description of robber were virtually identical to charged offense, was properly admissible pursuant to C.R.E. 404(b) to establish identity.

People v. Kemp, 885 P.2d 260 (Colo. App. 1994). Evidence that the defendant confessed and pleaded guilty to three prior robberies committed in similar manner to charged offense was admissible to establish defendant's identity in charged offense.

People v. Lahr, 316 P.3d 74 (Colo. App. 2013). Evidence of another robbery committed by the defendant was properly introduced under C.R.E. 404(b) for the purposes of establishing the defendant's identity as the perpetrator in the instant case because: 1) the robberies occurred in close geographic and temporal proximity to each other; 2) the description of the perpetrator of each robbery was substantially similar; 3) the weapon and the manner in which it was used was similar in each robbery; and 4) evidence of each robbery was found in the car being used by the defendant.

People v. Thompson, 2018 COA 83, (Colo. App. 2018). The trial court properly admitted other-acts evidence in theft and securities fraud prosecution where the evidence established that the defendant had obtained money from another victim by selling a parcel of land the defendant did not own, by similar false promises and deceptive statements involving the same project. Court admitted the evidence for motive and lack of mistake or accident, and clarified that admissibility does not require the absence of the inference of bad character but merely requires that the proffered evidence be logically relevant independent of that inference.

2. Assault and homicide cases

People v. Cordova, 293 P.3d 114 (Colo. App. 2011). Court upheld the trial court's ruling admitting information that the Defendant had a knife on him when he was arrested and that other knives were located in his vehicle. At trial, the Defendant conceded that he fought with the victims but denied cutting them. The Court found that the evidence of the defendant being in possession of knives had a tendency to make it more probable that the Defendant had a knife at the time of the stabbing and such inference is independent of an inference of a particular character trait (that defendant is a violent person, defendant is more prone to fighting, or defendant would have a propensity to disobey the law).

People v. Sandoval-Candelaria, 328 P.3d 193 (Colo. App. 2011) (rev'd on other grounds). In a homicide case, the Court upheld the use of 404(b) evidence that the defendant previously sold drugs out of his home because the identity of the killer was disputed at trial. The evidence related to the material facts of identity, intent, and motive. The evidence corroborated two witnesses' testimony that the defendant offered them drugs to dispose of the victim's body. Evidence that the

defendant previously sold crack cocaine to two witnesses tended to prove that he had the ability to give the witnesses a large enough quantity of cocaine to bribe them to become accessories to the murder and this, in turn, tended to prove that the witnesses testified truthfully, and thus, that the defendant was the killer.

People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991). In admitting evidence of the defendant's prior threats and arguments with the victim (his wife), the Court of Appeals stated: "In homicide cases involving marital partners, any fact or circumstance relating to ill-feeling, ill-treatment, jealousy, prior assaults, personal violence, threats, or any similar conduct or attitude by one spouse against the other is relevant to show motive and malice in such crimes."

People v. Atkins, 844 P.2d 1196 (Colo. App. 1992) (rev'd on other grounds). A videotape of the defendant admitting his role in the shooting incident and discussing his gang activities was properly admissible in the defendant's first-degree murder trial. The tape was relevant to the defendant's mental state at the time of the shooting, and the jury was not only instructed as to the limited purpose of the evidence, but also that they could not speculate whether the defendant acted in conformity with his alleged gang activities.

People v. Thompson, 950 P.2d 608 (Colo. App. 1997). In a first-degree murder prosecution, the Court of Appeals found the trial court had not committed plain error by admitting testimony from defendant's wife that defendant was "more volatile, secretive, [and] more verbally abusive" upon his return from Denver and that she felt her life was in danger, even though the trial court did not follow the four-part analysis in *Spoto*. The evidence explained why defendant's wife called the police and disclosed his confession, and also offered a possible motive of fear or retaliation for the witness to fabricate the story of defendant's confession.

People v. Vialpando, 954 P.2d 617 (Colo. App. 1997). Evidence was properly admitted to show history of attempts to escape from custody and willingness to use force against law enforcement officers because it tended to prove defendant's intent, preparation, and plan to escape and murder deputy and that murder was not an accident or mistake.

People v. Cook, 22 P.3d 947 (Colo. App. 2000). In a robbery and murder case of massage therapist, defendant allegedly asked victim to come to his residence and give him massage in exchange for handyman skills, and trial court properly admitted evidence of out-of-state incidents in which defendant lured or attempted to lure victims to meet him under false pretenses.

People v. Covington, 988 P.2d 657 (Colo. App. 1999) (rev'd on other grounds). Where defendant was charged with second-degree assault on his wife, and she testified that, "after the case was resolved, she intended to resume her relationship with defendant," the trial court properly admitted on re-direct examination a letter to the court in which the wife stated she knew "other abusive incidents would keep occurring unless I called the authorities or I left." The letter was admitted to impeach the wife's credibility and was not other-acts evidence under C.R.E. 404(b). However, evidence that on the night before the shooting defendant struck his wife and pulled her hair was

properly admitted under C.R.E. 404(b) as relevant to disproving defendant's claim the shooting was an accident by showing his indifference to his wife's welfare.

People v. Crespin, 631 P.2d 1144 (Colo. App. 1981). In a pre-*Spoto* case, evidence established that the defendant met the murder victim at a bar, left with her, and before taking her to his home (where she was killed) he smoked marijuana in his sister's car. In a Honey-type analysis, the Court of Appeals held that evidence of a similar incident involving another intended victim was properly admitted for the purpose of proving modus operandi, plan, scheme, design, identity and motive.

People v. Masters, 33 P.3d 1191 (Colo. App. 2001). In first-degree murder trial, drawings and narratives created by defendant near time of crime, which referenced use of survival knives, dragging of bodies, cutting upon bodies, blood pools, scratching of faces, violence against women, and pairing of sex and violence, were logically relevant. This evidence showed motive, intent, and plan to commit the crime. The drawings, narratives, and journals created in the years since the murder, which showed that defendant had violent fantasies, were logically relevant to show that defendant acted with the guilty knowledge of a perpetrator of a sexual homicide. Pornographic pictures found in defendant's home after the murder were relevant and were not inadmissible character evidence in prosecution of defendant for committing sexual homicide because an issue for determination was how a 15-year-old boy could have possessed the knowledge required to have cut out victim's genitalia.

***Caution about Masters Case*:** Be careful using the Masters case. Although this case was affirmed on appeal, see Masters v. People, 58 P.3d 979 (Colo. 2002), Master's conviction was subsequently overturned and later sealed.

Kaufman v. People, 202 P.3d 542 (Colo. 2009). "Other acts" evidence of defendant's possession of general reading materials related to martial arts was inadmissible in prosecution for first-degree murder and attempted second-degree murder arising from altercation in which defendant concededly stabbed victims but claimed to have acted in self-defense. The materials did not tend to show motive, intent, absence of accident or mistake, preparation, or opportunity, and only served to further the prosecution's portrayal of defendant as an evil and dangerous individual trained to kill. "Other act" evidence of defendant's alleged involvement in two prior bar fights was inadmissible because the alleged prior fights were entirely unrelated to facts of the case and served no purpose but to paint defendant as an individual with a proclivity to fight, particularly in light of substantial quantity of other act evidence already admitted.

People v. Griffin, 224 P.3d 292 (Colo. App. 2009). Trial court's admission of defendant's journal entries discussing her anger at having to look at white people after defendant murdered a white man was proper as evidence of defendant's mental state.

People v. Vasquez, 531 P.3d 1042 (Colo. App. 2022). Evidence of defendant's other acts, that defendant had hit the victim's sons, was admissible to explain that the reason why child had told

different stories about how victim died was the child's fear of defendant, in defendant's prosecution for felony murder, fourth degree arson, and other charges.

> ***Practice Tip***: As shown in the Masters case, it is not necessary that the other act evidence occurred prior to the offense for which the defendant is currently on trial.

3. Drug cases

a. Knowledge

People v. Ihme, 528 P.2d 380 (Colo. 1974). In prosecution for sale of cocaine, evidence that defendant sold marijuana to same undercover agent two months before charged act was relevant to show continuing plan to sell drugs and to establish defendant's guilty knowledge.

People v. Wilkie, 522 P.2d 727 (Colo. 1974). In prosecution of possession with intent to distribute dangerous drugs, evidence of defendant's admission he had previously invested $400.00 in drugs was properly admitted to show scheme, intent and guilty knowledge.

People v. Taylor, 131 P.3d 1158 (Colo. App. 2005). Evidence that defendant previously possessed crack cocaine was relevant to whether he knowingly possessed imitation crack cocaine. The prior possession made it more probable that he was aware that the substances he possessed appeared to be crack cocaine.

People v. Cooper, 104 P.3d 307 (Colo. App. 2004). The trial court did not abuse its discretion by admitting both the defendant's admission that he used meth the day before he was arrested, and the police officers' observations of the defendant outside a meth manufacturing facility the day before he was arrested. In case for Unlawful Possession of a Schedule II Substance, this evidence was logically relevant as to whether the defendant knew of the presence of meth in the car he was driving.

People v. Warren, 55 P.3d 809 (Colo. App. 2002). Because defendant claimed a lack of knowledge of the drug found in her bedroom dresser, evidence that she previously supplied the same drug to her roommate was relevant to whether she knowingly possessed the drug.

b. Modus Operandi

People v. Madonna, 651 P.2d 378, 386 (Colo. 1982). This case involved a prior bad act of fraudulently obtaining narcotic drugs that "involved features markedly similar to the offense charged," including a bogus telephone call from a phony physical to a pharmacist, a forged prosecution, and the solicitation of a stranger to pick up the prescription. Courts properly admit *modus operandi* evidence when there are "striking similarities" between the uncharged misconduct and the charged crime.

People v. Williams, 475 P.3d 593 (Colo. 2020). The Court of Appeals reversed Williams's conviction for distributing a schedule II controlled substance, finding that the trial court improperly

admitted evidence pursuant to C.R.E. 404(b) of a prior incident in which Williams pled guilty to selling cocaine. It found an abuse of discretion in admitting this evidence for the limited purposes of demonstrating "*modus operandi* and common plan, scheme, or design," largely on the grounds that the evidence in question did not meet the strictures imposed by prior case law for admitting uncharged misconduct evidence pursuant to C.R.E. 404(b) for these particular purposes, and because the error was not harmless. The Colorado Supreme Court disagreed with the analysis by the Court of Appeals, but came to the same conclusion under a C.R.E. 403 analysis, holding that because the incremental probative value of this evidence relative to any material issue in the case was substantially outweighed by the danger that it would be unfairly prejudicial, the district court abused its discretion in admitting it.

4. Child abuse cases

a. Absence of accident

People v. Christian, 632 P.2d 1031 (Colo. 1981). In a prosecution for child abuse and reckless manslaughter in which the defendant claimed that the child's injuries and death were the result of an accident, evidence of two incidents resulting in injuries to the child that occurred approximately one month before the crime charged were properly admitted on the issue of the defendant's criminal intent and to rebut the claim of accident, where "there was sufficient evidence to permit a reasonable inference that these incidents involved acts of child abuse by the defendant."

People v. Fulton, 754 P.2d 398 (Colo. App. 1987). In a prosecution for felony child abuse, evidence that, one week before the charged offense, the defendant placed one of the baby's socks in her mouth when she was crying was relevant and admissible to prove absence of accident, which was the defendant's theory of defense.

People v. Cauley, 32 P.3d 602 (Colo. App. 2001). An autopsy of the infant victim showed she had "four healing rib fractures." The prosecution initially sought admission of this evidence under C.R.E. 404(b) and C.R.E. 702 and 703 as a basis for expert opinions, then dropped its request under C.R.E. 404(b). The Court of Appeals rejected defendant's claim that admissibility should have been governed by C.R.E. 404(b) even though it was offered under C.R.E. 703, "which allows an expert to rely upon evidence that is otherwise not admissible." The court noted the evidence "was not admitted pursuant to C.R.E. 404(b) and it was not offered to establish defendant's intent or the absence of accident concerning the charged offense."

b. *Mens Rea*

People v. Casias, 312 P.3d 208 (Colo. App. 2012). Admission of child abuse committed by the defendant on another child was error and inadmissible under 404(b). While a defendant's actions may be relevant to knowledge or recklessness, it must be shown that during the commission of the bad act that "(1) the defendant revealed guilty knowledge of a circumstance or risk; (2) the defendant gained direct knowledge of a fact or risk relevant to charged offense; or (3) the defendant

learned something which circumstantially provides evidence of knowledge (or recklessness) at the time of the crime; or when (4) other bad act(s) tends to prove the requisite knowledge by virtue of the doctrine of chances." In applying the doctrine of chances as the legal theory to establish a defendant's knowledge, the other act should closely parallel the charged act -- specifically whether the prior act and charged offense require the same state of mind. The Court held that the dissimilarity of the prior acts and charged offense—difference in age of the victims, the acts of child abuse were months apart, the acts of child abuse were materially different with dissimilar outcomes, and the defendant's emotional state differed during each act—made the prior acts irrelevant to prove the culpable mental state element for child abuse resulting in death.

5. Sexual assault cases

People v. Everett, 250 P.3d 649 (Colo. App. 2010). Evidence of an uncharged sexual assault against a different victim was properly admitted for three reasons. First, it related to a material fact. By raising the defense of consent, the defendant asserted the victim was lying and contested the actus reas of sexual assault. Second, it was logically relevant to the defendant's consent defense under the "doctrine of chances." The assaults shared significant similarities: the fact that the defendant was involved in two such unusual incidents exceeded the frequency rate for the general population, and it was objectively improbable that two women would say that they had been sexually assaulted by defendant under similar circumstances. Third, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

People v. Rath, 44 P.3d 1033, 1039-40 (Colo. 2002). "In order to prove that the defendant in this case was guilty of kidnapping and sexual assault, the prosecution was required to show that he knowingly seized and carried the victim from one place to another without her consent and that he knowingly inflicted sexual intrusion or penetration on her by physical force or violence. The trial court heard the prosecution's pretrial motion to admit the evidence of uncharged misconduct, and in a written order granted admission of all four transactions for the purpose of showing a common plan, scheme or design, modus operandi, motive or intent, and to refute the defendant's contention that the alleged victim's claim of sexual intercourse or contact was a fabrication." The Colorado Supreme Court upheld the trial court's decision to admit two prior instances of uncharged misconduct by defendant, involving two other young women. The Court held that the evidence was supportive of victim's claim of sexual intercourse, as well as for common plan, scheme or design, modus operandi, and motive, that the evidence established pattern of behavior by defendant of offering young women a ride as a ruse to isolate them and have sex with them, regardless of their consent; the chain of logical inferences was independent of any inference that defendant committed sexual assault because he was a person of criminal character; and prior incidents, which did not involve completed sexual assaults, presented less danger of unfair prejudice." The Court held that the inference is based on pattern. When the defendant did certain things, in a certain way, in the past, he did so with a criminal purpose, and he took affirmative action to accomplish that purpose. This kind of inference is included within the term "modus operandi."

People v. Martinez, 987 P.2d 884 (Colo. App. 1999). Defendant was charged with sexually assaulting another inmate while in jail. Testimony from a former inmate that defendant had sexually assaulted him while incarcerated in another facility was properly admitted under C.R.E. 404(b) to show a common plan, scheme, or design.

People v. Frost, 5 P.3d 317 (Colo. App. 1999). The trial court improperly admitted testimony regarding a prior sexual assault for which defendant had been previously convicted. The prosecutor did not indicate the prior act evidence was offered for any of the specific limited purposes set forth in C.R.E. 404(b) nor articulate a precise hypothesis for the admission of the prior act evidence, but merely argued the evidence was needed to help the jury to understand all the testimony, and the unfair prejudicial effect of the evidence would substantially outweigh its "marginal" probative value.

People v. Brown, 342 P.3d 564 (Colo. App. 2014). The trial court improperly admitted evidence of a defendant's prior unlawful sexual contact conviction when defendant was charged with videotaping victim's actions alone due to the evidence being more prejudicial than probative.

6. Other-crimes evidence in sanity proceedings

People v. Bieber, 835 P.2d 542 (Colo. App. 1992). In upholding the admission of evidence relating to the defendant's prior drug sales during a sanity trial, the Court of Appeals acknowledged that "in an insanity trial, [the] rule [excluding evidence of the defendant's prior criminality] is relaxed since the prejudice that may occur by the admission of such evidence is lessened by a separate trial on the issue of guilt."

7. Other illustrative cases

a. Criminal impersonation

People v. Gallegos, 226 P.3d 1112 (Colo. App. 2009). Evidence that defendant previously used her sister's name in connection with an arrest, was relevant to show her intent to 1) buy time before her identity could be determined, and 2) evade responsibility for what she had done.

b. Escape

People v. Romero, 197 P.3d 302 (Colo. App. 2008). Evidence that defendant was previously in work release programs, and therefore was familiar with the procedures for release from county jail, was properly admitted under C.R.E. 404(b) to refute defendant's claim that when he did not return to the facility, he thought he had been released from his sentence, despite the fact that he did not go through the normal check-out procedures.

c. Testimony regarding DNA database

People v. Harland, 251 P.3d 515 (Colo. App. 2010). Officer's testimony that he ran the DNA profile obtained from the sexual assault victim's clothes and articles in her home through two DNA databases was not evidence of prior criminality subject to C.R.E. 404(b).

d. Gang Cases

People v. Trujillo, 338 P.3d 1039 (Colo. App. 2014). Gang expert's testimony concerning gang rules against cowards and disrespect offered by the prosecution to prove the defendant's motive for joining in an assault admissible under 404(b). However, reversal required due to other gang evidence that was not properly admitted under a *res gestae* theory or 404(b).

People v. Clark, 370 P.3d 197 (Colo. App. 2015). Expert testimony of a police officer who testified about the organization of a gang, it's relationship with other gangs, the origin of the sub-gang to which the defendant belonged, the hierarchy of the gang, and what it means to be "jumped in" as a member admissible as 404(b) evidence of the defendant's motive.

D. Defensive Use of Other-Acts Evidence

People v. Bueno, 626 P.2d 1167 (Colo. App. 1981). In reversing the defendant's conviction for aggravated robbery, the Court of Appeals held that the trial court erroneously excluded a defense witness who would testify that a similar robbery was committed by a person fitting the defendant's description the day after the charged offense, and that the defendant was not the culprit. The Court acknowledged that the use of other transaction evidence for defensive purposes was a question of first impression, but found no logical reason to preclude the defendant from using such evidence. Moreover, the Court concluded that, since the defendant assumed the risk of prejudice in offering such evidence, the safeguards set forth in Stull and Honey were inapplicable, and admission of the evidence became simply a question of relevancy: "If all of the similar facts and circumstances, taken together, may support a finding that the same person was probably involved in both transactions, then evidence that the defendant did not commit the second transaction is relevant and admissible." *See also People v. Flowers*, 644 P.2d 916 (Colo. 1982); *People v. Rollins*, 892 P.2d 866 (Colo. 1995).

Compare with People v. Pack, 797 P.2d 774 (Colo. App. 1990). In a robbery prosecution in which the defendant asserted that an acquaintance was solely responsible and that he (the defendant) was merely an innocent bystander, the Court of Appeals held that the trial court properly excluded evidence of a prior robbery by the acquaintance in which, like the charged offense, a weapon was used and money was taken. The Court reasoned that the two transactions were not sufficiently similar as to suggest that the acquaintance was the perpetrator of both transactions, since the type of weapon used in the other transaction was not included in the defendant's offer of proof; the offer of proof did not indicate that the person accompanying the acquaintance during the other transaction was an innocent bystander; and the witness offered to testify to the other transaction did not possess first-hand knowledge of the pertinent events.

24. OTHER ACTS EVIDENCE

People v. Arrington, 843 P.2d 62 (Colo. App. 1992). Evidence of "reverse similar transactions" from which jurors can infer misidentification should be admitted if all of similar facts and circumstances, taken together, may support finding that same person was probably involved in both transactions; defendant's similar acts were significantly dissimilar to crime charged, and were therefore irrelevant.

People v. Gray, 975 P.2d 1124 (Colo. App. 1997). Where defendant confessed to abusing his child, trial court did not commit plain error by excluding defendant's "reverse similar transaction" evidence of wife's alleged abuse of her first child intended to implicate wife by showing her motive for inflicting abuse.

People v. Griffin, 867 P.2d 27 (Colo. App. 1993). Defendant's offer of evidence in robbery prosecution regarding robbery occurring seven months after charged offense (while he was incarcerated on charged offense) properly denied where only similarity between incidents was that both involved youths forcibly robbing or attempting to rob one or more victims, particularly where incidents "were not so similar as to establish any distinctive method of committing the [charged] crimes."

People v. Ornelas, 937 P.2d 867 (Colo. App. 1996). In prosecution for distribution of controlled substances, trial court properly refused to admit evidence that defendant's house guests who were present during execution of search warrant had previously been convicted of distribution of cocaine, where facts regarding alternate suspects' prior convictions were not similar to charged offense; "[i]f the details of the other crime are not distinctive or unusual enough to represent a 'signature' of a single individual, and thus do not support a finding that the same individual was involved in all transactions, a trial court does not abuse its discretion in refusing to admit such evidence."

People v. Perez, 972 P.2d 1072 (Colo. App. 1998). No abuse of discretion to reject proffered testimony on alternate suspects where details of crimes not distinctive enough to represent "signature" of one person.

People v. Van Meter, 421 P.3d 1222 (Colo. App. 2018). Trial court admitted evidence of a defendant's possession of a stolen gun, and a defendant's prior drug use at work, when a defense attorney sought to impeach a witness who was the defendant's supervisor at work. The defense attorney stated he was opening the door, and the Court of Appeals found the fundamental fairness of the proceedings were not undermined.

People v. Toro-Ospina, 535 P.3d 132 (Colo. App. 2023). Trial court, in prosecution for two counts of felony menacing, did not err by disallowing evidence of victim's alleged drug dealing, though defendant offered it in support of his self-defense claim; had defendant offered testimony that he was aware of victim being violent during alleged drug deals, such evidence may have been relevant to establish victim's pertinent character trait of violent tendencies, but proffered testimony was only that victim engaged in drug dealing, and required inferential leap, that all drug dealers

engaged in violence and therefore defendant legitimately feared victim was more prone to violence, was a leap too far, and thus, such evidence was not relevant, and any theoretical relevance was substantially outweighed by its unfairly prejudicial impact.

E. Use of Other-Crimes Evidence in Rebuttal

People v. Miller, 890 P.2d 84 (Colo. 1995). The Colorado Supreme Court upheld the admission of testimony of a witness in a distribution of controlled substances case regarding the witness's prior sale of drugs to the defendant in order to rebut the defendant's misleading characterization of his relationship with that witness, from whom he had purchased drugs in the present case. In analyzing the admissibility of the other crimes evidence, the Court held that the same pre-admission inquiry, standards of admissibility and procedural safeguards required under *Spoto* and Garner apply, whether the evidence is offered during the prosecution's case-in-chief or during rebuttal and regardless of whether the defendant "opened the door" to admission of such evidence during the defense case. In all circumstances, questions of admissibility of other crimes evidence is first to be addressed by the trial court, out of the presence of the jury, pursuant to the standards of the C.R.E. 404(b) and its interpretative case law.

Douglas v. People, 969 P.2d 1201 (Colo. 1998). Applying the test set forth in *Spoto*, the Colorado Supreme Court held that evidence of prior incidents in which defendant brandished a gun at other people without any provocation or danger to himself were admissible under C.R.E. 404(b) to rebut defendant's claims of self-defense and defense of premises.

Compare with Yusem v. People, 210 P.3d 458 (Colo. 2009). The court held that "the prior act evidence was admissible in both Douglas and Willner because it demonstrated the defendant's tendency to use a gun in a particular manner in specific circumstances, and therefore rebutted the claim that the defendant acted in self-defense when similar circumstances arose. Additionally, because the prior acts demonstrated a specific tendency, the relevance of the evidence could be separated from the improper inference that the defendant had a bad character. Therefore, the evidence was relevant independent of the prohibited inference of bad character. In contrast, the prior act evidence in Yusem's case does not show a specific tendency that can be separated from the prohibited inference that Yusem bullied in the past and therefore menaced in this case."

People v. Deroulet, 22 P.3d 939 (Colo. App. 2000) (rev'd on other grounds). "If one party offers evidence that would create a false or misleading impression, the other party may explain or contradict that impression through evidence that might otherwise be inadmissible." Because defendant initially adduced evidence of a prior loan to defendant secured by fake cocaine, the prosecution was entitled to show the context and particulars of the loan transaction and the court was not required to comply with the procedural requirements of C.R.E. 404(b) or *Spoto*.

24.4 IN SEXUAL ASSAULT CASES: § 16-10-301

The admission of evidence of other crimes, wrongs, or acts of the defendant that are wholly independent of the offense charged in sexual assault prosecutions is governed by both § 16-10-301

and C.R.E. 404(b). *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002). The statute embodies the same basic principles governing other transactions generally: evidence of prior criminal conduct is not admissible to prove the defendant's propensity to commit crime based on an inference of bad character, but may be admissible for other relevant purposes. Many of the same kinds of procedural requirements that are applicable to the admission of other-crimes evidence are set forth in § 16-10-301 as well. The statute was adopted to permit the introduction of other sexual crimes on the same basis as other-crimes evidence generally, and reflects a "policy judgment that in sexual assault cases a need arises to make similar transactions evidence more readily available." *See People v. Opson*, 632 P.2d 602, 604 (Colo. App. 1981). Nonetheless, noting that the statute "is couched in permissive, not mandatory, language," the Court of Appeals has stated that "the fact that § 16-10-301 applies specifically to prosecutions for unlawful sexual behavior and for first degree murder (when the underlying basis involves sexual assault) does not eliminate the necessity of a C.R.E. 404(b) analysis." *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

The offenses to which this statute is applicable are set forth in § 16-10-301(2).

A. The Statute

Section 16-10-301 recognizes that "there is a greater need and propriety for consideration by the fact finder of evidence of other acts of the accused, including any actions, crimes, wrongs, or transactions, whether isolated acts or ongoing actions and whether occurring prior to or after the charged offense . . . , [that] evidence of other sexual acts is typically relevant and highly probative, and it is expected that normally the probative value of such evidence will outweigh any danger of unfair prejudice, even when incidents are remote from one another in time."

Unlike the predecessor statute that pertained to the introduction of other similar acts of the defendant, § 16-10-301 is more inclusive by permitting the introduction of other acts of the defendant to prove the commission of the offense charged. § 16-10-301(3). The statute permits the introduction of other transactions evidence for any purpose other than propensity. Included among the possible purposes enumerated in the statute are "showing a common plan, scheme, design, or *modus operandi*, regardless of whether identity is at issue and regardless of whether the charged offense has a close nexus as part of a unified transaction to the other act; showing motive, opportunity, intent, preparation including grooming of a victim; knowledge, identity, or absence of mistake or accident; or for any other matter for which it is relevant." Admission of evidence pursuant to § 16-10-301 may be sought either in the prosecution's case-in-chief or during rebuttal, and may be used to rebut evidence of good character presented by the defendant.

The statute requires the prosecution to advise the court in advance of trial regarding the act or acts sought to be introduced and the purposes for which the evidence is offered. § 16-10-301(4). Likewise, the court must determine by a preponderance of the evidence whether the act or acts occurred and whether it is offered for a valid purpose, taking into consideration the broad inclusionary expectations of the statute. In 2002, § 16-10-301(4)(c) was revised, no longer requiring the prosecution to establish a *prima facie* case for the charged offense exists. The trial

court may determine the admissibility by offer of proof. The trial court must advise the jury at the time the evidence is received, and again in its general charge to the jury, of the limited purposes for which the evidence is admitted.

Although the statute sets forth unique foundational requirements and specific procedural requirements, the "statute contains no new language that could be interpreted to erode the continued vitality of C.R.E. 404(b), *People v. Spoto*, *People v. Garner*, or their progeny." *People v. Martinez*, 36 P.3d 154, 158 (Colo. App. 2001). *See also* *People v. Glasser*, 293 P.3d 68 (Colo. App. 2011).

1. Factors to be considered

Adrian v. People, 770 P.2d 1243 (Colo. 1989). In a prosecution for sexual assault on a child, the Colorado Supreme Court held that evidence of other sexual assaults on children that occurred more than 15 years before the charged offense was properly admissible, where all of the victims were male members of the same family who were befriended by the defendant; each victim was between the ages of 5 and 11; all of the assaults occurred while the victims were in the defendant's care and custody; and the type of sexual abuse was similar in each instance. The Court acknowledged that the remoteness of the other transactions is included among the factors to be considered in determining the relevancy of the other-crimes evidence, but that there is no fixed standard for determining remoteness. "In addition to remoteness, the trial court must also consider the strength of the evidence of the commission of prior acts, the similarities between the acts, the interval of time elapsed between the acts, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence will rouse the jury to overmastering hostility."

2. Not limited to incidents within the statute of limitations/remoteness

The Court in *Adrian* acknowledged that "section 16-10-301 sets forth the exclusive standards and procedures for the admission of prior similar acts in sexual assault cases. The statute contains no restrictions on the admission of evidence of prior similar acts based upon the ten-year statute of limitations for sexual offenses in § 16-5-401(6). To engraft a statute of limitations restriction into § 16-10-301 would establish a bright line rule, but would invade the discretion vested in the trial court by the statute."

People v. Larson, 97 P.3d 246 (Colo. App. 2004). Evidence that defendant had committed prior acts of child sexual molestation was admissible to establish identity and intent, notwithstanding that the prior acts were temporally remote (20+ years); both prior and current victims were of approximately same age and were strangers to defendant, both prior and current victims had similar sex acts performed on them by defendant, and defendant had a predilection to return to the scene of the molestation in both the prior and instant cases.

3. Not limited to prosecutions for sexual assault on a child

People v. Fell, 832 P.2d 1015 (Colo. App. 1991). The Court of Appeals rejected the defendant's argument that similar transaction evidence pursuant to § 16-10-301 is limited to cases involving

child victims, due to the difficulty a child may have in recollecting and articulating the details of a sexual assault: "[The defendant] provides no direct authority to support such a restriction, and we are unable to find any. Also, the statute contains no language to support his assertion. Thus, in our view, similar transaction evidence which meets the requirements of § 16-10-301 is admissible in a prosecution for sexual assault regardless of the age of the victim."

B. Illustrative Cases

1. Common plan, scheme, or design

People v. Delgado, 890 P.2d 141 (Colo. App. 1994). In a sexual assault prosecution where the only disputed issue was whether the defendant forcibly caused submission of the victim or whether she consented to the sexual contact, the district court admitted evidence of a prior similar sexual assault upon another woman by the defendant pursuant to § 16-10-301. The evidence was admitted for the purposes of showing a common plan, scheme, design, and the defendant's modus operandi. In upholding the admission of the other crimes evidence, the Court of Appeals recognized that "[a]dmission of prior acts to establish such a common plan is subject to abuse. However, the possibility of abuse may be reduced by requiring that the similarities in prior acts be sufficient to be equivalent to those required to establish modus operandi. Thus, the methods used in the commission of the acts being compared must be both similar to each other and dissimilar from the methods generally used in such an offense." The court acknowledged that "the greater the number of prior incidents the stronger the logical inference independent of defendant's bad character. However, when, as here, the 'act' is complex, requiring several steps to completion, a single prior act may be sufficient to demonstrate the common plan. This is because it is sufficient to demonstrate a tendency to put these multiple steps together into a common plan of action, again without regard to defendant's general character or the moral connotation of any one or more of the individual steps in the plan."

People v. Janes, 942 P.2d 1331 (Colo. App. 1997). The trial court properly admitted evidence of other similar acts by the defendant despite the fact that those acts occurred nearly seven years before the charged offense, because the similarities between the charged and uncharged acts were particularly relevant in establishing a common plan or scheme. Among the similarities are the fact that each of the victims was male and of the same approximate age, the alleged molestation occurred at the defendant's home while the defendant's wife and others were present in the home, the defendant engaged in the same type of sexual behavior and offered the victims money, he sought to silence each of the victims by using the same language, and as part of the molestation he allegedly left or attempted to leave hickeys on each of the victims' bodies.

People v. Fell, 832 P.2d 1015 (Colo. App. 1991). Evidence that the defendant sexually abused the victim ten to twelve years earlier was properly admissible in a sexual assault and incest prosecution. The Court of Appeals recognized that similar transaction evidence involving the defendant and the same victim is normally admissible as being probative of plan, scheme, or design, and held that the trial court acted within its discretion in finding "similarity in the persons

and the sexual acts involved, in the 'pattern of flattery beforehand and reproach afterwards,' and in the defendant's use of the father/daughter relationship for sexual gratification."

People v. Guilbeaux, 761 P.2d 255 (Colo. App. 1988). The trial court abused its discretion in admitting evidence of other sexual acts in a prosecution for sexual assault on a child, where the trial court made no findings regarding the purpose and relevancy of the evidence, and the other acts were dissimilar in the manner in which the children were induced to participate, in the type of sexual contact, and in the defendant's relationship with the children. The Court of Appeals noted that identity and intent were not disputed issues, and that the only proper purpose was to show a common scheme, to which the dissimilarities were not probative.

People v. Underwood, 53 P.3d 765 (Colo. App. 2002). Testimony from defendant's other daughter that defendant had previously forced her to engage in sexual intercourse with him was admissible in prosecution for aggravated incest because the other daughter's testimony showed a common scheme or plan and *modus operandi*. Testimony from the victim and her former boyfriend regarding an incident in a motel when defendant gave victim a backrub, commented on how she was becoming a woman, and moved his hands towards her breasts was admissible. The incident was similar to the charged incident in which defendant gave the victim a backrub and then forced her to engage in sexual intercourse, and the evidence established a common scheme or plan and defendant's *modus operandi*.

People v. Jones, 311 P.3d 274 (Colo. 2013). Trial court properly admitted defendant's prior sexual assaults of women in other states when the victim and the two prior victims were white women who the defendant assaulted late at night after they were drinking by placing his hand over the victim's mouth and causing facial injuries. The evidence could lead to the inference that the defendant had a common plan, scheme, or design to have sexual relations with white women who had been drinking late at night regardless of their consent. This inference made it more likely that the defendant committed the charged offenses.

2. Intent, Motive, or Lack of Mistake

People v. Rowe, 318 P.3d 57 (Colo. App. 2012). In a child sexually exploitative material ("CSEM") case, case where defendant "offered" CSEM by storing the photos in a peer-to-peer sharing network, evidence of defendant's previous admissions that he visited CSEM sites and liked CSEM was admissible pursuant to 404(b) and §16-10-301(1) as evidence of defendant's intent and lack of mistake. Additionally, evidence that the defendant kept animated CSEM in the same location as CSEM images was admissible to show defendant's intent, motive, and lack of mistake.

People v. Villa, 240 P.3d 343 (Colo. App. 2009). Where a defendant is charged with sex assault on a child and does not stipulate that he committed the assault and committed it for the purpose of sexual arousal, gratification, or abuse, intent is a material element that the prosecution had a right to prove through prior act evidence.

People v. Orozco, 210 P.3d 472 (Colo. App. 2009). Evidence of other sexual assaults involving victims of different age and gender is relevant to show intent and motive in charges of incest and sexual assault on a child.

People v. Snyder, 874 P.2d 1076 (Colo. 1994). In upholding the admission in a sexual assault on a child case of evidence of other sexual acts perpetrated by the defendant upon the victim, the Colorado Supreme Court rejected the holding of the Court of Appeals that, in such a case, "intent" was not a proper purpose upon which to admit evidence pursuant to § 16-10-301 inasmuch as intent is necessarily implied from the nature of the charged sexual acts. "Despite the fact that the alleged conduct constituting the assaults is highly suggestive of a purpose of sexual arousal, gratification, or abuse, the element of intent was distinct from and additional to the conduct and was a material fact essential to the prosecution's case." The other transactions evidence was therefore logically relevant to a material element in the case. The Court likewise rejected the assertion that such evidence is necessarily rendered inadmissible if any inference is raised by the evidence suggesting the defendant acted in conformity with bad character. "[A]lmost by definition, similar transaction evidence will suggest bad character and action in conformity therewith. The third prong of the *Spoto* test does not demand the absence of the inference but merely requires that the proffered evidence be logically relevant independent of that inference."

People v. Conyac, 361 P.3d 1005 (Colo. App. 2014). Defendant's prior attempt or request to have anal sex with his spouse found relevant as evidence of motive when the prosecution offered the evidence to show the defendant's interest and motive for performing the sexual act when defendant was charged with sexually assaulting his stepdaughter in that manner.

People v. Sabell, 452 P.3d 91 (Colo. App. 2018). The trial court did not abuse its discretion by admitting evidence for purposes of intent when the defendant injected the affirmative defense of involuntary intoxication into the case.

