COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Douglas County District Court Honorable Theresa M. Slade Case Number 21CA841	DATE FILED January 16, 2024 4:35 PM
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant COREY NEIL KOLACNY	
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 7,693 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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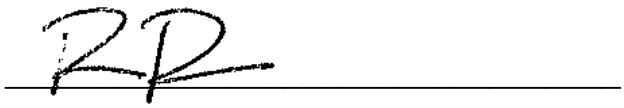

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STATEMENT OF THE CASE

Corey Kolacny was charged with and convicted of one count each of felony menacing – real/simulated weapon, § 18-3-206(1)(a), (b), C.R.S. 2021; felony criminal mischief – $1000-$5000, § 18-4-501(1), (4)(d), C.R.S. 2021; and prohibited use of a weapon, § 18-12-106(1)(b), C.R.S. 2021, following a late-night confrontation in front of his home. CF, pp. 1-3, 400.

In bifurcated proceedings, Mr. Kolacny was also convicted by the same jury of one count of possession of a weapon by a previous offender – burglary, § 18-12-108(1), (2)(c), C.R.S. 2021, a class five felony; one count of possession of a weapon by a previous offender – any prior felony, § 18-12-108(1), C.R.S. 2021, a class six felony; and one count of violation of a civil protection order, § 18-6-803.5(1)(a), C.R.S. 2021, a class two misdemeanor. CF, pp. 1-3, 400.

Mr. Kolacny received a controlling three-year custodial sentence on the felony menacing charge, followed by three years' mandatory parole. CF, pp. 400-01. This sentence ran consecutively to Mr. Kolacny's sentences in Douglas County cases 19CR1073, 19CR992, and 19CR713. CF, p. 400.

STATEMENT OF THE FACTS

Around 10:00 p.m. on September 11, 2021, Wil Lowery and his girlfriend, Shannon Ball, parked on a side street near downtown Castle Rock. TR 8/16/2022, pp. 209-12, 216. Sitting inside Mr. Lowery's gray Audi, they were talking and listening to music when suddenly they heard a loud noise. TR 8/16/2022, p. 216:17-22; *see also* TR 8/16/2022, p. 187:3-7. Thinking someone had thrown a rock at the car or "maybe something had fallen from [a] tree," Mr. Lowery got out to look around and inspect his car. TR 8/16/2022, pp. 217-18. It was "pitch black," but he saw "something kind of moving in th[e] darkness." TR 8/16/2022,

p. 224:4-14. At trial, Mr. Lowery testified he thought it was a person wearing a "lighter shirt" but he "couldn't make [out] any sort of the body or physique or anything like that." TR 8/16/2022, p. 224:16-21.[1]

Assuming this person was responsible for the alleged damage to his car, Mr. Lowery asked them "why [they] threw rocks at [his] car[?]" TR 8/16/2022, p. 225:1-4. In response, the person told Mr. Lowery he was on "private property." TR 8/16/2022, p. 225:16-17. Again, Mr. Lowery pressed the person to explain what happened to his car. TR 8/16/2022, p. 226:6-9. This time, the person responded in a "belligerent" voice, warning Mr. Lowery: "If you step one foot closer, I'm going to blow it." TR 8/16/2022, p. 227:12-15; *see also* TR 8/16/2022, pp. 192-93. Mr. Lowery "tried to kind of inquire a little bit more" about what had happened to his car when he "heard a gunshot go off." TR 8/16/2022, p. 228:3-11. Mr. Lowery did not see a weapon. He only saw "the muzzle flash" upward and "smoke arise from" it. TR 8/16/2022, p. 228:13-14, 21-23.

Following the gunshot, Mr. Lowery and Ms. Ball left the area and drove a few blocks south before calling 911. TR 8/16/2022, pp. 229-30.

[1] Mr. Lowery later testified that, as time passed, he "saw that it was a white adult male." TR 8/16/2022, p. 227:8-9.

Responding officers interviewed Mr. Lowery and Ms. Ball, who directed them to the location of the alleged incident. *See, e.g.*, TR 8/17/2022, p. 68:12-20. On arriving at that location, officers encountered Mr. Kolacny standing outside his house smoking a cigarette. TR 8/17/2022, pp. 18-19. Mr. Kolacny was immediately detained, and officers conducted a protective sweep of his house. TR 8/17/2022, pp. 20-21, 230-31. Officers read Mr. Kolacny his *Miranda* rights and then asked about his whereabouts that evening. *See* Ex. 17 at 0:10-0:53. Mr. Kolacny denied any involvement in the alleged incident. He told officers he only left his house around 5:00 p.m. to grab dinner. Otherwise, he was home playing video games and watching Saturday Night Live. Ex. 17 at 0:54-1:15, 3:32-4:19. During this discussion, Mr. Kolacny also consented to a search of his truck and residence for any weapons. Ex. 17 at 6:48-7:03, 8:06-8:11.

Officers did not find anything inside the cab of Mr. Kolacny's truck; however, they found a slingshot in the truck bed. *See* TR 8/17/2022, p. 26:1-12. Additionally:

- Officer Robert Schuster discovered a .45 caliber spent shell casing in Mr. Kolacny's driveway. TR 8/17/2022, pp. 22:1-3, 25:8-13.
- He found a Walther starter pistol in a closet inside the house with markings indicating it was either a .22 or 9mm caliber weapon. TR 8/17/2022, pp. 31-32, 44-45.

- Officer Schuster also found rifle ammunition inside the house. TR 8/17/2022, pp. 33-34, 45-46.
- Officer Luke Godfrey found a .45 caliber bullet "that had not been spent" on a coffee table. TR 8/17/2022, p. 69:16-18.
- And Officer Adam Jakubik found "tactical gloves" on a "cocktail table," which "[p]eople sometimes use . . . when they fire weapons." TR 8/17/2022, p. 107:1-7.

