COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; Douglas District Court Honorable Theresa Michelle Slade Case Number 2021CR841	DATE FILED October 29, 2024 3:07 PM
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant COREY NEIL KOLACNY	
Megan A. Ring Colorado State Public Defender ROBIN RHEINER 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #50127	Case Number: 2022CA2106
REPLY 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 and formatting requirements set forth in C.A.R. 28(g).

It contains 5,050 words.

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

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ARGUMENT

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

The Opening Brief challenged evidence of firearms paraphernalia admitted in the first part of Mr. Kolacny's bifurcated trial as irrelevant to the charges at issue and highly prejudicial. Opening Br. 10-15. The People argue otherwise.

A. Preservation

The Answer Brief states that Mr. Kolacny "partially preserved" this issue. Answer Br. 12-13. Specifically, the People agree defense counsel objected to admission of the Walther starter pistol under Colorado Rules of Evidence 401-403 and to admission of the rifle ammunition under Rule 401. But the People posit the defense "never argued below that admitting the rifle ammunition violated CRE 403." Answer Br. 13. Although the parties made "similar arguments" when discussing admission of the rifle ammunition and Walther starter pistol, TR 8/16/2022, p. 11:5-6, Mr. Kolacny acknowledges that defense counsel focused on the relevance of the rifle ammunition (or lack thereof) and thus did not specifically argue Rule 403 provided an additional reason why the ammunition should not be admitted, *see* TR 8/16/2022, pp. 10-11.

The parties agree that defense counsel did not specifically object to testimony about the tactical gloves. Answer Br. 13.

B. Discussion

1. The trial court abused its discretion by admitting irrelevant evidence of firearms paraphernalia that was undisputedly not used to commit the charges at issue in the first part of the bifurcated trial.

The People contend evidence of firearms paraphernalia was relevant for two reasons: (1) "because it showed the thorough, complete quality of the investigation," and (2) "because Defendant had categorically denied the Walther gun and rifle ammunition were in his possession that night." Answer Br. 10; *see also* Answer Br. 20. These arguments are unpersuasive.

First, this evidence could not be admitted under the auspices of a thorough investigation because it is undisputed the Walther starter pistol and rifle ammunition were *not* used to commit menacing, criminal mischief, or prohibited use of a weapon. *See* CF, pp. 1-3 (complaint), 78-80 (motion to bifurcate), 400 (mittimus); TR 8/17/2022, p. 73:10-12; TR 8/18/2022, p. 68:15-23. That the police searched Mr. Kolacny's house and discovered another weapon (albeit, an inoperable one) and rifle ammunition did not make it more probable Mr. Kolacny menaced the victims with the .45 caliber Taurus handgun found in his grandfather's property, or that he damaged the victim's car. *Cf. People v. Carlson*, 712 P.2d 1018, 1022 (Colo. 1986) ("In determining whether the challenged evidence relates to a fact of consequence

to the determination of this case, [this Court] must necessarily look to the elements of the crime[s] charged.").

In the alternative, the People claim the defense "open[ed] the door to the prosecution presenting this evidence" by "question[ing]" the quality and thoroughness of the investigation in opening statements. Answer Br. 22-23, 26. To support this argument, the People cite two statements by defense counsel about how the police arrested Mr. Kolacny without considering other suspects. *See* Answer Br. 23 (citing TR 8/16/2022, pp. 175:17-18, 177:3-7). The People insist this rendered the challenged evidence "relevant to prevent a misleading impression and to provide the jury context for the investigation," including "what the police did and what tied Defendant to the crime both directly and circumstantially." Answer Br. 26. But the People do not explain why evidence of firearms paraphernalia in Mr. Kolacny's house—but not used in the alleged crime—shows a thorough investigation tending to establish Mr. Kolacny's guilt, directly or circumstantially. And the record does not suggest the trial court believed the defense had opened the door. *Cf.* TR 8/17/2022, pp. 6-8. In any event, this Court should reject the People's argument that, simply because the defense asserted Mr. Kolacny was not involved in the incident, any and all evidence discovered in the course of the police investigation became relevant and admissible.