People v. Heredia-Cobos, 415 P.3d 860 (Colo. App. 2017). Court was permitted to allow introduction of evidence of sexual assaults committed by defendant against two other victims in sexual assault of a child prosecution; although there was a difference in ages between child victim and prior victims, the other crimes replicated in all respects the manner in which the crime charged was committed, AND WERE probative of defendant's intent and method of seeking sexual gratification from women to whom he had access because they were relatives who lived or stayed in his home.

3. Identity

People v. Apodaca, 58 P.3d 1126 (Colo. App. 2002). Trial court acted within its discretion in prosecution for child sexual assault in allowing the People to present evidence that defendant had previously committed sexual assault upon an underage passenger in his vehicle, even though the elapsed time between the prior incident and the incident which had given rise to the instant prosecution was eight years. The prior act evidence was relevant to the material fact of identity,

independent of the prohibited inference that the defendant's character was simply bad, and the probative value of the evidence outweighed any danger of unfair prejudice, which was further ameliorated by the trial court's instruction to the jury disallowing the use of the evidence for any purpose other than to prove identity.

People v. Opson, 632 P.2d 602 (Colo. App. 1981). In a sexual assault on a child prosecution, evidence established that the defendant approached a 12-year-old child in an alley and asked her to help him find his dog. He then led her to an isolated location and assaulted her. In upholding the admission of evidence that, two days later, the defendant approached a 14-year-old child and asked her to call out for his lost dog since her voice might sound like that of the 12-year-old sister he claimed to have, the Court of Appeals recognized that the other-transaction evidence was properly received to prove *modus operandi* and identity, which was disputed at trial. [Note that the fact that the other incident did not involve criminal activity was not significant, since the statute refers to "similar acts or transactions."]

People v. Pigford, 580 P.2d 820 (Colo. App. 1978). The trial court did not abuse its discretion in allowing the admission of evidence of a similar sexual assault that occurred almost four months after the crime charged, where there was sufficient similarity between the two incidents so that *modus operandi* and common identity could be inferred.

4. Rebuttal

People v. Enriquez, 597 P.2d 1048 (Colo. App. 1979). In a prosecution for criminal trespass and third-degree sexual assault in which the defendant's wife testified that the defendant told her that the victim had perpetrated the sexual assault, the prosecution was properly allowed to present evidence in rebuttal that the defendant had sexually assaulted another woman in a similar manner five weeks after the crime charged.

C. Defensive Use of § 16-10-301 Evidence

People v. Rollins, 892 P.2d 866 (Colo. 1995). In a prosecution for sexual assault on a child, the defendant's theory of the case was that the child victims fabricated the charges. In support of the theory, the defense introduced evidence of other uncharged sexual assaults involving the victims in an attempt to discredit the allegations in the present case. The defendant's subsequent convictions were reversed by the Court of Appeals, on grounds that the trial court did not conduct the balancing tests required by *Spoto* and *Garner* in permitting the admission of the other transactions evidence, nor did it give the limiting instructions required by § 16-10-301. In reversing the Court of Appeals, the Colorado Supreme Court held that, while C.R.E. 403 and 404(b) govern the defensive use of other-acts evidence involving persons other than the defendant, "section 16-10-301 does not apply to the introduction of similar transaction evidence when offered by defense counsel as part of trial strategy and the defense's theory of the case." The Court recognized that the rationale for the procedural protections underlying the statute no longer apply once other transactions evidence is offered by the defendant. Rather, the defendant assumes the risk when

offering such evidence of any prejudice that might result from its admission in return for whatever exculpatory value the evidence might demonstrate to the jury. Notably, this evidence was found by the trial court to exist 'outside the scope' of § 18-3-407, which currently governs admissibility of evidence of previous sexual assault allegations by a victim or witness, a topic which was not discussed in the Supreme Court's decision.

1. Prior act to rebut defense theory of fabrication

People v. Mata, 56 P.3d 1169 (Colo. App. 2002). To rebut the defense theory that the victim fabricated her story, the trial court properly permitted defendant's adult daughter to testify that defendant sexually abused her multiple times when she was a child. The daughter and the victim were of similar age at the time of the assaults, both were familiar to the defendant and molested in his home, the progression of abuse was similar, and defendant threatened both children to maintain secrecy.

People v. Duncan, 33 P.3d 1180 (Colo. App. 2001). The trial court properly admitted other-acts evidence to rebut defense claim of recent fabrication.

People v. Martinez, 36 P.3d 154 (Colo. App. 2001). The term "recent fabrication" applies to a defendant's assertion that the victim's initial disclosure was false. The trial court properly admitted evidence of prior sexual assaults. The evidence was logically relevant to the defendant's intent and to refute a consent defense.

People v. Orozco, 210 P.3d 472 (Colo. App. 2009). Where defendant disputes the victim's allegations, the prior acts evidence is relevant to identify the defendant as the perpetrator of the present offense and to rebut the suggestion that the victim fabricated the allegations.

People v. Victorian, 165 P.3d 890 (Colo. App. 2007). Evidence that defendant sexually assaulted daughter 18 years earlier was logically relevant to rebut suggestion that other daughters had fabricated their allegations. "Because this theory of relevance does not depend on temporal proximity or exacting similarity, we need not compare and contrast the factual details of the various assaults."

2. Rape Shield Statute

The admissibility of other sexual acts by a victim or witness *in any type of case* is subject to the special protections of Colorado's Rape-Shield statute, § 18-3-407, as well as to the general provisions of C.R.E. 403, 404, and 405 to the extent that they are inconsistent with the statute. *See* C.R.E. 1101(e) and 405(b).

Generally, the statute prohibits the introduction of any evidence of a witnesses or a victim's prior sexual activity at trial unless the defendant can establish, through pre-trial notice and hearing, that those activities are relevant to a defense and not prejudicial to the victim. *See generally* § 18-3-407.

There's More: The Rape Shield statute and relevant caselaw are discussed at length in the Character Evidence Chapter of this Manual.

3. Sexual Orientation, Gender Identity, and Gender Expression Evidence and the so-called "Gay Panic Defense"

In 2020, the Colorado General Assembly passed a law prohibiting the use of a victim's, defendant's, or witness's actual or perceived gender identity, gender expression, or sexual orientation offered in relation to an affirmative defense or pursuant to 404(b). § 18-1-417. The law is largely modeled after the Rape Shield law. *See generally* § 18-3-407. The legislative intent is to protect against the attack of a person's identity, orientation, or gender expression as a way to either prejudice them or to form the basis of a self-defense claim in a violent crime. It was created after numerous attempts by defendants to avoid prosecution for violent crimes on self-defense theories that they committed the crime because they "panicked" upon learning a person was not heteronormative.

To admit such evidence, a party must file a written motion at least thirty-five days prior to trial, unless later for good cause shown, stating that the moving party has an offer of proof of the specific factual relevancy and materiality of evidence of a victim's, defendant's, or a witness's actual or perceived gender identity, gender expression, or sexual orientation. If the prosecution stipulates to the facts contained in the offer of proof, the court shall rule on the motion based upon the offer of proof without an evidentiary hearing. Otherwise, the court shall set an in-camera hearing prior to trial.

An exception exists in statute to introduce evidence of a person's sexual orientation, gender identity, or gender expression in bias-motivated cases charged pursuant to § 18-9-121.

24.5 IN DOMESTIC VIOLENCE CASES: § 18-6-801.5

A. The Statute

Section 18-6-801.5 allows the admission of other acts of domestic violence in criminal prosecutions where the named defendant and victim have engaged in an intimate relationship as of the time of the charged offense. Admission in such cases is predicated, in part, upon the legislative declaration that evidence of other acts of domestic violence can be "helpful and necessary" in prosecuting crimes involving domestic violence given the frequently cyclical nature of the abuse and the risk in such cases of harm "with escalating levels of seriousness." § 18-6-801.5(1).

The statute authorizes the admission of any other acts of domestic violence between the defendant and the victim. § 18-6-801.5(2). Effective July 1, 2001, § 18-6-801.5(2) was modified to allow admission of any other acts of domestic violence "between the defendant and the victim named in the information and between the defendant and other persons." The proponent of the evidence is obligated to advise the court by offer of proof of its intent to introduce such evidence and to specify

whether it is being offered to establish a common plan, scheme, design, identity, *modus operandi*, motive or guilty knowledge, or for some other purpose. § 18-6-801.5(3). Like the admission of other categories of other transactions evidence, the trial court must conduct a C.R.E. 403 balancing analysis to determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect. § 18-6-801.5(4). The court must likewise instruct the jury at the time the evidence is admitted, as well as during its final charge to the jury, as to the limited purpose for which the evidence was admitted. § 18-6-801.5(5).

A trial court must find by a preponderance of the evidence that proffered prior acts of domestic violence occurred before admitting them under § 18-6-801.5. However, the trial court does not have to hold an evidentiary hearing on the matter if the offer of proof satisfies the preponderance standard. *People v. Ma*, 104 P.3d 273 (Colo. App. 2004) (rev'd on other grounds). *See also People v. Moore*, 117 P.3d 1 (Colo. App. 2004).

B. Illustrative Cases

People v. Torres, 141 P.3d 931 (Colo. App. 2006). Defendant broke into his ex-girlfriend's home, assaulted her and dragged her to the basement. The trial court properly admitted a prior incident in which defendant broke into his ex-girlfriend's home and grabbed her. Although the statute requires a cautionary instruction on the limited use of the defendant's prior bad acts, the defendant did not request it, and the trial court's failure to give it *sua sponte* was not plain error.

People v. Ramirez, 18 P.3d 822 (Colo. App. 2000). In prosecution for burglary, the defendant's earlier assault on his wife was relevant to the element of intent to commit an underlying crime, assault, at the time of the trespass.

People v. Raglin, 21 P.3d 419 (Colo. App. 2000) (overruled on other grounds). Trial court properly admitted evidence of prior threats and violent actions made by the defendant to the victim. The Court of Appeals held that the trial court appropriately applied *People v. Hulsing*, 825 P.2d 1027 (Colo. App. 1991), to domestic violence in the context of a non-marital relationship.

People v. Thomasczek, 284 P.3d 110 (Colo. App. 2011). Evidence of the conduct that led to a protection order being issued between an ex-husband and ex-wife found admissible as "necessary to provide a full understanding of why the victim and defendant may have behaved as they did in the charged incident, and was probative of defendant's intent with regard to the burglary and harassment charges."

People v. Cross, 531 P.3d 444 (Colo. App. 2023). Evidence of defendant's prior violent acts toward long-term romantic partner whom he shot to death did not result in unfair prejudice to defendant that substantially outweighed its probative value in first degree murder prosecution. Although challenged evidence occurred as long as three years before shooting, the prior acts evidence was substantially similar to evidence that showed defendant had physically abused victim shortly before her death and that she talked about leaving him. The prior acts evidence showed consistent volatility and ongoing abuse in relationship, which suggested shooting was not an

accident, and evidence of prior physical and emotional abuse would not unduly inflame passions of jury in case where defendant was accused of shooting victim twice in head.

* * *

2025 Contributions by Jessica Dotter
Sexual Assault Resource Prosecutor
Colorado District Attorneys' Council

CHAPTER 25

PROPERTY CRIMES ISSUES

25. PROPERTY CRIMES ISSUES

25.1 OWNERSHIP INVOLVING NON-CORPORATE VICTIMS

A. Victim May Be Actual Owner or One in Rightful Possession

Kelley v. People, 443 P.2d 734 (Colo. 1968). In a prosecution for theft by the bailee of an automobile, the Colorado Supreme Court held that the automobile dealer had rightful possession, custody and control of the vehicle in question, constituting sufficient proof of ownership even though no certificate of title was introduced into evidence. "Nor is a larceny case the proper platform to determine the so-called legal ownership of a chattel. In *Sloan v. People*, 176 P. 481, we stated that the 'actual condition of the legal title is immaterial to the thief [and] so far as he is concerned, one may be taken as the owner who was in peaceable possession of it, and whose possession was unlawfully disturbed by the taking.' Therefore, in a larceny case, it is sufficient to show that the named victim had possession, control and custody of the chattel which was the alleged object of the larceny."

People v. Berry, 457 P.3d 597 (Colo. 2020). Although the majority opinion focused on the meaning of "public property" particular to the embezzlement of public property statute, Justice Samour, writing in dissent, emphasized the historical and modern importance of possession of property in the proving of ownership over that property:

The adage that "possession is nine-tenths of the law" dates back to 1616, more than four centuries ago. *Willcox v. Stroup*, 467 F.3d 409, (4th Cir. 2006). But under the common law, this is more than an adage; it's a truism. In 1822, the Supreme Court observed that it was beyond doubt that "if a person be found in possession ... it is prima facie evidence of his ownership." *Ricard v. Williams*, 20 U.S. 59 (1822). Some decades later, in 1889, our court proclaimed that "[t]he actual control and possession of personal property ... is prima facie indicative of ownership at law." *Herr v. Denver Milling & Mercantile Co.*, 22 P. 770, (Colo. 1889). And this uncontroversial concept continues to hold sway in modern times.

1. Exceeding scope of bailment

People v. Stephens, 837 P.2d 231 (Colo. App. 1992). Testimony from the defendant's employer that he gave the defendant permission to use his vehicle for a few hours on a specified date and extended that permission until early the following morning, but did not authorize the defendant's possession beyond that time, constituted sufficient evidence to sustain the defendant's conviction for aggravated motor vehicle theft.

2. Heirs

People v. McCormick, 784 P.2d 808 (Colo. App. 1989). In prosecution for theft of the victim's personal property and murder, the Court of Appeals held that, because the victim's daughter, as an heir of the victim, was a co-owner of the money and property taken after the victim's death and

had authorized and participated in the taking of the money and property, the defendant could not be guilty of theft, even though the daughter had conspired with the defendant to commit the murder. "Since she was legally a rightful possessor of these items at the time of taking, any control exercised by the defendant was with authorization and there was no theft."

3. Power of Attorney

People v. Gracey, 940 P.2d 1050 (Colo. App. 1996). Defendant, an accountant charged with theft from the elderly, claimed he was authorized under the power of attorney to borrow money from the victim's account and that the withdrawals he made from the account were loans. However, the evidence showed defendant made 32 withdrawals from the victim's account without contemporaneously issuing promissory notes to the victim, that he made no attempt to repay the "loans," and that he concealed the "loans" from the victim's sons.

People v. Stell, 320 P.3d 382 (Colo. App. 2013). A general power of attorney authorizing defendant to act as victim's agent with respect to victim's property and assets did not preclude prosecution for theft from the victim.

4. Application in robbery cases

People v. Benton, 829 P.2d 451 (Colo. App. 1991). The defendant was charged with several offenses, including the aggravated robbery of a customer at a fast-food outlet. During the crime, he seized the customer, placed a knife at his throat, and demanded that two employees give him all of the money in the cash registers. In reversing the aggravated robbery conviction as to the customer, the Court of Appeals stated: "[W]e conclude that, in order to commit the crime of robbery against an individual who does not have physical possession of the article taken, i.e., in order to take property from such an individual's 'presence,' that individual must be exercising, or have the right to exercise, control over the article taken. Here, the undisputed evidence was that the customer did not have possession of the money in the cash register, he was not exercising any control over it at the time he was assaulted, and there was no showing that he had any right of control. The evidence, therefore, demonstrated, as a matter of law, that, although the customer was the victim of several offenses perpetrated by defendant, he was not the victim of an aggravated robbery."

People v. Mortenson, 541 P.3d 639 (Colo. App. 2023). In a robbery prosecution, the defendant did not "take" merchandise from the victim's person or presence because the defendant was not able to escape the presence of the undercover Target security guard who tacked her to the ground and disarmed her on her way out of the store. Although the defendant "took" the property for the purposes of the theft statute, she did not "take" the property for the purpose of the robbery statute because the theft was not taken away from the victim's person or presence.

5. Application in burglary cases

People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996). In a burglary prosecution, a marital relationship did not preclude the conviction of a husband who broke into the dwelling of his estranged wife, even though that dwelling had once been shared by the couple prior to their separation. The court recognized that, since the law of burglary is designed to protect the dweller, the controlling question is a matter of occupancy rather than ownership. In the context of a marital residence, "in the absence of a restraining order or an order granting one party exclusive possession of the marital residence, the question whether one spouse has the sole possessory interest in it depends on whether the evidence shows that both parties had decided to live separately. Simply ordering a spouse out of the house and changing the locks does not establish this. Both parties must have understood that the possessory interest of one was being relinquished, even if such interest is relinquished begrudgingly or reluctantly." Here, there was sufficient evidence to establish that the defendant relinquished his possessory interest in the marital residence when, two and one half months before the burglary, he was informed that his wife desired a divorce and that he was no longer welcome in the house, he thereafter left the residence and took many of his personal belongings with him, and he was later informed that his wife had consulted with an attorney regarding divorce proceedings and had changed the locks on the home.

People v. Smith, 943 P.2d 31 (Colo. App. 1996). In a second-degree burglary case, defendant had been verbally informed of a restraining order and that his wife and children had possessory rights to the premises before he entered. The Court of Appeals found "no basis for limiting the dweller's right to occupancy of the structure to those cases in which the intruder is informed in writing that his former possessory rights are no longer in effect."

People v. Lopez, 946 P.2d 478 (Colo. App. 1997). Defendant had permission to live in the family home, but his parents did not allow any of the children in their bedroom. Defendant nonetheless entered the bedroom and stole money from his stepfather's "stash" and was charged with second degree burglary. The jury was properly instructed that a general grant of authority to enter part of a building does not necessarily include the right to enter other parts of the building.

Compare with *People v. Waddell*, 24 P.3d 3 (Colo. App. 2000). The prosecution failed to prove unlawful entry in second-degree burglary case because defendant had permission to enter crawl spaces and use bathrooms of two homes, regardless of fact that defendant was not authorized to use bathrooms for purpose of installing peephole.

6. Application in criminal trespass cases

People v. Allen, 944 P.2d 541 (Colo. App. 1996). The focus of criminal trespass is the "invasion of one's interest in habitation or possession of a building, rather than an invasion of one's ownership interest in a building." Even assuming defendant had a property interest in the home, his wife occupied the home and a restraining order "nullified his license or privilege to enter the premises."

People v. Murray, 452 P.3d 101 (Colo. App. 2018). Defendant was convicted of first-degree burglary, trespass, third degree assault, false imprisonment, attempted sexual assault, attempted second degree burglary, and criminal mischief. Defendant claimed at trial that he had a legal right to be present in the victim's home, and therefore, he did not "unlawfully enter or remain." The court held that, despite evidence that the defendant had stayed at his ex-girlfriend's residence in the past, absent a landlord-tenant agreement, he was not a tenant with a license to enter/remain in her residence and she could revoke permission for the defendant to be on the premises at any time.

7. Application in embezzlement of public property cases

People v. Berry, 457 P.3d 597 (Colo. 2020). The Colorado Supreme Court held that "public property" in the embezzlement of public property statute, § 18-8-407, means property that is owned by the state. In this case, a police officer was found guilty of embezzlement of public property for selling a defendant his confiscated gun back to him. A Court of Appeals overturned the conviction and the Colorado Supreme Court agreed with the Court of Appeals, finding that the property was not public property for the purposes of the embezzlement of public property statute because the guns, although in possession of the state at the time of the officer's crime, were private property. This opinion is likely confined to the particular meaning of "public property" for the purpose of this statute only, and likely does not signal a departure from the general principal that mere possession of the property is usually sufficient to qualify a person as a victim of most property crimes.

B. Theft From Multiple Owners May be Charged in One Count

People v. District Court, 559 P.2d 1106 (Colo. 1977). The Colorado Supreme Court held that the trial court erroneously dismissed as duplicitous several counts in an indictment, each of which charged theft from multiple victims. "We have long held . . . that mere multiplicity of ownership and possessory interest does not cause a charge to be duplicitous. Rather, this court, as well as respected authority in other jurisdictions, has emphasized the continuity of the act or transaction. 'No more than one offense should be charged in one count; but, by the great weight of authority, the stealing of several articles of property at the same time and place, as one continuous act or transaction, may be prosecuted as a single offense, although the several articles belong to several different owners.' *Sweek v. People*, 277 P. 1 (Colo. 1929)."

Practice Tip: Section 18-4-401(6) provides: "In every indictment or information charging a violation of this section, it shall be sufficient to allege that, on or about a day certain, the defendant committed the crime of theft by unlawfully taking a thing or things of value of a person or persons named in the indictment or information. The prosecuting attorney shall at the request of the defendant provide a bill of particulars."

25.2 OWNERSHIP INVOLVING CORPORATE OWNER OR VICTIMS

25. PROPERTY CRIMES ISSUES

A. Theft from Co-Owners of Property

A series of cases in the 1970s and 80s held that a defendant could not legally steal from co-owners of property because theft required taking something of value from *another*, and fellow shareholders or partners were not seen legally as "another." *See, e.g.*, *People v. Zimbelman*, 572 P.2d 830 (Colo. 1977); *People v. Westfall*, 522 P.2d 100 (Colo. 1974); *People v. McCain*, 552 P.2d 20 (Colo. 1976); *People v. Clayton*, 728 P.2d 723 (Colo. 1986). The legislature has since amended the theft statute. § 18-4-401(1.5) now states: "For the purposes of this section, a thing of value is that of 'another' if anyone other than the defendant has a possessory or proprietary interest therein."

B. Proof of Corporate Existence

1. Competency of evidence

People v. Lamb, 438 P.2d 699 (Colo. 1968). The Colorado Supreme Court held that the president of the victim corporation should have been permitted to testify to the corporate entity, and that the trial court's exclusion of such testimony under the "best evidence rule" was error. "This Court on several occasions has clearly indicated that it is not necessary to go beyond testimony to that offered in this case to establish the corporate existence of the entity involved. In *Miller v. People*, 21 P. 1025 (Colo. 1889), we find the following, citing *Reed v. State*, 15 Ohio 217: 'the existence of such corporation may be proved by one who of his own knowledge is acquainted with the fact.'" *Lamb*, 438 P.2d at 700.

2. De facto corporate existence

People v. Zimbelman, 572 P.2d 830 (Colo. 1977). The victim corporation's defunct status did not preclude its continued existence as a de facto corporation, and the prosecution's evidence was sufficient to establish such de facto corporate existence: "The People correctly assert that in criminal cases the prosecution is required to prove only the de facto corporate existence of an alleged corporate victim. For an enterprise to constitute a de facto corporation, three elements must coincide: (1) a law under which a corporation may lawfully be formed; (2) a bona fide attempt to form the corporation according to that law; and (3) an exercise or attempt to exercise corporate powers.

25.3 ALLEGATION AND PROOF OF OWNERSHIP

"Two types of variance[s] may arise between the offense in the charging instrument and the offense of which a defendant is convicted. A 'simple variance' occurs when the charged elements are unchanged, but the evidence at trial proves facts materially different from those alleged. A 'constructive amendment' occurs when the evidence at trial changes an element of the charged

offense and alters the substance of the charging instrument. A simple variance is immaterial unless it prejudices the defendant's substantive rights." *People v. Carlson*, 72 P.3d 411 (Colo. App. 2003).

A. Non-Corporate Victim

Griffin v. People, 400 P.2d 928 (Colo. 1965). When the owner of stolen property had left it in the possession of the named victim for safe-keeping, the Colorado Supreme Court rejected the assertion that there was a fatal variance between the allegation of ownership and the proof at trial; "The complete answer to this contention is contained in the rule announced in *Romero v. People*, 304 P.2d 639 (Colo. 1956), where it was said: 'It is well settled that the ownership (in a theft case) may be laid either in the real owner or in the person in whose possession the property was at the time of the theft.'"

B. Corporate Victim

Straub v. People, 358 P. 2d 615 (Colo. 1961). In cases in which the owner of stolen property is alleged to be a certain company which is a corporation, the Colorado Supreme Court held that the failure to prove the corporate existence of such company does not constitute a material variance. "The name of the owner of property stolen is material only to the extent it serves a descriptive purpose. Another is to show that it was not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. And, where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results. Here, the corporate existence of 'The Continental Oil Company' was not a factor in the description either of the owner of the stolen property or of the person by whom it was stolen. The defendant could not have been misled by the allegation of corporate entity, nor prejudiced by failure of the prosecution to prove it.

25.4 PROVING VALUE: THEFT

To establish the crime of theft under § 18-4-401(1)(a), the prosecution need not prove the *precise* value of the thing taken to establish the theft, but "it must plead and prove that value to determine the theft's classification level." *People v. Jamison*, 220 P.3d 992 (Colo. App. 2009); *People v. Samson*, 302 P.3d 311 (Colo. App. 2012).

A. "Thing of Value"

Section 18-1-901(3)(r) defines "thing of value" as "real property, tangible and intangible personal property, contract rights, choses in action, services, confidential information, medical records information, and any rights of use or enjoyment connected therewith."

B. Measure of Market Value

1. Fair or reasonable market value

People v. Moore, 226 P.3d 1076 (Colo. App. 2009). "Where, as here, the value of the item stolen determines the grade of the offense, the People must present competent evidence of the reasonable market value of the item at the time of the commission of the alleged offense. Market value is what a willing buyer will pay in cash to the true owner for the stolen items."

People v. Crawford, 230 P.3d 1232 (Colo. App. 2009). "[T]estimony must relate to the value of the property at the time of the commission of the crime. Moreover, testimony on the purchase price of goods is competent evidence of fair market value only where the goods are so new, and thus, have depreciated in value so insubstantially, as to allow a reasonable inference that the purchase price is comparable to current fair market value."

People v. Jamison, 220 P.3d 992 (Colo. App. 2009). "While evidence of market value is necessary to sustain a theft conviction, the face value of some items, such as cash and coins, provides sufficient evidence of the value of those items."

People v. Paris, 511 P.2d 893 (Colo. 1973). "To make a prima facie case, it was incumbent upon the People to present competent evidence of the reasonable market value of the goods in question at the time of the commission of the alleged offense." In this case, the Colorado Supreme Court held that the owner's testimony as to the purchase price of stolen goods was not competent evidence of fair market value where the goods were not so new as to allow a reasonable inference that the purchase price was comparable to the current fair market value.

But see *People v. Austin*, 523 P.2d 989 (Colo. 1974). Testimony of the victim that he had purchased a vehicle for $700 one year prior to its theft and that if he were to sell it he would have asked at least $400 for it constituted sufficient evidence to establish that the reasonable market value of the vehicle at the time of the commission of the offense was more than $100.

People v. Bornman, 953 P.2d 952 (Colo. App. 1997). An "appropriate and recognized method of determining the value of an item of property, whether personality or realty, is to review the price at which 'comparable' items have been sold . . ."

a. Fair market value: retail goods

Maisel v. People, 442 P.2d 399 (Colo. 1968). Evidence of retail price is sufficient to prove reasonable market value, "especially where as in the instant case we are dealing with items which were being sold over the counter on a more-or-less daily basis and there is nothing to indicate that the retail price is higher than the true market value."

People v. Velarde, 790 P.2d 903 (Colo. App. 1989). "For purposes of a theft from a store, the prima facie measure of value to be attached to stolen goods is the retail value at the time of the commission of the offense."

People v. Rosa, 928 P.2d 1365 (Colo. App. 1996) Even though a stolen diamond ring with a stated retail price of $15,000 had remained unsold in a store for an extended period of time, testimony by three store clerks that the value of ring equaled or exceeded $15,000 was competent and sufficient evidence of fair market value.

i. Wholesale cost

People v. Lindsay, 636 P.2d 1318 (Colo. App. 1981). In affirming the defendant's conviction for felony theft, the Court held that the trial court properly excluded evidence of the wholesale cost of the goods which were stolen from a department store. "An article in a retail outlet has a value significantly different from that which it had in the hands of a wholesaler. Retail price therefore is the better evidence of value. Once the retail price of allegedly stolen items from a retail outlet has been established, the wholesale price becomes irrelevant, and the defendant should not be allowed to submit such evidence." *See also People v. Binkley*, 687 P.2d 480 (Colo. App. 1984).

ii. Salvage value

Beaudoin v. People, 627 P.2d 739 (Colo. 1981). Although in a prosecution for felony theft an employee of an auto salvage company testified that the market value of a car was $300, he also testified that he actually paid the defendant only $11.50 or $11.70 as the salvage value of the car. In reversing the defendant's conviction, the Colorado Supreme Court held that this testimony concerning value was sufficient to require the submission of an instruction on the lesser-included offense of misdemeanor theft.

iii. Replacement value

People v. Binkley, 687 P.2d 480 (Colo. App. 1984). Replacement value should not be admitted unless a market value cannot be established.

Burns v. People, 365 P.2d 698 (Colo. 1961). In the absence of evidence of market value of a particular item, the purchase price, junk price, or replacement cost may be considered.

b. Fair market value: commercial instruments

People v. Marques, 520 P.2d 113 (Colo. 1974). The prima facie value of a stolen check is its face value, given the theory that the drawee or the drawer will pay that amount in the overwhelming majority of cases. "The value of the thing lost is not limited to what the thief could realize on the instrument. As we pointed out above, the loss is measured by what the owner could expect to receive for the instrument."

People v. Myers, 609 P.2d 1104 (Colo. App. 1979). Holding that the value of a check was the face amount, not the amount of "reward" defendant sought for its return.

People v. Evans, 612 P.2d 1153 (Colo. App. 1980). Holding the value of stolen food stamps was face value of $90, not the $30 victim paid for them.

2. "Illegal Market" value

Miller v. People, 566 P.2d 1059 (Colo. 1977). In a prosecution for felony theft of credit cards, the Court held that evidence of the "street value" of the stolen credit cards was admissible to prove value. "Where the stolen item, such as a credit card, has no market value in lawful channels, we conclude that other objective evidence of value may be admitted including evidence of the `illegitimate' market value."

See also Burns v. People, 365 P.2d 698 (Colo. 1961). The testimony of an accomplice as to the amount of money the defendant paid him for stolen goods established their value in the "stolen goods market" and was sufficient to satisfy the statutory amount for felony theft.

3. "Street value" may be one of several means of establishing value

People v. McCoy, 764 P.2d 1171 (Colo. 1988). In a theft-by-receiving prosecution, the People introduced testimony from an undercover police officer that the defendant paid him $300 for the stolen items. The officer also testified that items, over which he exercised lawful possession and control, were worth $1200 each. In rejecting the defendant's assertion that street value evidence may be used only when no evidence of market value is available, the court recognized that "alternative methods of showing value are allowed in a range of circumstances, and not only . . . in cases where no legitimate market for the stolen items exists." The Court concluded that the officer's testimony was competent to establish the street value of the items, and that his lawful possession of the items enabled him to provide competent evidence of value as the owner of the items.

4. Intrinsic value: unusual items

People v. Kolego, 554 P.2d 712 (Colo. App. 1976). The Court disapproved the trial court's judgment of acquittal because the prosecution failed to prove value of stolen gold concentrate. "Although value is usually proven by evidence of market value, there are alternative methods which may be used under special circumstances. Here, expert testimony as to intrinsic value was used since the object had unusual characteristics." In so holding, the Court acknowledged that expert testimony established that the owner of the gold concentrate "could expect to receive" more than $100 for it on the open market, which exceeded the then-statutory amount for felony theft. Such testimony was competent to create a jury issue with respect to value.

C. Proof of Value

1. Cannot speculate

Henson v. People, 444 P.2d 275 (Colo. 1968). Testimony that the amount of money stolen was "in the vicinity of $50" was insufficient to support a conviction of theft over $50. "It is vital where the value of the money or goods stolen determines the grade of the offense that there be some basis other than pure speculation for a determination of the real value."

People v. Evans, 612 P.2d 1153 (Colo. App. 1980). "Defendant asserts that the value attached to the watch stolen from the victim was entirely speculative and unreasonable. The victim testified that approximately five years before the theft she had purchased the watch at a post exchange for $120, considerably less that its actual retail value, and that she believed it to be worth $80 to $90 at the time of the offense. This testimony was competent. Under the circumstances, the trial court's acceptance of the $80 figure was reasonable and not so uncertain as to require speculation on the part of the finder of fact."

The jury is not required to fix or find an exact value of the stolen goods. They need only determine whether it meets the statutory requirement. *See People v. Kolego*, 554 P.2d 712 (Colo. App. 1976); *People v. Austin*, 523 P.2d 989 (Colo. 1974).

2. Owner's testimony as to value

It has been repeatedly held in Colorado that an owner is always competent to testify to the value of his property. *See Rodriguez v. People*, 450 P.2d 645 (Colo. 1969); *People v. Jenkins*, 768 P.2d 727 (Colo. App. 1988); *People v. Albright*, 722 P.2d 430 (Colo. App. 1986); *People v. Bornman*, 953 P.2d 952 (Colo. App. 1997).

a. Owner defined

Kelley v. People, 443 P.2d 734 (Colo. 1968). In the context of a theft case, "one may be taken as the owner who is in peaceable possession of" the item involved.

b. Owner's testimony must be competent

People v. A.G., 605 P.2d 487 (Colo. App. 1979). In a prosecution for theft over $200, the evidence of value consisted of the owners' testimony that they purchased a television set seven years prior to its theft for $600, and they "assumed" it would cost $800 or $900 to replace it. In finding such testimony incompetent to establish the value of the item, the Court stated: "The owner's testimony as to the purchase price of the goods is competent evidence of fair market value 'only where the goods are so new, and thus have depreciated in value so unsubstantially, as to allow a reasonable inference that the purchase price is comparable to the current fair market value.'" The Court concluded that because the purchase price could not be reasonably equated with the fair market value of the goods at the time of the taking, the jury's verdict could have been based only upon pure speculation.

People v. Payne, 361 P.3d 1040 (Colo. App. 2014). The evidence was insufficient to prove conviction of theft of property valued between $1,000 and $20,000 because the property owner testified to the “cost” of the items without any additional testimony regarding the age or condition of the items or the fair market value of the items at the time they were stolen. Evidence must prove the value of the items at the time of the theft.

3. Price tag sufficient to establish value

People v. Codding, 551 P.2d 192 (Colo. 1976). The only evidence establishing the value of stolen retail goods was the testimony of a store detective who stated that when she recovered the goods from the defendant the total value, based on the price tags, exceeded $100. The Court held that there was no adequate foundation for the admission of this testimony. First, the store detective was not qualified to testify concerning value [as compared to a store owner or manager, who would be so qualified] because she had no personal knowledge of the value of the merchandise, was not involved in the pricing, had no access to price lists, and would not know if the goods were mismarked. Secondly, the price tags themselves were hearsay, and no adequate foundation was laid for their admission as business records.

Codding has since been effectively overruled by the Colorado General Assembly in the form of § 18-4-414, which provides that evidence of retail value of the thing involved constitutes prima facie evidence of value, and permissible forms of proof include affixed labels and tags, signs, shelf tags, and notices. The statute also permits value to be established through the sale price of other similar property, and proof thereof may include testimony regarding affixed labels and tags, signs, shelf tags, and notices tending to indicate the price of the thing involved. Under the statute, “[h]earsay evidence shall not be excluded in determining the value of the thing involved.”

People v. Schmidt, 928 P.2d 805 (Colo. App. 1996). “[P]rice tags speak for themselves.” A defendant may rebut the presumption of value by calling witnesses to establish a value other than that specified on the price tags.

People v. Pearman, 209 P.3d 1144 (Colo. App. 2008). Loss prevention officer’s testimony that he determined the value of the items by looking at their price tags and adding up the prices listed on those tags was properly allowed under § 18-4-414.

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). In prosecution for first degree aggravated motor vehicle theft, valuation found in automobile market report known as the Blue Book, which was generally used and relied upon by the public, was properly admitted under § 18-4-414. The Court of Appeals also rejected defendant’s contention that the officer needed to be qualified as an expert to provide valuation testimony based on the Blue Book. “Because evidence of the Blue Book valuation was admissible, there was no requirement that it be admitted through expert testimony.”

a. Hearsay

Section 18-4-414 creates a hearsay exception: "For the purposes of this part 4, in all cases where theft occurs, evidence of the value of the thing involved may be established through the sale price of other similar property and may include, but shall not be limited to, testimony regarding affixed labels and tags, signs, shelf tags, and notices tending to indicate the price of the thing involved. Hearsay evidence shall not be excluded in determining the value of the thing involved."

People v. Thornton, 251 P.3d 1147 (Colo. App. 2010). Blue Book valuation is admissible under § 18-4-414(2) as well as under the market reports exception to the hearsay rule, C.R.E. 803(17) ("Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations [are not excluded by the hearsay rule].")