While inside the residence, officers also inspected Mr. Kolacny's video surveillance system. However, because Mr. Kolacny recorded on VHS tapes that required rewinding and rerecording every few hours, the surveillance system had not captured footage of the alleged incident. TR 8/18/2022, pp. 14-15; Ex. 40-A.

At one point, officers escorted Mr. Lowery to the scene for a show-up identification. Mr. Kolacny was standing outside his house, handcuffed, and surrounded by several police officers. Still, Mr. Lowery could not identify Mr. Kolacny as the person who allegedly threw rocks at his car and fired a gun. TR 8/17/2022, p. 74:1-22. Nor did Mr. Lowery recognize Mr. Kolacny's voice when he was asked to say, "This is private property." TR 8/17/2022, pp. 74, 76-77; *see also* Exs. 9, 18.

The house next door belonged to Mr. Kolacny's grandfather. TR 8/17/2022, p. 164:21-25. Mr. Kolacny maintained he did not have permission to access it unless his grandfather was present. TR 8/17/2022, pp. 165:4-7, 232-33. Thus, officers obtained a warrant to search the property. TR 8/17/2022, p. 107:8-14. Upon entering, officers observed the door was unlocked and "slightly ajar." TR 8/17/2022, p. 167:1-2. On a ledge next to a stairwell, officers found a magazine holding .45 caliber bullets. TR 8/17/2022, pp. 109-11. And in a "back room straight off of th[e] stairwell," they discovered a Taurus 1911 handgun with a .45 caliber bullet in the chamber. TR 8/17/2022, pp. 118-19.

Corporal Daniel Moffitt, the on-call investigator that night, administered a gunshot residue (GSR) test to Mr. Kolacny. TR 8/17/2022, pp. 157-60. GSR particles were detected on the samples of his hands and forearms. TR 8/17/2022, p. 206:16-20; *see also* TR 8/17/2022, p. 161:15-16. Officers also found "three approximately nickel-size rocks" in Mr. Kolacny's right front pants pocket during a pat down search. *See* TR 8/17/2022, p. 175:6-9; Ex. 32.

At trial, the prosecution argued that, based on this evidence, Mr. Kolacny was "the right man at the right time at the right place with all of the evidence in his possession or in his control." *See* TR 8/16/2022, p. 167:11-13. He was "the only

person involved at the residence where" the alleged incident occurred; consequently, he must be guilty. *See* TR 8/18/2022, p. 53:1-3.

The defense theory was based on identity: *Someone* threw rocks at Mr. Lowery's car and *someone* fired a gun into the air. But that someone was *not* Mr. Kolacny. *See* TR 8/16/2022, p. 175:4-18. The defense asserted police homed in on Mr. Kolacny immediately and never investigated anyone else. TR 8/16/2022, p. 177:3-7.

SUMMARY OF THE ARGUMENT

I. The trial court erroneously admitted irrelevant and highly prejudicial evidence in violation of CRE 401-403 when it admitted evidence of firearms paraphernalia found in Mr. Kolacny's house that was indisputably not used in the alleged incident. Because this evidence had no bearing on any issue in the first part of the bifurcated trial, it should have been excluded. Reversal is required because this evidence encouraged a conviction based on Mr. Kolacny's mere possession of firearms, regardless of his conduct.

II. The trial court erred by admitting hearsay testimony of a professional estimate of damage to the victim's car. Because the estimate's declarant never testified, this testimony was improper. Reversal is required because the only other evidence about damages came from a police officer, based on his personal

experience, and was significantly lower. The hearsay bolstered the credibility of the victim's higher valuation, a valuation which elevated criminal mischief to a felony. Thus, this error warrants reversal.

III. The prosecutor committed misconduct in closing argument by misstating the law on the presumption of innocence. By telling the jury Mr. Kolacny was not "presumed credible," the prosecutor undermined the force of the presumption of innocence and shifted the burden onto the defense to prove Mr. Kolacny's not guilty plea was credible. Such egregious misconduct constitutes plain error and requires reversal.

IV. The plain language of section 24-4.2-104(1), C.R.S. 2023, requires, as relevant here, a victim assistance surcharge of a certain amount be "levied on each criminal action resulting in a conviction." The trial court assessed a surcharge of $808.00 against Mr. Kolacny—$163.00 per felony conviction and $78.00 per misdemeanor conviction. Because the surcharge should have been "levied on each criminal *action*," not on each *conviction*, this assessment was erroneous. Additionally, a remand is required because the trial court added this and other surcharges and costs to the mittimus after the sentencing hearing, without providing Mr. Kolacny an opportunity to demonstrate his inability to pay and to request a waiver.

ARGUMENT

I. The trial court erroneously admitted irrelevant and highly prejudicial evidence of firearms paraphernalia found in Mr. Kolacny's home.

A. Standard of Review and Preservation

De novo review applies to whether the erroneous admission of evidence violated a defendant's rights to a fair trial and an impartial jury. *Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008); *People v. Al-Yousif*, 49 P.3d 1165, 1169 (Colo. 2002). Otherwise, appellate courts review a trial court's evidentiary rulings for an abuse of discretion. *See People v. Saiz*, 32 P.3d 441, 446 (Colo. 2001).