Second, this evidence did nothing to prove whether Mr. Kolacny was guilty of the three charges at issue in the first phase of trial. The People assert otherwise, arguing that evidence of the Walther starter pistol in particular was "circumstantial evidence of [Mr. Kolacny's] guilt, specifically that he shot a firearm to menace the victims." Answer Br. 21. The People appear to reason that, because Mr. Kolacny "denied using a firearm that night," the challenged evidence was "relevant to th[e jury's] credibility determination." Answer Br. 21-22. This argument, too, is unavailing.

In the first part of Mr. Kolacny's bifurcated trial, the prosecution introduced Exhibit 17—video from an officer's body-worn camera of Mr. Kolacny being questioned by police on the scene. *See* TR 8/17/2022, pp. 101-02. In the video, Mr. Kolacny denied any involvement in the menacing and, when asked about the spent shell casing in his driveway, told police he wasn't "in possession" of any firearms. *See* Ex. 17 at 1:18-1:48; *see also id.* at 1:57-2:01, 6:47-7:02.[1] He did not, however, specifically "den[y] the Walther gun and rifle ammunition were in his possession

[1] Exhibit 17 was admitted in the first part of the bifurcated trial and was edited to exclude Mr. Kolacny's statements that he was on probation and, for that reason, knew he wasn't allowed to possess a firearm. Mr. Kolacny thus gave his firearms to his grandfather to store. TR 8/18/2022, pp. 163, 168; *see also* Ex. 50 (admitted in the second phase of the bifurcated trial and included Mr. Kolacny's statements about being on probation).

that night," as the People claim. Answer Br. 10. This makes sense, too, because neither were thought to be involved. The Walther starter pistol was "non-operable" and not "capable of firing a .45 caliber cartridge"—the caliber of the spent shell casing in the driveway and suspected to be evidence of the menacing. *See* 8/17/2022, pp. 44-45, 181. Even the prosecution admitted police "were able to rule it out as what was not used in the offense." TR 8/16/2022, p. 8:7-10. And as defense counsel noted, Mr. Kolacny was never asked about the rifle ammunition. TR 8/16/2022, p. 11:14-19. (Nor, for that matter, was he asked about other firearms paraphernalia, including the tactical gloves.) An officer even testified rifle ammunition was "not rounds that would have been fired in the driveway" but "just happened to be in the house." TR 8/17/2022, pp. 46-47.

But even if this Court disagrees, the credibility of Mr. Kolacny's statements denying possession of any weapons did not render evidence of all the firearms paraphernalia found in his home admissible in the first part of the bifurcated trial (as opposed to the second). *Contra* Answer Br. 21. None of this evidence was alleged to be involved in the menacing and so did nothing to establish Mr. Kolacny's guilt for that offense. Nor did it connect Mr. Kolacny with the Taurus handgun found in his grandfather's house. *See People v. Evans*, 710 P.2d 1167, 1169 (Colo. App. 1985) ("Facts so remote or so collateral to the issue that they afford only conjectural

inference are properly excluded."). Finally, the prosecution did not present any evidence suggesting that Mr. Kolacny used or handled the Walther starter pistol or rifle ammunition that night.

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

2. Contrary to the People's argument, the jury's 52 witness questions demonstrate that the evidence of firearms paraphernalia was unduly prejudicial.

The People assert the jury's 52 witness questions submitted during the first part of the bifurcated trial show the jury "thoughtfully considered" and "differentiated between" the evidence before it, Answer Br. 23-24; therefore, admission of the firearms paraphernalia evidence was not prejudicial. To the contrary, it is just as likely that the jury's questions show confusion and an effort to sort through the evidence to determine whether it tended to prove Mr. Kolacny's guilt—a task made more difficult by the admission of irrelevant evidence having nothing to do with the charges.