4. Expert may testify about value

People v. Bornman, 953 P.2d 952 (Colo. App. 1997). A licensed automobile dealer who "appraised thousands of cars in his twelve years in the used car business" was qualified as an expert and testified concerning the value of the stolen vehicle. His opinion was "based, in part, upon the recent sales of two similar vehicles," and he did not state the particulars of those sales or the source of his knowledge. Thus, there was no indication that he testified from other than his own personal knowledge. Even assuming the testimony was not based on personal knowledge, it was not hearsay received under § 18-4-414(2) because, under C.R.E. 703, an expert witness may rely upon statements or reports of others and describe those materials, referring to them "merely to establish the basis for an expert opinion." The court noted that evidence of sales of comparable items could also have been admitted for direct consideration by the jury.

5. Value in conspiracy to commit theft

People v. Samson, 302 P.3d 311 (Colo. App. 2012). Because the completed crime of theft does not require proof of the defendant's knowledge of the value of the goods taken, a conspiracy to commit theft does not require the prosecution to prove an agreement to take goods valued at a particular amount of money.

6. Proof of value not established

People v. Jaeb, 434 P.3d 785 (Colo. App. 2018). Where a theft is established by the evidence but the amount stolen is not proven by competent evidence of value, the proper remedy is to remand to enter judgment on the lowest-class theft offense.

25.5 PROVING VALUE: CRIMINAL MISCHIEF

People v. Waters, 641 P.2d 292 (Colo. App. 1981) "[T]he value of the damage may be determined by the costs of repair and replacement." The testimony of the owner of an auto body shop that the cost to repair the damage to the victim's automobile would be $177.70 was sufficient evidence that the damage was in excess of $100."

25.6 MISCELLANEOUS

A. Intent to Permanently Deprive

People v. Destro, 215 P.3d 1147 (Colo. App. 2008). The evidence was sufficient to establish defendant's intent to permanently deprive victims of their money where defendant told victims he was having difficulties repaying them, he continually failed to repay the victims, and defendant moved without informing victims of his whereabouts. Defendant purchased home with a promissory note for $25,000 secured with an assignment of proceeds from treasury bonds valued at $25,000, and also gave victims an unsecured promissory note in the amount of $11,820 for the purchase of furniture and other items. Although defendant purchased treasury bonds in the amount of $25,000 on the date of the closing, he sold them ten days later, the lender instituted foreclosure proceedings when defendant failed to make mortgage payments on the home, defendant failed to pay the two notes despite repeated assurances, defendant moved without informing victims of his new address, and defendant only responded when victims threatened legal action.

People v. Sharp, 104 P.3d 252 (Colo. App. 2004). Evidence supported finding that defendant intended to permanently deprive hotel of compensation for the room she occupied. Defendant knew that her credit card had been cancelled when she tendered it to hotel, she continued to stay at hotel, and when hotel asked for a different form of payment defendant gave the hotel a telephone number that she stated the hotel could use to obtain authorization for the credit card but the telephone number was for a resort.

People v. Witek, 97 P.3d 240 (Colo. App. 2004). It is not necessary for a conviction of theft by deception that defendant maintain absolute control over stolen property for his or her own personal use. A conviction for theft by deception will stand where the intended use of stolen property is inconsistent with owner's use or benefit, and the victim parted with something of value in reliance on defendant's misrepresentation.

People v. Carlson, 72 P.3d 411 (Colo. App. 2003). "A defendant possesses the requisite intent [for theft] when he or she obtains a victim's money or other property in a manner inconsistent with the victim's use and benefit." The failure of a debtor to repay a creditor can constitute theft when the debtor does not perform as promised and circumstantial evidence shows that the debtor established the relationship never intending to perform as promised. In this case, the evidence established that the defendant deceived the victim into making a down payment and signing the promissory note.

B. Physical Control Over Property

People v. Jenson, 172 P.3d 946 (Colo. App. 2007). In § 18-4-401(1), "obtains or exercises control" over real property does not require a defendant to exercise physical control over the property. "Obtains or exercises control" includes the conveyance of real property through a quitclaim deed. "In other words, a person may obtain or exercise control over real property by obtaining or retaining an interest in real property without authorization and with the intent to deprive another person permanently of the use or benefit of such real property. [Therefore], one may commit theft of real property by obtaining, retaining, or exercising control over a quitclaim deed with the intent to permanently deprive the grantor of the quitclaim deed of his or her interest in the property, contrary to the parties' agreement."

C. Statute of Limitations

People v. Zuniga, 80 P.3d 965 (Colo. App. 2003). Theft-by-receiving based on a person's retention of stolen property is a continuing offense, and therefore, the statute of limitations does not begin to run until the person no longer possesses the property. "When an offense is based on a series of acts performed at different times, the period of limitations begins to run when the last act is committed."

D. Theft by Deception

People v. Carlson, 72 P.3d 411 (Colo. App. 2003). "Theft by deception requires proof that a defendant's misrepresentations to the victim caused the victim to part with something of value in reliance on the misrepresentations. A misrepresentation is a false representation of a past or present fact or a promise made with the intent not to perform."

People v. Devine, 74 P.3d 440 (Colo. App. 2003). Deception made upon a probate court in an effort to commit theft from the victim's estate satisfies the requirements of § 18-4-401(1). The victim is the probate estate, which is capable of being deceived through deception of the probate court.

People v. Prendergast, 87 P.3d 175 (Colo. App. 2003). Victims gave defendant money in exchange for securities in business run by defendant. Defendant then used the money for his personal expenses. The evidence was sufficient to convict defendant of theft. Even if the victims initially authorized defendant to obtain control over their money, they did so upon defendant's misrepresentations about what he would do with it.

People v. Thompson, 471 P.3d 1045 (Colo. App. 2018). The evidence was sufficient to support the defendant's theft conviction because it showed that the defendant obtained the victims' money through deception and that he intended to permanently deprive them of it. The victims testified that they had agreed that their money was to be used for a development project, and an investigator testified that the defendant instead used the funds to pay his own attorneys' fees, to improve the house his wife continued to occupy at the time of trial, and for other personal expenses.

25. PROPERTY CRIMES ISSUES

25.7 AGGREGATION

Section 18-4-401(4)(a):

When a person commits theft twice or more within a period of six months, two or more of the thefts may be aggregated and charged in a single count, in which event the thefts so aggregated and charged shall constitute a single offense, the penalty for which shall be based on the aggregate value of the things involved, pursuant to subsection (2) of this section.

Section 18-4-401(4)(b):

> When a person commits theft twice or more against the same person pursuant to one scheme or course of conduct, the thefts may be aggregated and charged in a single count, in which event they shall constitute a single offense, the penalty for which shall be based on the aggregate value of the things involved, pursuant to subsection (2) of this section.

People v. Ramos, 417 P.3d 902 (Colo. App 2017). Defendant was charged in an aggregated count with three thefts occurring within six months. The jury found that the Defendant committed one of the three thefts. The Court held that the plain language of § 18-4-401(4)(a) requires a jury to find that a defendant committed every theft charged in an aggregated theft count, and a single act of theft is a lesser included offense of "aggravated theft." Case was remanded with directions to enter a conviction for a single count of theft.

CHAPTER 26

SELF-DEFENSE

26. SELF-DEFENSE

26.1 INTRODUCTION

The "self-defense" affirmative defenses of defense of persons, defense of premises, and defense of property as set forth in § 18-1-704 through § 18-1-706 require that, upon the presentation of "some credible evidence" by the defendant, the prosecution bears the burden of disproving the defense beyond a reasonable doubt. §18-1-407. There also exists a special immunity from prosecution §18-1-704.5(3) affirmative defense applicable to the use of physical force against an intruder.

26.2 DEFENSE OF PERSONS

A. Use of Non-deadly Force

Section 18-1-704(1) provides that "a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by the other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose." COLJI-Crim. H:11.

B. Use of Deadly Physical Force

Section 18-1-704(2) justifies the use of deadly physical force "only if a person reasonably believes a lesser degree of force is inadequate and: (a) [t]he actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or receiving great bodily injury; or (b) [t]he other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary . . ." or (c) the other person is committing or reasonably appears about to commit kidnapping, robbery, sexual assault, or assault in the first or second degree. *See* COLJI-Crim. H:12.

The victim must have died for the jury to be instructed on the justified use of deadly physical force. *See People v. Silva*, 987 P.2d 909 (Colo. App. 1999). *See also* §18-1-901(3)(d) (defining "deadly physical force" as "force, the intended, natural, and probable consequence of which is to produce death and which does, in fact, produce death").

Kaufman v. People, 202 P.3d 542 (Colo. 2009). "Under § 18-1-704(2)(a) and (c), a person is justified in using deadly physical force to defend him or herself only if that person reasonably believes that 'a lesser degree of force is inadequate,' and 'has reasonable ground to believe, and does believe,' that either the person or a third person 'is in imminent danger of being killed or of receiving great bodily injury;' or the other person is committing or reasonably appears about to commit first- or second-degree assault." The Court held that the jury instruction defining second-degree assault was incorrect because it was based on a repealed statute, and therefore significantly limited the jury's consideration of the defendant's self-defense theory.

Compare with People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). The trial court, over defendant's objection, properly instructed the jury: "In deciding whether or not the Defendant had reasonable grounds for believing that he was in imminent danger of receiving serious bodily injury, you should determine whether or not he acted as a reasonable and prudent person would have acted under like circumstances. It is not enough that he believed himself in danger, unless the facts and circumstances shown by the evidence and known to him at the time, or by him then believed to be true, are such that you can say that as a reasonable person he had grounds for that belief."

People v. Vasquez, 148 P.3d 326 (Colo. 2006). Defendant in murder and assault case testified that he did not remember taking the knife out and stabbing the victims in the altercation. He was entitled to a jury instruction on self-defense principles relating to both ordinary force and deadly force. The Colorado Supreme Court held that "the General Assembly in Colorado included an intent element as a necessary ingredient of 'deadly physical force.' Thus, if the jury found that defendant did not intend to use his knife to produce death, his use of the knife would not qualify as the use of 'deadly physical force' as defined by statute."

People v. Opana, 395 P.3d 757 (Colo. 2017). When the evidence justifies a jury instruction for using deadly force, the defendant will not be entitled to an instruction on self-defense using non-deadly force if there was no evidence that the use of force on the victim was anything other than deadly force.

People v. Speer, 255 P.3d 1115 (Colo. 2011). While the threshold for entitlement to an instruction on an affirmative defense is low, it is not negligible. In this case there was no evidence from which the jury could have found that the defendant's use of physical force upon the victim was anything other than deadly physical force. By the defendant's own testimony and theory of the case, he shot the victim in the chest, at close range, with a large caliber firearm. The physical force actually inflicted by the defendant upon the victim could not reasonably be characterized as anything other than force, the intended, natural, and probable consequence of which was to produce death, and there was no dispute that the victim died as the result of being shot in the chest by the defendant. Whether or not the defendant was entitled to a self-defense instruction at all, when the definition of "deadly physical force" is properly construed, he was clearly not entitled to a self-defense instruction premised on the use of any physical force other than deadly physical force.

C. Objective Standard

Bustamont v. People, 401 P.2d 597 (Colo. 1965). The Colorado Supreme Court held that the trial court properly refused the defendant's tendered self-defense instruction stating the jury should put itself in the place of the defendant, because the tendered instruction called for a subjective standard, rather than the objective standard set forth in the statute.

D. Reasonable Belief

People v. Williams, 827 P.2d 612 (Colo. App. 1992) (self-defense instruction not justified where defendant did not have reasonable belief that person whom he threatened with a knife was engaged in imminent use of unlawful physical force against defendant's brother).

People v. Jones, 543 P.3d 419 (Colo. App. 2023). A defendant in murder case was not entitled to jury instruction on self-defense under § 18-1-704(2)(b) where the evidence showed that the defendant committed to shooting the victim—a friend who was a guest in the defendant's home—before she could identify him or his purpose.

E. Threat Must be Imminent

People v. Suazo, 867 P.2d 161 (Colo. App. 1993). Shortly after the defendant's mother was injured during an altercation where she was employed, the defendant confronted the assailant (who was also injured) at the hospital and struck him in the face. In holding that the defendant was not entitled to an instruction on defense of others, the Court of Appeals reiterated that resort to physical force in defense of one's self or another requires a reasonable belief that such force is used to defend against the unlawful application of imminent physical force. Here, where the defendant's actions occurred at a location other than where the initial assault occurred, where the defendant was aware that the initial assailant would not return to the scene of the altercation at least until the completion of his physical examination, and where the defendant's attack upon the assailant did not occur during "a lull in some continuing violence," there was insufficient evidence upon which to conclude that further violence toward the defendant's mother was imminent such as would justify physical force in defense of another.

People v. Laurson, 15 P.3d 791 (Colo. App. 2000). The trial court properly refused to instruct the jury on self-defense where, though there was evidence that the victims' group assaulted defendant's friend, there was no evidence indicating defendant had a reasonable belief that the use of unlawful physical force against him was imminent. There was no evidence that anyone acted aggressively toward defendant, and the victims' group fled when defendant exited his vehicle.

People v. Washington, 517 P.3d 706 (Colo. App. 2022). There was overwhelming evidence that the defendant, who shot and killed the victim, did not act in self-defense or defense of others where, at the time of the shooting, the victim was no longer punching, kicking, or otherwise harming or attempting to harm a man who he had previously knocked out with a punch, and there was no evidence the victim ever had a weapon, much less a deadly weapon.

F. Defendant May Act on Appearances: "Apparent Necessity"

Beckett v. People, 800 P.2d 74 (Colo. 1990). The Colorado Supreme Court recognized the long-standing principle that, under Colorado law, a person has a right to act upon appearances, even though such appearances may prove to be incorrect or deceptive. The Court also recognized prior cases that required, under appropriate circumstances, a specific instruction regarding "apparent necessity." However, while reaffirming that the principle of apparent necessity is embodied in the

current statute governing self-defense, the Court concluded that an instruction patterned upon § 18-1-704 adequately apprises the jury that it is required to consider the totality of circumstances in evaluating the reasonableness of the defendant's belief in the necessity of defensive action, and a separate instruction on apparent necessity is not required. *See also Hare v. People*, 800 P.2d 1317 (Colo. 1990).

G. No Duty to Retreat

Colorado follows the doctrine of no-retreat, which permits non-aggressors who are otherwise entitled to use physical force in self-defense to do so without first retreating, or seeking safety by means of escape. In Colorado, only initial aggressors must retreat before using force in self-defense. A defendant is entitled to a jury instruction on the doctrine of no-retreat when the facts of the case raise the issue of retreat and the evidence supports a jury finding that the defendant was not the initial aggressor. *Cassels v. People*, 92 P.3d 951 (Colo. 2004). *See People v. Toler*, 9 P.3d 341 (Colo. 2000).

Section 18-1-704(3)(b) requires an initial aggressor to withdraw and communicate his withdrawal before physical force is justified.

People v. Willner, 879 P.2d 19 (Colo. 1994). Defendant's testimony that he approached victim [who was repossessing his automobile] armed with a semiautomatic pistol and chased the automobile as it backed toward an "exit" street did not entitle him to jury instruction explaining no-retreat doctrine, despite defendant's claim he was required to fire at and ultimately kill driver of the automobile because driver reversed direction of the vehicle thereby posing an imminent threat to him, because defendant was an initial aggressor who did not effectively withdraw and communicate his withdrawal to victim.

1. Retreat is not required before using deadly physical force

Idrogo v. People, 818 P.2d 752 (Colo. 1991). The Colorado Supreme Court recognized that § 18-1-704(2) expressly authorizes the use of deadly physical force by a non-aggressor upon the reasonable belief and to counter the imminent danger of death or serious bodily harm; the Court found no statutory language reflecting any legislative intent to revive the doctrine of retreat prior to the application of deadly physical force.

People v. Garcia, 1 P.3d 214 (Colo. App. 1999). Defendant testified she killed her husband with an axe after he attempted to sexually assault her and threatened to kill her. The Court of Appeals found the trial court erred in refusing to instruct the jury that defendant had no duty to retreat before exercising her right of self-defense. The evidence indicated she had reasonable grounds to believe the use of force was necessary for self-protection, and the prosecutor's cross-examination and closing argument addressed choices defendant had besides killing her husband, "implying that she could have retreated rather than kill him." Based on the record, the "issue of retreat was raised, placed in issue, and argued" and defendant was entitled to an instruction on the no-retreat doctrine.

2. Retreat is not required even if person is where he has no "right to be"

People v. Toler, 9 P.3d 341 (Colo. 2000). Neither case law nor statute require a trespasser to "retreat to the wall" before using physical force in self-defense, and a person need not be where he has a "right to be" before using defensive physical force. However, a trespasser is not necessarily in the same position as an "innocent person" or "true man" with respect to the use of physical force in self-defense because a trespasser may face lawful physical force by one who is defending against the trespass. Under the facts of this case, the "right to be" language of the self-defense instruction amounted to reversible error because it might have misled the jury to believe that a trespasser must retreat to the wall before using physical force in self-defense. On the contrary, "Colorado does not impose a duty to retreat on any person who may lawfully use physical force in self-defense under the provisions of § 18-1-704 unless the person is an 'initial aggressor' . . . ."

H. Circumstances Under Which Self-Defense is Not Available

1. Section § 18-1-704(3)

The affirmative defense of self-defense is not available under circumstances in which: (a) the defendant, with the intent to cause bodily injury or death, provokes the use of unlawful force by another; (b) the defendant is the initial aggressor, unless he thereafter withdraws from the encounter and effectively communicates to the other person his intent to do so and the other person continues to use or threaten to use unlawful force; or (c) the physical force used is the product of a combat by agreement that is not authorized by law. § 18-1-704(3).

Galvan v. People, 476 P.3d 746 (Colo. 2020). "[W]hen a trial court instructs the jury on the affirmative defense of self-defense, it should instruct the jury on an exception to that defense if there is *some evidence* to support the exception."

a. Provocation limitation

People v. Silva, 987 P.2d 909 (Colo. App. 1999). To warrant an instruction on the provocation limitation on self-defense, the prosecutor must establish that "defendant intended to harm the victim and that he or she intended the provocation to goad the victim into attacking him or her as a pretext for injuring or killing the victim." The provocation limitation applies in situations in which defendant was not the initial aggressor. In this case, the trial court erred in instructing the jury on provoking the victim because there was no evidence that defendant intended to provoke a fight with the victims or their friend in order to inflict injury upon them under the guise of that provocation.

Compare with Galvan v. People, 476 P.3d 746 (Colo. 2020). The trial court properly instructed the jury on self-defense where there was some evidence that the victim used unlawful physical

force, the defendant forced the victim to use that unlawful physical force, and the defendant's provocation was undertaken as a ruse to manufacture an excuse to physically harm the victim.

b. Initial aggressor

People v. Goedecke, 730 P.2d 900 (Colo. App. 1986). "In *People v. Smith,* 682 P.2d 493 (Colo. App. 1983), we held that when an initial aggressor withdraws from an encounter and effectively communicates his withdrawal to the initial victim, the aggressor becomes a victim entitled to act in self-defense should the initial victim retaliate for the attack. Thus, if the initial victim continues the attack, the victim then becomes the aggressor and is no longer entitled to act in self-defense."

People v. Zubowski, 260 P.3d 339 (Colo. App. 2010): "A defendant must initiate the physical conflict to be the initial aggressor. The trial court determines whether there is sufficient evidence to give an instruction concerning an exception to the asserted affirmative defense. A trial court should instruct the jury on a principle of law when there is some evidence to support it.

i. Multiple aggressors

People v. Beasley, 778 P.2d 304 (Colo. App. 1989). In a case in which an assault and homicide arose during a fight and shooting between several individuals, the Court of Appeals stated: "In determining whether the 'initial aggressor' instruction is appropriate [under such circumstances] the conduct of the defendant in the context of the developing situation must be the focus of any analysis of his right to self-defense." The Court recognized that, where there was no evidence that the defendant initiated the physical conflict, it was misleading to instruct the jury regarding the "initial aggressor" concept, inasmuch as the instruction may lead the jury to conclude that the defendant was the initial aggressor (and thereby lose the right of self-defense) when someone else actually started the altercation.

People v. Laurson, 15 P.3d 791 (Colo. App. 2000). Defendant's tendered initial aggressor instructions were irrelevant and unnecessary where evidence undisputed that victims' group initiated physical assault on defendant's friend and neither party raised issue of whether defendant was initial aggressor.

c. Combat by agreement

People v. Cuevas, 740 P.2d 25 (Colo. App. 1987). An instruction about the limitation of the right to self-defense when there is combat by agreement within the meaning of § 18-1-704(3)(c) must include the following elements: (1) an agreement to fight must exist between the parties; and (2) the agreement must have been entered into prior to the beginning of the combat. The jury should be further instructed that "if they were to find that there was a combat by agreement, then self-defense was not established; and, conversely, if they were to find that there was at least a

reasonable doubt as to there being combat by agreement, then they should consider whether defendant was acting in self-defense."

i. Termination of agreement

People v. Beasley, 778 P.2d 304 (Colo. App. 1989). In addition to the instructions set forth in *Cuevas*, the Court of Appeals recognized that "if a participant determines to withdraw from combat and he effectively communicates that intent to his opponent or opponents, then the requisite intent to commit the crime charged has been abandoned." Under such circumstances the right to self-defense is reinstated, and the jury should be instructed accordingly.

d. Felony murder

Self-defense is not an affirmative defense to felony murder. *People v. Renaud*, 942 P.2d 1253 (Colo. App. 1996) (holding that self-defense may be available as an affirmative defense to predicate felony, but not as to resulting death*).*

People v. Gilbert, 12 P.3d 331 (Colo. App. 2000). Court did not abuse its discretion by instructing jury that self-defense was not a defense to felony murder, even though self-defense was raised by defendant, because jury might believe defendant had right to use self-defense due to evidence that, before occupant of second car fired a weapon at victim, victim pointed a weapon at car occupied by defendant.

I. Burden of Proof

The COLJI instructions on self-defense state that the prosecution bears the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt. *See, e.g.,* COLJI H:11 Use of Non-deadly Physical Force (Defense of a Person) ("The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense.")

When the required mental state is recklessness or criminal negligence, the defendant may argue self-defense, but the prosecution is not required to disprove self-defense beyond a reasonable doubt. The defendant may argue self-defense as a way of negating an element of the crime and the prosecution is still required to prove the requisite mental state beyond a reasonable doubt. *See Montoya v. People*, 394 P.3d 676 (Colo. 2017)

J. Jury Instructions

1. In general

"The trial court must tailor the self-defense instructions to the particular circumstances of the case in order to adequately apprise the jury of the law of self-defense from the standpoint of the defendant." *Cassels v. People*, 92 P.3d 951 (Colo. 2004).

Colorado appellate courts consistently hold that an instruction embodying the defendant's theory of the case must be given if there is any evidence in the record to support it. *See Idrogo v. People*, 818 P.2d 752 (Colo. 1991); *People v. Fuller*, 781 P.2d 647 (Colo. 1989). "An instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory, even if the supporting evidence consists only of highly improbable testimony by the defendant." *People v. Garcia*, 28 P.3d 340 (Colo. 2001).

People v. Vasquez, 148 P.3d 326 (Colo. 2006). Since defendant's testimony created a dispute about whether he intended to produce death by his use of force, and thus, whether he employed ordinary or deadly physical force, he was entitled to have the jury resolve that issue and apply appropriate self-defense principles.

People v. Janes, 982 P.2d 300 (Colo. 1999). Evidence supported defendant's theory of self-defense and he was entitled to appropriate instruction, though instruction tendered by defendant was properly rejected because it misstated the law.

People v. Fuller, 781 P.2d 647 (Colo. 1989). The defendant was entitled to self-defense instruction when some evidence in record supported his claim that police officers used or were about to use unreasonable or excessive force.

Compare with People v. Smith, 754 P.2d 1168 (Colo. 1988). The defendant was not entitled to self-defense instruction where there was no evidence from which jury could infer he fired a rifle with intent to defend himself or that shooting was necessary to defend himself. *See People v. Whatley,* 10 P.3d 668 (Colo. App. 2000) (holding that the evidence did not support claim of self-defense); *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997) (holding that the instructions adequately apprised jury of self-defense law and there was, therefore, no error in rejecting additional instructions tendered by defendant).

2. No-retreat instruction

"In self-defense cases, the defendant is entitled to a jury instruction on the doctrine of no-retreat when one is requested, when the facts raise the issue, and when the evidence supports a jury finding that the defendant was not the initial aggressor." *People v. Martinez,* 224 P.3d 1026 (Colo. App. 2009). "[D]efendant did not request a no duty to retreat instruction nor did the prosecutor argue that he had a duty to retreat. During her closing argument, the prosecutor was simply rebutting defendant's claim that he acted in self-defense because he was 'so scared and ... nervous; about the victim and the fact that he 'had a black belt.' It was only in this context that the prosecutor pointed out that defendant had chosen to remain and confront the victim and his friend. The issue of no duty to retreat was then raised by defense counsel who, while objecting, stated, 'The Defendant has no duty to retreat.'"

"In cases where the jury could reasonably conclude that the defendant had a duty to retreat before using force in self-defense, the defendant may be entitled to a self-defense instruction tailored to address the issue of retreat." *Cassels v. People*, 92 P.3d 951 (Colo. 2004). "A trial court's failure to instruct the jury on the doctrine of no-retreat in cases where the defendant was not the initial aggressor creates a risk that the jury will not acquit the defendant because it will consider the defendant's use of force unreasonable in light of the possibility of retreat."

3. Abandonment instruction

People v. Renaud, 942 P.2d 1253 (Colo. App. 1996). The defendant, who was charged with first-degree felony murder, second-degree murder, and attempted aggravated robbery, was not entitled to his three "surrender" instructions, which he tendered in relation to his theory that he completed commission of attempted robbery then surrendered to victim. The first two contained language covered by other instructions, including an abandonment instruction. The third one was an attempt to circumvent rule that self-defense is not an affirmative defense to felony murder.

4. Use of deadly weapon

People v. Castro, 10 P.3d 700 (Colo. App. 2000). On retrial, upon proper foundation, the jury should be instructed on whether victim's fists could be considered deadly weapons in context of self-defense and witness testimony regarding victim's boxing lessons may be admissible in relation to that issue. ***But see*** *People v. Roberts*, 983 P.2d 11 (Colo. App. 1998) (holding that the evidence did not support inclusion of fists in definition of deadly weapon).

5. Apparent necessity

People v. Grenier, 200 P.3d 1062 (Colo. App. 2008). The Court of Appeals held that the instruction provided by the trial court "tracks CJI-Crim. 7:17 (1983), the pattern jury instruction, and conforms to the language of § 18-1-704(2)(a), (c). In addition, it encompassed defendant's tendered "apparent necessity" instruction, and permitted the jury to consider from defendant's viewpoint whether he was justified in using physical force in self-defense. Therefore, we conclude that the trial court did not err in refusing defendant's 'apparent necessity' jury instruction."

Practice Tip: The standard instructions regarding self-defense are set forth in COLJI-Crim. H:10-H:18. However, the trial court has the duty to "tailor instructions to the particular circumstances of a given case when the instructions, taken as a whole, do not adequately apprise the jury of the law of self-defense." *Idrogo v. People*, 818 P.2d 752, 754 (Colo. 1991). *See, e.g.*, *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989) (holding that in a fight involving multiple participants, self-defense instruction must refer to use of unlawful force by any of defendant's opponents, as opposed to "by the victim").

K. Illustrative Cases

1. Heat of passion manslaughter

Sanchez v. People, 820 P.2d 1103 (Colo. 1991). When the evidence so warrants, "a trial court does not abuse its discretion by instructing the jury as to the elements [of self-defense], when requested, in a case involving the charge of heat of passion manslaughter." *See also* *Thomas v. People*, 820 P.2d 656 (Colo. 1991).

People v. Roberts, 983 P.2d 11 (Colo. App. 1998). Jury should have been instructed it should consider whether defendant reasonably believed it necessary to use deadly physical force to defend himself or another from unlawful physical force by victim, and that defendant could use degree of force he reasonably believed necessary for that purpose, in determining whether defendant committed reckless manslaughter or lesser offense of criminally negligent homicide.

2. Recklessness, Criminal Negligence and Extreme Indifference Murder

When the required mental state is recklessness or criminal negligence, the defendant may argue self-defense but the prosecution is not required to disprove self-defense beyond a reasonable doubt. The defendant may argue self-defense as a way of negating an element of the crime. *See* *Montoya v. People*, 394 P.3d 676 (Colo. 2017).

People v. Pickering, 276 P.3d 553 (Colo. 2011). "With crimes requiring recklessness, criminal negligence, or extreme indifference, such as reckless manslaughter, self-defense is not an affirmative defense, but rather an element negating traverse." The prosecution bears no burden of disproving self-defense with respect to crimes for which self-defense is not an affirmative defense.

3. "Battered woman syndrome"

People v. Yaklich, 833 P.2d 758 (Colo. App. 1991). In a case in which the defendant claimed she suffered from "battered woman syndrome," and contracted with other individuals to murder her abusive husband while he was sleeping, the Court of Appeals recognized that, although the battered woman syndrome does not establish a legal right of an abused woman to kill her abuser, evidence of the syndrome may, in certain circumstances, be considered in the context of self-defense. The Court concluded, however, that the defendant was not entitled to such an instruction in the contract-for-hire situation where the victim was murdered in his sleep and the danger he posed to her was not "imminent" as a matter of law.

People v. Garcia, 1 P.3d 214 (Colo. App. 1999). Self-defense instruction given in language of statute and instruction that jury could use evidence of battered woman syndrome in deciding issues relating to self-defense were adequate concerning this aspect of self-defense, and defendant not entitled to "other amplifying self-defense instructions."

4. Attempted sexual assault

People v. Garcia, 1 P.3d 214 (Colo. App. 1999). Defendant testified that, before she killed her husband with an axe, he attempted to sexually assault her and threatened to kill her. The Court of

Appeals found that, contrary to the trial court's ruling, defendant was entitled to a jury instruction that "one may justifiably use deadly force to prevent a sexual assault." Section 18-1-704(2) "plainly applies when the actor reasonably perceives that the aggressor appears about to commit a sexual assault upon her and reasonably believes that a degree of force less than deadly physical force is inadequate." The instructions given, concerning the use of force when "in imminent danger of being killed or of receiving great bodily injury" and that "the existence of a marital relationship does not justify a husband committing a sexual assault against his spouse," did not inform the jury of the right of self-defense when a sexual assault reasonably appears to be imminent.

5. Unreasonable or excessive force by police officers

People v. Fuller, 781 P.2d 647 (Colo. 1989). A person may resort to self-defense when the person reasonably believes that unreasonable or excessive force, as set forth in §18-1-707(1)(a), is being used or is about to be used by law enforcement officers. Under the particular facts of this case, in which police officers were effecting an arrest with drawn weapons, the Colorado Supreme Court stated: "We now hold that a self-defense instruction is required when evidence has been presented that officers displayed weapons and were commanded to discharge them in the course of effecting an arrest and that such conduct was unreasonable or excessive under the circumstances."

People v. Barrus, 232 P.3d 264 (Colo. App. 2009). Self-defense is an available defense against the charge of Obstructing a Peace Officer when a defendant reasonably believed that unreasonable or excessive force was being used by the peace officer, or that its use was imminent.

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008). "A person may act in self-defense if he or she reasonably believes that a law enforcement officer is using or is about to use unreasonable or excessive force. The person must hold a reasonable belief that the appearance of danger, whether real or apparent, justifies his or her actions."

6. Harassment

Roberts v. People, 399 P.3d 702 (Colo. 2017). The defendant in this harassment prosecution was not entitled to a jury instruction on the affirmative defense of self-defense where she denied striking the victim with the intent to harass. An affirmative defense admits the doing of the act charged but seeks to justify, excuse, or mitigate it

Compare with Pearson v. People, 502 P.3d 1003 (2022). A defendant charged with harassment based on road-rage incident was entitled to a self-defense instruction based on his trial testimony that he struck the victim with the intent to alarm the victim so that the victim would leave him alone.

7. Miscellaneous cases

26. SELF-DEFENSE

People v. Taylor, 230 P.3d 1227 (Colo. App. 2009). Self-defense is an affirmative defense to Illegal Discharge of a Firearm under § 18-12-107.5.

People v. Mullins, 209 P.3d 1147 (Colo. App. 2008). Self-defense is an affirmative defense to Inciting a Riot, § 18-9-102, and Engaging in a Riot, § 18-9-104.

People v. Bachofer, 192 P.3d 454 (Colo. App. 2008) "Self-defense is an affirmative defense to the crime of felony menacing if the defendant (1) threatened force upon another person to defend against the use or imminent use of unlawful physical force, and (2) reasonably believed the degree of force threatened was necessary for that purpose. A defendant may also present evidence that he or she acted in self-defense if the charges involve reckless or criminally negligent conduct. The trial court should instruct the jury that, in determining whether the defendant acted recklessly, it must consider whether the defendant reasonably believed it necessary for him to defend himself or another person from the victim's use or imminent use of unlawful physical force."

People v. Tardiff, 433 P.3d 60 (Colo. App. 2017). Self-defense is not a defense to conspiracy to commit first degree assault. Because self-defense justifies the use of physical force, it can be an affirmative defense only to crimes of physical force. Criminal conspiracy is not one of those crimes.

People v. Coahran, 436 P.3d 617 (Colo. App. 2019). Self-defense may be raised as an affirmative defense to criminal mischief, and arguably other property crimes dependent on circumstances. Here, defendant was charged with criminal mischief after she kicked the victim's car door. She claimed she did so because the victim had grabbed her wrist and she needed to kick the door both to distract him and to gain leverage to pull away. To disallow an instruction under these circumstances would create a "perverse incentive" where persons in defendant's position are encouraged to direct physical force exclusively against the other person (i.e., kick the other person rather than kick the car door).

26.3 USE OF DEADLY FORCE AGAINST AN INTRUDER

A. Statute

Section 18-1-704.5(2), sometimes referred to colloquially as the "make my day" statute, provides that "any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant."

1. Creates Immunity from Prosecution

Section 18-1-704.5(3) states, "Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force."

People v. Guenther, 740 P.2d 971 (Colo. 1987). The plain language of the statute creates an immunity from prosecution, as opposed to an affirmative defense, for persons falling within the statutory provisions: "[W]here, as here, a defendant is charged with crimes arising out of circumstances colorably within the scope of § 18-1-704.5, subsection (3) of this statute confers authority on a court to conduct a pretrial hearing on whether the statutory conditions for immunity from prosecution have been established and, if so established, to dismiss the criminal charges." However, with regard to the scope of the statutory immunity, the legislative intent was not to broaden a home occupant's right to use physical force on the basis of appearances: "Section 18-1-704.5 provides the home occupant with immunity from prosecution only for force used against one who has made an unlawful entry into the dwelling, and that this immunity does not extend to force used against non-entrants."

2. Procedural considerations

In *Guenther,* the Court held that the burden of proof is upon the defendant at a pretrial hearing to establish by a preponderance of the evidence an entitlement to assert the immunity as a bar to criminal prosecution. Moreover, if the court denies a defendant's motion to dismiss the prosecution under § 18-1-704.5, the defendant may nevertheless raise the issue at trial as an affirmative defense.

People v. Phillips, 91 P.3d 476 (Colo. App. 2004) and *People v. Janes,* 982 P.2d 300 (Colo. 1999). When the "make-my-day" statute is asserted as an affirmative defense at trial, the burden is on the prosecution to disprove that defense beyond a reasonable doubt.

People v. Zukowski, 260 P.3d 339 (Colo. App. 2010). Because the pre-trial make-my-day immunity hearing has a different procedure and burden of proof than the affirmative make-my-day defense at trial, issue preclusion does not prevent the independent resolution of the same issue in each proceeding.

People v. Wood, 230 P.3d 1223 (Colo. App. 2009). If a trial court denies a defendant's pretrial motion for immunity under the make-my-day statute, the defendant may assert the make-my-day defense at trial. The prosecution then must prove beyond a reasonable doubt that the killing did not occur under the requisite circumstances. "[A] defendant may not appeal the denial of his motion for dismissal under the make-my-day statute. Absent extraordinary relief under C.A.R. 21, a defendant's only recourse is to raise the issue as a defense at trial and, if unsuccessful, appeal the jury's verdict."

3. Unlawful entry required

People v. Malczewski, 744 P.2d 62 (Colo. 1987). The trial court erroneously granted the defendant's motion to dismiss under § 18-1-704.5 in a case in which the defendant used physical force against a police officer who had made a warrantless entry into the defendant's apartment in order to verify the safety of a baby who was inside. The officer's warrantless entry into the apartment was not unlawful, as required by the statute, because it was justified by the presence of exigent circumstances. Nor could the defendant have reasonably believed that the officer entered the dwelling with the intent to commit a crime therein.