Defense counsel moved pretrial to exclude evidence of a "non-operable [Walther] pistol," i.e., "either a starter pistol or a pistol with an obstructed barrel," found in Mr. Kolacny's home. TR 8/16/2022, pp. 6-7. According to the defense, this type of firearm "looks real" but you "place blanks in it, and it makes a loud noise." TR 8/16/2022, p. 7:2-4. Critically, it was "not capable of basically shooting a projectile." TR 8/16/2022, p. 7:4-5. The defense also moved to exclude evidence of rifle ammunition found in Mr. Kolacny's home. TR 8/16/2022, pp. 10-11. Because the prosecution theorized Mr. Kolacny fired a different handgun (a 1911 Taurus) with different ammunition (.45 caliber bullets), the defense argued evidence of the Walther starter pistol and rifle ammunition was "irrelevant," did "nothing . . . [to]

advance[] . . . the People's case, and it would confuse the jury and be prejudicial to Mr. Kolacny." TR 8/16/2022, pp. 7:13-17, 11:1-3.

The prosecution contended this evidence was relevant to "the bias and credibility of [Mr. Kolacny] who made statements to officers on the night of [the] offense that he was not in possession of any weapons or . . . involved in the menacing at all." TR 8/16/2022, p. 8:1-6, 11:5-13. Additionally, the prosecution asserted this evidence established "the thoroughness of the investigation" because it showed "officers did search the home[, t]hey did find this weapon, and they were able to rule it out as what was not used in the offense." TR 8/16/2022, p. 8:7-10.

Believing it did not have enough information, the trial court declined to rule pretrial. TR 8/16/2022, pp. 10-11.

On the second day of trial, the prosecution introduced evidence of the Walther starter pistol and rifle ammunition. Over defense counsel's objection, this evidence was admitted. TR 8/17/2022, pp. 31-34; Exs. 14, 15, 41. The court also admitted testimony about tactical gloves. TR 8/17/2022, p. 107:1-7. Defense counsel did not specifically object to that testimony.

B. Discussion

The trial court's admission of firearms paraphernalia found in Mr. Kolacny's residence, namely the starter pistol, rifle ammunition, and tactical gloves, constituted

an abuse of discretion. Not only was this evidence irrelevant and prejudicial, but it also encouraged the jury to convict Mr. Kolacny of the three charges at issue in the first part of the bifurcated trial because, as defense counsel put it, "he's got firearm stuff in his house, so he's probably the shooter." TR 8/18/2022, pp. 99:3-8, 100:6-8.

1. Evidence of firearms paraphernalia was irrelevant.

Due process guarantees every criminal defendant the right to a fair trial. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973); *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000). Admission of irrelevant and prejudicial evidence may violate this right. *Howard-Walker v. People*, 2019 CO 69, ¶ 23.

"[E]vidence which is not relevant is not admissible." *People v. Carlson*, 712 P.2d 1018, 1021 (Colo. 1986) (quoting CRE 402). Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. In making this determination, the court "must necessarily look to the elements of the crime charged." *Carlson*, 712 P.2d at 1022.

Evidence of firearms paraphernalia was not relevant to any issue in the first part of the bifurcated trial. The prosecution alleged the 1911 Taurus handgun, found in Mr. Kolacny's grandfather's house, fired the .45 caliber spent shell casing found

in the driveway. This theory rendered the Walther starter pistol irrelevant. For one, Officer Schuster testified it had markings indicating the pistol was either a .22 or 9mm caliber weapon, meaning it was not "capable of firing a .45 caliber cartridge." TR 8/17/2022, pp. 44-45. Similarly, Corporal Moffitt testified the "barrel was filled, which would prevent it from firing." TR 8/17/2022, p. 181:2-3. "In the condition that [the Walther pistol] was in when [he] observed it," Corporal Moffitt testified it was "a non-operable firearm," more like a "replica[]" or "showpiece." TR 8/17/2022, p. 181:7-15. Thus, the Walther pistol was not involved in, and irrelevant to, the charged offenses in the first part of the bifurcated trial. *Cf. Kaufman v. People,* 202 P.3d 542, 555 (Colo. 2009) (excluding evidence of knives, a machete, and brass knuckles where defendant "carried none of these other weapons on his person at the time of the accident" and "[n]one of them is significantly similar to the knife actually used in the altercation").

The rifle ammunition was also irrelevant. First, a rifle was never found, nor was a rifle used to menace the victims. Second, the spent shell casing found in Mr. Kolacny's driveway and the unfired round in the chamber of the 1911 Taurus handgun were Remington-branded .45 caliber bullets—not rifle cartridges. TR 8/17/2022, p. 169:17-21, 174:5-9. The rifle ammunition was too large to fit in either the Walther pistol or the 1911 Taurus handgun. TR 8/17/2022, pp. 46-47. Thus,

"these [were] not rounds that would have been fired in the driveway." TR 8/17/2022, p. 47:8-12. Rather, they "just happened to be in the house." TR 8/17/2022, p. 47:13-14.

There was also no evidence suggesting the tactical gloves were worn by Mr. Kolacny the night of the incident or were in any way involved. *See Kaufman*, 202 P.3d at 555. The presence of GSR particles on Mr. Kolacny's hands suggests they were not.

Thus, evidence of the gloves, rifle ammunition, and starter pistol was irrelevant and inadmissible under CRE 402.

2. Evidence of firearms paraphernalia was unduly prejudicial.

Even if evidence is relevant, it should be excluded "if its 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 needless presentation of cumulative evidence." CRE 403; *see also People v. Ramirez*, 155 P.3d 371, 379 (Colo. 2007); *People v. Smith*, 121 P.3d 243, 246 (Colo. App. 2005).

Any minimal probative value of the firearms paraphernalia evidence in this case was strongly outweighed by the danger of unfair prejudice.

