COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED August 29, 2024 2:29 PM
Douglas County District Court Honorable Theresa M. Slade, Judge Case No. 21CR841	
THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF-APPELLEE, v. COREY NEIL KOLACNY, DEFENDANT-APPELLANT.	▲ **COURT USE ONLY** ▲ Case No. 22CA2106
PHILIP J. WEISER, Attorney General SONIA RAICHUR RUSSO, Senior Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-508-6000 E-Mail: sonia.russo@coag.gov Registration Number: 53300 *Counsel of Record	

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

Choose one:

☒It contains 9,004 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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

/s/ Sonia R. Russo

_____

Signature of attorney or party

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

Defendant, Corey Neil Kolacny, appeals from the judgment of conviction entered following guilty verdicts by a jury of felony menacing with a real or simulated weapon, criminal mischief causing damage between $1,000 and $5,000, prohibited use of a weapon, violation of a civil protection order, possession of a weapon by a previous offender ("POWPO") (burglary), and POWPO (any previous felony). CF, pp 1, 400. The trial court sentenced Defendant to a controlling term of three years in the Department of Corrections, followed by three years of mandatory parole. CF, p 400.

STATEMENT OF FACTS

Late on a September evening, Wil Lowery and Shannon Ball were talking in Lowery's car, which was parked in a public parking spot on Wilcox Street in downtown Castle Rock. TR 8/16/22, p 211:8-12. The parking spot was marked with white lines and as public parking, it wasn't limited by time, and Lowery's car wasn't blocking a driveway. *Id.*, pp 213:25-214:6; EX 2.

Lowery and Ball had been in the parked car for about five minutes when they heard a loud, puncture-like sound. TR 8/16/22, pp 185:7-9; 216:7-24. Lowery thought "someone was throwing a rock at my car[.]" *Id.*, p 217:13. Before the concerning sound, Lowery didn't hear anyone talk to him or Ball, and no one warned them about being parked on private property. *Id.*, 217:18-25.

Lowery got out of his car and saw that it was damaged. *Id.*, p 218:3-9. Lowery looked around and didn't immediately see anyone, but in an area where it was "pitch black," he saw a person wearing a lighter color shirt move. *Id.*, p 224:5-23. The house nearest to the person had no inside or outside lights on, so all Lowery could discern was a white male. *Id.*, p 227:1-9.

Lowery said, "Sir, I'm just trying to understand as to why you threw rocks at my car." *Id.*, p 225:1-4. The person responded, "You're on private property." *Id.*, p 225:23. Lowery said again, "I'm just trying to figure out what…happened here. Someone threw something at my car." *Id.*, p 226:6-9. The person responded, "If you step one foot closer, I'm going to blow it." *Id.*, p 226:11-12.

One or two seconds later, Lowery heard a gunshot, saw the muzzle of the firearm flash, and saw "smoke arise from the weapon." *Id.*, p 228:11-14. Lowery estimated that he was about twenty yards away from the person and still standing on the sidewalk next to his car. *Id.*, p 229:1-3. Lowery ran back to his vehicle, and told Ball, who was standing outside his car on the passenger's side, to run back to her car, which was parked just in front of his. *Id.*, pp 229:14-230:15.

Lowery and Ball drove approximately fifty yards south on Wilcox, stopped, and then Lowery called 911. *Id.*, p 230:17-22. After Castle Rock police quickly responded, Lowery showed them where this incident happened. *Id.*, p 233:12-20. Shortly after, officers took Lowery to identify a suspect. *Id.*, p 231:3-22.

When Lowery couldn't identify the person, he requested that the police ask the suspect to say, "I'm going to blow it." *Id.*, p 231:22-24. The suspect said that phrase twice, but Lowery still couldn't identify him as the person who had menaced him and Ball.[1] *Id.*, pp 232:6-10, 233:11.

[1] Exhibits 9 and 18 indicate that Defendant said the phrase, "This is private property," twice.

Lowery said that the suspect's tone of voice was different from the tone the person used during the incident. *Id.*, p 233:1-8.

Castle Rock Police Officer Robert Schuster responded after Lowery's 911 call and at first was stationed east of the house where Lowery said this incident had occurred. TR 8/17/22, p 15:15-22. Schuster confirmed that public parking was marked on Wilcox Street where Lowery had been parked and that the area was very dark. *Id.*, pp 14:2-7, 16:2-18. Schuster then saw a man leave a residence and stand in a driveway next to a truck smoking a cigarette.[2] *Id.*, p 16:1-18.

Schuster notified other officers, who went to speak with the man. *Id.*, p 18:20-24. Schuster crossed the street and joined them, where they detained the man. *Id.*, p 19:1-17. Schuster identified the man he saw in the driveway as Defendant. *Id.*, pp 19:18-20:10. The truck was parked in the driveway at 709 Wilcox, which was the defendant's home. *Id.*, p 18:17-19:2.

[2] The prosecution did not present evidence that the truck was registered to Defendant or that he owned the vehicle.

Schuster found a .45 caliber shell casing next to the truck. *Id.*, p 22:1-2. Schuster also found a slingshot in the truck's bed. *Id.*, p 26:10-14; EX, p 39. Inside Defendant's home, Schuster found a "Walther-labeled handgun" in a closet next to the front door. *Id.*, pp 31:6-13, 32:7-8; EX, pp 60-62. The Walther gun was admitted over defense objection. *Id.*, p 33:6-22. Schuster also found 10 rounds of rifle ammunition inside Defendant's residence, a photo of which was admitted over defense objection. *Id.*, p 34:12-22; EX, p 25.