People v. McNeese, 892 P.2d 304 (Colo. 1995). A prerequisite for immunity from prosecution pursuant to the statute is that an intruder made a knowing unlawful entry into the dwelling of another. "For purposes of § 18-1-704.5, the 'unlawful entry' element requires an entry in knowing violation of the criminal law." In construing the statute, the Court recognized that, while the statute does not expressly require the culpable mental state of "knowingly" as a predicate to an "unlawful entry," the legislative history and policy considerations surrounding the enactment of the statute necessitate such a mental state. "The immunity was not intended to justify use of physical force against persons who enter a dwelling accidentally or in good faith." Accordingly, § 18-1-704.5 requires proof of an actual unlawful entry and not simply a reasonable belief that an entry was unlawful.

People v. Zukowski, 260 P.3d 339 (Colo. App. 2010). The trial court instructed the jury that, "the other person's unlawful entry into the dwelling must have been made in knowing violation of the criminal law." The Court of Appeals held that "[t]his language is misleading in that it could be taken to mean that an intruder must know his or her conduct would violate a criminal statute, which goes farther than the *McNeese* requirement of a 'knowing, criminal entry.' Although the *McNeese* court used the phrase 'in knowing violation of the criminal law,' it appears that the phrase was intended to express a requirement that an intruder must knowingly engage in criminal conduct, not that an intruder knows he or she is violating a criminal statute." The argument by the prosecutor incorrectly suggested that "an intruder must know that his or her conduct violates a criminal statute, rather than that the intruder must not have a reasonable belief that his or her entry is licensed, invited, or otherwise privileged." Additionally, a portion of an instruction stated that the defense did not apply if the victim's entry into defendant's condominium was made with a good faith belief that it was lawful. The Court of Appeals held that this was misleading, and thus erroneous, because the instruction did not limit or define "good faith," and allowed the view that an intruder's broad subjective belief that he had a right to enter another person's home might make that entry lawful. The make-my-day statute requires an unlawful entry by intruder, and a mistaken belief that an entry, though uninvited, was lawful does not make it lawful.

Compare with People v. Cline, 525 P.3d 303 (Colo. App. 2022). The division declined to apply *Zukowski*'s holding that a "knowing criminal entry" requires only that an intruder knowingly engage in criminal conduct, because *Zukowski*'s interpretation of this language conflicts with the

Colorado Supreme Court's *McNeese* opinion, which holds that the intruder must make a knowing unlawful entry into the dwelling of another.

People v. Eckert, 919 P.2d 962 (Colo. App. 1996). Defendant who occupied bedroom in house owned and occupied by victim was not entitled to immunity under § 18-1-704.5 nor to rely on affirmative defense created by that statute where defendant did not establish that bedroom he occupied was exclusively his province such that victim's entry therein was unlawful.

4. Requires entry of a dwelling

People v. Rau, 501 P.3d 803 (Colo. 2022). Relying on the definition of "dwelling" in § 18-1-901(3)(g) ("a *building* which is used, intended to be used, or usually used by a person for habitation"), the Colorado Supreme Court held that the basement of the house in which the defendant rented an apartment was part of his dwelling for purposes of evaluating his claim of immunity under the force-against-intruders statute to a charge of murder, even though the basement itself was not used for habitation and was a common area used by all renters.

5. Statute does not include "remain unlawfully"

People v. Drennon, 860 P.2d 589 (Colo. App. 1993). The Court of Appeals concluded that the trial court erroneously dismissed charges against the defendant who, after initially inviting the victim into his residence, later told the victim to leave and then stabbed him during an argument. "Here, giving effect to the plain and ordinary meaning of the statutory words and phrases, we are unable to discern a legislative intent to include 'remain unlawfully' in the statute. The explicit terms of the statute provide the home occupant with immunity from prosecution only for force used against one who has made an unlawful entry into the dwelling. If the General Assembly had intended the result reached by the trial court, we must assume that it would have employed statutory terminology which clearly expressed that intent, as it has done under other circumstances.

6. Belief must be objectively reasonable

People v. Hayward, 55 P.3d 803 (Colo. App. 2002). A trespasser has no right to claim self-defense against the occupant of a dwelling because the defense applies only when a person faces unlawful physical force. "[T]he question whether defendant's belief that he was defending against the use of unlawful force was objectively reasonable would turn in part on whether he knew or should have known about the victim's right to use force while in her dwelling and the nature of the force she could use. Because every person is generally presumed to know the law, it is presumed that defendant knew the victim could employ lawful force against him if he unlawfully entered her dwelling."

People v. Jones, 543 P.3d 419 (Colo. App. 2023). The trial court did not abuse its discretion by refusing to instruct the jury on the affirmative defense of force against intruders under § 18-1-704.5 because the defendant did not make the required threshold showing of the statute's objective

element: that the victim (who was a guest in the home) had knowingly entered the dwelling unlawfully when the defendant shot him. The defendant's mistaken belief that the victim was an intruder did not cure her inability to meet the objective element.

26.4 DEFENSE OF PREMISES

A. Statute

Section 18-1-705 permits a person in possession or control of any building, realty or other premises, or a person who is licensed or privileged to be thereon, to use reasonable and appropriate physical force on another person to the extent that it is reasonably necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of an unlawful trespass in or upon the building, realty or premises. Deadly physical force may only be used in defense of the person or another person pursuant to §18-1-704 or when the person in possession or control reasonably believes it is necessary to prevent a first-degree arson.

B. Applicable to Unlawful Entries by Police Officers

People v. Lutz, 762 P.2d 715 (Colo. App. 1988). The Court of Appeals held that the defense provided in § 18-1-705 may be applicable to situations in which an unlawful trespass into a dwelling is committed by a police officer. As opposed to the privilege to use physical force against an officer to resist an illegal arrest (which is not available unless it is in response to unreasonable or excessive force): "The historical and traditional importance placed upon the privacy of one's home has caused the courts to distinguish between the privilege forcibly to resist an unlawful arrest attempted in some public place from the greater privilege to resist governmental intrusion into the home."

26.5 DEFENSE OF PROPERTY

A. Statute

Section 18-1-706 provides: "A person is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the other person to commit theft, criminal mischief, or criminal tampering involving property, but he may use deadly physical force under these circumstances only in defense of himself or another as described in § 18-1-704."

1. Physical force to prevent a crime

People v. Goedecke, 730 P.2d 900 (Colo. App. 1986). The defendant and the victim became involved in an argument over a debt owed to the victim, and when the defendant tendered food stamps as partial payment, the victim tore them up. Later, the defendant returned with a friend and assaulted the victim. In holding that the defendant was not entitled to an instruction regarding defense of property, the Court of Appeals stated: "Here, the evidence demonstrates that

defendant's use of physical force on the victim did not constitute justifiable defense of property. Defendant was charged with second degree assault that allegedly occurred in the second altercation with the victim. While the amount of time between the incidents is disputed, the fact that the assault took place after the alleged theft of the food stamps had already occurred is not. Thus, there were no grounds upon which the jury could find that defendant reasonably believed that force was necessary to prevent an attempted theft, and the trial court did not err in refusing the tendered instruction."

26.5 CHARACTER EVIDENCE IN SELF-DEFENSE CASES

When there is evidence to support a claim of self-defense, evidence of character traits for peacefulness and violence of the victim or the defendant may be admissible under the Colorado Rules of Evidence.

A. Character Traits: C.R.E. 404(a)

Once evidence of self-defense has been introduced, or the defendant has made an adequate offer of proof that such evidence will be forthcoming, the defendant may introduce evidence of his own character for peacefulness to prove that he acted in conformity therewith at the time of the alleged crime. C.R.E. 404(a)(1). Such evidence may be presented in the form of reputation or opinion evidence. Once such evidence is introduced by the defendant, the prosecution may cross-examine the defendant's character witnesses concerning specific instances in which the defendant's conduct may be inconsistent with the testimony regarding peacefulness. C.R.E. 405(a). The prosecution may also introduce character evidence in the form of reputation or opinion testimony to rebut the defendant's character evidence. C.R.E. 404(a)(1).

The defendant may also introduce evidence of the victim's character for violence, C.R.E. 404(a)(2), and the prosecution may likewise rebut such evidence by cross-examination, including specific instances, or by evidence of the victim's peaceful character. The prosecution is also entitled to introduce evidence of the victim's character for peacefulness in a homicide case to rebut the claim that the victim was the initial aggressor. C.R.E. 404(a)(2).

1. Victim's Conduct Admitted to Show Defendant's State of Mind

Under some circumstances, the defendant may introduce evidence of the victim's prior violent acts to show the victim's character for violence in order to prove that the victim was the initial aggressor.

a. Requirements for admissibility

People v. Jones, 675 P.2d 9 (Colo. 1984). In holding that evidence of the victim's prior acts of violence that were unknown to the defendant at the time of the alleged assault was inadmissible, the Colorado Supreme Court reiterated its holding in *People v. Ferrell*, 613 P.2d 324 (Colo. 1980)

that evidence of prior violent acts by the victim is admissible only if the defendant knew of the victim's prior violence at the time of the offense. The Court recognized that evidence of a victim's character trait for violence is legally relevant to the issue of self-defense because the inference that the victim was the initial aggressor is made more probable with the evidence than without it. Thus, when character of the victim is directly in issue as an essential element of a crime, claim, or defense, evidence may be presented in all available forms, including specific acts or instances of conduct. In this case, however, the defendant was unaware of the victim's prior acts of violence, and the alleged character trait was therefore not an essential element of the claim of self-defense. "If, of course, [the victim's] prior acts of violence had been known to the defendant at the time of the offense in question, then they would have been admissible as direct evidence of an essential element of self-defense, namely, the reasonableness of the defendant's belief in the imminent use of unlawful physical force against him. The defendant, however, was admittedly without knowledge of these prior acts of violence at the time of the offense, and, consequently, they were offered only as circumstantial evidence that [the victim] was the initial aggressor. Under these circumstances, proof of [the victim's] character or character trait for violence must be confined to reputation or opinion testimony only."

People v. Marquantte, 923 P.2d 180 (Colo. App. 1995). Evidence of victim's prior violent conduct offered to establish defendant's fear of victim was properly refused because defendant failed to establish he had knowledge of victim's prior conduct and acted on basis of that knowledge.

b. Offer of proof sufficient for admissibility

People v. Lyle, 613 P.2d 896 (Colo. 1980). The Colorado Supreme Court rejected the assertion that competent evidence of self-defense be presented as a condition precedent to admission of evidence of the victim's prior violence, and held that under C.R.E. 104(b) the trial court may admit such evidence subject to the later introduction of evidence of self-defense. The Court recognized that the defendant must, as a minimum, make an offer proof that there will be evidence of self-defense in order to comply with the requirements of C.R.E. 104(b).

c. Remoteness of prior violence

People v. Burress, 515 P.2d 460 (Colo. 1973). "If the trial judge concludes that the act [of violence by the victim] or the discovery were too remote in time to create a present apprehension of fear, then evidence of the victim's specific violent acts should be excluded. On the other hand, if the trial judge concludes that the proximity in time of either the specific act of violence or the discovery of that act could create present apprehension or fear on the part of the defendant, then the degree of that apprehension and the issue of whether the defendant's fear justifies the force which he used by way of self-defense is for the jury."

2. Victim's Prior Conduct to Show Victim's State of Mind

26. SELF-DEFENSE

a. Victim's prior threats toward the defendant

Subject to relevancy and hearsay rules, evidence of prior threats by the victim toward the defendant, whether or not communicated to the defendant, is generally admissible to show the victim's state of mind and to prove that the victim was the initial aggressor.

Sowards v. People, 408 P.2d 441 (Colo. 1965). It was error to exclude evidence that, shortly before being shot, the victim stated he was going to defendant's cafe to wreck it and assault defendant.

Bershenyi v. People, 207 P. 591 (Colo. 1922). It was error to exclude evidence that, during seven days prior to homicide, victim had expressed great hostility towards defendant and had stated he would be justified in killing him.

b. Victim's fear of the defendant

Evidence of the victim's prior statements expressing fear of the defendant may be admissible if relevant to a material issue. Such evidence is generally admissible when the evidence raises the issue of whether the victim first attacked the defendant, to prove that the victim was not in fact the initial aggressor.

People v. Madson, 638 P.2d 18 (Colo. 1981). "When evidence raises the issue whether the victim first attacked the defendant, evidence that the victim feared the defendant is highly probative of the declarant's future conduct, namely that the victim was not the aggressor. In such cases the relevant state of mind may be established by the victim's statement of fear or by other evidence circumstantially probative of that condition."

People v. Gladney, 570 P.2d 231 (Colo. 1977). Victim's statements to third parties that defendant had threatened her were admissible to show her state of mind and to explain her subsequent action in carrying a gun, where defendant attempted to show that she was the initial aggressor.

Bustamonte v. People, 401 P.2d 597 (Colo. 1965). Testimony that victim told witness shortly before fatal shooting that victim had a fight with defendant, took a gun away from her, and was going home to put her out was admissible to prove victim's mental state and hostility between victim and defendant.

3. Defendant's Prior Conduct to Show Defendant's State of Mind

Douglas v. People, 969 P.2d 1201 (Colo. 1998). Evidence of prior incidents in which defendant "brandished a gun at individuals without provocation or danger to himself" were admissible under C.R.E. 404(b) to rebut defendant's claims of self-defense and defense of premises.

26.7 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR PREVENTING AN ESCAPE

26. SELF-DEFENSE

A. Peace Officer Use of Physical Force

Section 18-1-707(1) provides that a peace officers, in carrying out their duties, shall apply nonviolent means, when possible, before resorting to the use of physical force. Physical force may be used only if nonviolent means would be ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of injury to the peace officer or another person.

Under § 18-1-702(2), a police officer using physical force shall:

(a) Refrain from using deadly physical force to apprehend a person who is suspected of only a minor or nonviolent offense;
(b) Use only a degree of force consistent with the minimization of injury to others;
(c) Ensure that assistance and medical aid are rendered to any injured or affected persons as soon as practicable; and
(d) Ensure that any identified relatives or next of kin of persons who have sustained bodily injury or death are notified as soon as practicable.

Under § 18-1-707(2.5(a), peace officers are prohibited from using a chokehold, as defined in § 18-1-707(2.5)(b), on another person.

People v. Vigil, 242 P.3d 1092 (Colo. 2010). During arrest the defendant was struck on the face, kicked to the ground, sprayed with a chemical repellent and hit several times with a metal baton. The officers handcuffed the defendant with their knees pushing into his back. The defendant then made a statement at the time of his arrest. The defendant received six hours of medical treatment and was then released back to the same officers who had beaten him. He then made more statements. Both the first statement during the arrest and the later statements made after he had received medical treatment were suppressed as involuntary.

People v. Walker, 666 P.2d 113 (Colo. 1983): "A defendant who is charged with assaulting a police officer is entitled to disclosure of the fact that complaints charging excessive use of force have been filed against the officer involved."

B. Peace Officer Use of Deadly Force

Under § 18-1-707(3), deadly physical force may be used to make an arrest only when all means of apprehension are unreasonable given the circumstances and:

i. The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;
ii. The suspect poses an immediate threat of death or serious bodily injury to the peace officer or another person;
iii. The force employed does not create a substantial risk of injury to other persons.

26. SELF-DEFENSE

Martinez v. Harper, 802 P.2d 1185 (Colo. App. 1990). In this civil suit, an officer's use of deadly force was reasonable in shooting one of two prison escapees, where officer knew the escapees were armed and dangerous, had pointed a rifle at the officer, the officer had given two clear warnings, officer feared for his safety and the escapees were not cornered.

* * *

2025 Contributions by Doyle Baker

Senior Deputy District Attorney

4th Judicial District

CHAPTER 27

VENUE

27. VENUE

27.1 PLACE OF TRIAL

A. Constitutional and Statutory Provisions

Article II, Section 16 of the Colorado Constitution provides an accused with the right to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The statutory provisions pertaining to venue are set forth in § 18-1-202. The statute requires a criminal action to be tried in the county where the offense was committed or in any other county where an act in furtherance of the offense occurred, except where otherwise required by law. *See also* Crim. P. 18.

1. Particular applications

Colorado's venue statute sets forth the applicable place or places where trial may commence under a variety of particular situations:

(a) An offense upon a person in which the defendant and the victim are in different counties at the time of the commission of the offense may be tried in either such county. § 18-1-202(2).

(b) An offense involving the death of another person may be tried in any county in which the cause of death was inflicted, in which death occurred, or in which the body (or any part thereof) was found. § 18-1-202(3).

(c) A theft case may be tried in any county in which the defendant exercised control over the stolen property. § 18-1-202(4).

(d) An offense that is commenced outside the state but is consummated in the state is to be tried in the county in which the crime was consummated. § 18-1-202(5).

(e) An offense committed in or upon any vehicle of transportation may be tried in any county over which the vehicle passed. § 18-1-202(6).

(f) Multiple crimes based on the same act (or series of acts) arising from the same criminal episode may be tried in any county in which any one of the crimes could have been tried, and certain offenses committed at least twice within a six-month period shall be considered part of the same criminal episode. § 18-1-202(7).

(g) An inchoate offense may be tried in any county in which any act which constitutes an element of the offense, including formation of an agreement in conspiracy, is committed. § 18-1-202(8).

(h) A person charged as an accessory may be tried in any county in which the principal could be tried. § 18-1-202(9)].

(i) A person charged with failure to register as a sex offender may be tried in the county in which he was released from incarceration for commission of the offense requiring registration, or the county in which he resides, or the county in which he is apprehended. § 18-1-202(12).

(j) A person charged with identity theft may be tried in any county where a prohibited act was committed, in any county where an act in furtherance of the offense was committed, or in any county where the victim resides during all or part of the offense. For purposes of this subsection (13), a business entity resides in any county in which it maintains a physical location. § 18-1-202(13).

(k) A person charged with sexual assault on a child as a pattern may be tried in any county where any of the pattern acts occurred or where an act in furtherance of the pattern acts occurred. § 18-1-202(14).

2. Prosecution permitted where act was committed or furthered

People v. Bobo, 897 P.2d 909 (Colo. App. 1995). In a COCCA and conspiracy prosecution in which the defendant, while residing in California, negotiated fraudulent transactions involving real estate located in Gilpin County primarily through attorneys and other agents who were located in Denver County, the district court incorrectly held that venue was proper only in Denver County. The trial court reasoned that Denver County was the only venue in which the defendant could be tried because the offenses were commenced outside the state and completed in Denver County. In reversing, the Court of Appeals held that the statutory provisions that define where a criminal act is committed do not negate or modify the statutory provision that allows trial in any other county where an act in furtherance of the offense occurred, in addition to the county where the act was committed. *See* § 18-1-202(1). The court construed the phrase "act in furtherance" to require some conduct by the defendant connecting him to the county where the crime occurred that helps forward, advance or promote the charged offense. Since "the negotiations and other activities undertaken on defendant's behalf in Gilpin County were acts that advanced, promoted, and furthered [the defendant's] scheme and the alleged theft and COCCA violations, the First Judicial District was a proper venue for the offenses alleged here."

People v. Nevarez-Zambrano, 222 P.3d 329 (Colo. 2010). Defendant's filing of tax returns with assistance of tax preparation service located in Nineteenth Judicial District did not constitute an act in furtherance of the crime of criminal impersonation, and thus venue was properly transferred to Thirteenth Judicial District, where defendant earned wages under a false social security number. The crime of criminal impersonation stemming from alleged use of fictitious social security number to earn income was fully completed prior to the filing of any tax returns.

People v. Shackley, 248 P.3d 1204 (Colo. 2014). Where a defendant voted in Arapahoe County and then again in Adams County, he could be prosecuted in either county. The Arapahoe vote was an act "in furtherance" of the crime of voting twice. An "act in furtherance" for purposes of determining proper venue includes not only an act necessary to the commission of the offense but may encompass other conduct closely related to an overall criminal scheme.

3. Designation of venue after indictment by state grand jury

Section 13-73-107 states:

> Any indictment by a state grand jury shall be returned to the chief judge who is supervising the statewide grand jury without any designation of venue. Thereupon, the chief judge shall, by order, designate any county in the state as the county of venue for the purpose of trial. Once venue is designated by the chief judge, a change of venue may be granted . . . .

People v. Valdez, 928 P.2d 1387 (Colo. App. 1996). No error in initially fixing venue in El Paso County where certain criminal conduct had occurred, despite fact that venue was later changed to Costilla County for convenience of parties and witnesses.

B. Manner of Proof

Colorado is among a small minority of jurisdictions that treat venue solely as a procedural prerequisite to prosecution. Wayne R. LaFave et al., *Criminal Procedure* § 16.1(g) (2d ed. 1999) (citing similar procedural schemes in California, Illinois, Iowa, Louisiana, Maryland, and Utah); Nancy Hollander et al., *Wharton's Criminal Procedure* § 10:14 (14th ed. 2005). No longer is an allegation of venue a matter to be proved to the satisfaction of the jury, as other elements of an offense, unless the statute defining the crime actually requires as much. § 18-1-202(11). Instead, any objection to the place of trial authorized by this provision is waived unless it is raised by written motion before trial, in the manner prescribed.

Section 18-1-202(11) states:

> Proof of the county in which the offense occurred or which county is the proper place for trial pursuant to this section shall not constitute an element of any offense and need not be proven by the prosecution at trial unless required by the statute defining the offense.

See, e.g., People v. Burgess, 946 P.2d 565 (Colo. App. 1997) (holding that venue was not an element contained in any of crimes in which the defendant was convicted).

People v. Brown, 70 P.3d 489 (Colo. App. 2002). The prosecution was not required to prove venue because venue is not an element of attempted aggravated incest or attempted sex assault on child. "[A] defendant may be prosecuted in Colorado for crimes committed wholly or partially within the territorial boundaries of the state. Thus, criminal jurisdiction over felonies committed in Colorado generally extends to all district courts in the state. Therefore, we conclude that regardless of where in Colorado the information alleged the crimes had occurred, the trial court had jurisdiction."

1. Slight evidence sufficient

Fernandez v. People, 490 P.2d 690 (Colo. 1971). The Court recognized that venue is a matter to be determined from all the evidence in the case and "[w]hile there must be some proof of venue, even slight evidence may be sufficient. Such evidence may be direct or circumstantial, and its

sufficiency will be assumed if it is not controverted by other evidence nor affected by circumstances or other matters."

Claxton v. People, 434 P.2d 407 (Colo. 1967). "Where the defendant offers no evidence on venue and tenders no instruction, slight evidence is sufficient, and such evidence may be circumstantial."

2. Offense near a boundary

Section 18-1-202(10) provides:

> When an offense is committed on the boundary line between two counties, or so close thereto as to be difficult to readily ascertain in which county the offense occurred, the offense is committed and the offender may be tried for the offense in either county.

C. Waiver

Section 18-1-202(11) states:

> Any challenge to the place of trial pursuant to this section shall be made by motion in writing no later than twenty-one days after arraignment, except for good cause shown. The court shall determine any such issue prior to the commencement of the trial and the selection of a jury. . . . Failure to challenge the place of trial as provided in this subsection (11) shall constitute a waiver of any objection to the place of trial.

People v. Burgess, 946 P.2d 565 (Colo. App. 1997). Even assuming defense counsel's pre-trial objection constituted a venue objection rather than a challenge to subject matter jurisdiction, defendant waived any venue-related error by failing to file a timely written motion as required by § 18-1-202(11).

Davis v. People, 264 P. 658 (Colo. 1928). The Colorado Supreme Court held that the entitlement to an "impartial jury of the county or district in which the offense is alleged to have been committed" exists solely for the benefit of the accused and therefore may be waived. "In the instant case defendant was specifically advised by the recitals of the information that he was being tried in Denver for a crime alleged to have been committed in La Plata County. If he did not desire to waive his constitutional right, he was duty bound to protest when he knew that right was being violated. Having entered his plea and gone to trial, and reserved his protest until the people rested, he was too late. He had waived his right as irrevocably as if by express words."

People v. Joseph, 920 P.2d 850 (Colo. App. 1995). The defendant, who was charged with criminal acts occurring both in Denver County and Arapahoe County, waived any objection he might have to venue upon his entry of a guilty plea to the charges in Denver County.

D. Illustrative Cases

People v. Ray, 109 P.3d 996 (Colo. App. 2004). "Here, the record supports the trial court's finding that 'This drug transaction began, although it began ever so slightly, it still began in Denver. It continued in Adams County.' Codefendant's act of motioning the detective to pull over after the detective yelled 'sixty' occurred in Denver. Codefendant knew that he did not have $60 worth of cocaine to sell, and he then called defendant to involve him in the transaction. The trial court properly inferred that defendant and codefendant were acting in concert and that codefendant's act of motioning the detective to pull over aided and abetted defendant's offense of distributing a controlled substance. Accordingly, under § 18-1-202(9), venue would have been proper in either Denver or Adams County."

People v. Cortez, 737 P.2d 810 (Colo. 1986). In a prosecution for burglary and theft by receiving, the Court held that the defendant's possession in Denver of property stolen in an Adams County burglary was insufficient to establish venue in Adams County where the defendant was acquitted of the burglary and no evidence was produced to show that any act in furtherance of theft by receiving was committed in Adams County.

People v. Gould, 563 P.2d 945 (Colo. 1977). In a prosecution for a hand-to-hand sale of LSD instituted in Jefferson County but where the crime was completed in Denver County, there was insufficient evidence of venue where no part of the transaction was carried out in Jefferson County and nothing was offered which would tie the defendant to any act in furtherance of the offense in Jefferson County.

But see *People v. Freeman,* 668 P.2d 1371 (Colo. 1983). In a homicide prosecution in which the abduction, murder, and discovery of the victim's body occurred entirely in Denver County, venue was nevertheless proper in Jefferson County where the evidence established that the abduction and murder were part of the defendant's common scheme to obtain and sell vehicles to an undercover "sting" operation conducted by Jefferson County police officers. The Court acknowledged that the sale of the victim's vehicle was clearly in the defendant's mind prior to the commission of the murder and in fact was the motivating factor for the robbery and murder. In addition, the Court held that "where the disposition of the vehicle was, in part, an act to conceal his participation in these offenses and actually took place in Jefferson County, there is sufficient evidence to tie the defendant to an act in furtherance of the offense [of murder] in Jefferson County."

People v. Black, 524 P.3d 341 (Colo. App. 2022). A homicide defendant discussing killing victim with his co-defendant could be tried in Arapahoe county where discussion took place, even though murder took place in Denver County because the discussion was "in furtherance" of the act.

27.2 CHANGE OF VENUE

A. Statutory Provisions

Sections 16-6-101 through 16-6-104 set forth the provisions governing change of venue. The grounds for a change of venue are set forth in § 16-6-101 and include situations in which (a) a fair trial cannot take place in the county or district in which the trial is pending; (b) a more expeditious

trial may be had by a change in the place of trial from one county to another; or (c) when the parties stipulate to a change in venue. The procedures governing change of venue are set forth in § 16-6-102, which require a motion for change of venue to be accompanied by one or more affidavits setting forth the facts upon which the defendant relies, or by a stipulation of the parties. *See also* Crim. P. 21(a).

B. Inherent Authority of the Court to Change Venue

Wafai v. People, 750 P.2d 37 (Colo. 1988). Although neither the statute nor the rules of procedure specifically authorize a trial court to change venue in the absence of a motion for a change of venue, the trial court nevertheless has the inherent power to order a change of venue at its own instance when necessary to assure the defendant a trial by an impartial jury. This power may be exercised in appropriate circumstances even when the defendant objects to a change of venue. The court's exercise of this inherent power to insure an impartial jury does not violate the defendant's constitutional right under Article II, Section 16 of the Colorado Constitution to a trial "by an impartial jury of the county or district in which the offense is alleged to have been committed."

People v. Shackley, 248 P.3d 1204 (Colo. 2011). Court abused its discretion by transferring venue from one judicial district to another when the defendant had committed the offense of voting twice in two different jurisdictions and the Court felt that the other district had a closer nexus to the crime. "That is, a criminal court does not have the inherent power to transfer a criminal prosecution from a county in which the legislature has deemed it triable 'merely because the court considers another county to be a more appropriate venue or more easily established as a proper situs of the offense'." The decision must still be made pursuant to one of the grounds set forth in § 16-6-101.

C. Change of Venue Due to Adverse Pretrial Publicity

"Section 16-6-101(a) provides for a change of venue when a fair trial cannot take place in the county or district in which the trial is pending. However, the existence of extensive pretrial publicity, by itself, does not create a right to change of venue." *People v. Dore*, 997 P.2d 1214 (Colo. App. 1999) (internal citations and quotations omitted).

Colorado appellate courts have consistently held that the mere existence of pre-trial publicity, even extensive publicity, does not in itself trigger a due process entitlement to a change of venue. Rather, the burden is on the party seeking a change of venue to establish either (1) the publicity was so "massive, pervasive, and prejudicial" as to create a presumption that the defendant would be denied a fair trial, or (2) that the publicity created actual prejudice or hostility towards the defendant on the part of the jury panel. *See Sheppard v. Maxwell,* 384 U.S. 333 (1966) (holding that the failure of state trial judge in murder prosecution to protect defendant from inherently prejudicial publicity which saturated community and to control disruptive influences in courtroom deprived defendant of fair trial consistent with due process); *People v. Bartowsheski,* 661 P.2d 235 (Colo. 1983); *People v. Carrillo,* 946 P.2d 544 (Colo. App. 1997) (coverage not massive, pervasive, and prejudicial).

Wafai v. People, 750 P.2d 37 (Colo. 1988). The decision whether to grant a change of venue rests in the sound discretion of the trial court and will not be disturbed on appellate review absent an abuse of discretion. *See People v. Harlan,* 8 P.3d 448 (Colo. 2000) (*rev'd on other grounds*) (holding that "defendant was not deprived of a fundamentally fair trial even though we, were we in the trial court's place, may have decided that a change of venue was merited").

1. When prejudice is presumed

People v. Dore, 997 P.2d 1214 (Colo. App. 1999). If the publicity was "massive, pervasive and prejudicial," prejudice can be presumed. Otherwise, a defendant must demonstrate that publicity had an actual adverse effect on the jury. The press coverage in this case was not "massive, pervasive and prejudicial," and *voir dire* demonstrated a fair jury.

People v. Hankins, 361 P.3d 1033 (Colo. App. 2014). Although this murder occurred in a small town of 8,500 people, the town's sole newspaper published only thirty-five articles in two years, none of the articles were published in the two months prior to trial, and the articles were not written in an inflammatory or sensational manner, so the district court acted within its discretion in rejecting the argument of presumed prejudice.

Walker v. People, 458 P.2d 238 (Colo. 1969). This is the only reported case in Colorado in which the presumption of an unfair trial has been applied as the result of "massive, pervasive, and prejudicial" publicity. The Colorado Supreme Court noted that, in addition to the 236 stories published about the defendant or the case, the media also hired famous criminologists to assist in the investigation published photographs of how the "frenzy-filled eyes" of the killer may have looked, interspersed prayers in various articles, and inaccurately reported that the defendant confessed to the murder and that his exculpatory statements proved to be lies under polygraph examination. The Court concluded that the publicity surrounding the defendant's arrest and trial amounted to a virtual attack upon the defendant. In reversing his murder conviction, the Court noted that the publicity was "so extensive, so slanted and prejudicial, so calculated to inflame, and so all-pervasive as to posit [the] case within the holding of *Sheppard* [*v. Maxwell*]."

People v. Harlan, 8 P.3d 448 (Colo. 2000) (*rev'd on other grounds*). "Only when the publicity is so ubiquitous and vituperative that most jurors in the community could not ignore its influence is a change of venue required before voir dire examination."

People v. Coit, 961 P.2d 524 (Colo. App. 1997). No error in only partially granting venue motion by moving trial from Routt County to Grand County where defendant's expert presented survey results showing that responses unfavorable to defendant were less than 40% in Grand County.

2. Actual prejudice or hostility

People v. Botham, 629 P.2d 589 (Colo. 1981) (*rev'd on other grounds*). In a highly publicized homicide case, the Colorado Supreme Court held that, although the publicity was not so massive, pervasive, and prejudicial such that the denial of a fair trial could be presumed, the totality of

circumstances nevertheless demonstrated that the actual impact of the publicity on the jury was such as to deny the defendant his constitutional right to a fair trial. The Court stated that the defendant bears the burden of establishing the denial of a fair trial based upon a nexus between extensive pretrial publicity and the jury panel. Under the circumstances of this case, that burden was satisfied: "Here, more than 50% of the jury panel questioned on the subject were inclined to believe in the defendant's guilt; one-half of the fourteen jurors selected to hear the case believed, at one time or another, that the defendant was guilty. More than 90% of the jury panel had been exposed to pretrial publicity; thirteen of the fourteen jurors selected to hear the case were exposed to pretrial publicity. Approximately one-half of the jury panel possessed detailed knowledge of the crime; all fourteen jurors selected to hear the case knew some details of the crime. Moreover, some of the evidence described by the news media was not admitted at the defendant's trial." The Court stated that where a defendant has not demonstrated the existence of massive, pervasive, and prejudicial publicity, which would create a presumption that he was denied a fair trial, the defendant must establish the denial of a fair trial based upon a nexus between extensive pretrial publicity and the jury panel.

Compare with *People v. Loscutoff,* 661 P.2d 274 (Colo. 1983). The defendant was not entitled to a change of venue on grounds of pretrial publicity where there was no showing that the publicity had an actual adverse effect upon the jury panel and where there was no basis for finding that massive, pervasive, and prejudicial publicity existed. "The record reveals that those jurors who had heard of this case testified under oath that they could base their verdict solely on the evidence presented at trial. Mere familiarity with a case due to publicity does not, in itself, create a constitutionally defective jury . . . . The pretrial publicity consisted of approximately four newspaper articles and several radio broadcasts, spanning the sixteen months between the time of the homicide and the defendant's trial. Such limited publicity is distinguishable from the volume and intensity of pretrial publicity present in [*Botham* and *Walker*]."

See also *People v. Simmons,* 516 P.2d 117 (Colo. 1973); *People v. Trujillo,* 509 P.2d 794 (Colo. 1973); *People v. Arevalo,* 725 P.2d 41 (Colo. App. 1986).

* * *

2025 Contributions by Jessica Dotter
Sexual Assault Resource Prosecutor
Colorado District Attorneys' Council

CHAPTER 28

WITNESSES

28. WITNESSES

28.1 COMPETENCY OF A WITNESS

Section 13-90-106 provides two exceptions to the general rule that all persons may testify:

(1) Persons who are of unsound mind at the time of the proposed testimony. However, this prohibition does not apply to every person of unsound mind, for those who have been adjudicated incompetent may testify if the trial court determines through appropriate *in camera* examination that the witness appreciates and understands the obligation of the oath and is capable of accurate recollection and narration. *See Howard v. Hester*, 338 P.2d 106 (Colo. 1959).

(2) Children under 10 who appear "incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly." However, this prohibition does not apply in any "criminal proceeding for child abuse, sexual abuse, a sexual offense pursuant to part 4 of article 3 of title 18, or incest, when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined."

A. Competency Hearing

1. Not required to be held outside the presence of the jury

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). "Although some preliminary matters are required by rule to be conducted outside the presence of the jury, the competency of a child witness is not one of them. Instead, the competency of a child witness falls under the blanket rule that preliminary matters should be conducted outside the presence of the jury when 'the interests of justice require…' If the trial court decides to hold a child competency proceeding in the presence of the jury, then it bears the risk that the defendant will be prejudiced to a degree that requires reversal on appeal."

a. Limiting instruction may be required

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). "[I]f competency questioning is conducted in front of the jury, then a limiting instruction is most likely necessary to minimize jury confusion." "Though the wording of a limiting instruction is within the trial court's discretion, the instruction should inform the jury that competency is a legal question for the court but that the jury makes the ultimate determination on credibility."

2. Illustrative Cases

a. Intoxication

People v. Alley, 232 P.3d 272 (Colo. App. 2010). Over defendant's objection that a witness was not competent to testify because he was intoxicated, the trial court permitted him to take the stand. The court informed the jury of the witness's BAC level of .084, and permitted defendant to cross-examine him regarding his intoxication. At the end of the witness's testimony, he was again tested, and the jury was told that his BAC was then 0.049. The Court of Appeals held that "[g]iven the trial court's statement that it would evaluate N.H.'s competency to testify and its careful monitoring of his BAC, we conclude it implicitly found him competent to give testimony… [T]here is no indication in the record that he lacked capacity to observe, recollect, communicate, and understand the oath to tell the truth. He was also thoroughly cross-examined by defense counsel, and the jury was fully apprised of his intoxication status. We disagree with defendant's contention that a witness's intoxication necessarily requires the trial court to conduct a competency hearing."

Whether a witness was, at the time of the events as to which he testifies, under the influence of some drug that could have affected his perception of those events bears directly on credibility. *People v. Lopez*, 401 P.3d 103 (Colo. App. 2016).

b. Child witness

People v. Stackhouse, 411 P.3d 708 (Colo. App. 2012), aff'd 386 P.3d 440 (Colo. 2015). A child victim otherwise competent to testify was found to not be incompetent due to failure to remember prior statements she made to any witnesses other than her foster father, and that failure to remember neither rendered the statements inadmissible nor violated defendant's confrontation rights.