The prosecution repeatedly argued the firearms paraphernalia found in Mr. Kolacny's residence was relevant to "the bias and credibility of the defendant who made statements to officers on the night of [the] offense that he was not in possession of any weapons or . . . involved in the menacing at all." TR 8/16/2022, p. 8:1-6. The prosecution also claimed this evidence showed the "thoroughness of the investigation" and that "officers did search the home." TR 8/16/2022, p. 8:7-8. Essentially, the prosecution posited this evidence demonstrated that officers searched Mr. Kolacny's home for both inculpatory *and* exculpatory evidence. *See, e.g.*, TR 8/17/2022, pp. 26-27, 73. But such an explanation, even if well intentioned, does nothing to mitigate the prejudice of informing the jury about irrelevant evidence of firearms paraphernalia in a trial involving the alleged use of a firearm.

Indeed, the prosecution conceded officers "were able to rule [the Walther starter pistol] out as what was *not* used in the offense." TR 8/16/2022, p. 8:8-10 (emphasis added). Officer Godfrey also testified he did not believe the Walther pistol was used in the alleged incident; however, he documented it to "give[] credence to all the other firearm-related things that [they] found within the house." TR 8/17/2022, p. 73:10-16. This testimony makes clear the obvious prejudicial nature of that evidence.

Thus, admission of the Walther starter pistol, rifle ammunition, and tactical gloves likely encouraged the jury to render a "decision on an improper basis," specifically bias and contempt toward an individual who appeared to casually leave firearms and ammunition around their house, and who was accused of firing a gun at strangers legally parked outside. *See People v. District Court*, 785 P.2d 141, 147 (Colo. 1990).

This evidence was highly prejudicial. Accordingly, its admission violated CRE 403 and Mr. Kolacny's right to a fair trial by an impartial jury. *See Howard-Walker*, ¶ 23.

C. Reversal is required.

Admission of the firearms paraphernalia evidence was not harmless. *See Hagos v. People*, 2012 CO 63, ¶ 12; Crim. P. 52(a).

The evidence in this case was not overwhelming. Neither victim could identify Mr. Kolacny. There were no eyewitnesses. And only circumstantial evidence connected Mr. Kolacny to the alleged incident. *See People v. Eickman*, 728 P.2d 369, 372-73 (Colo. App. 1986) (holding evidence used to impeach defendant was not harmless where, "in light of the circumstantial nature of the prosecution's case as revealed by the record as a whole, . . . the jury's assessment of defendant's credibility may well have been determinative of its verdict"); *People v. Ortega*, 580

P.2d 813, 817-18 (Colo. App. 1978) (concluding, in part, the "wholly circumstantial evidence relied on by the prosecution" to prove defendant's guilt "militate[s] against a finding of harmless error"). Because of this, the jury could have had reasonable doubt about the identity of the perpetrator.

In order to prove Mr. Kolacny menaced the victims, the prosecution relied on various weapons and ammunition found in "physical proximity" to him, arguing "[h]e's the only one in the area. He is the one with the slingshot and the rocks *and the guns*." TR 8/18/2022, p. 79:2-3 (emphasis added); *see also* TR 8/18/2022, pp. 80-81 (arguing the jury "can use all of" the evidence admitted in the case, including the bullets, shell casing, gun, magazines, and tactical gloves, to reach a verdict). But as defense counsel put it in closing argument, the fact that officers "found firearm paraphernalia in his house" does not mean "it had to be him." TR 8/18/2022, p. 99:3-8; *accord Kaufman*, 202 P.3d at 555 ("[T]he fact that a person displays many books on a bookshelf does not necessarily mean that the person has ever read the books. Possession and use are not equivalent.").

This evidence was especially damaging in a case where the identity of the shooter was in dispute. It risked a verdict based on Mr. Kolacny's mere possession of firearms paraphernalia, rather than proof beyond a reasonable doubt of his conduct. Especially where Mr. Kolacny denied having anything to do with the

incident—even if the 1911 Taurus handgun might have been his—the other, irrelevant evidence of firearms paraphernalia likely tipped the scales in the prosecution's favor. *See* CF, pp. 293-94 (jury questions submitted asking whether officers found a "rifle in the home" and whether Mr. Kolacny had "any other registered guns"); TR 8/17/2022, pp. 53-55.

For these reasons, reversal is required.

II. The trial court erred in admitting hearsay testimony about an estimate of the damage to the victim's car.

A. Standard of Review and Preservation

Generally, a trial court has broad discretion whether to admit evidence. *People v. Dominguez*, 2019 COA 78, ¶¶ 13-14. A trial court's application of hearsay law, however, is reviewed de novo. *Id.* ¶ 14.

Defense counsel preserved this issue by contemporaneously objecting, on hearsay grounds, to testimony about an estimate of the value of damage to Mr. Lowery's car. TR 8/16/2023, p. 221:1-8.

B. Discussion

1. The victim testified that a professional estimate was consistent with his opinion of the damage done to his car.

During Mr. Lowery's direct examination, the prosecutor asked him to estimate the damage to his car:

> **Q**: Mr. Lowery, you mentioned you're kind of a car person. Did you know about how much damage was done to your car?
>
> **A**: Yes. It was a couple thousand dollars. It was –
>
> [Defense counsel makes an objection, which is overruled.]
>
> **A**: It was $2,000.
>
> . . . .
>
> [Defense counsel objects again and the parties discuss the matter in a bench conference.]

TR 8/16/2023, pp. 220-21.

Defense counsel argued, as relevant here, Mr. Lowery's response was hearsay because he is "getting into . . . an estimation. That is an outside statement." TR 8/16/2023, p. 221:6-8. The prosecutor disagreed because "lay witnesses can estimate value." TR 8/16/2023, p. 221:19-20. Moreover, the prosecutor planned to "ask a separate question about the estimate, and a contemporaneous objection can be made the[n]." TR 8/16/2023, p. 221:17-19. The trial court ruled Mr. Lowery could "testify as to the damage to his own car, and he can testify to the extent he knows the value."