For instance, the People point out that the jury "asked questions specific to the Taurus handgun and the driveway shell casing, including whether they were fingerprinted." Answer Br. 25. The People then assume the jury *didn't* ask whether the Walther starter pistol was fingerprinted because "they understood that law

enforcement did not believe the gun was used to menace" the victims. *Id.* Instead, it's possible the jury didn't ask because it knew the starter pistol was found in Mr. Kolacny's home—meaning it would be unsurprising if his fingerprints were on it (as opposed to the Taurus handgun, which was found next door in his grandfather's house, where Mr. Kolacny maintained he did not have access).

In any event, the fact that the jury asked so many questions about each piece of evidence—including evidence not involved in the alleged menacing—highlights the prejudice, confusion, and distraction caused by admission of the firearms paraphernalia. *See, e.g.*, CF, p. 293 (asking whether police found "a .45 caliber weapon *or a rifle* in the home") (emphasis added); p. 294 (asking whether Mr. Kolacny has "any other registered guns"); p. 299 (asking whether the "gun found [that] had both 9mm and .22 [caliber] markings," i.e., the Walther starter pistol, could "be af[f]ixed with different caliber barrels, including .45 ACP"); pp. 297, 305 (multiple questions asking whether a weapon was found that *could* have fired the spent bullet or fit the magazine).

But also, the questions suggest the jury was open to Mr. Kolacny's theory of defense. For example, the jury asked whether the slingshot "belonged to Mr. Kolacny or prove he'd used it?" CF, p. 292. They also asked about concentrations of GSR particles and transferred contact. *See, e.g.*, CF, p. 312 (asking if it's "possible

for the defendant to have GSR on his hand without shooting a gun?"). And whether the police wore "gloves when searching for evidence or apprehending" Mr. Kolacny. CF, p. 303. This suggested the jury might have believed Mr. Kolacny had been inside his house and was not involved in the incident.

The People admit the Walther starter pistol "couldn't fire the .45 caliber shell casing found in Defendant's driveway" and that "rifle ammunition . . . couldn't be fired from either the Walther gun or the Taurus gun." Answer Br. 23. And the People do not dispute that the prosecution failed to present any evidence the tactical gloves were involved. Admission of this irrelevant evidence was highly prejudicial. It distracted the jury and encouraged it to "convict[] based on Mr. Kolacny's mere possession of firearms, regardless of his conduct." Opening Br. 7; *see also Kaufman v. People*, 202 P.3d 542, 555 (Colo. 2009) ("[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.").[2] And the prosecution relied on this inference in closing, saying that Mr. Kolacny was the "right" guy because "[h]e's

[2] In attempting to distinguish *Kaufman*, the People assert that Mr. Kolacny did not challenge the firearms paraphernalia evidence under *Spoto* and CRE 404(b), and thus, "should not be permitted to" do so in this Reply Brief. *See* Answer Br. 23 & n.6. But Mr. Kolacny is not raising such an argument. Instead, *Kaufman* illustrates why admission of the challenged evidence here, as in that case, was prejudicial and impacted the verdict and fairness of the trial. Mr. Kolacny made the same argument in the Opening Brief. *See* Opening Br. 16-17.

the only one in the area. He is the one with the slingshot and the rocks *and the guns*." TR 8/18/2022, pp. 68:12-14, 79:2-3 (emphasis added).

C. Reversal is required.

The Opening Brief argued admission of the firearms paraphernalia evidence was not harmless because the evidence of guilt wasn't overwhelming and because its admission "risked a verdict based on Mr. Kolacny's mere possession of firearms paraphernalia, rather than proof beyond a reasonable doubt of his conduct." Opening Br. 15-17.

The People do not directly respond to these arguments. Instead, the People argue only that the error was harmless because the jury's questions "demonstrated understanding of the evidence." Answer Br. 27. But this argument assumes the questions are unambiguous, which they aren't. As explained in Part I.B.2, the jury's questions suggest an awareness of *all* the evidence the prosecution introduced and an effort to sort out what evidence was involved in the crime and what role, if any, the rest of the evidence should play in its decision making. Because the record does not reveal what ultimately factored into the jury's deliberations, this Court cannot confidently conclude there was "no reasonable possibility" the firearms paraphernalia evidence affected the fairness of the trial. Opening Br. 15-17; Answer Br. 27.