People v. Whitman, 205 P.3d 371 (Colo. App. 2007). Child victims were competent to testify in prosecution for sexual assault on a child because they were able to convey the details of events, identified defendant, and answered each question posed by both the prosecutor and defense counsel. Although they had some difficulty articulating the concepts of truth and lies, and gave some incorrect answers to questions on factual matters unrelated to charged offenses, they were capable of differentiating between truth and lies by responding to examples.

28.2 EXAMINATION OF A WITNESS

A. Rules and Statutes

Most of the Colorado Rules of Evidence impact the examination of witnesses to varying degrees and under varying circumstances. The following is a list of Rules that most directly apply:

103(a)(1)	Objections - Stating Specific Grounds
103(a)(2)	Offer of Proof
103(c)	Preventing Inadmissible Evidence from Being Suggested to the Jury by Asking Questions in the Hearing of the Jury
104(b)	Relevancy Conditioned on a Fact

104(d)	Limitation on Cross-Examination of the Defendant as to Preliminary Matters, e.g., Admissibility of Confession
401-403	Relevancy
405(a), 608(b)	Cross-Examination of Character Witnesses
607	Leading Questions to Attack credibility of Witnesses, Including Own Witness
612	Use of Writing to Refresh Memory of Witness
613	Impeachment of Witness by Use of Prior Inconsistent Statements
614	Calling and Interrogation of Witnesses by the Court
615	Exclusion of Witnesses from the Courtroom: Preventing an Excluded Witness's Access to Trial Testimony
701-705	Opinion and Expert Testimony
801(d)(1)(A)-(B)	Prior Inconsistent and Consistent Statements
803(18)	Cross-Examination of Expert by the Use of Learned Treatises
806	Cross-Examination of Hearsay Declarant by Party Against Whom Hearsay Statement Has Been Admitted

In addition, a number of significant principles relating to the examination of witnesses have been codified by the Colorado Revised Statutes, particularly as they relate to the procedures and effect of impeaching a witness by means of prior inconsistent statements. *See, e.g.,* § 16-10-201.

Section 16-10-201 is more expansive than its counterpart in the Rules of Evidence [C.R.E. 613], and appears to supersede the Rule inasmuch as the statute has been held to be a proper exercise of legislative authority to create rules of substantive evidence. *See, e.g., People v. Smith*, 512 P.2d 269 (Colo. 1973).

People v. Fisher, 9 P.3d 1189 (Colo. App. 2000). Holding there was sufficient deviation from witness' prior statement for prosecution to impeach witness with prior statement under C.R.E. 801(d)(1)(A), and objections based on "otherwise competent evidence" requirement of § 16-10-201 went to weight not competency of statement.

B. Presentation of Witnesses

1. Mode and order of interrogation and presentation

C.R.E. 611(a) invests the trial court with the authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

The trial court has broad discretion over the mode and presentation of evidence and is the final arbiter of the admissibility of evidence. *People v. District Court*, 767 P.2d 239 (Colo. 1989).

2. Calling and recalling witnesses

Colorado appellate courts have consistently held that the selection and presentation of evidence are considerations within the discretion of the prosecution, and that the prosecutor is entitled wide latitude in presenting the People's case. *See People v. District Court*, 767 P.2d 239 (Colo. 1989); *People v. Wright*, 742 P.2d 316 (Colo. 1987).

a. Prosecutor has no obligation to call particular witnesses

"A prosecuting attorney is not obliged to call any particular witness, but may try his case in his own way and at his discretion call those witnesses he chooses." *Hampton v. People*, 465 P.2d 394 (Colo. 1970).

The prosecutor has no obligation to advocate the admissibility of evidence favorable to the accused. *People v. Austin*, 523 P.2d 989 (Colo. 1974).

b. Recalling witnesses for direct or cross-examination

Leyba v. People, 481 P.2d 417 (Colo. 1971). The Colorado Supreme Court held that the trial court did not commit plain error by permitting the prosecutor to recall the victim for further testimony: "We have held in *Raullerson v. People*, 404 P.2d 149 (Colo. 1965), that allowing a party to reopen direct examination of a witness after cross-examination has been concluded is discretionary with the trial court as controlling the order of proof and will not be disturbed in the absence of clear abuse of discretion."

It is within trial court's discretion to permit prosecutor to recall defense witness for further cross-examination. *People v. Lewis*, 506 P.2d 125 (Colo. 1973).

c. Illustrative cases

People v. Adkins, 508 P.2d 377 (Colo. 1973). The prosecution was allowed to reopen its case-in-chief to admit exhibits where the prosecutor inadvertently failed to move for their admission before resting.

Raullerson v. People, 404 P.2d 149 (Colo. 1965). The prosecution was allowed to reopen its direct examination of a police officer after cross-examination. The Court likened the procedure to reopening the case-in-chief after the conclusion of the testimony, which is discretionary with the trial court.

Martinez v. People, 267 P.2d 654 (Colo. 1954). The prosecution was allowed to reopen its case-in-chief to prove the defendant's confession was voluntary.

Monchego v. People, 99 P.2d 193 (Colo. 1940). The prosecution was allowed to reopen to show the age of the defendant in a statutory rape prosecution.

3. Witnesses called by the court

C.R.E. 614 permits the trial court to call witnesses, either on its own motion or at the suggestion of a party, and to interrogate witnesses called by itself or by a party. Parties are permitted to cross-examine any witness called by the court.

a. Within trial court's discretion

People v. Esquibel, 599 P.2d 981 (Colo. App. 1979). The trial court did not abuse its discretion in calling a witness and permitting cross-examination by both parties, where the witness had stated his intention of lying on the stand because he was afraid of the defendant. "It is generally held that it is within the discretion of the court when it shall call a witness for whom neither the prosecution nor the defense is willing to vouch and who appears to possess material evidence."

b. Standard of review

People v. Ray, 640 P.2d 262 (Colo. App. 1981). "A trial court has the prerogative and, sometimes, the duty to question witnesses called by a party. Such questions are not improper where the purpose is to develop more fully the truth and to clarify testimony already given. The test to be applied in these circumstances is whether the trial court's conduct so parted from the required impartiality as to deny the defendant a fair trial."

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008). "With respect to comments, questions, and ultimately, even a judge's demeanor, more than mere speculation concerning the possibility of prejudice must be demonstrated to warrant a reversal; the record must clearly establish bias."

c. Court may not be an advocate

People v. Martinez, 523 P.2d 120 (Colo. 1974). Where the prosecutor failed to appear for a hearing on a motion to suppress the defendant's statement, the court committed error in assuming the role of the prosecutor by calling and examining witnesses for the People, cross-examining defense witnesses, and making objections to defense counsel's questions and ruling on them.

4. Questions asked by the jury

Crim. P. 24(g) states:

> Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.

Juror questioning of a witness does not violate a defendant's right to a fair trial or to a trial by an impartial jury. *See Medina v. People*, 114 P.3d 845 (Colo. 2005).

When the applicable rules of law and evidence are applied and after consulting with counsel, the decision of whether to ask a juror's question is committed to the sound discretion of the trial court. Like other instances where a trial court errs in admitting otherwise inadmissible evidence, improper juror questions which are asked by the court will be reviewed for harmless error. *Id.*

C. Direct Examination

1. Use of leading questions

C.R.E. 611(c) provides that leading questions should not be used on direct examination "except as may be necessary to develop [a witness's] testimony." The Rule provides, however, that leading questions may be permitted when interrogating a hostile witness, an adverse party, or a witness identified with an adverse party.

a. What constitutes a leading question

A "common sense" test in determining if a question is leading is whether an ordinary person would get the impression that the questioner desires one answer rather than another. *See* McCormick, Evidence, § 6 (1972). The fact that a question may be answered with a simple "yes" or "no" does not, of itself, make the question leading. *See Damas v. People*, 163 P. 289 (Colo. 1917) (rev'd on other grounds).

2. Permissible use of leading questions on direct examination

In addition to the permissible uses of leading questions set forth by C.R.E. 611(c) [hostile witnesses, adverse parties, and witnesses identified with adverse parties], C.R.E. 607 also permits the use of leading questions on direct examination to impeach the credibility of a witness. Contrary to prior case law, this provision does not require a showing of hostility or surprise. *See* Committee Comment to C.R.E. 607. However, C.R.E. 607 remains subject to C.R.E. 611 which gives the trial court broad control over the mode of interrogating witnesses and allows leading questions on direct examination only to the extent necessary to develop a witness's testimony.

Practice Tip: The Advisory Committee's Note to the identical Federal Rule of Evidence [611] sets forth an expansive interpretation of the circumstances under which leading questions may be utilized on direct examination, to include witnesses who are hostile, unwilling, or biased; child witnesses or adults with communication problems; witnesses whose recollection is exhausted; and witnesses examined regarding undisputed preliminary matters.

a. Child witnesses

Warren v. People, 213 P.2d 381 (Colo. 1949). The Colorado Supreme Court held that the trial court did not abuse its discretion in permitting the prosecutor to ask leading questions during direct examination of a 10-year-old girl in a indecent liberties case. "A wider latitude in asking leading questions is permitted both because of the youth of the witness and the intimate nature of the questions." *See also People v. Raehal*, 971 P.2d 256 (Colo. App. 1998).

b. Use of leading questions on direct is ultimately within the trial court's discretion

Berger v. People, 224 P.2d 228 (Colo. 1950). In holding that the trial court acted within its discretion in permitting leading questions during the direct examination a 7-year-old child who witnessed the murder of his mother by his father, the Court stated: "It is, so far as we have found, a universal rule that whether leading questions should be permitted is largely within the discretion of the trial court and only in clear cases of abuse of that discretion will such permission be held to be reversible error."

People v. Gillis, 883 P.2d 554 (Colo. App. 1994). Trial court did not abuse its discretion in permitting prosecutor to ask leading questions on redirect examination where testimony on cross-examination was confusing and unclear and leading questions were designed to develop and clarify the witness's testimony.

D. Cross-Examination

1. Defendant's right of confrontation

People v. Hendrickson, 45 P.3d 786 (Colo. App. 2001). "It is constitutional error to limit excessively a defendant's cross-examination of a witness regarding the witness's credibility. Nevertheless, the trial court has wide latitude to place reasonable limits on cross-examination based on concerns about such factors as confusion of the issues or interrogation that would be repetitive or only marginally relevant. The trial court must exercise its discretion to preclude inquiries that have no probative value, are irrelevant, or are prejudicial."

Kogan v. People, 756 P.2d 945 (Colo. 1988) (overruled on other grounds). "The right of a defendant in a criminal prosecution to confront adverse witnesses is a fundamental element in the panoply of constitutional protections afforded those accused of crimes. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Further, the exposure of a witness's motivation in testifying is a proper and important function of his constitutionally protected right."

Vega v. People, 893 P.2d 107 (Colo. 1995). Exclusion of cross-examination regarding internal incentives offered to DEA agents who obtain convictions of drug traffickers, which may reveal benefits that would accrue to witness upon defendant's conviction and thereby show his motive for testifying against defendant, was improper and violated defendant's constitutional right to confrontation; but here error harmless.

People v. Martinez, 987 P.2d 884 (Colo. App. 1999). Defendant's right to confrontation not violated by limiting cross-examination of prosecution witness because court did not excessively limit cross-examination regarding credibility and it properly considered witness's constitutional right against self-incrimination.

2. Scope of cross-examination

C.R.E. 611(b) limits cross-examination to the subject matter of direct examination and matters affecting the credibility of the witness, and gives the trial court discretion to permit inquiry into additional matters as if on direct examination. *See also* *People v. Loscutoff*, 661 P.2d 274 (Colo. 1983); *People v. Raffaelli*, 647 P.2d 230 (Colo. 1982).

People v. Chavez, 511 P.2d 883 (Colo. 1973). The trial court did not abuse its discretion in limiting cross-examination of a prosecution expert concerning certain tests not relevant to the issues raised on direct examination. The Colorado Supreme Court recognized that "[a] reasonably full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege of a party against whom he is called, and as a rule, the denial of this right constitutes prejudicial error. However, after the right has been substantially and fairly exercised, further cross-examination becomes discretionary with the trial court."

People v. Bell, 809 P.2d 1026 (Colo. App. 1990). The trial court did not abuse its discretion in precluding cross-examination of the victim regarding his viewing of photographs of the defendant immediately prior to his testimony at trial. "Although the right to confront and cross-examine witnesses is constitutionally guaranteed by the Sixth Amendment and Colo. Const. art. II, §6, this right is tempered . . . by the trial court's authority to prohibit cross-examination on matter wholly irrelevant and immaterial to issues at trial. Unless the restriction of cross-examination is so severe as to constitute denial of that right, the extent to which the cross-examination should be allowed rests within the trial court's discretion."

People v. McFee, 412 P.3d 848 (Colo. App. 2016). Prohibiting the defendant from cross-examining witness in murder trial whether he had been previously found incompetent to stand trial was not an abuse of discretion. The incompetency finding occurred three years before the victim's murder and four years before he testified as a witness, there was no evidence that the witness's ability to recall events or testify accurately was compromised because of incompetency finding, and the witness admitted during cross-examination that his memory was vague as to certain details based on his mental health problems.

People v. Tyer, 796 P.2d 15 (Colo. App. 1990). Scope and limits of cross-examination are vested to sound discretion of trial court and, absent a showing of abuse or manifest prejudice, trial court's limitation of cross-examination will not be disturbed on review.

Compare with *People v. Harris*, 762 P.2d 651 (Colo. 1988). In a case where identification was a critical issue, it was an abuse of discretion for the trial court to limit cross-examination regarding whether the defendant and a co-participant wore the same size jackets and whether the two traded clothes, inasmuch as such inquiries related to a material issue as well as to the credibility of the witnesses.

3. Broad latitude to show bias or motive to testify

Kogan v. People, 756 P.2d 945 (Colo. 1988) (overruled on other grounds). In a prosecution for multiple counts of sexual assault on a child which were allegedly committed by a schoolteacher

on school grounds, it was an abuse of discretion for the trial court to limit cross-examination of the school's principal regarding specific instances of different or inconsistent stories told by some of the children. The Colorado Supreme Court recognized that, although cross-examination may be properly limited under certain circumstances, the right should nevertheless be "liberally extended to permit a thorough inquiry into the motives of witnesses." The principal played a key role in the investigation of the allegations of abuse, and his behavior during the investigation had a material bearing on his credibility as a witness. The Court concluded that the proposed cross-examination related to the witness's possible bias, and the limitation imposed by the trial court amounted to denial of the defendant's right to effective cross-examination.

People v. Taylor, 545 P.2d 703 (Colo. 1976). "Cross-examination should be liberally extended to permit a thorough inquiry into the motives of witnesses. Within broad limits, any evidence tending to show bias or prejudice, or to throw light upon the inclinations of witnesses, may be permitted. The trial court must, however, exercise its sound discretion to preclude inquiries that have no probative force, or are irrelevant, or which would have little effect on the witness' credibility but would substantially impugn his moral character."

People v. Griffin, 867 P.2d 27 (Colo. App. 1993). The Court of Appeals held that, although a trial court may not excessively limit a defendant's cross-examination of a witness on issues relating to bias, prejudice or motive for testifying, the district court did not abuse its discretion in precluding cross-examination of a juvenile regarding his incarceration in another state on unrelated charges. The Court recognized that the defendant's right to conduct an effective cross-examination does not necessarily require unlimited cross-examination. In light of the extensive cross-examination of the witness regarding possible ulterior motives for testifying, the additional testimony sought to be elicited regarding the witness's place of incarceration would have been cumulative and of minimal probative effect.

People v. Mandez, 997 P.2d 1254 (Colo. App. 1999). Though defendant claimed extensive cross-examination was needed to impeach officer credibility, to establish the officers were biased, and to show investigation was not thorough, he did not establish he was prejudiced in his defense by trial court's restriction on cross-examination.

Kinney v. People, 187 P.3d 548 (Colo. 2008). Defendant's constitutional right of confrontation was violated when defendant was precluded from cross-examining a prosecution witness about a pending criminal trespass charge against her. Even if prosecution had not promised the witness a favorable disposition on the witness's misdemeanor charge in exchange for testifying, the prosecutor's prior assistance that had helped witness avoid going to jail on a pending charge of vehicular eluding made it reasonable to conclude that witness's willingness to testify might have been influenced by hope or expectation of leniency on the trespass charge.

Margerum v. People, 454 P.3d 236 (Colo. 2019). "[T]he defense must be permitted to question a prosecution's witness about [their] probationary status when the witness is on probation in the same sovereign as the prosecution."

People v. Golden, 140 P.3d 1 (Colo. App. 2005). The trial court committed reversible error in limiting defendant's cross-examination of the victim by excluding under the rape shield statute an inquiry into whether the victim was in a "committed romantic relationship" with a roommate at the time of the alleged assault. "The purpose of the inquiry was to establish that the victim had a motive to lie concerning whether the sex was consensual."

4. Rational basis for the question is required

People v. Simbolo, 532 P.2d 962 (Colo. 1975). The trial court properly sustained an objection to defense counsel's cross-examination of an 11-year-old statutory rape victim, where the questioning suggested that she had falsely accused another man of similar activity. "To cast an innuendo, such as was involved in this question, must be predicated upon a statement of fact by counsel (in chambers) in justification, which will show to the court that there was a rational and reasonable basis for the question, including source, or at least a good reason for lack of identification of source."

People v. Vialpando, 804 P.2d 219 (Colo. App. 1990). Defense may not ask a witness questions that cause doubt in jury's mind as to witness's credibility when there is no reasonable basis in fact for that interrogation.

People v. Lewis, 506 P.2d 125 (Colo. 1973). Good-faith basis required when questioning witness about prior felony conviction.

People v. Yascavage, 80 P.3d 899 (Colo. App. 2003). The trial court did not err in restricting defendant's cross-examination of the victim in a stalking case by excluding evidence of victim's past drug and alcohol use. The defendant provided no rationale connecting the victim's alleged past drug and alcohol use to the emotional distress she suffered as a result of defendant's action.

5. Cross-examination of the defendant

"As a general rule, a defendant who testifies in a criminal case may be cross-examined like any other witness regarding his or her credibility . . . . [Q]uestions to the defendant regarding the veracity of other witnesses, ['were they lying' questions,] should be disallowed, except when the only possible explanation for the inconsistent testimony is deceit or lying or when the defendant has opened the door by testifying about the veracity of other witnesses on direct examination." *People v. Liggett*, 114 P.3d 85 (Colo. App. 2005).

People v. Sallis, 857 P.2d 572 (Colo. App. 1993). The Court of Appeals held that the district court abused its discretion by requiring the prosecutor to conduct a cross-examination of the defendant out of the presence of the jury and by thereafter strictly limiting cross-examination of the defendant before the jury to the factual matters that were elicited on direct examination. The Court held that a defendant who voluntarily testifies on his own behalf necessarily waives his right against self-incrimination "to the extent necessary to permit effective cross-examination" and may be cross-examined by the prosecution in the same manner as any other witness. Although cross-examination

is generally limited to the subject matter elicited on direct examination, "this rule does not limit cross-examination to the same acts and facts to which a witness has testified on direct examination; rather, it must be liberally construed to permit cross-examination on any matter germane to the direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict, or rebut testimony given by the witness. In addition, the prosecutor must be permitted to inquire as to the witness' motives, intentions, bias, or prejudice." The Court of Appeals also disapproved of the procedure requiring the prosecution to first conduct a mock cross-examination of the defendant out of the presence of the jury. "Having waived the protection of the Fifth Amendment, a criminal defendant should not have the benefit of procedures that are not extended to other witness. He must take his chances, as any other witness, and can only expect the limitations on cross-examination which have been previously set forth in this opinion."

6. Character for truthfulness

People v. Knight, 167 P.3d 147 (Colo. App. 2006). "Under C.R.E. 608(b), a witness may be cross-examined about specific instances of conduct that are probative of the witness's character for truthfulness or untruthfulness. However, the trial court should exclude evidence that has little bearing on credibility, places undue emphasis on collateral matters, or has the potential to confuse the jury."

E. Re-direct Examination

People v. Ewing, 413 P.3d 188 (Colo. App. 2017). A detective-witness did not open the door to further cross-examination by defense counsel about the detective's alleged bias against the defendant, where neither the prosecutor nor the detective referenced a personal bias against defendant, and instead were discussing the informational bias that an interviewer might have after conducting an outside investigation, and defense counsel recognized as much at trial when he stated that the prosecution raised "interviewer/interrogative bias" for the first time during redirect.

People v. Taggart, 621 P.2d 1375 (Colo. 1981) (overruled on other grounds). Where defense counsel cross-examined a witness about a prior assault by the defendant for the purpose of showing her prejudice against the defendant, it was not error to permit the prosecutor to explore the matter on re-direct. "Once the defendant had injected this matter into the trial to buttress his defense, the prosecution had the right to question the witness about the matter in an effort to dispel any unfavorable innuendo thereby cast on the witness."

People v. Tenorio, 590 P.2d 952 (Colo. 1979). Where the defense elicited on cross-examination that a police officer approached the defendant with his gun drawn and pointed it at the defendant, it was proper to permit the prosecution to elicit on re-direct examination that the officer did so because he received a call on a person who was drunk and brandishing a weapon. "The defense 'opened the door' to this topic when it asked if the officer's gun had been drawn. The district attorney had a right to explain or rebut any adverse inferences which might have resulted from that cross-examination question."

Abeyta v. People, 400 P.2d 431 (Colo. 1965). Where defense counsel brought out on cross-examination that the witness had discussed the case with the police and the prosecutor prior to testifying, the prosecution was properly permitted to elicit on redirect that he had advised the witness to tell the truth. "The purpose of the district attorney's questioning was to rebut any unfavorable inferences which might have been drawn from the cross-examination. This he had an unqualified right to do."

People v. Espinoza, 989 P.2d 178 (Colo. App. 1999). Because defendant cross-examined witness about his written statements to police, defendant waived any objection to introduction of remainder of written statements by prosecution on re-direct.

F. Rebuttal

People v. Welsh, 80 P.3d 296 (Colo. 2003). "Rebuttal evidence is that evidence which tends to contradict the adverse party's case, whether it be challenging the testimony of a specific witness or refuting the adverse party's entire theory or claim. Unlike impeachment evidence, which is more focused on the credibility of an individual declarant, [r]ebuttal evidence goes to the heart of the case, reflecting upon the truth of facts upon which the other side relies. Thus, rebuttal evidence is essentially substantive in nature."

1. Admission of rebuttal testimony is within trial court's discretion

People v. Silburn, 807 P.2d 1167 (Colo. App. 1990) (overruled on other grounds). The Court of Appeals upheld the admission of rebuttal testimony of a nurse as to the likelihood that a person who had never previously injected herself with drugs could make a perfect puncture without missing the vein, to rebut the defendant's claim that he did not forcibly inject the victim with cocaine and that the victim, in fact, injected herself. In so holding, the Court recognized that the admission of rebuttal testimony rests largely within the discretion of the trial judge and is subject to review only for abuse of discretion resulting in prejudice. *See also* *Wertz v. People*, 418 P.2d 169 (Colo. 1966).

2. No specific foundation requirement

People v. Welsh, 80 P.3d 296 (Colo. 2003). "In order to present rebuttal evidence, the offering party necessarily must demonstrate that the evidence is relevant to rebut a specific claim, theory, witness or other evidence of the adverse party. By its very nature, then, rebuttal evidence generally should be admitted after the adverse party has presented its evidence. At the very minimum, a trial court must avoid making an admissibility determination before it has enough information to conclude whether such evidence is relevant to rebut the adverse party's case." Therefore, "where the prosecution seeks to rebut a defendant's claim or theory using evidence of the defendant's silence, it must clearly establish how that silence is relevant to that claim or theory. Here, in order for the prosecution to introduce evidence of the defendant's silence as rebutting her claim that she was legally insane, the prosecution must demonstrate how that silence renders more probable the fact that the defendant was legally sane at the moment she shot the victim."

3. Discovery considerations

Crim. P. 16 Part II(c) provides that the court may require the defendant to inform the prosecution as to the nature of any defense and the names of any witnesses to be called in support of that defense. Upon receipt of such information, the Rule requires the prosecution to inform the defendant of any additional witness which may be called to rebut the defense. It is significant to note that the Rule requires notification of rebuttal witnesses called to refute the given defense; it does not require notification of rebuttal witnesses in general. *See People v. Muniz*, 622 P.2d 100 (Colo. App. 1980). Upon the failure to comply with the notification requirement as set forth in Crim. P. 16, the trial court has the discretion to limit or preclude the rebuttal testimony or impose some other sanction. *See, e.g.*, *People v. Shannon*, 683 P.2d 792 (Colo. 1984).

4. Admissibility generally

"When the defense opens the door to a topic, the prosecution has a right to explain or rebut any adverse inferences that might have resulted from the questions." *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

People v. Rowerdink, 756 P.2d 986 (Colo. 1988). In a prosecution for arson, the Colorado Supreme Court held that the admission of rebuttal testimony to demonstrate that a certain type of beer bottle was breakable and could be used to construct an incendiary device was proper to rebut the defense theory that the bottles could not be used as incendiary devices. The Court recognized that the admission of rebuttal testimony is within the discretion of the trial court: "A party may introduce in rebuttal any competent evidence which explains, refutes, counteracts, or disproves the evidence put on by the other party, even if the rebuttal evidence also tends to support the party's case-in-chief." See *People v. Welsh*, 80 P.3d 296 (Colo. 2003).

Moore v. People, 467 P.2d 50 (Colo. 1970). Where the defendant took the stand and denied the presence of marijuana in his cell, and testified that he did not know what marijuana looked like and had no dealings with drugs, the prosecution was properly allowed to introduce a letter found in the defendant's cell, the clear import of which was to describe trafficking in illegal drugs.

a. Need not anticipate defense testimony

Deeds v. People, 747 P.2d 1266 (Colo. 1987). In a prosecution for sexual assault on a child in which the date of offense was alleged to be "on or about March 8," the defendant presented testimony suggesting that the assault could not have occurred on March 8. On rebuttal, the prosecution was properly permitted to introduce evidence establishing that the assault actually occurred on March 6. In affirming the defendant's conviction, the Colorado Supreme Court stated that "a party need not anticipate an opposing party's defense testimony, rather a party is entitled to introduce any competent evidence to explain, refute, counteract or disprove the proof of the other party. Here, in his case in chief, the defendant was able to demonstrate that the second sexual offense could not have occurred on March 8, 1982. On rebuttal, the prosecution properly attempted

to counteract this testimony, while striving to prove that the incident occurred on or about March 8, 1982."

5. Scope of rebuttal

Eckhardt v. People, 247 P.2d 673 (Colo. 1952). Where the prosecutor called three unendorsed witnesses for the asserted purpose of rebutting two specific matters testified to by the defendant, it was reversible error to permit the witnesses to give an eyewitness account of the entire altercation between the defendant and the victim. This testimony went far beyond the scope of legitimate rebuttal and gave the prosecution an opportunity to present one last version of the alleged crime.

Compare with *People v. Clark*, 547 P.2d 267 (Colo. App. 1975). In a sexual assault case where the defendant called two high school counselors to testify to his generally outstanding character, it was proper to permit the People to call an expert witness in rebuttal to testify that a person of 'outstanding character' could commit a violent sexual assault. The Court rejected the defendant's contention that rebuttal evidence should have been limited to "bad character" testimony: "The obvious purpose in eliciting testimony to show defendant's good character was to raise the inference that he would not commit a violent rape. The doctor's testimony merely tended to rebut that inference by showing that in the doctor's opinion there was no correlation between an individual's character and his propensity to commit violent acts. Since it is proper for the People to present testimony of bad character in response to evidence of good character offered by the defendant, we conclude that it is also proper to offer testimony to rebut the inferences to be derived from defendant's character evidence."

6. Rebuttal of collateral matters

The general rule is that a party may not present extrinsic (rebuttal) evidence to impeach a witness as to a collateral matter. *See, e.g.*, *McKee v. People*, 195 P. 649 (Colo. 1921). Matters relating to bias and motive, however, are not considered collateral matters, and if a witness denies such matters, the other party may be permitted to present extrinsic evidence to contradict the witness. *See* *People v. Taylor*, 545 P.2d 703 (Colo. 1976).

7. Rebutting specific assertions of fact

United States v. Benedetto, 571 F.2d 1246 (2nd Cir. 1978). Where the defendant, a meat inspector charged with accepting bribes, denied on cross-examination that he had taken a bribe from a named person on an occasion not charged, the prosecution was properly permitted to call the person in rebuttal to testify to the bribe. "Once a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case."

8. Rebuttal evidence showing other crimes

People v. Gutierrez, 622 P.2d 547 (Colo. 1981). Where the defendant put on an alibi defense, it was not error to permit the prosecution to rebut the alibi by showing that during the time period in question the defendant was committing a burglary and assault which were related to the charges for which he was on trial, but of which such counts had been severed. The Colorado Supreme Court stated that, since the defendant contended several victims and witnesses had falsely accused him, there was an increased importance for establishing why their encounter with the defendant during the time of the alibi was memorable.

People v. Enriquez, 597 P.2d 1048 (Colo. App. 1979). Where the defendant's wife testified that the defendant told her after his arrest that if any sexual assault had occurred it was the victim, and not he, that was the perpetrator, it was proper to permit the prosecution to present evidence in rebuttal that the defendant had sexually assaulted another woman in a similar manner some five weeks after the assault of the victim in the present case.

G. Surrebuttal

1. Admission largely within the discretion of the trial court

People v. Hansen, 551 P.2d 710 (Colo. 1976). A sexual assault victim testified that she was attacked by a clean-shaven man. The defense then put on testimony that the defendant had a beard around the date of the crime. In rebuttal, the prosecution presented testimony that the defendant did not have a beard on the date of the offense, and the defendant thereafter sought to introduce evidence that he had a beard several months prior to the date of the offense. In affirming the trial court's refusal to permit the surrebuttal testimony, the Colorado Supreme Court stated the general rule that "defendants should always be permitted to introduce as surrebuttal, evidence which tends to meet new matter introduced by the prosecution on rebuttal. Otherwise, it is within the discretion of the trial court to allow or deny surrebuttal." See *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. Harlan*, 8 P.3d 448 (Colo. 2000).

Whether to allow surrebuttal testimony lies within discretion of trial court. *People v. Saathoff*, 837 P.2d 239 (Colo. App. 1992).

2. Illustrative cases

People v. Terry, 720 P.2d 125 (Colo. 1986). In a prosecution of a chiropractor charged with sexually assaulting a patient during an examination, the defendant testified that the victim's knees were approximately six inches apart during his cursory visual examination. On rebuttal, the prosecution presented the testimony of a nurse who had recreated the examination as described by the defendant and who testified that it would have been impossible for the defendant to make the necessary visual observations for his examination with the victim's knees only six inches apart. On appeal of the trial court's denial of the defendant's request that the victim submit to another examination by a defense expert to respond to the prosecution's rebuttal, the Colorado Supreme Court held that the examination by the prosecution's expert, which was conducted ex parte and without notice to the defense, constituted new matter on rebuttal which the defense was entitled to

oppose, if possible. Therefore, since the defendant was denied the right to refute new matter presented in rebuttal he was entitled to a new trial.

People v. Brockman, 699 P.2d 1339 (Colo. 1985). A defense alibi witness testified that the defendant, a fellow employee, was at the shop on the night of the robbery. The witness also testified that he had been fired the next day. On rebuttal the prosecution proved that the witness had actually been fired a week and a half later. The trial court subsequently refused to permit the defendant to present surrebuttal evidence that the witness was working the night of the robbery, and the Colorado Supreme Court reversed, holding that "the defendant . . . had no need to present extrinsic evidence to corroborate the testimony of [the witness] during his case-in-chief, surrebuttal was the only means by which he could verify that [the witness] remembered the night [in question]."

Compare with *People v. Somerville*, 703 P.2d 615 (Colo. App. 1985). The defendant was charged with accosting a police officer and holding a knife to his throat. Although he did not testify on his own behalf, the defendant presented evidence that he suffered from poor impulse control because of the ingestion of alcohol and barbiturates. On rebuttal, the victim testified that the defendant did not appear intoxicated and did not smell of alcohol. The trial court thereafter properly refused to permit the defendant to testify on surrebuttal about his ingestion of drugs and alcohol before the incident because he had the chance to so testify during his case-in-chief and the prosecution had raised no new issues during its rebuttal so as to permit such surrebuttal.

28.3 IMPEACHMENT OF WITNESS

The Colorado Rules of Evidence that pertain to impeachment are 607, 608, 610, 611, 613, and 806. Statutes relevant to impeachment are §§ 16-10-201 and 13-90-101.

C.R.E. 607 permits the attack on the credibility of a witness by any party, including the party calling him. Additionally, leading questions may be used for the purpose of attacking credibility.

Any time a witness testifies, including the defendant, that person puts their credibility in issue, and if that witness testifies about another witness, including the defendant, the witness puts the credibility of the other witness, including the defendant, in issue. *See People v. Drake*, 748 P.2d 1237 (Colo. 1988); *People v. Segovia*, 196 P.3d 1126 (Colo. 2008).

A. Prior Inconsistent Statements

1. Statute and Colorado Rules of Evidence

The procedure and effect of impeaching a witness by means of prior inconsistent statements is governed by C.R.E. 613 and § 16-10-201 The foundational requirements of the Rule and the statute vary substantially. Although the two provisions appear on their face to conflict with one another, the Colorado Supreme Court has harmonized the provisions and interprets them as addressing separate aspects of trial practice relating to the use and admissibility of prior inconsistent statements for different purposes. *See Montoya v. People*, 740 P.2d 992 (Colo. 1987); *People v. Saiz*, 32 P.3d 441 (Colo. 2001).

C.R.E. 613 adopts the traditional requirement that, prior to impeaching a witness with a prior inconsistent statement, the examiner must direct the attention of the witness to the time, place, circumstances, and content of the statement. If the witness denies or does not remember making the statement, extrinsic evidence is then admissible to prove the statement. Should the witness admit making the prior statement, however, additional extrinsic evidence regarding the statement is inadmissible. The Rule has been construed to apply to situations in which a prior inconsistent statement is used only for impeachment purposes. *See Montoya v. People*, 740 P.2d 992 (Colo. 1987).

Section 16-10-201 does away with the common law requirement that a witness first deny or fail to remember the prior statement before it can be proved by extrinsic evidence. The statute also dispenses with the requirement that surprise or hostility be shown before a party may impeach its own witness. *See People v. Hawthorne*, 548 P.2d 124 (Colo. 1976). Moreover, in contrast to C.R.E. 613, the statute allows a prior inconsistent statement to be used as substantive evidence of the fact to which the statement relates. *See Montoya v. People*, 740 P.2d 992 (Colo. 1987).

Thus, in cases in which the foundational requirements of § 16-10-201 are satisfied, extrinsic evidence of a prior inconsistent statement is admissible for impeachment purposes as well as substantive proof of the content of the statement. In cases in which the statutory foundation cannot be established but the prior statement qualifies for admission pursuant to C.R.E. 613, the statement may be proven by extrinsic evidence only if the witness denies or cannot recall making it, and is admissible for impeachment purposes only. "[E]xtrinsic evidence of a prior inconsistent statement must still be 'otherwise competent' for the purpose for which it is offered," and that the trial court has broad discretion in determining the competence of proffered evidence.

People v. Saiz, 32 P.3d 441 (Colo. 2001). Reversing the Court of Appeals and upholding trial court's exclusion of videotaped statements made by defendant's minor child offered solely to impeach the child where the offered purpose had already been accomplished by other extrinsic evidence.

a. Section 16-10-201 is constitutional

People v. Pepper, 568 P.2d 446 (Colo. 1977). In a case where a witness, after claiming a lack of memory, was impeached with a prior statement pursuant to § 16-10-201, the Colorado Supreme Court rejected the defendant's assertion that such impeachment denied him the right to confront adverse witnesses. The Court held that when a witness takes the stand and is available for cross-examination, the admission of a prior inconsistent statement does not violate the constitutional right of confrontation.

People v. Mulligan, 568 P.2d 449 (Colo. 1977). The Colorado Supreme Court rejected the defendant's contention that § 16-10-201 is an unconstitutional encroachment by the legislature upon the exclusive power of the judiciary to prescribe court procedures.

b. Other relevant authorities

C.R.E. 801(d)(1)(A) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. Like § 16-10-201, the Rule dispenses with the common law foundational requirements and permits the admission of the statement as substantive evidence.