TR 8/16/2023, p. 222:12-13. "If it comes to an exact estimate or exact damages, that's a different topic," the court explained. TR 8/16/2023, p. 222: 15-17. "But [Mr. Lowery] can testify to as he has so far." TR 8/16/2023, p. 222:17-18. Following this ruling, this exchange took place:

> **Q**: And Mr. Lowery, at some point did you seek out some information about what it would cost to fix your car as well?
>
> **A**: Yes, ma'am, I did.
>
> **Q**: Did that change your estimate of the value of damage done to your car?
>
> **A**: It was very similar to what I was quoted.

TR 8/16/2023, pp. 222-23.

2. The victim's testimony about the estimate was inadmissible hearsay.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." CRE 801(c). Unless an exception applies, hearsay is inadmissible. CRE 802.

Mr. Lowery's testimony that the estimate he received tracked his opinion of the damage to his car was inadmissible hearsay. An itemized estimate was never introduced at trial. *Cf.* CF, pp. 405-10. Yet Mr. Lowery told the jury his estimate of damage was "very similar to what [he] was quoted." TR 8/16/2023, p. 223:1. By eliciting this testimony, the prosecutor effectively presented the estimate for the truth

of the matter asserted—i.e., the value of damage to the car—without permitting Mr. Kolacny an opportunity to challenge it.

"[V]alue is an essential element of felony criminal mischief." *People v. Cisneros*, 566 P.2d 703, 705 (Colo. 1977); *see also* § 18-4-501(1), (4)(d), C.R.S. 2021; *People v. Jensen*, 172 P.3d 946, 949 (Colo. App. 2007) ("Where 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."). "In cases of partial damage, the appropriate measure of economic loss will generally be the reasonable cost of repair or restoration." *People v. Dunoyair*, 660 P.2d 890, 895 (Colo. 1983).

Here, while it may have been appropriate for the victim to testify solely about his personal opinion of the damage, his testimony crossed the line by incorporating a third-party professional estimate. As such, this testimony was improper hearsay and its admission was error. *See* CRE 802.

C. Reversal is required.

Admission of the victim's testimony about the estimate was not harmless. *Hagos*, ¶ 12 (Appellate courts "review nonconstitutional trial errors that were preserved by objection for harmless error."); Crim. P. 52(a).

The classifications and penalties for criminal mischief depend on the amount of damage proven by the prosecution beyond a reasonable doubt. At the time of the alleged incident, criminal mischief was a misdemeanor offense if the damage did not exceed $1,000. *See* § 18-4-501(4)(a)-(c), C.R.S. 2021. But criminal mischief jumped up to a felony offense if the damage exceeded $1,000. *See* § 18-4-501(4)(d), C.R.S. 2021.[2]

This difference matters here. Mr. Lowery testified the damage to his car, as confirmed by the estimate he received, was $2,000. TR 8/16/2022, pp. 220, 222-23. However, one of the responding officers was also asked to approximate the damage he observed: in his opinion, the "top range" of damage was "[p]robably around 500 bucks." TR 8/17/2022, pp. 67-68. This conflicting testimony left the jury with two possible valuations: $500 or $2,000.

The lower estimate came from a police officer who had no stake in this case. But because the victim improperly bolstered his higher valuation through hearsay testimony that a professional, third-party estimate was "very similar" to his valuation, it is likely the jury credited this higher valuation over the officer's lower,

[2] As of March 1, 2022, misdemeanor criminal mischief involves damage to the real or personal property of another below $2,000. § 18-4-501(4)(b)-(c), C.R.S. 2023. Class six felony criminal mischief, of which Mr. Kolacny was convicted, now involves damages exceeding $2,000 but less than $5,000. § 18-4-501(4)(d), C.R.S. 2023.

uncorroborated one. Indeed, the prosecutor argued as much in closing argument. *See* TR 8/18/2022, p. 75:16-19 (reminding the jury that although "Officer Godfrey . . . estimated the damage [at] more than a dollar, probably $500," "Mr. Lowery estimated it at a couple thousand dollars, and he told you that he got an estimate that can confirm that amount"); *see also Golob v. People*, 180 P.3d 1006, 1013-14 (Colo. 2008) (trial court's admission of "independent verification hearsay" regarding expert print analyses improperly "bolstered [the prosecution expert's] credibility"); *People v. Hard*, 2014 COA 132, ¶ 37 (admission of trooper's hearsay testimony was not harmless where it was the "only evidence presented at trial to identify" some of the drugs found in defendant's possession and no chemical testing was performed).

Because the victim's hearsay testimony about the estimate "substantially influenced the verdict" and "affected the fairness of the trial proceedings," reversal of Mr. Kolacny's felony criminal mischief conviction is warranted. *Hagos*, ¶ 12 (citation omitted); *see also* Crim. P. 52(a).