The People also assert "any error was not plain as to admission of the rifle ammunition violating CRE 403" and testimony about the tactical gloves because case law does not categorically preclude such evidence when it wasn't used in the charged offense. Answer Br. 27-28. But Mr. Kolacny's argument is not so absolute. Instead, he is arguing that *in this case* the firearms paraphernalia should have been excluded under CRE 401-403 because he was being accused of menacing the victims with a particular gun and so evidence of *other* guns and/or ammunition in his house, which was undisputedly not used in the crime, was irrelevant and highly prejudicial. *See* TR 8/18/2022, pp. 99-100 (defense counsel characterizing the prosecution's argument as "he's got the firearm stuff in his house, so he's probably the shooter").

Such an argument is not novel. *See, e.g.*, *Kaufman*, 202 P.3d at 555 (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"); *Carlson*, 712 P.2d at 1022 (determining evidence was irrelevant where it "tended to establish nothing more than the fact for which it was offered" but "was of no consequence to the resolution of the arson charge"); *Evans*, 710 P.2d at 1169 (concluding trial court did not abuse its discretion by refusing to admit evidence "regarding defendant's personal religious belief[s]" as this was "irrelevant to the charge of distribution of

marijuana to others"). In any event, because CRE 401-403 are fundamental rules governing evidence admissibility, and the parties repeatedly litigated issues surrounding the admission of this evidence, this error was "obvious." *Hagos v. People*, 2012 CO 63, ¶ 14; *see also People v. Pollard*, 2013 COA 31M, ¶ 40 (error is obvious if it contravenes "a well-settled legal principle").

Finally, the People assert "any error wasn't substantially prejudicial" because the jury's questions suggest it was neither confused nor relied on the firearms evidence to reach its verdict. Answer Br. 28. To the contrary, jury confusion and distraction is precisely what this case involved. For example, the jury asked about GSR particles on the gloves because they were told about the gloves, *even though* Mr. Kolacny tested positive for GSR *and* no one testified the gloves were in any way involved. And the jury asked about different ammunition and magazines fitting different weapons because they were told about every firearms-related piece of evidence the police found, *even though* the prosecution alleged only that the Taurus handgun and a .45 caliber bullet were involved.

There were no eyewitnesses to the alleged incident. Neither victim could identify Mr. Kolacny by physical appearance or the sound of his voice. And no direct evidence connected Mr. Kolacny to the alleged incident. Under these circumstances, admission of the firearms paraphernalia risked a conviction on an improper

inference, i.e., that Mr. Kolacny had many guns and gun-related things around, so he was more likely to be guilty of menacing the victims with a gun.

Reversal is required.

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

A. This error was preserved.

Even though the parties appear to agree defense counsel timely objected to Lowery's testimony about an estimate of damage to his car as hearsay,[3] the People nonetheless contend this issue is only "partially preserved." Answer Br. 29. The People assert that, because "[d]efense counsel never argued that Lowery 'improperly bolstered his higher valuation through hearsay testimony,'" this portion of Mr. Kolacny's appellate argument is unpreserved. Answer Br. 30 (quoting Opening Br. 21). But this argument incorrectly conflates the error at issue with the harm flowing from it.

[3] At one point the Answer Brief contends the defense never objected "to th[e] specific statement" by Lowery about the estimate. Answer Br. 39. But defense counsel had already objected to Lowery's testimony and the court overruled the objection. *See* TR 8/16/2022, pp. 221-22. Under these circumstances, the defense was not required to reraise the objection to preserve the issue. *See* CRE 103(a); *Bondsteel v. People*, 2019 CO 26, ¶ 28 ("If the facts and circumstances that motivated the initial objection have not changed, then all of the requirements for preservation of the issue will have been satisfied.").