2. Prior inconsistent statements admissible for impeachment and substantive purposes under section 16-10-201

a. Foundation requirement

Section 16-10-201 permits the previous statement of a witness to be proven by "any otherwise competent evidence." The foundation for admissibility of such a statement is that (1) the witness be given an opportunity while testifying to explain or deny the statement or the witness still be available to testify in the trial; and (2) the statement purports to relate to a matter within the witness's own knowledge. When the foundational requirements have been satisfied, the prior inconsistent statement is admissible for all purposes. *See People v. Madril*, 746 P.2d 1329 (Colo. 1987).

People v. Jenkins, 768 P.2d 727 (Colo. App. 1988). A witness's written statement to police properly admitted under § 16-10-201 where it was inconsistent in several respects with his trial testimony, he was still testifying and had opportunity to explain prior statement, and written statement related to matters within witness's own knowledge.

People v. Stewart, 568 P.2d 65 (Colo. App. 1977). Prior inconsistent statement of witness who was not given opportunity to explain or deny statement while testifying was properly admitted where witness was still available to give further testimony at trial.

b. Exception to foundation requirement under C.R.E. 806

C.R.E. 806 states:

> When a hearsay statement, or a statement defined in C.R.E. 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to the requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement had been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

People v. Dore, 997 P.2d 1214 (Colo. App. 1999). Where defendant does not testify but elicits his own hearsay statements through another witness, the jury is permitted to hear impeachment

evidence that would have been admissible if the defendant had testified, including defendant's felony conviction.

c. Prior statement must be attributable to the witness

People v. Marlott, 552 P.2d 491 (Colo. 1976). The trial court properly refused to admit into evidence a police offense report that supposedly contained prior inconsistent statements of the victim, because the defense failed to establish that the inconsistencies in the report were attributable to the victim instead of the reporting officer. The victim, who signed the report, denied the statements, and the reporting officer did not testify. "Under similar circumstances where the source of the statement in an offense report was not readily apparent, we have held that such a refusal to admit the report was proper. See *People v. Lopez*, 511 P.2d 889 (Colo. 1973)."

d. Degree of inconsistency

Babcock v. People, 22 P. 817 (Colo. 1889). The prior statement need not be directly contradictory. A material variance or omission in the prior statement renders it admissible for purposes of impeachment (and, presumably, for substantive purposes under § 16-10-201).

One test, suggested by McCormick, is whether "the jury reasonably [could] find that a witness who believed the truth of the fact testified to would have been unlikely to make a prior statement of this tenor? Thus, if the previous statement is ambiguous and according to one meaning would be inconsistent with the testimony, it should be admitted for the jury's consideration." *See* McCormick, Evidence, § 34 (1972).

e. Witness acknowledges the prior statement

Section 16-10-201 does not specifically address the admissibility of prior inconsistent statements in situations in which the witness acknowledges having made the prior statement. Although admission of the statement under such circumstances would not be relevant for impeachment purposes and could not be proven with extrinsic evidence under C.R.E. 613, it nevertheless may be admissible as substantive evidence pursuant to § 16-10-201 if the proper foundation is established. *See People v. Jenkins*, 768 P.2d 727 (Colo. App. 1988) (holding that prior written statement properly admitted under § 16-10-201 even though witness admitted making prior statement). However, such evidence may be subject to exclusion under C.R.E. 403 as needlessly cumulative. *See People v. Saiz*, 32 P.3d 441 (Colo. 2001) ("Rule 403['s] 'probative value' may be calculated by comparing evidentiary alternatives.").

f. Witness claims no recollection of statement

People v. Madril, 746 P.2d 1329 (Colo. 1987). In a prosecution for sexual assault on a child, the prosecution was properly permitted to call a counselor who interviewed a friend of the child victim to testify as to statements made by the witness regarding the assault, where she had previously testified on direct examination that she did not recall certain events or making certain statements.

"In this case, the prosecution satisfied the foundation requirements of § 16-10-201 before presenting [the counselor's] testimony about the prior inconsistent statement made to him by the defendant's daughter. The defendant's daughter was available to give further testimony in the trial after the admission of her prior inconsistent statement and such statement purported to relate to a matter within her own knowledge." *See also People v. Pepper*, 568 P.2d 446 (Colo. 1977).

People v. Candelaria, 107 P.3d 1080 (Colo. App. 2004) (rev'd on other grounds). Statutory foundational requirements for admission of prosecution witness's prior inconsistent statements were met where witness testified at trial that she could not recall what defendant said on night of murder or why defendant wanted her to hold gun. The witness remained under subpoena while the detective testified, as to prior statements, that witness had told detective that defendant and accomplice were very angry, yelling, and going to seek revenge against individual who had shot at them, and witness had personal knowledge of prior statements.

g. Recanting witness

Montoya v. People, 740 P.2d 992 (Colo. 1987). The trial court properly admitted testimony of a social worker and a police officer regarding a child-victim's prior statements regarding the sexual assault in question, where those statements were clearly inconsistent with the victim's denial at trial that any such sexual assault had occurred. Given that the foundational requirements of § 16-10-201 were established, the Colorado Supreme Court held that the prior inconsistent statements were admissible for substantive and impeachment purposes.

People v. Aldrich, 849 P.2d 821 (Colo. App. 1992). Section 13-25-129 is not the exclusive means through which child hearsay testimony may be admitted. Here procedural requirements of § 13-25-129 were not implicated where child hearsay testimony met requirements for admission as prior inconsistent statement under § 16-10-201.

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). After a prosecution witness denied having told a police officer he had seen defendant in possession of murder weapon and further denied telling police he was afraid of defendant, the trial court properly permitted the officer's testimony that witness had stated he feared for his life if defendant discovered he talked to police. This testimony provided the jury with a possible explanation for witness's change in statements and reluctance to testify against the defendant. "Within broad limits, any evidence tending to show bias or prejudice, or to shed light on the inclinations of witnesses, may be permitted."

h. Witness refuses to testify

People v. Smith, 559 P.2d 221 (Colo. 1976). Where the co-defendant was called by the prosecution and refused to testify, even after being granted immunity, the trial court correctly refused to admit his prior statement. The Colorado Supreme Court stated that § 16-10-201 prefaces the admission of a prior statement upon its being inconsistent with the testimony of the witness at trial. Since the co-defendant made no statement at trial, the statute did not apply.

i. Prior statements relating to collateral matters

Neither § 16-10-201, C.R.E. 613, nor C.R.E. 801(d)(1)(A) specifically require that the prior statement relate to a matter in issue. It appears that a prior statement relating to a collateral matter may be admissible for substantive purposes under § 16-10-201, subject to the relevancy requirements of C.R.E. 401 - 403. *See People v. Schuett*, 819 P.2d 1062 (Colo. App. 1991) (rev'd on other grounds) (holding that collateral source evidence was properly admissible under § 16-10-201 even though defendant admitted making prior statements, where defendant was given opportunity to give further testimony and previous statement related to a matter within his own knowledge).

The general rule in Colorado, which would appear to apply to impeachment evidence admitted pursuant to C.R.E. 613, is that if a witness denies having made a prior inconsistent statement relating to matters which are not material to the issues at trial, the examiner is bound by the answer and may not present independent evidence of the prior statement. *See McKee v. People*, 195 P. 649 (Colo. 1921). A test of materiality in this context is set forth in *Mitsunaga v. People*, 129 P. 241 (Colo. 1912): "If the statement which it is alleged the witness made out of court was true, would the impeaching party be entitled to prove it in support of his case?"

Practice Tip: Statements tending to establish the bias or motive of a witness in testifying may generally be proved by extrinsic evidence. *See People v. Taylor*, 545 P.2d 703 (Colo. 1976).

j. Double hearsay issue

People v. Card, 596 P.2d 402 (Colo. App. 1979). A prosecution witness denied that the defendant had admitted to him that he (the defendant) had participated in a burglary. The witness then equivocated as to whether he had made such a statement to the detective. Under such circumstances, it was permissible to call the detective to testify to the witness's statement concerning the defendant's admission: "Testimony by one who has heard a statement, going to whether the statement was made, is not inadmissible hearsay. Thus, [the detective's] testimony as to [the witness's] prior inconsistent statement was properly admitted for the purpose of impeaching [the witness's] testimony and for the fact that [the witness] made the statement to [the detective]."

k. Other illustrative cases

People v. Golden, 140 P.3d 1 (Colo. App. 2005). The trial court erred by prohibiting the defense from inquiring into alleged sexual assault victim's prior inconsistent statements acknowledging a committed romantic relationship. This inquiry would not have been a fishing expedition into her past sexual conduct, but rather would have called her credibility into question as providing a possible alternative motive for telling her roommates that she had been assaulted. Her prior statements allegedly indicated that she had a romantic relationship with a female roommate, and thus such inquiry was not barred by rape shield statute where the theory of defense was that sex

was consensual, and any reference to sexual orientation of the alleged victim, which was prohibited by rape shield statute, could have been redacted.

3. Prior statements admissible for impeachment purposes only: C.R.E. 613

a. Foundation requirement

Before a witness may be impeached by means of a prior inconsistent statement pursuant to C.R.E. 613, the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement. If the witness denies or fails to remember the prior statement, extrinsic evidence is admissible to prove the prior statement. If the witness acknowledges making the prior statement, additional extrinsic evidence is inadmissible.

b. C.R.E. 613 applies for impeachment purposes only

Montoya v. People, 740 P.2d 992 (Colo. 1987). "C.R.E. 613 thus will have application in all civil cases and, as well, in criminal cases whenever the foundation requirements of § 16-10-201 for admissibility have not been satisfied but the statement nonetheless qualifies for admission for the limited purpose of impeaching the credibility of the witness."

c. Limiting instruction

In situations in which the defendant's statement is admissible for impeachment purposes only, the trial court should instruct the jury that the inconsistent statement may be considered for the limited purpose of testing the credibility of the witness. *See People v. District Court*, 580 P.2d 388 (Colo. 1978); C.R.E. 105.

d. Illustrative cases

Montoya v. People, 740 P.2d 992 (Colo. 1987). These are examples of situations in which prior inconsistent statements would be admissible solely under C.R.E. 613:

(1) a prior custodial statement of an accused taken in violation of his *Miranda* rights;
(2) a prior statement of an accused made in connection with a subsequently withdrawn guilty plea under C.R.E. 410;
(3) a prior statement consisting of a previously expressed opinion, rather than a matter within the witness's own knowledge, which is inconsistent with the witness's trial testimony; and
(4) a prior inconsistent statement in which the witness claimed a lack of recollection as to the fact in question but testifies to that fact at trial, since current recollection and prior lack of recollection are inconsistent.

People v. Dembry, 91 P.3d 431 (Colo. App. 2003). The trial court properly found that defendant's suppression hearing testimony, in which defendant admitted having sexual contact with victim, could be used to impeach defendant's sister's opinion that defendant's character was such that he would not have committed a sexual assault. The trial court did not prohibit defendant from calling

his sister as a witness, and defendant's suppression hearing testimony was not used during prosecutor's case-in-chief as evidence of guilt.

i. Voluntary statement in violation of *Miranda*

People v. Trujillo, 49 P.3d 316 (Colo. 2002). "A defendant's unwarned custodial statements may not be admitted against him as substantive evidence." Those statements may, however, be used to impeach the defendant if he testifies at trial. The statements may not be used either to rebut a defense theory or impeach a witness other than the defendant.

People v. Velarde, 586 P.2d 6 (Colo. 1978). "Voluntary statements obtained in violation of a defendant's *Miranda* rights, although inadmissible in the prosecution's case-in-chief, are admissible for impeachment purposes if the defendant testifies in a manner inconsistent with his prior statements. The shield of *Miranda* cannot be used as a license to commit perjury and avoid confrontation with prior inconsistent utterances."

Practice Tip: Where the prosecution seeks to impeach a witness other than the defendant by means of a statement obtained from that witness in violation of *Miranda*, the defendant does not have standing to assert that witness's rights and thereby preclude the impeachment evidence. *See People v. Cunningham*, 570 P.2d 1086 (Colo. 1977).

ii. Silence in the wake of *Miranda* warning

Impeachment of a defendant by means of post-arrest silence in the wake of *Miranda* warnings violates due process. *See* *People v. Cole*, 584 P.2d 71 (Colo. 1978). Likewise, although the constitutional considerations which render evidence of a defendant's post-arrest silence inadmissible do not extend to other witnesses, a witness's silence in the wake of *Miranda* warnings is generally considered inherently ambiguous and thus not inconsistent with later testimony. *Id.*

iii. Guilty plea later withdrawn

A defendant's inconsistent statements made at the providency hearing of a later withdrawn guilty plea may be used to impeach his credibility if the trial court determines, after an *in camera* hearing, that the statements are voluntary and trustworthy. Such impeachment is premised on the theory that a defendant is not entitled to pervert his right to testify into the right to commit perjury. *See* *Harris v. New York*, 401 U.S. 222 (1971). "Voluntariness" in this context means that the statement was not extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. When such statements are admissible, the fact that they were made in the course of a tendered and withdrawn plea is inadmissible for any purpose. *See* *People v. Cole*, 584 P.2d 71 (Colo. 1978); § 16-7-303.

C.R.E. 410 permits the use for impeachment purposes of voluntary and reliable statements made in court on the record in connection with later withdrawn pleas of guilty or *nolo contendere*.

iv. Statements made during sanity examination

Section 16-8-107(1)(c) provides that statements made by the defendant in the course of a court-ordered examination in connection with a plea of not guilty by reason of insanity or impaired mental condition may be used to impeach or rebut the defendant's testimony at the trial on the merits. Such impeachment is permissible regardless of whether the statements were obtained from a privately retained or court-appointed psychiatrist. *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980).

Pursuant to § 16-8-107(1)(c), "[i]f the defendant testifies in his or her own behalf upon the trial of the issues raised by the plea of not guilty [by reason of insanity] or at a sentencing hearing held pursuant to § 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony."

4. Putting prior inconsistent statements into context: the "Rule of Completeness"

People v. Thompson, 529 P.2d 1314 (Colo. 1975). After a prosecution witness had been impeached on cross-examination with a prior inconsistent statement made at the preliminary hearing, the prosecution was properly allowed on re-direct to rehabilitate the witness by showing additional excerpts of the witness's preliminary hearing testimony which explained and clarified the supposed inconsistency.

Compare with People v. DelGuidice, 606 P.2d 840 (Colo. 1979) (overruled on other grounds). After the defendant's testimony was impeached with a prior inconsistent statement from a tape recording made by the police after his arrest, the defense sought to introduce the entire tape recording to rehabilitate the defendant's testimony. The Colorado Supreme Court held, however, that the trial court properly denied the request, limiting admissibility to those portions of the tape recording that were relevant to rebut the prior inconsistent statement. "There is no rule which permits a party to introduce all portions of a document merely because the opponent has employed some portion of it to impeach a witness . . . . The rule of completeness, which does permit the further use of a document to explain the portion already in evidence as fully as the document may allow, does not extend to portions which are irrelevant to the initial use."

People v. Halstead, 881 P.2d 401 (Colo. App. 1994). The trial court properly admitted the entire contents of a videotaped statement of a witness as a prior consistent statement following an extensive cross-examination that constituted a general attack upon the witness' credibility. "The rule of completeness does not extend to permit the admission of irrelevant portions of a document to explain the portion already in evidence. Instead, the determination of how much of a prior consistent statement is admissible is based upon its relevance and probative use. Thus, if the impeachment or charge of fabrication goes only to specific facts, then only consistent statements regarding those specific facts are relevant and admissible. If, however, the impeachment was general and not limited to specific facts, the consistent statements are relevant and probative."

B. Prior Consistent Statements

A prior consistent statement is one method of rehabilitating a witness who has been impeached by a prior inconsistent statement or otherwise. The admissibility of such statements is governed by C.R.E. 801(d)(1)(B), which requires that (1) the declarant testify at trial and be subject to cross-examination concerning the statement; (2) the statement is consistent with the trial testimony; and (3) the statement is offered to rebut an expressed or implied charge of recent fabrication or improper influence or motive. If the foundational requirements are satisfied, the prior statement is not hearsay and is admissible for all purposes. *See People v. Eppens*, 979 P.2d 14 (Colo. 1999) (holding that prior consistent statements may be used for rehabilitation when witness' credibility has been attacked because such statements are admissible outside C.R.E. 801(d)(1)(B)). *See also People v. Allgier*, 428 P.3d 713 (Colo. App. 2018) (citing *Eppens*).

Under pre-C.R.E. case law, prior consistent statements were admissible only to rebut an inference of recent fabrication after the witness had been impeached with a prior inconsistent statement. *See People v. DelGuidice*, 606 P.2d 840 (Colo. 1979) (overruled on other grounds). However, C.R.E. 801(d)(1)(B) contains no requirement that the witness first be impeached with a prior inconsistent statement. An express or implied charge, by any means, of recent fabrication, improper influence or motive is sufficient.

People v. Ambrose, 907 P.2d 613 (Colo. App. 1994). There is no requirement that a witness first be confronted with a prior consistent statement before such a statement is used to rehabilitate the witness "because the witness has no need to explain, change, or qualify the present testimony or the prior statement[,]" nor is impeachment by means of a prior inconsistent statement a condition precedent to admission of a prior consistent statement provided a proper foundation is established for admission of such a statement pursuant to C.R.E. 801(d)(1)(B)).

> ***Practice Tip:*** C.R.E. 806 may also permit the use of prior consistent statements to support the credibility of a declarant whose hearsay statement has been admitted under C.R.E. 801(d)(2)(C), (B), or (E).

1. Scope of prior consistent statements

People v. Tyler, 745 P.2d 257 (Colo. App. 1987). In a prosecution for sexual assault, the victim was impeached with prior inconsistent statements she had made regarding details preceding the assault, as well as the assault itself. The defendant also called a police officer to testify regarding other inconsistent statements made by the victim. On cross-examination of the officer, the prosecution was properly allowed to elicit statements made to the officer by the victim that were consistent with her trial testimony. The Court of Appeals held that the means by which the defense utilized the victim's prior inconsistent statements implied that she had fabricated the assault story, which satisfied the foundational requirement of C.R.E. 801(d)(1)(B). The court also rejected the defendant's assertion that, when prior consistent statements are justified by a charge of recent fabrication, the consistent statements must directly relate to the alleged fabrication or prior inconsistent statement. "The determination of how much of a prior consistent statement is admissible is based on its relevancy and probative value. If the impeachment or fabrication goes

to specific facts, then only consistent statements regarding those specific facts are relevant and admissible. However, here, the defendant's defense of consent and impeachment of the victim implied she had fabricated or contrived the assault story. The impeachment was general and not limited to specific facts only. Therefore, the consistent statements in the police report detailing her story were relevant and probative."

a. Illustrative cases

People v. Page, 907 P.2d 624 (Colo. App. 1995) (overruled on other grounds). Defense counsel's cross-examination of a police officer emphasizing his destruction of rough notes pertaining to the defendant's confession amounted to an implied charge that the officer fabricated the defendant's confession, thereby permitting the introduction of a written police report pursuant to C.R.E. 801(d)(1)(B) that was prepared by the officer documenting the confession.

People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994). The trial court properly admitted the entire contents of a videotaped statement of a witness, even though the videotaped testimony was not subject to cross-examination and may have had a greater impact on the jury than other forms of prior consistent testimony, where the defendant made a general attack on the witness's credibility that implied recent fabrication.

People v. Eppens, 979 P.2d 14 (Colo. 1999). When witness's credibility is attacked, prior consistent statements may be used for rehabilitation because such statements are admissible outside C.R.E. 801(d)(1)(B).

People v. Johnson, 987 P.2d 855 (Colo. App. 1998). Trial court properly admitted prior consistent statements of two witnesses—one witness's statement was made before witness was arrested and voluntarily approached the police, and co-defendant's statement was made before co-defendant was charged or any plea bargain made.

People v. Allgier, 428 P.3d 713 (Colo. App. 2018). Trial court allowed a sergeant to testify to a witness's statements to him during an interview after defense counsel accused the witness of fabricating details on the stand, and held "[w]hen a witness's credibility has been attached, how much of a prior consistent statement is admissible turns on the scope of the attack. If the witness's testimony is attacked based on specific facts, only prior consistent statements regarding those facts are admissible. But when the attack is more general, the jury may hear all relevant facts, including consistent and inconsistent statements."

2. Includes statements made before or after the alleged fabrication

People v. Andrews, 729 P.2d 997 (Colo. App. 1986). The Court of Appeals held that a prior consistent statement made by a witness during the preliminary hearing was admissible pursuant to C.R.E. 801(d)(1)(B), even though the statement was made after a prior inconsistent statement to the police shortly after the offense. "We note that the plain language of C.R.E. 801(d)(1)(B) does not limit use of consistent statements solely to those made prior to the inconsistent statement. In

People v. Koon, 724 P.2d 1367 (Colo. App. 1986), we held that the rule encompasses statements made both before and after the time of the alleged impropriety or the time when the supposed motive to falsify arose."

Compare with *People v. Segura*, 923 P.2d 266 (Colo. App. 1995). The Court of Appeals declined to follow the rational of Koon that permits the introduction of prior consistent statements made before or after the alleged fabrication, holding instead that C.R.E. 801(1)(d)(B) permits the admission of prior consistent statements only if those statements were made before the alleged fabrication or improper influence or motive.

People v. Johnson, 987 P.2d 855 (Colo. App. 1998). It was proper to admit prior consistent statements of two witnesses where court found statements were made before witnesses were motivated to lie.

3. Declarant must be subject to cross-examination

People v. Avery, 736 P.2d 1233 (Colo. App. 1986) (overruled on other grounds). The trial court properly refused to permit the defendant's cellmate to testify concerning statements the defendant made to her during the course of the trial. The Court of Appeals held that, to qualify under C.R.E. 801(d)(1)(B), the declarant must testify at the trial and be subject to cross-examination concerning the statement. At the time the defendant sought her cellmate's testimony, the defendant had not yet testified and could still invoke her constitutional right not to testify. "Therefore, the cellmate's testimony did not satisfy the criteria of the rule because the defendant [declarant] was not available to the prosecutor for cross-examination concerning the possibility of recent fabrication or improper influence or motive."

C. Prior Felony Conviction

1. Section 13-90-101

This statute provides: "In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness. The fact of such conviction may be proved like any other fact, not of record, either by the witness himself, who shall be compelled to testify thereto, or by any other person cognizant of such conviction as impeaching testimony or by any other competent testimony. Evidence of a previous conviction of a felony where the witness testifying was convicted five years prior to the time when the witness testifies shall not be admissible as evidence in any civil action."

a. Statute held constitutional

Section 13-90-101 has consistently withstood constitutional attack on several grounds:

The statute is not violative of the accused's right to due process and does not impermissibly chill the exercise of his right to testify on his own behalf. *People v. Henry*, 578 P.2d 1041 (Colo. 1978); *People v. Montez,* 589 P.2d 1368 (Colo. 1979).

The statute does not deny due process because it precludes the exercise of judicial discretion in admitting prior felony convictions for purposes of impeachment. *People v. Meyers*, 617 P.2d 808 (Colo. 1980).

The statute does not violate equal protection by permitting impeachment by a prior felony conviction more than five years old in a criminal case, while denying such impeachment in a civil case. *People v. Davis*, 516 P.2d 120 (Colo. 1973); *People v. Velarde*, 586 P.2d 6 (Colo. 1978).

b. Application of statute not discretionary

The Colorado Supreme Court has consistently interpreted § 13-90-101 as not granting trial court's discretion to foreclose the use of prior felony convictions to impeach a witness's testimony, including defendant's. *People v. Hubbard*, 519 P.2d 951 (Colo. 1974); *People v. Yeager*, 513 P.2d 1057 (Colo. 1973); *People v. Velarde*, 586 P.2d 6 (Colo. 1978).

2. Remoteness goes to weight

A party may not be precluded from impeaching a witness by means of a prior felony conviction because of the remoteness of the prior conviction. Remoteness goes to weight, not to the admissibility of the impeachment. *People v. Yeager*, 513 P.2d 1057 (Colo. 1973); *People v. Davis,* 516 P.2d 120 (Colo. 1973).

3. What constitutes a "felony conviction" for impeachment purposes

a. Nolo *contendere* plea

Lacey v. People, 442 P.2d 402 (Colo. 1968). "We elect to follow what we deem to be not only the majority rule, but the rule which we feel is the better one, namely, that a conviction based on a plea of nolo contendere is within the meaning of [felony conviction] as it is used in [the predecessor to § 13-90-101]." *See also* *Reynolds v. People*, 471 P.2d 417 (Colo. 1970).

b. Juvenile conviction

"A Colorado juvenile delinquency adjudication may not be used for impeachment purposes because such an adjudication does not occur in a criminal proceeding and, therefore, is not a felony conviction." *People v. D'Apice*, 735 P.2d 882 (Colo. App. 1986).

People v. Armand, 873 P.2d 7 (Colo. App. 1993). In the prosecution of a juvenile as an adult in district court following transfer of the case from juvenile court, the district court erred in ruling that evidence of the juvenile's prior adjudications for sexual assaults upon children were admissible for impeachment purposes should the juvenile testify on his own behalf at trial. While the Children's Code permits impeachment of any witness by means of prior adult felony

convictions or juvenile adjudications in proceedings instituted in juvenile court, *see* § 19-2.5-905(2), the application of such procedures are limited solely to proceedings in juvenile court. If jurisdiction is transferred and criminal proceedings are instituted in district court, the same protections afforded to adult defendants apply to the juvenile, thereby precluding impeachment by means of prior juvenile adjudications even though the case was initiated pursuant to the Children's Code.

c. Finality of conviction

A prior felony conviction resulting from a guilty verdict may be used for impeachment after the motion for new trial has been denied, even though the defendant has not been sentenced. *See People v. Johnson*, 560 P.2d 465 (Colo. 1977). Likewise, a prior felony conviction resulting from a plea of guilty may be used for impeachment even though the defendant has not yet been sentenced. *See People v. Baca*, 610 P.2d 1083 (Colo. App. 1980).

People v. Silva, 987 P.2d 909 (Colo. App. 1999). It was proper to allow impeachment of defendant with his prior plea to felony drug offense even though proceedings in that case were suspended until completion of rehabilitation program upon court's finding that defendant was "person in need of treatment" under then existing § 18-18-404(2).

d. Case pending appeal

People v. McNeely, 68 P.3d 540 (Colo. App. 2002). A witness's credibility may be impeached with a prior conviction even though the direct appeal of that conviction is pending. Once a trial court has entered a judgment of conviction, the conviction can be used for impeachment purposes.

e. Reclassification of felony

People v. Anders, 559 P.2d 239 (Colo. App. 1976). The prosecution was properly allowed to impeach the defendant with a 1970 felony conviction for possession of marijuana which, at the time of trial, would have been a misdemeanor: "Thus, we hold that, for purposes of the impeachment statute, the classification of a felony hinges on its classification at the time of the commission of the offense."

f. Expungement

A witness may not be impeached by a prior felony which has been expunged. *See People v. Wright*, 678 P.2d 1072 (Colo. App. 1984).

g. Military convictions

Apodaca v. People, 712 P.2d 467 (Colo. 1985). In light of the distinctive characteristics of military offenses, the question of whether military convictions qualify as felony convictions under § 13-90-101 is resolved by a two-part test: "(1) whether the maximum penalty applicable to the military offense is substantially equivalent to the punishment reserved for a felony offense in Colorado;

and (2) whether the same criminal conduct, if committed in Colorado, would be classified as a felony under Colorado law." *See also* *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983).

4. Inquiry into felony conviction: procedure

People v. Lewis, 506 P.2d 125 (Colo. 1973). "Although a prosecutor may, on cross-examination, ask a witness if he has been convicted of a felony, nevertheless, he must ask the question in good faith. When prosecutors are about to impeach witnesses by reason of former felonies, they should advise the judge on what background they will propound the question. The judge must then determine, within his discretion, whether good faith is present."

People v. Robles, 514 P.2d 630 (Colo. 1973). It was reversible error to ask defendant about prior felonies when prosecutor knew there were none.

a. Form of the question

People v. Drake, 748 P.2d 1237 (Colo. 1988). The defendant acknowledged on cross-examination that he had been convicted of two prior felonies, and in response to the prosecutor's question, "what are they?" he disclosed an extortion case that had in fact been a juvenile proceeding. Although the prosecutor's question was inartfully formed, the question and response did not constitute reversible error: "In the absence of an objection, a lack of good faith will not be presumed on appeal, and a defendant seeking to reverse a conviction because of improper prosecutorial inquiry into prior criminal conduct must demonstrate prejudice. The record here does not support the defendant's assertion that, in light of the prosecutor's knowledge of the defendant's criminal record, the question 'What are they?' was proposed in bad faith."

5. Scope of inquiry into prior felony convictions

It is not permissible to attempt to elicit the facts of the prior felony conviction. See *People v. Miller*, 529 P.2d 648 (Colo. 1974) (holding it was improper to ask defendant charged with murder (a shooting) when the defendant's prior conviction for assault with a deadly weapon involved a gun); *People v. McGhee*, 677 P.2d 419 (Colo. App. 1983) (holding that details of prior conviction irrelevant). The scope of inquiry into the facts of a prior felony conviction is generally limited to what crime the conviction was for, when it occurred, and whether it was by plea or by trial. *People v. Bueno*, 516 P.2d 434 (Colo. 1973); *Candelaria v. People*, 493 P.2d 355 (Colo. 1972).

People v. Huynh, 98 P.3d 907 (Colo. App. 2004). The trial court properly precluded the defense from eliciting details of a witness's felony conviction for smuggling marijuana; the details were immaterial to witness's bias or motivation for testifying.

It is likewise improper to ask the defendant whether the prior conviction was for the offense with which he was originally charged. See *People v. Huguley*, 568 P.2d 1177 (Colo. App. 1977) (rev'd on other grounds). It is also improper to inquire whether the defendant is currently serving time for the offense. *People v. Hardy*, 677 P.2d 429 (Colo. 1983).

If the witness equivocates as to the fact or nature of a prior felony conviction, reasonable latitude is permitted to elicit the nature of that conviction. *Eachus v. People*, 238 P.2d 885 (Colo. 1951); *Routa v. People*, 192 P.2d 436 (Colo. 1948) (overruled on other grounds). It is permissible to elicit the nature of a defendant's prior felony conviction even when it was for an offense that is similar to the offense charged. See *People v. Medina*, 583 P.2d 293 (Colo. App. 1978).

People v. Fears, 962 P.2d 272 (Colo. App. 1997). Where then defendant allowed to establish existence of prior felony convictions and given wide latitude to cross-examine witness on immunity received for testifying, including charge and sentence concessions in other jurisdictions, his right of confrontation was not violated, even though he was not allowed to ask about underlying plea agreements to prove witness was experienced in plea bargaining across jurisdictions.

Practice Tip: Unless the facts underlying the felony conviction are probative of the witness's bias or motivation for testifying, you will be precluded from bringing in those facts unless you file a 404(b) motion and the court grants your motion.

a. Inquiry re: probationary status

People v. Melanson, 937 P.2d 826 (Colo. App. 1996). The trial court did not abuse its discretion in limiting cross-examination of a jailhouse informant regarding his current probationary status. The Court of Appeals held that, although the probationary status of a witness may be relevant to establish the witness' bias or motive for testifying, "a trial court has wide latitude to limit cross-examination based upon concerns about harassment, prejudice, confusion of the issues, safety of the witness, or repetitive or marginally relevant interrogation." Here, where the witness had been extensively cross-examined regarding his prior felony convictions and any benefits he expected to receive for testifying, and where his probation was in another state such that Colorado prosecutors had no authority to affect his probationary status, the trial court's limitation of inquiry into the current status of his probation was within its discretion.

6. Validity of prior felony conviction

People v. Meyers, 617 P.2d 808 (Colo. 1980). The defendant's burglary conviction was reversed on grounds that he was improperly impeached with a constitutionally invalid prior felony conviction. "We now hold that where the defendant does make a prima facie showing of constitutional invalidity, the prosecution's burden is to establish by a preponderance of evidence the constitutional validity of a prior felony conviction before that conviction may be used for impeachment purposes."

a. Timely ruling on validity required

Apodaca v. People, 712 P.2d 467 (Colo. 1985). Although the defendant filed a motion in advance of trial to suppress evidence of a prior felony conviction on grounds that it was unconstitutionally obtained, the trial court refused to rule on the motion in advance of the defendant taking the stand. In holding that refusal to timely rule on the motion impermissibly burdened the defendant's

exercise of his constitutional right to testify on his own behalf, the Colorado Supreme Court stated: "A timely judicial ruling on a defendant's motion to suppress prior conviction evidence for the purpose of impeachment serves the vital function of providing the defendant with the meaningful opportunity to make the type of informed decision contemplated by the fundamental nature of the right to testify in one's own defense. The trial court deprived the defendant of that opportunity when it refused to rule on the defendant's motion to prohibit prosecutorial use of prior conviction evidence until such time as the prosecution actually sought to impeach the defendant with such evidence."

b. Subject to harmless error analysis

While impeachment of a defendant by an invalid felony conviction is constitutional error, it does not require reversal where the error is found to be harmless beyond a reasonable doubt. *See* *Apodaca v. People*, 712 P.2d 467 (Colo. 1985); *People v. Neal*, 528 P.2d 220 (Colo. 1974). Among the factors considered in determining whether the error was harmless are the strength of the People's case and the importance of the defendant's credibility to the jury's resolution of the facts.

7. Impeachment of a defendant charged with habitual criminal counts

People v. Chavez, 621 P.2d 1362 (Colo. 1981). The testimony of a defendant charged with habitual criminal counts may be impeached by showing prior felony convictions which also comprise the basis for the habitual criminal counts. However, when the defendant's testimony is so impeached, the trial court should instruct the jury to consider the defendant's admissions to the prior convictions only as they affect credibility. Further, the prosecution may not rely on the defendant's admission to the prior convictions as proof of the habitual criminal counts, but must prove those counts beyond a reasonable doubt by evidence independent of the defendant's admission. *See also* *People v. Walker*, 666 P.2d 113 (Colo. 1983) (applying Chavez retroactively).

8. Impeachment of accomplice

People v. Craig, 498 P.2d 942 (Colo. 1972). While an accomplice, co-defendant, or co-conspirator may be impeached by prior felony convictions, it is improper for the prosecution to elicit the fact that he was convicted of charges arising out of the same transaction which serve as a basis for the charges against the defendant.

But see *People v. Gallegos*, 950 P.2d 629 (Colo. App. 1997). The court did not err by admitting for impeachment purposes evidence that defendant's friend pleaded guilty to menacing with deadly weapon and conspiracy to commit first degree assault and few details concerning accomplice's plea. This Court of Appeals distinguished Craig as not citing § 13-90-101 and not suggesting evidence introduced to impeach credibility of co-conspirator's testimony.

a. May be admissible for other purposes

People v. Brunner, 797 P.2d 788 (Colo. App. 1990). While the guilty plea or conviction of a co-defendant or accomplice may not be used as substantive evidence of another's guilt, such evidence may be admissible for other purposes. "Such evidence may be used to show acknowledgement by the accomplice of participation in the offense. Further, evidence of an accomplice's plea agreement is relevant to impeach the credibility of the accomplice. It is also proper for the prosecution to elicit testimony of an accomplice's guilty plea to blunt an expected attack on the credibility of the accomplice as a witness." When a conviction is admitted for such purposes, the court must instruct the jury as to its limited purpose and that it may not be used as substantive evidence of the defendant's guilt.

b. Impeachment by a co-defendant

People v. Lesney, 855 P.2d 1364 (Colo. 1993). The district court properly allowed a co-defendant to impeach the defendant with a prior felony conviction, even though the prior felony conviction was not disclosed to the defendant by the prosecution. "[T]he Crim. P. 16 sanction for nondisclosure applies only against the prosecution, not against a co-defendant. Crim. P. 16 recognizes that a defendant may be in danger of having his or her constitutional right to testify hampered by the prosecution's failure to disclose prior convictions. A co-defendant in a joint trial should be able to use prior felony convictions to impeach the testimony of a defendant who chooses to testify (and perhaps attempts to portray the co-defendant as the more, or solely, culpable party). Such a co-defendant may have his or her right to a complete defense impaired by not being allowed to impeach such a testifying defendant's credibility."

9. Impeachment via felony convictions when defendant elicits own hearsay statements

Prior felony convictions are admissible for impeachment purposes, where a defendant does not testify at trial, but he or she elicits his or her own hearsay statements through another witness. *People v. Dore*, 997 P.2d 1214 (Colo. App. 1999) (relying on C.R.E. 806).

But see *People v. McLaughlin*, 530 P.3d 1206 (Colo. 2023). "[A] defendant-declarant's statements introduced under the rule of completeness to cure a misleading impression are not hearsay under C.R.E. 801(d)(2)(A). Because C.R.E. 806, by its own terms, does not reference these statements, the People may not use their admission as a basis for impeaching the defendant-declarant's credibility."