If on remand the prosecution elects not to retry Mr. Kolacny for felony criminal mischief and instead accepts the lesser charge of misdemeanor criminal mischief, the restitution award should be reduced accordingly—the court could not impose restitution of more than $1,000, the top value included in that misdemeanor conviction. *See* § 18-4-501(4), C.R.S. 2021; TR 8/17/2022, pp. 67-68; *see also*

Nelson v. Colorado, 137 S. Ct. 1249, 1256 n.10 (2017) ("'[R]eversal is reversal,' regardless of the reason, '[a]nd an invalid conviction is no conviction at all.'") (second alteration in original) (citation omitted); *Cowen v. People*, 2018 CO 96, ¶¶ 16-24, 41 (holding "Colorado's restitution statutes do not allow a trial court to impose restitution for pecuniary losses caused by conduct that formed the basis of a charge of which the defendant has been acquitted"); *People v. Sosa*, 2019 COA 182, ¶ 26 (applying *Cowen* to conduct for which the defendant was never criminally charged); *People v. Roddy*, 2021 CO 74, ¶ 32 (applying *Cowen* to conduct which underlies a dismissed charge); *United States v. Coddington*, 802 F. App'x 373, 374 (10th Cir. 2020) ("Based on *Nelson*, the Government concedes the restitution order against [the defendant] must be vacated if his convictions are vacated.").

III. The prosecutor committed misconduct by misstating the law on the presumption of innocence, in violation of Mr. Kolacny's due process rights.

A. Standard of Review and Preservation

This Court reviews prosecutorial misconduct by engaging in a two-step analysis. *People v. Trujillo*, 2018 COA 12, ¶ 36. First, this Court "determine[s] whether the prosecutor's conduct was improper based on the totality of the circumstances." *Id.* (citing *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010)).

Second, it "determine[s] whether any misconduct warrants reversal under the proper standard of review." *Id.*

"When the defense did not object to the misconduct," as here, this Court reviews for plain error. *Id.* ¶ 37; *see also Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005).

B. Discussion

1. The prosecutor committed misconduct during closing argument by misstating the law on the presumption of innocence.

Mr. Kolacny was questioned by police the night of the incident and denied any involvement. TR 8/17/2022, pp. 37-38. Specifically, he told police he left his house around 5:00 p.m. to grab dinner, returned home, and remained there all evening playing video games and watching Saturday Night Live. *See* Ex. 17 at 0:54-1:15, 3:32-4:19. At one point Mr. Kolacny thought he heard a car backfire but otherwise he was wearing headphones and did not hear a gunshot. Ex. 17 at 4:40-5:28.

During closing argument, the prosecutor argued these statements were untrustworthy:

> While a defendant is presumed innocent, *he is not presumed credible*. Credibility determinations are your province, right? But the defendant's statements to officers on the night of September 11, 2021, they're not presumed credible. *You don't have to give him that presumption*. You

> can look at the evidence and his statements, and they don't line up, right?

TR 8/18/2022, pp. 80-81 (emphases added).

This argument misstated the law on the presumption of innocence to which all criminal defendants are constitutionally entitled unless and until found guilty by a jury.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *see also* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25. The presumption of innocence, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Williams*, 425 U.S. at 503. It is a "bedrock" principle of this country's criminal law. *In re Winship*, 397 U.S. 358, 363 (1970); *see also Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). "A defendant retains the presumption of innocence throughout the trial process unless and until the jury returns a guilty verdict." *People v. Conyac*, 2014 COA 8M, ¶ 141 (citation omitted); *see also People v. McBride*, 228 P.3d 216, 223-24 (Colo. App. 2009) ("This presumption remains until *after* a jury returns a guilty verdict.") (emphasis added).

In practice, the presumption of innocence operates as "evidence in favor of the accused, introduced by the law in his behalf." *Coffin*, 156 U.S. at 460. "[I]t describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful." 2 McCormick on Evidence § 342 (8th ed. July 2022 update); *see also* 1 Wharton's Criminal Evidence § 2:2 (15th ed. Mar. 2023 update) ("The presumption [of innocence] operates merely as a procedural device to place the burden of producing evidence of guilt in the first instance and the burden of persuasion of guilt beyond a reasonable doubt upon the prosecutor."). To effectuate a defendant's presumption of innocence at trial, therefore, a jury must "put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (citation omitted).

In closing argument, the prosecutor told the jury Mr. Kolacny's statements denying guilt were not to be "presumed credible." TR 8/18/2022, p. 80:21-23.

Such an argument was legally inaccurate. It is the prosecution's burden to demonstrate each element of the charged offense beyond a reasonable doubt. U.S. Const. amends. V, XIV; Colo. Const. art. II § 25; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988). The presumption

of innocence is one way by which this burden remains with the prosecution and does not shift. If the prosecution's burden is to be meaningfully enforced, a defendant who maintained their innocence at the scene of an alleged crime and subsequently pleaded not guilty must be presumed credible in doing so. To say otherwise is to undermine the presumption of innocence. If it is not "assumed that any person's conduct upon a given occasion was lawful," McCormick, *supra*, § 342, the presumption of innocence is rendered meaningless. To be sure, the prosecution may introduce legitimate evidence at trial demonstrating a defendant is guilty. But it is the prosecution's burden to do so; it is not a defendant's burden to prove their credibility. That is precisely the function of the presumption of innocence: it means the defendant's assertion of innocence should be believed by the jury unless and until proven otherwise.

The prosecutor misstated these legal principles and thus violated Mr. Kolacny's due process right to a fair trial where he is presumed innocent throughout the trial proceedings. *See People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999) ("It is improper for [a prosecutor] to misstate or misinterpret the law during closing argument."); *see also People v. Rodriguez*, 794 P.2d 965, 977 (Colo. 1990). This was error.

2. Reversal is required.

"Ensuring fundamental fairness in trial is the beacon of plain error review." *People v. Nardine*, 2016 COA 85, ¶ 64. Because the prosecutorial misconduct here was "obvious" and "so undermine[d] the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction," reversal is required. *Id.* ¶ 63 (citing *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)).