After explaining why this testimony was improper hearsay, i.e., an error, the Opening Brief then argued its admission was not harmless because, as relevant here, it "bolstered the credibility of the victim's higher valuation" and "elevated criminal mischief to a felony." Opening Br. 7-8, 21-22. The bolstering argument was thus one of harm, not error. The People cite no authority, and Mr. Kolacny is aware of none, requiring preservation of both the error *and* any harm flowing from it before this Court will review for harmless error. Indeed, this would be illogical for it would effectively require trial counsel, as here, in the middle of trial, to not only identify an erroneous ruling but then anticipate any and all possible resulting harms. Colorado caselaw on preservation does not require this. Nor does this view comport with the characterization of harmless error as a standard of reversal, which, "[b]y definition, ... applie[s] *only after* an appellate court concludes (or at least assumes) that an error occurred." *Castro v. People*, 2024 CO 56, ¶ 113 (Gabriel, J., concurring in the judgment) (emphasis added); *see also People v. Crabtree*, 2024 CO 40M, ¶ 27 (recognizing "nonconstitutional harmless error" as a standard of reversal for preserved nonstructural trial errors); *Hagos*, ¶ 12 ("[W]e review nonconstitutional trial errors that were preserved by objection for harmless error.").

Because defense counsel contemporaneously objected to the admission of Lowery's testimony on hearsay grounds, this error was sufficiently preserved and

should be reviewed under the harmless error standard. *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (explaining an issue is preserved so long as "the trial court [is] presented with an adequate opportunity to make findings of fact and conclusions of law").

B. Discussion

1. Lowery's testimony about the estimate was inadmissible hearsay.

The People disagree that Lowery's testimony was inadmissible hearsay because the repair cost for the damage to the car was "based on his personal knowledge" as the owner and, in any event, the "prosecutor carefully phrased her questions" so as not to inquire "what the estimate said." Answer Br. 36-37. Rather than testifying about the "content of the estimate," the People posit Lowery testified only that the estimate was "'very similar' to his personal estimate." Answer Br. 37-38. But the record reflects that Lowery's testimony revealed the content of the estimate and that the prosecution used it as such.

When the prosecutor asked Lowery if he knew "about how much damage was done to [his] car[,]" Lowery replied: "It was $2,000." TR 8/16/2022, p. 220:10-19. And Lowery confirmed that $2,000 was "very similar to what [he] was quoted" when he sought out "some information about what it would cost to fix [the] car." TR 8/16/2022, pp. 222-23. By eliciting information about the estimate in this way, the

prosecutor was able to get the amount of the estimate before the jury as evidence offered for the truth of the matter asserted—i.e., the value of damage to the car. And the prosecutor did so without introducing the estimate itself or testimony from the declarant-mechanic, thereby depriving Mr. Kolacny of an opportunity to effectively challenge it. *See* Opening Br. 19-20.

Indeed, the prosecutor used Lowery's testimony in closing argument to prove the value element of criminal mischief: "Mr. Lowery estimated [the damage at] a couple thousand dollars, and *he told you that he got an estimate that can confirm that amount*." TR 8/18/2022, p. 75:17-19 (emphasis added).[4]

The Answer Brief nonetheless asserts Lowery's testimony was appropriate because a "property owner is generally competent to testify regarding the market value of their property," which "fairly include[s]" the "actual costs associated with its repair or maintenance." Answer Br. 36. But as Mr. Kolacny explained in his Opening Brief, he is not challenging Lowery's personal opinion of the damage to his car; he is asserting that Lowery's testimony "crossed the line" when it

[4] The Answer Brief claims that Mr. Kolacny did not challenge this statement at trial and "does not raise it on appeal." Answer Br. 35. But again, this argument conflates Mr. Kolacny's argument about the error with his arguments about the resulting harm. *See* Opening Br. 22 (relying on the prosecutor's statement in closing argument to show the inadmissible hearsay testimony "substantially influenced the verdict" and "affected the fairness of the trial proceedings") (citation omitted).

"incorporate[ed] a third-party professional estimate." Opening Br. 20. It does not appear the People dispute that eliciting the mechanic's estimate and using it for its truth would be inadmissible hearsay.

Accordingly, its admission was error. *See* CRE 802.