10. Limiting instruction

When evidence of a prior felony conviction has been admitted to impeach the credibility of a witness, a limiting instruction should be given, and must be given when the defendant's credibility is so impeached. *See Lee v. People*, 460 P.2d 796 (Colo. 1969).

The appropriate instruction is set forth in COLJI-Crim. D:06.

D. Character for Truthfulness under C.R.E. 608

C.R.E. 608(a) permits the credibility of a witness to be attacked or supported by opinion or reputation evidence. However, the evidence is limited to character for truthfulness or untruthfulness and evidence of truthfulness is only admissible after the character for truthfulness of a witness has been attacked.

"Bolstering testimony is generally improper. Bolstering testimony is improper when it relates to the witness's truthfulness on a specific occasion and when the foundational requirements of C.R.E. 608(a) are not met." *People v. Renfro*, 117 P.3d 43 (Colo. App. 2004) (citation omitted). Although bolstering testimony is normally inadmissible, where the defense on cross-examination creates the impression that an investigation was less than thorough, the defense has opened the door and the prosecution should be allowed the opportunity to dispel that impression. *Id.*

C.R.E. 608(b) prohibits the use of extrinsic evidence of specific instances of conduct to attack or support a witness's character for truthfulness, except for conviction of a crime as provided under § 13-90-101 However, specific instances of conduct probative of truthfulness or untruthfulness may be inquired into on cross-examination of the witness concerning that witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

*People v. Knigh*t, 167 P.3d 147 (Colo. App. 2006). "Under C.R.E. 608(b), a witness may be cross-examined about specific instances of conduct that are probative of the witness's character for truthfulness or untruthfulness. However, the trial court should exclude evidence that has little bearing on credibility, places undue emphasis on collateral matters, or has the potential to confuse the jury."

People v. Segovia, 196 P.3d 1126 (Colo. 2008). "Extrinsic evidence is evidence not contained in the source before the court, but which is available from other sources. Thus, where a witness is testifying, her answer to any question is intrinsic evidence, while the admission of any documents or calling of other witnesses constitutes extrinsic evidence.".

E. Impeaching with underlying facts for certain misdemeanor offenses

Unlike felony convictions, evidence of a misdemeanor conviction is not relevant to the issue of credibility. The underlying facts of the misdemeanor offense may however be probative to the issue of credibility. *See People v. Segovia*, 196 P.3d 1126 (Colo. 2008).

People v. Segovia, 196 P.3d 1126 (Colo. 2008). "Colorado courts have held that the following instances of conduct are probative of the witness's truthfulness: providing false information to a police officer, e.g., *People v. Garcia*, 17 P.3d 820 (Colo. App.2000); intentionally failing to file tax returns, *People v. Kraemer*, 795 P.2d 1371 (Colo. App. 1990); and misrepresenting financial information to obtain a loan,. In contrast, Colorado courts have excluded acts of violence, *People v. Ferguson*, 43 P.3d 705 (Colo. App. 2001); instances of drug use, *People v. Saldana*, 670 P.2d 14 (Colo. App. 1983); and bigamy, *People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996), because those acts are not probative of truthfulness."

People v. Segovia, 196 P.3d 1126 (Colo. 2008). Although shoplifting is a specific instance of conduct that is probative of truthfulness, a trial court can "exercise its discretion to exclude an act of shoplifting if it finds the act inadmissible for other reasons. Furthermore, our holding in no way suggests a misdemeanor conviction for shoplifting is probative of truthfulness. Rather, only the underlying circumstances surrounding the act are admissible pursuant to C.R.E. 608(b)."

Section 13-90-101 by its express terms applies to impeachment by means of prior felony convictions. It is generally true that evidence of prior misdemeanor convictions is not admissible for impeachment purposes. However, in some situations, such as when a party seeks to establish that a witness habitually utters untrue statements, the circumstances surrounding a misdemeanor conviction may be disclosed to the jury. *See People v. Drake*, 748 P.2d 1237 (Colo. 1988).

People v. Metcalf, 926 P.2d 133 (Colo. App. 1996). The district court properly admitted evidence of the defendant's prior misdemeanor conviction for custodial interference to contradict his direct testimony that he had no prior arrest record. The Court of Appeals recognized that, while evidence of prior misdemeanor convictions is generally inadmissible to impeach the general credibility of a witness, such evidence may be admissible for other purposes. "Evidence of a prior arrest, criminal charge, or conviction may be admitted for impeachment purposes when the witness on direct examination has given specific contrary testimony which, if uncontradicted, would likely result in the trier of fact receiving a false or misleading account of a matter which a witness has placed into evidence."

People v. Gillis, 883 P.2d 554 (Colo. App. 1994). The district court properly admitted evidence relating to the defendant's prior misdemeanor conviction for providing false information to the police in an unrelated case in order to establish the defendant's character for truthfulness or untruthfulness pursuant to C.R.E. 608(b). "As a general rule, evidence of a prior misdemeanor conviction is not admissible for purposes of impeachment; however, 'C.R.E. 608(b) provides that a court, in its discretion, may allow evidence of specific instances of conduct to be inquired into on cross-examination if probative of truthfulness or untruthfulness.' *People v. Armstrong*, 704 P.2d 877 (Colo. App. 1985). Here, the prosecutor was inquiring into a specific occasion when defendant and his wife had given false statements to law enforcement officers. There was no effort on the part of the prosecutor to put on evidence of the actual misdemeanor convictions which resulted from the prior specific instances of lying. Under these circumstances, we find no abuse of discretion in the trial court's allowing the testimony relating to these discrete instances of untruthfulness."

F. Impeachment by Showing Bias, Motive or Interest

Colorado courts consistently extend parties broad latitude in examining and impeaching witnesses for bias, motive, or interest. Such impeachment may occur on cross-examination of adverse witnesses, or on direct examination pursuant to C.R.E. 607, which permits impeachment of a party's own witness without a showing of hostility or surprise.

28. WITNESSES

1. Relevancy

People v. Taylor, 545 P.2d 703 (Colo. 1976). In a prosecution for first degree assault upon a police officer, the Colorado Supreme Court held that the defense was properly permitted to cross-examine the officer regarding his alleged racial prejudice: "Cross-examination should be liberally extended to permit a thorough inquiry into the motives of witnesses. Within broad limits, any evidence tending to show bias or prejudice, or to throw light upon the inclinations of witnesses, may be permitted. The trial court must, however, exercise its sound discretion to preclude inquiries that have no probative force, or are irrelevant, or which would have little effect on the witness' credibility but would substantially impugn his moral character."

People v. Couch, 500 P.2d 967 (Colo. 1972). It was improper to cross-examine witness regarding alleged homosexual relationship with third party where witness had already been impeached as to his hostility toward defendant and additional cross-examination regarding homosexuality was not relevant to show bias, interest, or motive and was intended only to discredit and impugn witness's moral character.

2. Offer of proof required when relevancy is not clear

Johnson v. People, 468 P.2d 745 (Colo. 1970). The defense was properly precluded from questioning a witness regarding a meretricious relationship between the husband of the key prosecution witness and the sister of the defendant, where the defendant's offer of proof failed to demonstrate how the results of such questioning would have impeached the testimony of the witness. "Without any foundation having been laid for the question and without any offer of proof to indicate otherwise, the question sought to bring out an irrelevant fact. Unless the relevancy of impeaching evidence is plain, it should not be admitted."

People v. Simmons, 513 P.2d 193 (Colo. 1973). Where there was no proof that the police officer who investigated the vehicular homicide had actual knowledge of a pending lawsuit against the city by accident victims (based on alleged negligence of other police officers), knowledge of the pending lawsuit was irrelevant to the issue of bias and was properly excluded: "There was no offer of proof made that the police officer whose credibility defendant's counsel sought to attack had knowledge of any impending suit against the City. In the absence of such actual knowledge on the part of the police officer, under the circumstances, the question was clearly irrelevant to the issue of bias or prejudice on the part of the witness. Bias is a state of mind and only those demands which can influence the mind at the moment of testifying are relevant to a demonstration of bias."

People v. Atencio, 565 P.2d 921 (Colo. 1977). The Colorado Supreme Court held that it was not plain error for the trial court to preclude cross-examination of a police officer regarding the officer's discharge from the police department and criminal charges pending against him in an unrelated incident. Since no offer of proof was made at trial to justify the proposed cross-examination to demonstrate its relevance to the officer's bias or motive, the Court refused to consider that rationale on appeal.

3. Pending charges against a witness: promise of leniency

Although evidence of pending charges and misdemeanor convictions is not admissible as bearing on a witness's general credibility, *see, e.g.*, *People v. Robles*, 514 P.2d 630 (Colo. 1973), "[t]his rule was never intended to prohibit testimony tending to show motive, bias, prejudice, or interest of a witness in the outcome of the trial." *People v. King*, 498 P.2d 1142 (Colo. 1972). The exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *See Kogan v. People*, 756 P.2d 945 (Colo. 1988) (overruled on other grounds).

a. Pending charges

People v. King, 498 P.2d 1142 (Colo. 1972). The Colorado Supreme Court held that the trial court committed prejudicial error in excluding defense evidence, offered to show the motive of a paid informant witness, that the witness had pending criminal charges against him and that the charges might not be pursued by reason of his testimony on behalf of the People. "[A] trial court should allow broad cross-examination of a prosecution witness with respect to the witness' motive for testifying, especially where such witness is charged with or threatened with criminal prosecution for other alleged offenses not connected with the case in which he testifies, and where his testimony against the defendant might be influenced by a promise of, or hope or expectation of, immunity or leniency with respect to the pending charges against him, as a consideration for testifying against the defendant."

Compare with *People v. Atencio*, 565 P.2d 921 (Colo. 1977). The trial court did not commit plain error in foreclosing defense cross-examination regarding pending charges against a police officer-witness in an unrelated incident in the absence of an offer of proof establishing relevance of the inquiry to the officer's motive to testify in favor of the prosecution: "We reaffirm the general rule denying the competency of evidence of mere arrests or pending charges against a witness, without more, for the reason that want of credibility may not logically be inferred from naked accusations of which the law presumes a person innocent until convicted."

b. Pending misdemeanor charges

People v. Jones, 675 P.2d 9 (Colo. 1984). The trial court erroneously refused to permit the defense from cross-examining a prosecution witness regarding pending misdemeanor charges arising from the fight with the defendant, a prior misdemeanor menacing conviction, and a prosecutorial motion to revoke a deferred judgment and sentence on felony theft. The Court recognized the need for probing inquiry into a witness's partiality when the witness has been charged with criminal offenses and his testimony might be influenced by some expectation of leniency from the prosecution. "The restrictive nature of the court's ruling prevented defense counsel from establishing an adequate factual basis from which the jury might have inferred the existence of an actual motive or interest on [the witness's] part to testify against the defendant as well as the reason

for his alleged partiality—favorable prosecutorial consideration on criminal cases pending against himself."

People v. Leonard, 608 P.2d 832 (Colo. App. 1979). The trial court denied the defendant's right of confrontation by precluding cross-examination of a prosecution witness concerning pending misdemeanor charges against the witness in juvenile court.

Compare with *People v. Hinchman*, 589 P.2d 917 (Colo. 1978). Not error to restrict cross-examination of a prosecution witness concerning unrelated juvenile charges, where cross-examination otherwise established the witness's history of bargaining for leniency in return for testimony.

c. Plea bargain

People v. Pate, 625 P.2d 369 (Colo. 1981). The defense was properly permitted to cross-examine two juvenile accomplices concerning plea agreements with the prosecution in which concessions were made in exchange for their testimony against the defendant. The Court held that the defendant's constitutional right to confrontation is paramount to the confidentiality interests afforded a juvenile under the Colorado Children's Code. See *Davis v. Alaska*, 415 U.S. 308 (1974).

People v. Jones, 635 P.2d 904 (Colo. App. 1981) (rev'd in part on other grounds). It was prejudicial error not to allow defendant to cross-examine complaining witness regarding plea bargain.

People v. Peterson, 633 P.2d 1088 (Colo. App. 1981) (rev'd in part on other grounds. It was error to exclude evidence that prosecution witness had been granted deferred prosecution for burglary arising out of same incident for which defendant was charged.

i. Inquiry into potential penalties

People v. Rubanowitz, 688 P.2d 231 (Colo. 1984). The defense was properly prohibited from cross-examining an immunized witness regarding potential penalties that could have been imposed absent the grant of immunity.

People v. Montoya, 942 P.2d 1287 (Colo. App. 1996). "When the jury is fully informed as to the original charge brought against a prosecution witness as well as the charge to which the witness later pleaded guilty in exchange for his or her testimony, and the jury also hears about the penalty actually received, the jury has been provided with adequate facts from which it can appropriately draw inferences relating to bias and motive. Provided the jury is so informed, the defendant is not denied his right to cross examination if the trial court refuses to allow evidence concerning the difference in the range of possible penalties between the original crime charged and the charge actually sustained."

d. Probationary status

People v. Bowman, 669 P.2d 1369 (Colo. 1983). The trial court erroneously precluded cross-examination of a prosecution witness regarding his probationary status and resentment toward the defendant, inasmuch as the witness's motive to cooperate and testify in favor of law enforcement and against the defendant was an important consideration for the jury.

e. Protected witness

People v. Nunez, 684 P.2d 945 (Colo. App. 1984). Permissible to cross-examine a witness's motive for testifying when that witness had been promised "round-the-clock" protection by the prosecution.

4. Evidence of civil suit to show bias or motive

a. Victim's suit against the defendant

Kreiser v. People, 604 P.2d 27 (Colo. 1979). The trial court properly permitted cross-examination of an assault victim regarding a civil suit filed against the defendant for monetary damages, inasmuch as the suit "bore upon the credibility of the victim's testimony and upon his motive, interest and bias."

People v. Coit, 961 P.2d 524 (Colo. App. 1997). Evidence of victim's civil lawsuit against defendant, including defendant's allegedly bigamous marriage, false claims of pregnancy and other fraudulent activities which "portrayed defendant as an evil, conniving, and manipulative person" was properly admitted to show defendant killed the victim to avoid presentation of this evidence in the civil trial.

b. Defendant's suit against the victim

People v. Stowers, 728 P.2d 356 (Colo. App. 1986). In a prosecution for felony theft, the defendant was properly precluded from introducing evidence of a civil suit that he had filed against the victims (corporations that were previous employers of the defendant) for monies allegedly withheld from him at the time of his discharge. The Court of Appeals recognized that the existence of a civil action may be relevant if the allegations contained in the complaint negate an element of the offense charged or reflect on the credibility of a witness's testimony. "However, the mere existence of a civil action, without more, is not competent evidence of the possible bias of a witness." The court held that since the civil complaint related to a matter unrelated to the criminal charges against the defendant, did not contradict or negate the defendant's state of mind at the time of the commission of the offense, did not reveal any inconsistencies in the statements of any prosecution witness, and did not name any of the victims as parties to the suit, evidence of the civil suit was inadmissible. "If such evidence were permitted, the defendant could create an inference of bias by his own unilateral act, rather than being required to establish bias through an act of the witness in question."

People v. Whatley, 10 P.3d 668 (Colo. App. 2000). The trial court did not abuse its discretion by allowing the prosecutor to cross-examine defendant about a notice of a possible civil claim defendant filed with the city for injuries he sustained during his arrest for the purpose of impeaching defendant's testimony by showing he had an economic interest in the outcome of his criminal case.

5. Evidence of gang affiliation to show bias

People v. Trujillo, 749 P.2d 441 (Colo. App. 1987) (overruled on other grounds). The prosecution was properly permitted to cross-examine an alibi witness regarding her affiliation with a street gang, where her gang, the "Steelettes," were often girlfriends of the "Steels" (the gang with which the defendant was affiliated), the two gangs were loyal to one another, and where testimony established that a "Steelette" would testify in court for a "Steel." The Court of Appeals concluded that "[t]he witness' personal relationship with the defendant and her membership in a gang loyal to the defendant's gang was probative of bias, and evidence that defendant belonged to a street gang did not unduly prejudice him."

G. Impeachment That Shows Misconduct or Weakness of Character

1. Improper to impeach on irrelevant matters intended only to impugn character

Webb v. People, 49 P.2d 381 (Colo. 1935). The Colorado Supreme Court disapproved the prosecution's attempt to impeach the credibility of a defense witness by inquiring whether he had been addicted to narcotics and whether he had been in possession of narcotics at the time of a prior conviction: "[A]ssailing the credibility of witnesses by questioning them about their supposed weaknesses, misdeeds, and misfortunes, short of crimes whereof they have been convicted, and wholly unrelated to the issue which is being tried, is all too common. It is a violation of sound and salutary rules of evidence. Such practice is vicious in its inevitable tendency to prejudice both the party and the witness, and counsel are expected to refrain scrupulously therefrom and thus observe the spirit as well as the letter of the law."

Practice Tip: Inquiry into irrelevant matters for the purpose of embarrassing or impugning a witness's character is also precluded by Colorado Rules of Professional Conduct §§ 3.5 and 4.4.

a. Police officer conduct

People v. Wilkinson, 555 P.2d 1167 (Colo. App. 1976). In a prosecution for prostitution and pandering, defense counsel sought to cross-examine the investigating officer as to the officer's prior sexual behavior, asserting that such inquiry was relevant in determining who initiated the sexual encounter forming the basis of the charges against the defendant as well as to impeach the officer's credibility. In holding that the trial court properly precluded such inquiry, the Court of Appeals stated: "In impeaching a witness, the inquiry must be directed toward his credibility rather than his moral character. In the absence of any suggestion that the witness has disregarded his oath,

the only effect of permitting the impeachment of the witness on these issues would have been to discredit and impugn his moral character."

People v. Edwards, 598 P.2d 126 (Colo. 1979). The trial court acted within its discretion in precluding the defendant's inquiry into the personal financial status of an undercover agent to whom the defendant sold heroin, where there was no showing that the agent committed any act that reflected adversely on his credibility.

People v. Saldana, 670 P.2d 14 (Colo. App. 1983). The defendant was properly precluded from attempting to attack an undercover agent's credibility by examining him regarding his past use of marijuana, where such an inquiry was not relevant to any trial issue or probative of the witness's credibility.

2. Relevant evidence reflecting adversely on character

The bias, interest or motive or a witness to testify are factors relevant to credibility, and evidence that is relevant to such issues may be admissible even though it may also impugn the witness's character. A good-faith basis in fact is a prerequisite for such examination, however, and an *in camera* determination of admissibility should precede the examination. *See People v. Simbolo*, 532 P.2d 962 (Colo. 1975); C.R.E. 103. Admissibility of relevant evidence that reflects adversely on character also calls for the application of C.R.E. 403, weighing the probative value of the evidence against the danger of unfair prejudice.

People v. Roberts, 553 P.2d 93 (Colo. App. 1976). In holding that the defense was properly permitted to cross-examine witnesses regarding their use of heroin, the Court stated: "In this state it is improper to ask questions pertaining to a witness' purported drug addiction merely for purposes of attacking the credibility of the witness. Here, however, the record discloses that the cross-examination was directed at another, permissible purpose: attempting to prove that the witnesses were under the influence of the narcotic substance at the time of the occurrence as to which they were testifying, or at the time of testifying at trial, matters which might affect the witnesses' ability to perceive, remember, or testify as to a particular event. Thus, the cross-examination was properly related to a material matter, and did not constitute impermissible impeachment of credibility."

Hamilton v. People, 287 P. 651 (Colo. 1930). It was proper to elicit from a co-defendant that he renewed his acquaintance with other co-defendants at the state penitentiary shortly before the formation of the conspiracy, because such evidence was admissible to show the opportunity to form the conspiracy, even though it had the incidental effect of impugning the witness's character.

3. Where the defendant puts character-related matters in issue

People v. Mejia, 534 P.2d 779 (Colo. 1975). Where the defendant testified on direct examination that he had never been arrested except for drunkenness, the prosecution was properly permitted to inquire regarding a prior arrest in Texas. "The purpose of this line of questioning is to test the truth

of the defendant's testimony on direct examination and on this basis, there is no error. In a case like this, where defendant's misrepresentations might mislead the jury unless corrected, such inquiry of the defendant on cross-examination is entirely proper."

Hawkins v. People, 423 P.2d 581 (Colo. 1967). It was error to admit into evidence the defendant's arrest record showing sixteen prior arrests for minor matters where the defendant had testified that he had been convicted of a felony and had been involved in minor scrapes with the police. The Court stated that the defendant's mere mention of his prior criminal involvement did not put that matter into issue such as to permit admission of his entire arrest record.

People v. Sasson, 628 P.2d 120 (Colo. App. 1980). Where the defendant testified that he had not been in any trouble since coming to Colorado in 1973, it was error for the trial court to allow cross-examination as to a misdemeanor conviction sustained by the defendant in New York prior to coming to Colorado. The Court stated that, by limiting his testimony to conduct in Colorado, the defendant did not raise any untrue inference concerning his activities in New York. Where, however, the defendant, who was charged with burglary of a pharmacy, implied that he had no familiarity with drugs, it was permissible to challenge his veracity by cross-examining him about a prior drug addiction.

H. Impeachment by Showing Mental Incapacity

People v. Gladney, 570 P.2d 231 (Colo. 1977). The Colorado Supreme Court recognized that evidence of mental incapacity may be admissible for impeachment purposes where an adequate foundation is laid establishing that the incapacity is relevant to the witness's credibility. Under the facts of this case, however, the trial court committed no error in excluding evidence that a prosecution witness had been committed to the state psychiatric hospital for a five-month period more than three years prior to the trial, where no such foundation was established.

People v. Schuemann, 548 P.2d 911 (Colo. 1976). It was not error to preclude cross-examination of a key prosecution witness about whether a psychiatrist had previously found him legally insane because the question sought to elicit an expert opinion by means of hearsay. However, it was error to refuse to permit a psychiatrist to testify that the witness was a delusional paranoid schizophrenic, for the purpose of impeaching the witness's credibility.

People v. Borrelli, 624 P.2d 900 (Colo. App. 1980) (overruled on other grounds). The trial court erroneously excluded testimony of a defense psychiatrist that, approximately three years before the homicide in question, he examined the key prosecution witness and found him to be suffering from permanent organic brain syndrome which could affect his intellectual functioning and memory.

1. Psychiatric examination of witness

People v. King, 581 P.2d 739 (Colo. App. 1978). The trial court did not err in denying the defendant's motion for a psychological examination of a child molestation victim where the only

support for the motion was the defendant's affidavit alleging that the victim was mentally immature, had a vivid imagination, and was subject to flights of fancy. The court stated that such an examination may be ordered only when there is a compelling reason for it. In making its determination, the court must "balance the possible emotional trauma, embarrassment or intimidation of the complaint against the likelihood of the examination producing material, as distinguished from speculative, evidence."

People v. Estorga, 612 P.2d 520 (Colo. 1980). It was not error for court to refusing to order psychological examination of slightly mentally impaired sexual assault victim where evidence in support of motion established only that victim was 10 years of age, had no trouble talking with people, was mentally impaired, and was in special education classes).

People v. Piro, 671 P.2d 1341 (Colo. App. 1983) (overruled on other grounds). It was not error to deny a motion for psychological evaluation of 13-year-old victim who was undergoing therapy, had allegedly made false reports of sexual conduct in past, did not initially report the incident to the authorities, and whose testimony at preliminary hearing was inconsistent with the report she gave the investigating police officers.

I. Other Illustrative Cases

People v. Chavez, 190 P.3d 760 (Colo. App. 2007). Evidence of defendant's refusal to consent to the search of his apartment was properly admitted during the state's rebuttal case to impeach defendant, who had denied living at apartment on direct examination by his counsel. One inference a reasonable juror could have drawn from defendant's refusal to consent was that he had dominion and control over the apartment, and therefore evidence of that refusal was relevant to impeach him on that point. Admission of this evidence did not impermissibly burden defendant's 4th Amendment right to be free from an unreasonable search.

28.4 SEQUESTRATION OF WITNESS

A. Colorado Rules of Evidence

C.R.E. 615(a) requires the trial court to order the exclusion of witnesses from the courtroom during trial upon the request of any party, and permits the court to so order on its own motion. The Rule provides four exceptions: (1) a party who is a natural person; (2) one officer or employee of a party which is not a natural person if that officer or employee has been designated as its representative by its attorney; (3) any person whose presence is shown by a party to be essential to the presentation of the cause; or (4) a person authorized by statute to be present.

C.R.E. 615(b) allows the trial court to additionally order that trial testimony may not be disclosed to excluded witnesses and prohibit excluded witnesses from accessing trial testimony.

Practice Tip: Previously, under *People v. Lopez*, 401 P.3d 103 (Colo. App. 2016), the trial court had discretion to allow witnesses who qualified under the V.R.A. to remain in the court room

despite a sequestration order. Now, with the 2024 change to C.R.E. 615, those with the right to be present under the V.R.A. are specifically exempted from sequestration.

1. Sequestration is a matter of right

The language of C.R.E. 615 is interpreted as conferring the right to sequestration to any party who requests it. See *People v. Cheeks*, 682 P.2d 484 (Colo. 1984) (holding the Rule makes sequestration mandatory if a party requests it and authorizes trial court to order it *sua sponte*); *People v. Fecht*, 701 P.2d 161 (Colo. App. 1985) (holding sequestration is a matter of right).

B. Purpose and Standard of Review

People v. Wood, 743 P.2d 422 (Colo. 1987). In holding that it was not error for the trial court to permit the prosecution to call a protective services worker as a rebuttal witness despite her presence in the courtroom in violation of the court's sequestration order, the Colorado Supreme Court recognized that the purposes of a sequestration order are to prevent the testimony of one witness from being influenced by that of another and to discourage fabrication and collusion. The court further recognized that "[m]atters relating to the sequestration of witnesses and violations of sequestration orders traditionally have remained within the trial court's sound discretion. Therefore, a trial court's decision to allow a witness to testify despite a violation of a sequestration order will not be deemed error entitling the defendant to a new trial unless the trial court abused its discretion. In order to show such an abuse of discretion, defendant must demonstrate that he was prejudiced by the trial court's decision."

C. Applicability of the Rule

1. Scope of sequestration order

People v. Brinson, 739 P.2d 897 (Colo. App. 1987). In holding that the prosecution did not violate the court's sequestration order by talking to witnesses in a group prior to the presentation of any evidence, the Court of Appeals recognized that "[t]he purpose of C.R.E. 615 . . . is to prevent the testimony of one witness from being influenced by that of another, and is accomplished under the rule's terms by ordering witnesses to withdraw from the courtroom until called. However, to make the rule effective, the court may also direct witnesses not to discuss the case with each other." In this case, the court's order did not prohibit all witness discussion of the case but only prohibited discussion about "testimony that may have been given." Since the prosecutor's discussion with the witnesses occurred prior to any testimony, the court's sequestration order was not violated.

People v. Villalobos, 159 P.3d 624 (Colo. App. 2006). C.R.E. 615 prohibits witnesses from conferring with each other concerning their testimony. It does not prohibit counsel from questioning witnesses about the testimony of other witnesses in a case.

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998). The trial court has discretion, in appropriate circumstances, to grant an exception to its sequestration order and allow a witness to impeach the testimony of a criminal defendant after hearing the defendant's testimony.

2. Rebuttal witnesses

People v. Fecht, 701 P.2d 161 (Colo. App. 1985). The trial court erroneously ruled that its sequestration order issued at the request of the defendant applied only to witnesses to be called in the parties' cases-in-chief, and improperly permitted two known rebuttal witness to testify despite their presence in the courtroom throughout the trial. "The policy reasons for the sequestration rule are to prevent a witness from conforming his testimony to that of another and to discourage fabrication and collusion. These policy reasons apply with equal force to known rebuttal witnesses."

People v. Scarlett, 985 P.2d 36 (Colo. App. 1998). The trial court acted within its discretion by granting an exception to its witness sequestration order which allowed a toxicologist to hear defendant's testimony and then testify in response to it. There was "no hint of witness collusion or fabrication of testimony," the toxicologist was the only witness who testified on the subject matter, and defendant "could not have been prejudiced by a violation of the sequestration order when the purposes of the order were not impaired." Also, since his testimony was partly based on defendant's testimony, the witness' presence while defendant testified was a reasonable exercise of the trial court's discretion to promote courtroom efficiency.

3. Advisory witness

People v. Cheeks, 682 P.2d 484 (Colo. 1984). The Colorado Supreme Court disapproved of the trial court's refusal to exempt an investigator designated by the prosecution from its sequestration order. The Court held that C.R.E. 615 places natural and unnatural parties (i.e., the government) on an equal plane with an equal right to have one potential witness who is not subject to sequestration, and the trial court "does not retain discretion to tip this balance against a non-natural party." The trial court accordingly has no discretion to prevent the designated representative of a non-natural party from remaining in the courtroom as an advisory witness despite an order of sequestration.

D. Sanctions for Violation of Sequestration

Before a court may consider sanctions for a sequestration violation, the trial court must first determine that a violation has actually occurred and prejudice will result from unrestricted admission of the testimony. *People v. Melendez*, 102 P.3d 315 (Colo. 2004). *See also People v. Dashner*, 77 P.3d 787 (Colo. App. 2003) (overruled on other grounds) (holding the defendant failed to demonstrate any resulting prejudice).

1. Within the discretion of the trial court

People v. Drake, 785 P.2d 1257 (Colo. 1990). “Matters relating to the sequestration of witnesses and violations of sequestration orders traditionally have remained within the trial court’s sound discretion.”

2. Factors to be considered

“First, the trial court must consider the involvement, or lack thereof, of a party or counsel in the violation of the order by the witness.” Additionally, there must be “evidence of the parties’ or counsel’s consent, connivance, procurement, or knowledge regarding the violation before a sanction can be imposed against that party.” “Second, the trial court should consider the witness’s actions and state of mind in his or her violation of the sequestration order, and whether the violation was inadvertent or deliberate. Finally, the trial court should consider the subject matter of the violation in conjunction with the substance of the disobedient witness’s testimony and if the testimony is unrelated in substance to the violation of the sequestration order, the court enjoys wide discretion in its ability to allow the witness to testify.” *People v. Melendez*, 102 P.3d 315 (Colo. 2004).

People v. Bell, 809 P.2d 1026 (Colo. App. 1990). In holding that the trial court acted within its discretion in prohibiting a witness, who had read a police report regarding the offense prior to testifying in violation of the court’s sequestration order, from testifying about any matter learned from the report, the Court of Appeals reaffirmed that the decision to impose sanctions and the propriety of such sanctions for violation of sequestration rest within the discretion of the trial court. The appropriateness of imposing sanctions depends on a three-factor analysis: “(1) the involvement, or lack thereof, of a party or his counsel in the violation by the witness; (2) the witness’ actions or state of mind in his or her violation and whether the violation was inadvertent or deliberate; and (3) the subject matter of the violation compared with the substance of the disobedient witness’ testimony.”

People v. Johnson, 757 P.2d 1098 (Colo. App. 1988). In determining whether to impose sanctions for violations of sequestration order, the trial court should consider subject matter of violation in conjunction with substance of disobedient witness’s testimony.

3. Nature of sanctions

A mistrial is a possible but rarely justified sanction for violations of sequestration orders. Disqualifying a witness’s testimony for violations of sequestration orders is a severe sanction to be imposed only after careful consideration. *People v. Melendez*, 102 P.3d 315 (Colo. 2004).

People v. P.R.G., 729 P.2d 380 (Colo. App. 1986). The trial court acted within its discretion in denying the defendant’s motion for mistrial based on the possible “lobbying” of an eyewitness by other witnesses in violation of the court’s sequestration order, where the eyewitness was cross-examined regarding the incident and the jury was able to hear all of the facts and make an assessment of his credibility and the effects of the alleged lobbying. The Court of Appeals recognized that, among the potential sanctions available to the trial court for violation of

sequestration, in addition to declaring a mistrial, are: "(1) citing the witness for contempt; (2) permitting comment on the witness' non-compliance in order to reflect on his or her credibility; or (3) refusing to let the witness testify or striking his or her testimony." *See People v. Melendez*, 102 P.3d 315 (Colo. 2004).

4. Illustrative Cases

People v. Dashner, 77 P.3d 787 (Colo. App. 2003) (rev'd on other grounds). No violation of sequestration order was shown where witnesses, who were police officers, made minor references to their testimony to each other and passed around a document that may have been a police report; defendant failed to demonstrate any resulting prejudice.

People v. Graham, 53 P.3d 658 (Colo. App. 2001). Police detective was imprudent in talking to a defense witness, but no violation of sequestration order as he did not reveal any trial testimony.

People v. Sherman, 45 P.3d 774 (Colo. App. 2001). A court observer repeatedly left the courtroom, conversed with witnesses, and made comments that disparaged the defendant's character. The trial court properly denied motion for a new trial because no evidence showed that the observer discussed the proceedings; and after the violation, the court instructed the observer to cease further contact with the witnesses, and she said she would comply.

28.5 IMMUNITY OF WITNESS

A. Statutory Immunity

Section 13-90-118 empowers the district court, upon the request of any district attorney, attorney general, or special prosecutor, to issue an order requiring an individual to give testimony or provide information which he refuses to give or provide on the basis of the privilege against self-incrimination. Upon the issuance of such an order, the individual may not refuse to testify or provide information on the basis of the privilege against self-incrimination, except that no testimony or information provided pursuant to the order, or any information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury or false statement or otherwise failing to comply with the order. The prosecution may request such an order when the testimony or other information sought may be necessary to the public interest and the individual possessing the information has refused or is likely to refuse to testify or provide the information on the basis of the privilege against self-incrimination.

1. Distinction between "transactional" and "use" immunity

Wheeler v. District Court, 519 P.2d 327 (Colo. 1974). "Transaction immunity may be simply described as that which precludes prosecution for any transaction or affair about which a witness testifies. Use immunity, by contrast, is a grant with limitations. Rather than barring a subsequent related prosecution, it acts only to suppress, in any such prosecution, the witness' testimony and evidence derived directly or indirectly from that testimony. Evidence obtained wholly

independently of immunized testimony may serve as a basis for prosecuting the witness for activities and transactions including those covered in his own statements."

2. Present statute provides for "use" immunity only

People v. Lederer, 717 P.2d 1017 (Colo. App. 1986). Unlike the predecessor to § 13-90-118, which empowered the court to grant immunity that was necessarily transactional, *see Steinberger v. District Court*, 596 P.2d 755 (Colo. 1979), the statute was repealed and reenacted in 1983 and the current provision protects witnesses only from the use of the compelled testimony or evidence derived therefrom in subsequent criminal proceedings.

3. Immunity available only upon request of the prosecution

People v. Harding, 671 P.2d 975 (Colo. App. 1983). Section 13-90-118 "vests the office of the prosecutor with sole discretionary authority to apply its provisions to any witness."

People v. Merrill, 816 P.2d 958 (Colo. App. 1991). Colorado courts possess no inherent authority to grant immunity pursuant to § 13-90-118; the statute grants sole discretionary authority to request the grant of such immunity to the prosecuting attorney.

People v. Aarness, 116 P.3d 1233 (Colo. App. 2005) (rev'd on other grounds). The decision to offer use immunity is vested solely in district attorney, attorney general, or special prosecutor. The trial court has no authority to grant a defendant's request for use immunity.

4. Refusal to testify after grant of immunity

People v. Lucero, 584 P.2d 1208 (Colo. 1978). "[A] witness who, despite receiving immunity, persists before a trial judge in refusing on Fifth Amendment grounds to supply . . . testimony, commits contempt 'in the presence of the court' and may be punished summarily pursuant to C.R.C.P. 107(b)."

B. Non-statutory Immunity

People v. Romero, 745 P.2d 1003 (Colo. 1987). Even though the statutory immunity provisions of § 13-90-118 are not followed, the state may nevertheless be bound by a promise of immunity made to a defendant by a governmental agent possessing the apparent authority to bind the government. The basis for enforcing such promises stems from the defendant's constitutional right to due process of law. The factors to be considered in ascertaining the existence and scope of the right to enforcement of a non-statutory governmental promise of immunity are: "whether a promise was made to the defendant by a governmental official with apparent authority to bind the government, and, if such promise was made, the scope of the promise; whether the defendant reasonably and detrimentally relied on the promise by performing his side of the bargain; and, if the defendant reasonably and detrimentally relied on the promise, the appropriate remedy to which the defendant is entitled." In determining the existence of a governmental promise, the court must consider not only the form and content of any written agreement, but also any oral statements and extrinsic

evidence relating to the circumstances of the dealings with the defendant. Any ambiguity regarding the scope of the promise is resolved in favor of the defendant, i.e., "between reasonable alternative interpretations as to the scope of the governmental promise, [the Court] will choose the interpretation favoring the defendant so long as that interpretation has a reasonable foundation in the document itself and in the circumstances surrounding its execution."