The misstatement of law was obvious. It contradicted well-settled legal principles and precedent that a criminal defendant retains the presumption of innocence unless and until a jury returns a guilty verdict. *See, e.g., Williams*, 425 U.S. at 503; *Taylor*, 436 U.S. at 485; *Conyac*, ¶ 141; *see also People v. Pollard*, 2013 COA 31M, ¶ 40 (error is obvious if it contravenes "a well-settled legal principle"); *McBride*, 228 P.3d at 222 (holding the "'plainness' of [an] error can depend on well-settled legal *principles* as much as well-settled legal *precedents*") (citation omitted).

Additionally, the prosecutor's comment cast serious doubt on the reliability of Mr. Kolacny's convictions. The evidence in this case was far from overwhelming. *See Domingo-Gomez*, 125 P.3d at 1050 ("Factors to consider when determining the propriety of statements include . . . the strength of the evidence supporting the conviction."). Neither victim could identify Mr. Kolacny. There were no

eyewitnesses or surveillance video footage. Instead, the prosecution's case depended on circumstantial evidence. As the prosecutor put it, Mr. Kolacny was simply "the right man at the right time at the right place." TR 8/18/2022, p. 68:12-13.

But the defense correctly pointed out this "physical proximity," i.e., living by the alleged crime scene, was all that connected Mr. Kolacny to the incident. TR 8/18/2022, p. 102:10-14. There was no direct evidence linking him to the crime. The handgun was found next door in Mr. Kolacny's grandfather's house, where Mr. Kolacny maintained he did not have access. The prosecution could not establish when the spent shell casing in Mr. Kolacny's driveway was fired. TR 8/17/2022, p.54:21-24. And testimony elicited from the prosecution's forensic science expert, Dana Greeley, suggested GSR particles could be easily transferred and linger in the air following a gunshot. TR 8/17/2022, pp. 196-98. Scant evidence, therefore, inculpated Mr. Kolacny. The prosecution's burden to prove a defendant's guilt beyond a reasonable doubt is a "heavy" one. *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984). But here, the prosecutor's comment reduced that burden by making it more likely the jury would disbelieve Mr. Kolacny and convict.

To be sure, the prosecutor's statement purported to define the contours of Mr. Kolacny's presumption of innocence in relation to the jury's role to evaluate witness credibility. But the statement went awry when the prosecutor misstated the

applicable law. Moreover, closing argument was not the first time the prosecutor told the jury not to trust Mr. Kolacny's account. In opening statements, the prosecutor cautioned the jury to "look at the misdirections and mistruths" in his statements. TR 8/16/2022, p. 172:5-6. Rather than being a fair comment on the evidence, the prosecutor gutted the presumption of innocence.

For these reasons, reversal of all convictions is required. This includes Mr. Kolacny's convictions in the second part of the bifurcated trial for two counts of possession of a weapon by a previous offender, § 18-12-108(1), (2)(c), C.R.S. 2021, and violation of a civil protection order, § 18-6-803.5(1)(a), C.R.S. 2021. For each of these alleged offenses, the prosecution was required to prove beyond a reasonable doubt, as relevant here, that Mr. Kolacny knowingly possessed a weapon. *See* § 18-12-108(1), (2)(c), C.R.S. 2021 ("A person commits the crime of possession of a weapon by a previous offender if the person *knowingly* possesses, uses, or carries upon his or her person a firearm . . . .") (emphasis added); § 18-6-803.5(1)(a), C.R.S. 2021; *see also* CF, pp. 339, 341.

But Mr. Kolacny testified to the contrary. He knew he was not permitted to possess firearms, so he gave them to his grandfather to store. TR 8/18/2022, pp. 163:2-4, 168:1-7. Anything that remained in Mr. Kolacny's house, he testified, was there without his knowledge. TR 8/18/2022, pp. 168-69. This is because Mr.

Kolacny was incarcerated before he moved into the house, so his brother had packed his things and Mr. Kolacny was still unpacking at the time of this incident. TR 8/18/2022, pp. 162, 176-79. Here again, the jury was tasked with deciding who and what to believe. This determination, in both parts of the bifurcated proceedings, should have been made against a legally accurate backdrop of Mr. Kolacny's presumption of innocence. Because it was not, reversal is required.

IV. The trial court erroneously imposed an excessive victim assistance surcharge against Mr. Kolacny and otherwise imposed surcharges and costs outside Mr. Kolacny's presence, without giving him an opportunity to request a waiver.

A. Standard of Review and Preservation

Mr. Kolacny was sentenced on October 17, 2022. *See* TR 10/17/22, pp. 25-28. At sentencing, the trial court granted the prosecution's request for restitution ($1,673.28) and costs of prosecution ($536.33). *See* TR 10/17/22, p. 28:1-3. The court did not address any other surcharges, costs, or fees at sentencing. However, the mittimus reflects a total amount owed of $3,283.11. *See* CF, pp. 400-01.[3] As relevant here, this amount includes a victim assistance surcharge of $808.00, comprised of $163.00 per felony conviction and $78.00 per misdemeanor

[3] Defense counsel did not object to restitution or costs of prosecution, comprising $2,209.61 of the $3,283.11 owed by Mr. Kolacny. TR 10/17/2022, p. 17:11-19.

conviction. *See* Colorado Courts E-Filing (CCEF), Douglas County Case No. 2021CR841.[4]

Whether Mr. Kolacny's sentence is authorized by law is a question this Court reviews de novo. *See Yeadon v. People*, 2020 CO 38, ¶ 6; *Waddell v. People*, 2020 CO 39, ¶ 10.

B. The trial court mistakenly imposed the victim assistance surcharge per count, rather than per action, contrary to the plain language of section 24-4.2-104(1).