2. The erroneous admission of this testimony warrants reversal.

The Opening Brief argued the admission of this hearsay testimony was not harmless. Opening Br. 20-23. But the People maintain the plain error standard applies. Answer Br. 39-40. Under either standard, reversal is warranted.

The error in admitting Lowery's testimony was obvious. It contradicted well-settled legal principles and precedent barring hearsay testimony unless an exception applies. *See* CRE 802; *see also Pollard*, ¶ 40.

Additionally, the error cast serious doubt on the reliability of Mr. Kolacny's felony criminal mischief conviction. "[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. Here, the prosecutor acknowledged a police officer's lower valuation, based on his personal experience, before encouraging the jury to credit Lowery's higher estimate because that amount was "confirm[ed]" by the mechanic's professional estimate. TR 8/18/2022, p. 75:16-19. Thus, as in *Golob v. People*, 180 P.3d 1006, 1011 (Colo. 2008), the prosecutor "pointed to the"

estimate "as evidence that" Lowery's estimate was "correct and, thereby, sought to bolster [Lowery's] credibility." Contrary to the People's argument, *see* Answer Br. 40, the jury was not simply deciding between two lay estimates. That is, the prosecutor was not asking the jury to credit Lowery's higher estimate over the officer's lower one because Lowery was a "car guy"; instead, the prosecutor was encouraging the jury to go with Lowery's testimony because it was "confirm[ed]" by a professional estimate. TR 8/18/2022, p. 75:16-19. Because the higher valuation elevated criminal mischief to a felony offense, the inadmissible hearsay testimony about the estimate "substantially influenced the verdict." *Hagos*, ¶ 12 (citation omitted).

For these reasons, reversal of Mr. Kolacny's felony criminal mischief conviction is warranted.

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

A. The prosecutor's comments were improper.

The Opening Brief argued that the prosecutor misstated the law on the presumption of innocence by telling the jury that Mr. Kolacny's statements denying guilt were not to be "presumed credible." Opening Br. 25-27. The Answer Brief disagrees such comments were improper for two reasons: first, because the

presumption of innocence doesn't include a corresponding presumption of credibility, Answer Br. 44; and second, because the prosecutor was merely "explaining to the jury how the presumption of innocence and credibility instruction worked together," Answer Br. 45. Both arguments fail.

To be clear, this is not a situation where the jury is simply evaluating witness credibility, as the People believe. Instead, this is about how the jury should receive Mr. Kolacny's assertion of his innocence as it evaluates the other evidence admitted at trial. The presumption of innocence operates as "evidence in favor of the accused, introduced by the law in his behalf." *Coffin v. United States*, 156 U.S. 432, 460 (1895). That is, the presumption is a "procedural device . . . plac[ing] the burden of producing evidence of guilt in the first instance . . . upon the prosecutor." 1 Wharton's Criminal Evidence § 2:2 (15th ed. Oct. 2024 update). Consequently, it is up to the prosecution to rebut that presumption, so to speak, by introducing evidence tending to show guilt beyond a reasonable doubt. For this process to work, a criminal defendant's assertion of innocence must necessarily be "presumed credible" unless and until the jury concludes during deliberations that the presumption of innocence has been overcome. *See People v. McBride*, 228 P.3d 216, 224 (Colo. App. 2009) ("The 'presumption operates at the guilt phase of a trial to remind the jury that the

State has the burden of establishing every element of the offense beyond a reasonable doubt.'" (quoting *Delo v. Lashley*, 507 U.S. 272, 278 (1993))).

The prosecutor here told the jury Mr. Kolacny's denial of wrongdoing need not be "presumed credible." TR 8/18/2022, p. 80:21-23. But this misstated the law. To the contrary, such statements *must* be presumed credible; otherwise, the prosecution's burden of proof would be impermissibly lowered and the presumption of innocence rendered meaningless. *See* Opening Br. 26-27.