1. Illustrative cases

People v. Manning, 672 P.2d 499 (Colo. 1983). During the course of an investigation of a missing child a police detective, after numerous attempts to obtain information regarding the whereabouts of the child from his mother (who was incarcerated on a contempt citation), informed the mother that "I am going to interview you as a witness in this thing. Because I am not going to advise you of your rights, they cannot prosecute you for this." In light of all of the circumstances surrounding the investigation, including previous offers of immunity by the county and district attorney, the Colorado Supreme Court held that the detective possessed the apparent authority to bind the government to an implied promise to the mother that she would not be prosecuted for anything she might admit in the course of the ensuring interview. Unlike the trial court's interpretation, however, which held that the detective's promise amounted to a grant of transactional immunity, the Supreme Court interpreted the implied promise as extending to the mother a grant of use immunity for any admissions she might make.

People v. Romero, 745 P.2d 1003 (Colo. 1987). A written agreement to the defendant in the course of a homicide prosecution which provided that, in exchange for his assistance, he would not be prosecuted for any "passive involvement" in the homicide, constituted an enforceable governmental promise not to prosecute the defendant for the crime of accessory and a further promise of use immunity for any statements made by the defendant during the interview session. The Colorado Supreme Court recognized that the promise was made by sheriff's officers, an investigator from the District Attorney's Office, and the director of the County Community Corrections, all of whom possessed the apparent authority to bind the government to the promise of immunity.

28.6 PRIVILEGES

A. Statutory privileges identified in § 13-90-107

1. Marital Privilege

Section 13-90-107(1)(a) establishes the marital privilege and the procedures for asserting it.

Notice of marital privilege must be given as soon as practicable but not less than ten days prior to assertion at any hearing.

"This statute creates two different privileges with respect to spousal testimony. The first is the privilege against adverse spousal testimony, also known as the rule of spousal disqualification.

The second is the privilege against disclosure of spousal conversations." *People v. Inman*, 950 P.2d 640 (Colo. App. 1997).

"As long as there is a valid contract of marriage in existence at the time of the proffered testimony, the statutory privilege against adverse spousal testimony will apply to prohibit one spouse from testifying for or against the other on any subject without the consent of that other spouse." "Conversely, if there is no valid marriage, the privilege against adverse spousal testimony does not apply." *People v. Inman*, 950 P.2d 640 (Colo. App. 1997).

"The privilege against spousal disclosure applies to communications made by one spouse to another, but only during the marriage." *Id.*

The burden of proving the existence of a marriage for purpose of asserting privilege shall be on the party asserting the claim. § 13-90-107(1)(a)(IV).

The marital privilege is a statutory, not a constitutional right. If the defendant is being tried for a class 1, 2, or 3 felony, the marital privilege belongs to the testifying spouse, not the defendant-spouse. Meaning, defendant cannot assert the privilege, only the testifying spouse may. If the testifying spouse fails to claim the privilege, it is waived. *People v. Wickham*, 53 P.3d 691 (Colo. App. 2001).

Communications between a husband and wife are generally inadmissible against either spouse, absent the consent of the spouse against whom the communications are offered. However, such communications are not privileged if made for the purpose of aiding the commission of a future crime or of a present continuing crime. *People v. James*, 40 P.3d 36 (Colo. App. 2001) (overruled on other grounds). *See also* § 13-90-107(1)(a)(III).

a. Proof of common law marriage

"A common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship . . . . [S]uch consent or agreement [must] be manifested by conduct that gives evidence of the mutual understanding of the parties . . . . [S]uch conduct in a form of mutual public acknowledgment of the marital relationship is not only important evidence of the existence of mutual agreement but is essential to the establishment of a commonlaw marriage. The reason for this requirement is to guard against fraudulent claims of common law marriage." *People v. Lucero*, 747 P.2d 660 (Colo. 1987).

"The very nature of a common law marital relationship makes it likely that in many cases express agreements will not exist. The parties' understanding may be only tacitly expressed, and the difficulty of proof is readily apparent. We have recognized that 'the agreement need not have been in words,' and the issue then becomes what sort of evidence is sufficient to prove the agreement. We have stated that if the agreement is denied or cannot be shown, its existence may be inferred

from evidence of cohabitation and general repute. In such cases, the conduct of the parties provides the truly reliable evidence of the nature of their understanding or agreement." *Id.*

"The two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife. Specific behavior that may be considered includes maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the parties; and the filing of joint tax returns. However, there is no single form that any such evidence must take. Rather, any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof from which the existence of their mutual understanding can be inferred." *Id.*

Hogsett v. Neale, 478 P.3d 713 (Colo. 2021). "In this case, we refine the test from *Lucero* and hold that a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The core query is whether the parties intended to enter a marital relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation. In assessing whether a common law marriage has been established, courts should accord weight to evidence reflecting a couple's express agreement to marry. In the absence of such evidence, the parties' agreement to enter a marital relationship may be inferred from their conduct. When examining the parties' conduct, the factors identified in *Lucero* can still be relevant to the inquiry, but they must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. Finally, the manifestation of the parties' agreement to marry need not take a particular form.

2. Attorney-client privilege

Section 13-90-107(1)(b) establishes the attorney-client privilege.

People v. Lesslie, 24 P.3d 22 (Colo. App. 2000). "The attorney-client privilege extends to confidential matters communicated by or to the client in the course of obtaining counsel, advice, or direction with respect to the client's rights or obligations. The attorney-client privilege exists for the personal benefit and protection of the client who holds the privilege, and it must be asserted by the client."

3. Clergy member, minister, priest, and rabbi privilege

Section 13-90-107(1)(c) establishes these privileges.

4. Physician, surgeon or registered professional nurse patient privilege

Section 13-90-107(1)(d) establishes these privileges.

Section 18-18-405(1)(b), which states, "[i]nformation communicated to a practitioner in an effort to procure a controlled substance other than for legitimate treatment purposes or unlawfully to procure the administration of any such controlled substance shall not be deemed a privileged communication," operates as an exception to the physician-patient privilege. *People v. Harte*, 131 P.3d 1180 (Colo. App. 2005).

Statutory physician-patient privilege applies to observations resulting from examination as well as to actual communications. Names, addresses, and telephone numbers do not fall within statutory physician-patient privilege because a doctor does not need them to prescribe or act on behalf of patient. *People v. Covington*, 19 P.3d 15 (Colo. 2001).

Section 12-36-135, otherwise known as the "Reporting Statute," requires a physician to report to law enforcement any bullet wound or injury the physician has attended or treated or that he or she believes was intentionally inflicted or the result of a criminal act, including injuries resulting from domestic violence. The "Reporting Statute" was "meant to abrogate the physician-patient privilege as it applied to the description of the wounds, not verbal communications between the physician and the patient." *People v. Covington*, 19 P.3d 15 (Colo. 2001).

People v. Covington, 19 P.3d 15 (Colo. 2001). The photos of the victim's injuries, taken by a physician's assistant, were protected by § 13-90-107(1)(d) However, they were admissible because they revealed no more information than basic medical facts that physicians are required to report pursuant to § 12-36-135.

5. Public officer privilege

Section 13-90-107(1)(e) establishes this privilege.

6. Public accountant-client privilege

Section 13-90-107(1)(f) establishes this privilege.

7.Licensed psychologist, professional counselor, marriage and family therapist, social worker, unlicensed psychotherapist, and licensed addiction counselor patient privilege

Section 13-90-107(1)(g) establishes these privileges.

People v. Sisneros, 55 P.3d 797 (Colo. 2002). "The psychologist-patient privilege shields more than just communications between the psychologist and the patient. Once it attaches, the psychologist-patient privilege protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment." *See People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

People v. Sisneros, 55 P.3d 797 (Colo. 2002). "The purpose of the psychologist-patient privilege is to enhance the effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation that might be caused by the psychologist's disclosure of information divulged by the client during the course of treatment."

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). The "psychologist-patient privilege" assures a victim of a sexual assault that all records of any treatment will remain confidential unless otherwise directed by the victim. The privilege protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment.

8. Qualified interpreter privilege

Section 13-90-107(1)(h) establishes this privilege.

9. Confidential intermediary privilege

Section 13-90-107(1)(i) establishes this privilege.

10. Privilege between a person who gets a voluntary self-evaluation and the person or entity who performs the evaluation

Section 13-90-107(1)(j) establishes this privilege.

11. Victim advocate-victim privilege

Section 13-90-107(1)(k) establishes this privilege.

People v. Turner, 109 P.3d 639 (Colo. 2005). "[T]he statute recognizes the 'victim advocate' as a person '[w]hose primary function is to render advice, counsel, or assist victims of domestic violence,' hence, the language anticipates that any number of services rendered by the advocate may be the subject of the victim's communications. Secure housing, for instance, could become the subject of communications made by a victim seeking to hide from an abuser. Assistance provided by the counselor is necessarily intertwined with information transmitted by the victim to the advocate. The legislative history supports a conclusion that the General Assembly intended a broad construction of 'communications' . . . . More importantly, the clear language of the statute extends the privilege so as to prohibit the disclosure of information contained in records or reports, such that 'examined' is not a restrictive term making the privilege effective only at trial. Accordingly, the plain language of the statute leads us to conclude that the privilege extends to services or assistance provided by the agency to the victim."

12. Limited parent-minor child privilege

Section 13-90-107(1)(l) establishes a very limited privilege applying only to certain communications made by the minor child to people for which another privilege applies under § 13-90-107.

13. Law enforcement or firefighter peer support team member privilege

Section 13-90-107(1)(m) establishes this privilege.

B. Information obtained from dependency and neglect proceedings under section 19-3-207

Section 19-3-207(2):

No professional shall be examined in any criminal case without the consent of the respondent [in the D & N proceeding] as to statements made pursuant to compliance with court treatment orders, including protective orders, entered under this article; except that such privilege shall not apply to any discussion of any future misconduct or of any other past misconduct unrelated to the allegations involved in the treatment plan.

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011). On its face, § 19-3-207(2) bars no more than the examination in criminal cases of certain professionals who are involved in a dependency and neglect case. The statute bars only examination about statements made in compliance with court treatment orders, and then only if the respondent in the D&N proceeding does not consent. Thus, it was error in a sexual assault case to bar testimony under § 19-3-207(2) where the trial court failed to make any findings that the statements in question were made pursuant to compliance with the treatment orders of the court handling the D&N case.

Section 19-3-207(2.5):

> Notwithstanding any other provision of law to the contrary, a juvenile's statements to a professional made in the course of treatment ordered by the court pursuant to this article shall not, without the juvenile's consent, be admitted into evidence in any criminal or juvenile delinquency case brought against the juvenile; except that the privilege shall not apply to statements regarding future misconduct.

Section 19-3-207(3): "No admission made by a respondent in open court or by written pleading filed with the court to a petition in dependency or neglect may be used against him or her in any criminal prosecution, except for purposes of impeachment or rebuttal."

People v. Stroud, 356 P.3d 903. The Court of Appeals held that, in the absence of an objection or any controlling statute or case law, the trial court did not commit error, much less plain error, by admitting the defendant's statements made during a prior contested dependency and neglect at his child abuse trial under § 19-3-207(3).

C. The Release of Education Records Under Section 22-1-123

Section 22-1-123(2): "A school district shall not release the education records of a student to any person, agency, or organization without the prior written consent of the parent or legal guardian of the student except as otherwise permitted in [the Family Educational Rights and Privacy Act ("FERPA")].

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). "Under FERPA, an exception to the parental consent requirement exists for release of records 'in compliance with judicial order, or pursuant to any lawfully issued subpoena' if the students or parents have been notified." "Prior to the issuance of a judicial order or subpoena, the defendant must articulate, in good faith, a specific need for the information contained in the records. The trial court must then balance the defendant's need for the information with the privacy interests of the student and her parents. A non-exclusive list of

factors the court should consider includes: '(1) the nature of the information sought, (2) the relationship between this information and the issue in dispute, and (3) the harm that may result from disclosure.' If the trial court determines that the defendant's need outweighs any privacy interests, then it should review the records *in camera*. The trial court, in its discretion, may then order disclosure of the records."

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). "We do not believe that, under the circumstances of this case, *Brady* or its progeny required K.H.'s education records to be reviewed for exculpatory information. K.H.'s education records related only tangentially to her diagnosis and treatment for sexual abuse, and academic performance is only one among many factors that are considered in a PTSD diagnosis. Moreover, the prosecution never relied on the education records at trial. Had the prosecution relied on them, the trial court's pre-trial ruling would have required disclosure or, at the very least, an *in camera* review. Based on the facts of this case and the relationship of the education records to the evidence, we hold that it was not reversible error for the trial court to decline an *in camera* review of these records."

D. Mandatory Reporters of Child Abuse

Pursuant to § 19-3-304, persons required to report suspected child abuse or neglect or who have observed the child being subjected to circumstances or conditions that would reasonably result in abuse or neglect include the following, despite any privilege that might exist:

Physician or surgeon, including a physician in training; Child health associate; Medical examiner or coroner; Dentist; Osteopath; Optometrist; Chiropractor; Podiatrist; Registered nurse or licensed practical nurse; Hospital personnel engaged in the admission, care, or treatment of patients; Christian science practitioner; Public or private school official or employee; Social worker or worker in any facility or agency that is licensed or certified pursuant to part 1 of article 6 of title 26; Mental health professional; Dental hygienist; Psychologist; Physical therapist; Veterinarian; Peace officer; Pharmacist; Commercial film and photographic print processor; Firefighter; Victim's advocate, as defined in § 13-90-107(1)(k)(II); Licensed professional counselors; Licensed marriage and family therapists; Unlicensed psychotherapists; Clergy member; Registered dietitian who holds a certificate through the commission on dietetic registration and who is otherwise prohibited by 7 CFR 246.26 from making a report absent a state law requiring the release of this information; Worker in the state department of human services; Juvenile parole and probation officers; Child and family investigators, as described in § 14-10-116.5; Officers and agents of the state bureau of animal protection, and animal control officers; The child protection ombudsman; Educator providing services through a federal special supplemental nutrition program for women, infants, and children; Director, coach, assistant coach, or athletic program personnel employed by a private sports organization or program; Person who is registered as a psychologist candidate pursuant to § 12-245-304(3), marriage and family therapist candidate pursuant to § 12-245-504(4), or licensed professional counselor candidate pursuant to § 12-245-604(4), or who is described in § 12-245-217; officials or employees of county departments of

health, human services, or social services; Naturopathic doctor; Employees of the department of early childhood.

Pursuant to §§ 19-3-304 & 19-3-311, the psychologist- client privilege does not apply to any communication that is the basis for a report of child abuse to social services or law enforcement. The privilege does apply, however, to communications between the abused child and the psychologist after legal proceedings based on the report begin. *Dill v. People*, 927 P.2d 1315 (Colo. 1996).

People v. Kyle, 111 P.3d 491 (Colo. App. 2004) (overruled on other grounds). "[W]e hold that when an appellate court determines that the trial court erred in failing to disclose certain documents from a file reviewed *in camera*, the proper remedy is to remand the case to the trial court with instructions to provide the documents to the parties and to afford the defendant an opportunity to demonstrate a reasonable probability that, had the documents been disclosed before trial, the result of the proceeding would have been different. On remand, the trial court, in its discretion, should determine the manner in which to allow the defendant to attempt to make the requisite showing of prejudicial error."

People v. Kyle, 111 P.3d 491 (Colo. App. 2004). Pursuant to § 19-3-311, "the psychologist-client privilege does not apply to any communication that is the basis for a report of child abuse under § 19-3-304."

E. Attorney Work Product

Gall v. Jamison, 44 P.3d 233 (Colo. 2002). "[T]he work product doctrine safeguards only an attorney's opinion of the facts, not the facts themselves."

Crim. P. 16(I)(e)(1):

Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

People v. Ullery, 984 P.2d 586 (Colo. 1999). "Defense counsel's work product has the same protection from discovery as the prosecution's work product. When materials sought to be disclosed contain both work product and non-work product, this rule does not shield the entire document from disclosure. Rather, [w]hen some parts of certain material are discoverable under the provisions of these court rules, and other parts are not discoverable, the nondiscoverable material may be excised and the remainder made available to the other party. Crim. P. 16(III)(e) contemplates the participation of the trial court, where necessary, when addressing materials that are discoverable . . . and other parts that are not discoverable. Implicit in our rules addressing the regulation of discovery is the authority of the trial court to examine material in chambers in order to excise attorney work product to protect undiscoverable information. Such a procedure, while informed, also contemplates that the trial court will take steps to preserve confidentiality and will

create a record of its orders and actions for appeal. In addition to an in chambers or informal *in camera* examination, our rules permit the trial court, in its discretion, to accomplish the same examination through a formal *in camera* proceeding."

People v. Angel, 277 P.3d 231 (Colo. 2012). "We hold that the protection of prosecutorial work product, under Crim. P. 16(I)(e)(1), extends to opinion work product prepared by the prosecution in anticipation of any criminal prosecution."

F. Waiver of Privileges

"Once the privilege has attached, the efendant may not compel discovery unless it is waived." *People v. Sisneros*, 55 P.3d 797 (Colo. 2002). "Waiver is a form of consent to disclosure which must be justified by an evidentiary showing of an expressed or implied waiver." *People v. Turner*, 109 P.3d 639 (Colo. 2005).

The party seeking to overcome the claim of privilege has the burden of establishing a waiver. *People v. Covington*, 19 P.3d 15 (Colo. 2001).

1. *In camera* review

"[An] evidentiary showing of waiver is required before the trial court may order the documents produced for an *in camera* review." *People v. Sisneros*, 55 P.3d 797 (Colo. 2002). *See People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

2. Burden

"Defendant bears the burden of establishing a waiver of the privilege by presenting evidence showing that the privilege holder, by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question." *People v. Sisneros*, 55 P.3d 797 (Colo. 2002).

3. Psychologist-Patient Privilege

Mental health records are subject to waiver of the psychologist-patient privilege. An evidentiary showing of waiver is required before the trial court may order the documents produced for an *in camera* review. P*eople v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

To determine whether there was a waiver of the psychologist-patient privilege, the proper inquiry is not whether the information sought may be relevant but whether the victim has injected her physical or mental condition into the case as the basis of a claim or an affirmative defense. *Id.*

a. Waiver by placing mental health in issue

"[E]ven though the victim is not asserting a personal claim or defense, she may waive the privilege by testifying as to the substance of her treatment sessions or by placing her post-assault mental health in issue." *People v. Sisneros*, 55 P.3d 797 (Colo. 2002). *See also People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).

A victim puts her mental health in issue if their testimony concerns the substance of the communications with their therapist. *Id.*

People v. Silva, 782 P.2d 846 (Colo. App. 1989). The victim of a sexual assault testified she suffered nightmares and anxiety as a result of the assault and that she was undergoing counseling to help her recover. The trial court did not permit defendant to question the victim's therapist because victim's testimony did not amount to a waiver of the privilege as her testimony did not concern the substance of the communications with her therapist.

People v. Sisneros, 55 P.3d 797 (Colo. 2002). "The victim's testimony did not place the substance of her treatment sessions in issue. The victim testified that she could not recall exactly when the assault occurred until her sessions with Petitioner. She ultimately came to the conclusion that the assault occurred sometime in December because she remembered being on vacation from school and singing Christmas carols on the way to Defendant's house. The victim testified that Petitioner "helped" her recall some of these details. The only thing this statement reveals is the sort of therapy she was undergoing with Petitioner. The victim did not reveal any specific statements made by either party, or any particular diagnosis or treatment suggestions made by Petitioner . . . . [W]e note that the circumstances of the testimony in this case do not indicate an intent on the part of the victim to waive the protections of the privilege."

People v. Hogan, 114 P.3d 42 (Colo. App. 2004). The victim did not waive her psychologist-patient privilege by putting her mental condition in issue by filling out the victim impact form. Although the victim indicated that she had been traumatized, had trouble sleeping and had gone back to counseling, she did not include the nature and extent of her treatment.

Zapata v. People, 428 P.3d 517 (Colo. 2018) The trial court properly declined to give the defendant access to, or to review *in camera*, a co-defendant's competency reports. The reports were protected by the physician-patient or psychologist-client privilege and the co-defendant did not waive the privilege as to the defendant when he raised competency in his own case. Because the defendant did not make a sufficient showing that the competency reports contained exculpatory evidence, the trial court's denial did not violate due process of Crim. P. 16.

b. Waiver by testimony

People v. Brown, 442 P.3d 428 (Colo. 2019). The Supreme Court exercised its original jurisdiction under C.A.R. 21 to review the trial court's order denying a request for a protective order during a reverse-transfer hearing. The Supreme Court concludes that neither the reverse-transfer statute, § 19-2-517(3) (2018), nor common law principles regarding the scope of waiver provides a defendant with the ability to temporarily waive privilege as to information disclosed during a reverse-transfer hearing. The court also concludes that this result does not impermissibly burden a defendant's Fifth Amendment right against self-incrimination. Thus, the Supreme Court holds that, if a defendant discloses privileged information in open court during a reverse-transfer hearing, that defendant would waive privilege as to any such information at trial.

4. Victim Advocate-Victim Privilege

"The mere endorsement of a domestic violence expert cannot operate to waive the privilege." *People v. Turner*, 109 P.3d 639 (Colo. 2005).

5. Physician-Patient Privilege

"When a communication between a physician and a patient takes place in the presence of a third party, not only may the third person testify as to the communication, but if it is plain that the patient did not intend what was said or done to be confidential, the physician may testify. However, the mere presence of a third party does not immediately waive the physician-patient privilege. Instead, we have held that in order for the physician-patient privilege to be waived by the presence of a third party, the information must be readily discernable to everyone present." *People v. Covington*, 19 P.3d 15 (Colo. 2001).

6. Marital privilege

The party seeking to overcome the marital privilege which prevents a spouse from testifying has the burden of showing the privilege holder has expressly or impliedly forsaken the claim of confidentiality. *People v. Wickham*, 53 P.3d 691 (Colo. App. 2001).

"Counsel for the privilege holder also may waive the marital privilege by failing to object to the testimony of the adverse spouse." *Id.*

7. Attorney-client privilege

a. Purpose of privilege

"The attorney-client privilege is for the personal benefit and protection of the client and therefore may be waived by the client." *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

b. To prove waiver

"Any waiver must be demonstrated by evidence that the client, by words or conduct, has expressly or impliedly forsaken his or her claim of confidentiality with respect to the information in question and, thus, has consented to its disclosure." *People v. Sickich*, 935 P.2d 70 (Colo. App. 1996); *see People v. Medina*, 72 P.3d 405 (Colo. App. 2003). "The burden of proving the waiver to the attorney-client privilege rests on the party attempting to overcome the privilege." *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

c. Presence of third party

"Statements initially made in confidence to an attorney lose the shield of privilege if the client knowingly and intentionally discloses them to a third party." *People v. Medina*, 72 P.3d 405 (Colo. App. 2003).

"The privilege may be waived by voluntary disclosure to a third person by the privilege holder. Therefore, the presence of a third person during a conference with a client and an attorney ordinarily destroys the confidentiality required to assert the attorney-client privilege. A limited exception exists, however, when two or more individuals consult an attorney for the purpose of a joint defense or common interest." *People v. Lesslie*, 24 P.3d 22 (Colo. App. 2000).

8. Waiver in insanity and impaired mental condition cases

A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity pursuant to § 16-8-103, asserting the affirmative defense of impaired mental condition pursuant to § 16-8-103.5, "waives his right to claim the attorney-client and physician/psychologist-patient privileges pursuant to § 16-8-103.6, and consents to disclosure of pre- or post-offense information concerning the defendant's medical condition." *People v. Ullery*, 984 P.2d 586 (Colo. 1999).

However, the defendant "does not waive attorney-client privilege in the medical records as to attorney work product, including attorney's theories, thoughts, opinions, or strategies regarding a defense involving mental condition." *Id.*

[S]ection 16-8-103.6 does not include within its scope attorney work product." *Id.*

"Accordingly, we decline to interpret § 16-8-103.6 in a manner that would fail to account for collaboration between physicians, psychologists, and nonphysician medical providers, particularly when the statute broadly applies to 'any claim of confidentiality or privilege.' Liggett's reading of § 16-8-103.6(2)(a)—that its waiver of 'any claim of confidentiality or privilege' only applies to communications made directly to physicians or psychologists—would do exactly that. Instead, to give the statute its proper effect, we determine that the statute's waiver also applies to communications made to a physician's or psychologist's agents." *Liggett v. People*, 529 P.3d 113 (Colo. 2023).

G. Illustrative Cases

1. Psychologist-patient privilege

People v. Wittrein, 221 P.3d 1076 (Colo. 2009). "We agree with the trial court and hold that K.H. did not waive the psychologist-patient privilege, either expressly or impliedly, as to the records from AMH. The trial court correctly drew a line between K.H.'s records from Children's Hospital and her records from AMH, holding that the two sets of records were distinct and required separate waivers to be admissible. K.H. expressly waived her privilege to the Children's Hospital records relating to her treatment and PTSD diagnosis. There was no such waiver, however, for the AMH records because K.H. never placed the substance of her ongoing AMH treatment sessions at issue. Therefore, the psychologist-patient privilege precluded the trial court from conducting an *in camera* review of K.H.'s AMH records."

Zapata v. People, 428 P.3d 517 (Colo. 2018) The trial court properly declined to give the defendant access to, or to review *in camera*, a co-defendant's competency reports. The reports were protected by the physician-patient or psychologist-client privilege and the co-defendant did not waive the privilege as to the defendant when he raised competency in his own case. Because the defendant did not make a sufficient showing that the competency reports contained exculpatory evidence, the trial court's denial did not violate due process of Crim. P. 16.

2. Physician-patient privilege

People v. Garrison, 109 P.3d 1009 (Colo. App. 2004). Statements made by defendant to a nurse about his failed relationship, and that the person with whom he had been in relationship "could not help [me] at all," and that he could not go to that person "after what happened," did not come within the physician-patient privilege statements because they were not made for purpose of treatment or diagnosis, but only in response to nurse's attempt to verify transportation for defendant when he left hospital.

People v. Meyer, 952 P.2d 774 (Colo. App. 1997). In a murder case, the trial court properly refused to hold an *in camera* review of the victim's hospital records because the defendant provided no basis for his assertion that the records may contain evidence supportive of his theory that the victim set the fire in a suicide attempt. Additionally, the defendant failed to overcome the physician-patient privilege protecting these records.

Zapata v. People, 428 P.3d 517 (Colo. 2018) The trial court properly declined to give the defendant access to, or to review *in camera*, a co-defendant's competency reports. The reports were protected by the physician-patient or psychologist-client privilege and the co-defendant did not waive the privilege as to the defendant when he raised competency in his own case. Because the defendant did not make a sufficient showing that the competency reports contained exculpatory evidence, the trial court's denial did not violate due process of Crim. P. 16.

3. Marital privilege

People v. Ford, 100 P.3d 540 (Colo. App. 2004). Defense counsel was not ineffective in failing to invoke marital privilege to prevent defendant's wife from testifying against him in prosecution for second degree burglary of a dwelling, a class three felony, as privilege was not available in prosecutions for class three felonies.

People v. Wickham, 53 P.3d 691 (Colo. App. 2001). "The record makes it clear that the wife's attorney mistakenly believed the marital privilege did not apply because defendant was charged with first degree murder. The prosecutor similarly asserted-also erroneously-that the marital privilege did not apply. Thus, while the trial court required the wife to testify after granting her immunity, the court apparently acted on her counsel's erroneous belief that the privilege statute did not apply to class one, two, or three felonies. The trial court also brought this issue to defense counsel's attention, and counsel did not object." "Because failing to object to testimony by an adverse spouse has been held to waive the privilege, no reversible error occurs where the witness-

spouse is allowed to testify after the defendant-spouse fails to object on the grounds of privilege under § 13-90-107(1)(a)(I). We similarly conclude that where, as here, the witness-spouse has failed to claim a marital privilege and make a timely objection to his or her own testimony, the witness-spouse has waived the privilege, and on appeal the defendant-spouse may not successfully contest the issue under § 13-90-107(1)(a)(II) It makes no difference to our analysis in this case that wife's counsel provided inaccurate advice. Further, because defendant was charged with a class one felony, he was not entitled to raise the marital privilege. Only his wife was entitled to do so under § 13-90-107(1)(a)(II)."

People v. James, 40 P.3d 36 (Colo. App. 2001). Defendant's statements to his wife concerning criminal acts defendant previously committed were not privileged because the statements were made at a time defendant and his wife were actively engaged in an ongoing pattern of criminal activity, and defendant made the statements for purpose of obtaining his wife's aid in the commission of ongoing criminal schemes.

People v. Inman, 950 P.2d 640 (Colo. App. 1997). Evidence supported the trial court's determinations that communications between defendant and his ex-wife were made prior to their marriage, and that parties were not married by common law at time of communication, and therefore, the privilege against spousal disclosure did not bar testimony of ex-wife regarding communications in criminal prosecution of defendant.

4. Attorney-client privilege

People v. Medina, 72 P.3d 405 (Colo. App. 2003). Defendant was convicted of, inter alia, first-degree murder. The trial court properly found that defendant waived any privilege when he placed a letter containing defendant's inculpatory statements in an envelope and gave it to his original attorney with the intention that the attorney deliver the letter to the pastor of the church where the family of the victim attended. The attorney told the pastor she wanted him to review the letter and decide whether he should then forward it to the victim's parents. The attorney testified that she provided the letter to the pastor "[i]n hopes that it would influence him to assist in . . . facilitating or mediating a meeting" between the attorney and the victim's family. The pastor testified that the attorney told him she was acting on defendant's wishes. Eventually, the pastor delivered the letter to the victim's parents, who then turned it over to the prosecution.

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011). Although the Children's Code requires that the guardian ad litem in a dependency and neglect proceeding must be an attorney, there is no attorney-client privilege between the guardian ad litem and the child. Thus, where the child in a dependency and neglect case was also the victim in a sexual assault case, the attorney-client privilege did not prevent the guardian ad litem from testifying about statements made to her by the victim.

People v. Lesslie, 24 P.3d 22 (Colo. App. 2000). Deputy sheriff's admission to an attorney regarding his involvement in the eavesdropping incident, made during a joint meeting between

attorney, deputy sheriff, another deputy and sheriff, was not protected by attorney client privilege pursuant to joint defense or common interest doctrine because the other deputy who attended the meeting was well aware of deputy sheriff's involvement in incident totally independent of and before deputy sheriff made admission in attorney's office.

H. Privilege Against Self-Incrimination

1. Fifth Amendment

"The Fifth Amendment to the United States Constitution and article II, section 18 of the Colorado Constitution can be invoked by anyone whose statements or answers might incriminate that person by admitting the commission of illegal acts or furnishing a chain in the link of evidence needed to prosecute him or her for a crime. The burden lies with the person asserting the right to remain silent to establish that the privilege is properly invoked." *People v. Blackwell*, 251 P.3d 468 (Colo. App. 2010). *See People v. Razatos*, 699 P.2d 970 (Colo. 1985); *People v. Ruch*, 379 P.3d 309 (Colo. 2016).

Resident aliens are considered "persons" for purposes of the Fifth Amendment and are entitled to the same protections under the Self-Incrimination Clause as citizens. *United States. v. Balsys*, 524 U.S. 666 (1998).

2. Compelling testimony
A court may only compel a response from a witness or punish a witness for refusing to testify if it is perfectly clear from a careful consideration of all the circumstances that the witness's answers cannot possibly have a tendency to incriminate him. *People v. Blackwell*, 251 P.3d 468 (Colo. App. 2010).

3. Sanity exams

"[A] defendant does not incriminate himself or herself by making statements during a court-ordered sanity examination so long as the use of such statements is limited to the issue of mental condition." *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003). "Indeed, § 16-8-106(2)(c), provides that statements made during the examination are protected pursuant to § 16-8-107. Hence, the privilege against self-incrimination is not violated when psychiatrists who have examined a defendant testify regarding the defendant's statements to them in that context." *Id.*

"[A] defendant who commits a crime retains the privilege against self-incrimination during a court-ordered sanity examination. The insanity statute protects that privilege by limiting evidence obtained during an examination to a defendant's mental condition." *Id.*

4. Illustrative Cases

People v. Blackwell, 251 P.3d 468 (Colo. App. 2010). The prosecutor's statement that he believed a witness, who invoked his Fifth Amendment right, had a legitimate Fifth Amendment privilege not to testify, and advice from witness's attorney that he not testify, supported the trial court's

conclusion that witness's testimony might incriminate him. Therefore, the court's decision that it could not force witness to testify did not deprive defendant of his Sixth Amendment right to present a defense in murder prosecution.

United States v. Balsys, 524 U.S. 666 (1998). A risk that a resident alien's testimony might subject him to deportation was not a sufficient ground for asserting Fifth Amendment privilege against self-incrimination, given the civil character of a deportation proceeding.

People v. Newton, 966 P.2d 563 (Colo. 1998) (overruled on other grounds). A prosecution witness's assertion of Fifth Amendment right not to testify may constitute reversible error in two instances: (1) when prosecution engages in prosecutorial misconduct, which is a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege; or (2) when, in the circumstances of a given case, inferences from a witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.

People v. Herrera, 87 P.3d 240 (Colo. App. 2003). Evidence of defendant's communications to the psychiatrist and the psychological testing, was acquired for the first time during the court-ordered examination and thus was admissible at trial only as to insanity issues pursuant to § 16-8-107(1.5)(a). Because the psychiatrist's statements related to defendant's culpability, and were not limited to his capacity to form the mental state at issue, they were erroneously admitted.

People v. Martinez, 987 P.2d 884 (Colo. App. 1999). Trial court's limitation on defendant's ability to cross-examine state's witness at sexual assault trial concerning witness's pending criminal charges did not violate defendant's right to confrontation because the limitation was not excessive, defendant was permitted to question witness concerning his bias, and the limitation was justified to protect witness's right against self-incrimination.

People v. Smith, 275 P.3d 715 (Colo. App. 2011). The codefendant properly invoked her Fifth Amendment right to remain silent when called as a witness in the defendant's prosecution on a charge of conspiracy to commit theft, because answering questions about her relationship with the defendant could possibly incriminate her. In these circumstances, the defendant's right to compulsory process properly gave way to the victim's right not to give incriminating testimony.

People v. Brown, 442 P.3d 428 (Colo. 2019). The Supreme Court exercised its original jurisdiction under C.A.R. 21 to review the trial court's order denying a request for a protective order during a reverse-transfer hearing. The Supreme Court concludes that neither the reverse-transfer statute, § 19-2-517(3) (2018), nor common law principles regarding the scope of waiver provides a defendant with the ability to temporarily waive privilege as to information disclosed during a reverse-transfer hearing. The court also concludes that this result does not impermissibly burden a defendant's Fifth Amendment right against self-incrimination. Thus, the Supreme Court holds that, if a defendant discloses privileged information in open court during a reverse-transfer hearing, that defendant would waive privilege as to any such information at trial.

Rios-Vargas v. People, 532 P.3d 1206 (Colo. 2023). "In sum, while we affirm that the prosecution may not call a witness who intends to invoke the Fifth Amendment, we overrule [People v. Dikeman, 555 P.2d 519 (Colo. 1976)] extending that prohibition to defendants. We hold that defendants are entitled to question a nonparty alternate suspect in the jury's presence under the circumstances and procedures set forth below." "[A] defendant is entitled to question a nonparty alternate suspect in the jury's presence under the circumstances and procedures set forth in this opinion. First, the trial court must determine whether, under *People v. Elmarr*, 351 P.3d 431 (Colo. 2015), there is a non-speculative connection between the nonparty alternate suspect and the crime with which the defendant is charged. Second, if the requirements of *Elmarr* are met, the court must determine whether the alternate suspect has a valid claim of Fifth Amendment privilege at a hearing outside the presence of the jury. Third, if the alternate suspect has a valid claim of privilege, the court should determine the areas of questioning that implicate the Fifth Amendment, exercising discretion to impose reasonable limits on such questioning to avoid unnecessary courtroom drama. The defense then should be permitted to call the nonparty alternate suspect in front of the jury and ask any questions the court has determined do not implicate the Fifth Amendment. When those questions have been asked, defense counsel may ask the questions to which the witness may invoke the privilege. Finally, after the witness testifies, the court should excuse the witness and instruct the jury that a witness has a constitutional right to invoke the Fifth Amendment and refuse to answer questions."

People v. Vigil, 529 P.3d 635 (Colo. App. 2023). "[W]e hold as a matter of first impression that the State cannot revoke a defendant's probation based on a valid invocation of the Fifth Amendment privilege against self-incrimination where the conviction is final but the defendant's initial period for seeking postconviction relief has not run. Because we conclude that *Vigil* validly invoked his privilege against self-incrimination and was pursuing timely postconviction relief, we reverse the order revoking probation and remand to the district court for further proceedings consistent with this opinion."

* * *

2025 Contributions by Colleen Lamb

Senior Appellate Deputy District Attorney

1st Judicial District