Section 24-4.2-104(1) requires the victim assistance surcharge be "levied on *each criminal action* resulting in a conviction." (Emphasis added.) The statute's plain language makes clear the surcharge is imposed once per criminal action; it is not imposed on each count comprising that action. *See, e.g.*, Black's Law Dictionary (11th ed. 2019) (defining "action" to mean "[a] civil or criminal judicial proceeding"); *see also Cowen*, ¶ 12 ("The plain meaning rule is the cardinal rule in the realm of statutory interpretation . . . [and] 'a court should always turn first' to the plain meaning rule 'before all other[ ]' rules because 'courts must presume that a

[4] Mr. Kolacny respectfully requests this Court take judicial notice of the breakdown of specific fees assessed against him as reflected on CCEF. *See* CRE 201; *People v. Linares-Guzman*, 195 P.3d 1130, 1135-37 (Colo. App. 2008) (courts may take judicial notice of the contents of records in related proceedings).

legislature says in a statute what it means and means in a statute what it says there.'" (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992))).

The legislature commonly uses the term "criminal action" to refer to an entire case. *See, e.g.*, § 16-5-101(1), C.R.S. 2023 (providing for the commencement of "a criminal action" by grand jury indictment, information, or complaint); § 16-2-114(1), C.R.S. 2023 (providing the procedures for appealing the "judgment of the county court in a criminal action"). And a division of this Court similarly concluded the "term 'action' is generally considered synonymous with the term 'case,'" and refers to "the entire judicial process of dispute resolution, from invocation of the courts' jurisdiction to entry of a final judgment that is not subject to further appeal." *People v. Sterns*, 2013 COA 66, ¶¶ 10-11 (citations omitted). Critically, the "terms 'case' and 'action' are *not* synonymous . . . with the terms 'charge' or 'claim.'" *Id.* ¶ 12 (emphasis added); *see also Ernst v. St. Clair*, 206 P. 799, 800 (Colo. 1922) ("action" is synonymous with "legal proceedings").

Here, Mr. Kolacny was charged in a single complaint with six alleged criminal law violations. CF, pp. 1-3. These allegations were assigned one case number, Douglas County Case Number 21CR841, and were prosecuted together (albeit in bifurcated proceedings before the same jury to minimize the prejudice to Mr. Kolacny). But the trial court mistakenly imposed the victim assistance surcharge on

each count of conviction (($163.00 x 4) + ($78.00 x 2) = $808.00) when it should have only imposed $163.00 total.[5] For these reasons, Mr. Kolacny asks this Court to vacate the excess surcharge ($645.00) and remand for correction of the mittimus. *See* Crim. P. 35(a) (an illegal sentence may be corrected at any time), 36 (clerical errors may be corrected at any time).

Additionally, Mr. Kolacny has already paid $516.38 toward the victim assistance surcharge. On remand, this Court should instruct the trial court to reallocate the overage to other surcharges and fees, to the extent they are not waived. *See infra* Part C.

C. The trial court failed to provide Mr. Kolacny an opportunity to demonstrate his indigence and request a waiver of surcharges and costs.

After the sentencing hearing, the trial court added surcharges to Mr. Kolacny's mittimus for victim assistance, § 24-4.2-104(1)(a)(I), C.R.S. 2023; victim compensation, § 24-4.1-119(1)(a), C.R.S. 2023; genetic testing, § 24-33.5-415.6(1), C.R.S. 2023; and restorative justice, § 18-25-101(1), C.R.S. 2023. Imposition of these surcharges was mandatory here. *See Waddell*, ¶¶ 22-25. Because they were not

[5] Notably, the trial court only imposed the victim compensation fee once. The statutory language about imposing that fee is substantially similar to the language used for the victim assistance fee. *Compare* § 24-4.2-104(1)(a)(I), C.R.S. 2023, *with* § 24-4.1-119(1)(a), C.R.S. 2023.

imposed at sentencing, "the sentence [Mr. Kolacny] received was not authorized by law" and thus it was "subject to correction" under Rule 35(a). *Yeadon*, ¶ 15; *accord* Crim. P. 35(a) ("The court may correct a sentence that was not authorized by law . . . at any time . . . .").

Moreover, the surcharges were imposed outside Mr. Kolacny's presence and without giving him an opportunity to show he was financially unable to pay and, thus, to request a waiver. The surcharges imposed here are waivable if the court finds that Mr. Kolacny is indigent. § 24-4.2-104(1)(c) (victim assistance surcharge); § 24-4.1-119(1.5) (victim compensation surcharge); § 24-33.5-415.6(9) (genetic testing surcharge); § 18-25-101(4) (restorative justice surcharge). The same is true for various costs also imposed here, including court costs, § 13-32-105(1)(a), (b), C.R.S. 2023 (silent as to waiver but see Chief Justice Directive 85-31, which provides authority for waiver in instances where the statutes are silent, if the court finds the defendant has no ability to pay); court security cash fund, § 13-1-204(1)(b), C.R.S. 2023 (silent as to waiver but see Chief Justice Directive 85-31); and the public defender accounts receivable code, § 21-1-103(3), C.R.S. 2023 (waivable upon finding defendant does not have the financial resources to pay).

Thus, a remand is appropriate for the court to consider whether to waive any, all, or a portion of these surcharges and costs. *Waddell*, ¶¶ 27-28 (remanding where the trial court failed to impose surcharges in open court).

CONCLUSION

Based on the foregoing arguments, Mr. Kolacny respectfully asks this Court to reverse all his convictions and remand for a new trial.

In the alternative, Mr. Kolacny asks this Court to remand to correct the victim assistance surcharge and to allow Mr. Kolacny to request a waiver of all or any portion of the surcharges and costs assessed against him.

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CERTIFICATE OF SERVICE

I certify that, on January 16, 2024, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's office through their AG Criminal Appeals account.