B. This error warrants reversal.

The People argue only that "none of the prosecutor's statements can be considered flagrantly, glaringly, or tremendously improper." Answer Br. 46. The People do not clearly argue that, if improper, the prosecutor's comments here did not impact the jury's verdict. *Cf.* Opening Br. 28-31; *People v. Nardine*, 2016 COA 85, ¶ 63 (reversal under the plain error standard is appropriate where the prosecutorial misconduct is both "obvious" *and* "so undermine[d] the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction"). Specifically, the People failed to respond to Mr. Kolacny's primary argument that the "evidence in this case was far from overwhelming." Opening Br. 28-29.

To the extent the People make any argument about the effect of the prosecutor's comments, they assert only that the "prosecutor commented on reasonable inferences from Defendant's statements relating to his credibility, but never connected his lack of credibility to an argument that he was guilty." Answer Br. 45. The People do not elaborate or explain further. *Cf. People v. Restrepo*, 2021 COA 139, ¶ 20 (declining to address merits of State's "undeveloped argument"); *People v. Lopez*, 2022 COA 70M, ¶ 40 (declining to address State's "tepid" argument, reasoning that "it is not [this Court's] job to make or develop a party's argument when that party has not endeavored to do so itself") (internal quotation marks and citation omitted).

But in any event, the record suggests otherwise. A theme running through the prosecutor's closing argument was that Mr. Kolacny carefully crafted a story to try and convince the police he was innocent when he wasn't: "[H]e's admitting what he can't deny, right? He has to admit things he can't deny. . . . But he's denying what he can['t] admit. *And that's what's important, right?* He has to deny certain things, because if he admits them, well, then of course they're going to know it's him, and then he gets in trouble." TR 8/18/2022, p. 82:4-6, 18-22 (emphasis added). In this way, the prosecution suggested the lack of credibility in Mr. Kolacny's statements tended to show his guilt.

Because the prosecutor's statement undermining the presumption of innocence was obvious error and cast serious doubt on the reliability of all Mr. Kolacny's convictions, *see* Opening Br. 28-31, reversal is appropriate.

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.

In the Opening Brief, Mr. Kolacny argued the trial court erred in two ways: (1) by mistakenly imposing the victim assistance surcharge per count, rather than per action, contrary to the plain language of section 24-4.2-104(1); and (2) by failing to provide Mr. Kolacny an opportunity to demonstrate his indigence and request a waiver of surcharges and costs. *See* Opening Br. 32-36.

The People agree. *See* Answer Br. 11-12, 46, 50.

Specifically, the People agree with Mr. Kolacny that the trial court erred in its assessment of the victim assistance surcharge per conviction, rather than per action, and the case should thus be remanded to vacate all but $163.00 of the victim assistance surcharges assessed.[5] *See* Answer Br. 49-50 ("The court's imposition of

[5] Attached to the Answer Brief as Exhibit 1 is a Data Access printout showing the surcharges and costs assessed against Mr. Kolacny. This reflects that he has now fully paid the $808.00 victim assistance surcharge erroneously assessed against him. Therefore, Mr. Kolacny requests this Court on remand instruct the trial court to reallocate the overage ($645.00) to other surcharges and fees, to the extent they are not waived. *See* Opening Br. 34.

$808.00 for the victim assistance fund surcharge was not consistent with section 24-4.2-104 . . . . This case should be remanded so the trial court can amend the assessed fees amount in the mittimus.").

The People also agree that the trial court erred by imposing waivable surcharges and costs outside Mr. Kolacny's presence, and thus that the case should be remanded to consider waiver. *See* Answer Br. 50 ("The People agree that this case should be remanded so that the court may make findings with respect to indigence and ability to pay the mandatory surcharges.").

CONCLUSION

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

Alternatively, Mr. Kolacny asks this Court to remand for correction of the mittimus to reflect the correct victim assistance surcharge ($163.00) 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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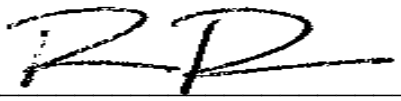

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CERTIFICATE OF SERVICE

I certify that, on October 29, 2024, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Sonia Raichur Russo of the Attorney General's Office.