The Walther handgun didn't have any ammunition in the magazine or chamber, and it couldn't fire a .45 caliber bullet. *Id.*, pp 43:6-44:25. The rifle ammunition Schuster found in Defendant's home couldn't have been fired from the Walther gun, *Id.*, pp 46:5-47:15.

Another officer photographed the damage to Lowery's car. *Id.*, p 65:3-66:7. This officer later went to Defendant's home, where he found a ".45 ACP round that had not been spent that was on a coffee table…or some sort of dinner like tray thing."[3] *Id.*, pp 68:21-25, 69:16-18; EX, pp

[3] The officer did not define the acronym "ACP", and the prosecutor didn't ask.

43-44. The round was admitted without objection. *Id.*, p 70:4-13. The officer spoke with Defendant, who told him he didn't have any visitors that night, he was playing a video game, and he hadn't fired a gun. *Id.*, p 78:14-21.

Next door to Defendant's residence at 709 Wilcox was a building at 711 Wilcox, which Defendant told the same officer his grandfather owned. *Id.*, p 79:6-11. Defendant also told the officer that he didn't have access to his grandfather's building. *Id.*, p 79:7-9. When asked if he heard a gunshot, Defendant said he heard a car backfiring. *Id.*, p 79:15-16.

Another officer also spoke with Defendant, who first said the video from a surveillance camera outside his home would show he was at the house that night. *Id.*, p 105:9-15; EX 17, 2:18-2:31, 3:04-3:09. Defendant then changed his story and said the videotapes re-record at about the same time he goes to bed—around 10:30 p.m. or 11:00 p.m.—and that he had re-wound the tapes. *Id.*, p 105:15-19; EX 17, 6:19-6:45, 7:10-7:15.

Defendant also told that officer that he did not have access to weapons or to his grandfather's building and that the building was

locked. *Id.*, p 106:9-14. Defendant first said, "I don't have any firearms. I'm not in possession of any firearms." EX 17, 1:42-1:45. After first telling the officer "no" when he asked Defendant if he owned any guns, Defendant changed his answer when asked again to confirm that he didn't own any firearms and Defendant corrected him, "I'm not in possession of any firearms." EX 17, 1:56-2:00. Defendant again denied having any weapons in his vehicle and residence ("Absolutely not, I swear to God."). EX 17, 7:00-7:02. That officer saw tactical gloves on a cocktail table in Defendant's home, which he noticed because people "sometimes use those when they fire weapons." *Id.*, p 107:1-7.

Defendant, while speaking with the officer, denied being near a firearm that night. *Id.*, p 232:4. That officer provided the bags to cover Defendant's hands to test for gunshot residue ("GSR") (EX 17, 3:13-3:15), but that officer didn't bag Defendant's hands. *Id.*, pp 104:6-8, 234:17.

By the time a Castle Rock detective arrived, Defendant's hands were already bagged.[4] *Id.*, pp 158:20-159:17. The detective then "took gunshot residue samples from both of his hands as well as each forearm." *Id.*, p 161:15-16. The detective also found three rocks in Defendant's right front pants pocket. *Id.*, p 175:6-9; EX, pp 36-38.

An agent from the Colorado Bureau of Investigation ("CBI") tested the samples Moffitt had taken for GSR and confirmed that GSR was present. *Id.*, p 206:19-20.

The detective who took the GSR samples led a team that executed a search warrant on the grandfather's building. *Id.*, p 167:1-2. The door to the building was unlocked and slightly ajar when police arrived to execute the warrant. *Id.* An officer confirmed that the door to the building was unlocked and the detective was able to "kind of push it open with his foot, and it just opened up freely on its own accord." *Id.*, p 240:17-19; EX 22, 0:00-0:23 (detective nudging door open with his foot).

[4] Trial testimony does not indicate which officer ultimately bagged Defendant's hands for GSR testing.

At the building, police found a magazine with .45 caliber bullets and a Taurus .45 caliber handgun. *Id.*, pp 109:22-23, 111:5, 119:19-22; EX, pp 31-34, 47-51, 63. The Taurus .45 caliber handgun couldn't have fired the rifle ammunition an officer found in Defendant's home. TR 8/17/22, p 119:19-22. One of the officers who helped search 711 Wilcox observed that the magazine police found wasn't dusty, so it had either been freshly placed where police found it or it hadn't been there long enough to accumulate dust like the other items near it, which were dusty. TR 8/18/22, p 24:4-15. The same officer also observed that the motion detector lights at Defendant's home did not activate when officers initially arrived and detained Defendant.[5] *Id.*, pp 29:24-30:11.

Another CBI agent examined toolmarks on shell casings from two rounds test fired by the Taurus .45 caliber handgun that police found at 711 Wilcox (TR 8/17/22, pp 119:15-120:20) and compared them to the toolmarks on the spent .45 caliber shell casing Schuster found next to

[5] This is consistent with Lowery's statement that he saw a man standing in front of 709 Wilcox in darkness, as opposed to a well-lit area if the motion detector lights had turned on.

the truck in Defendant's driveway (TR 8/17/22, p 24:14-25). TR 8/18/22, pp 46:22-47:13. The agent concluded that the Taurus handgun had fired the round for which the spent casing was found in Defendant's driveway. *Id.*, p 47:19-20.

Defendant did not testify during the first bifurcated trial. TR 8/18/22, p 58:3. He defended on the ground of insufficient evidence linking him to what happened to the victims. *Id.*, p 85:8-18, 88:23-89:3, 97:17-102:25.

SUMMARY OF ARGUMENT

The Walther gun and the rifle ammunition found in Defendant's home, as well as testimony about the tactical gloves, were admissible in the first bifurcated trial under CRE 401, 402 and 403. This evidence cleared the low bar for relevance under CRE 401 because it showed the thorough, complete quality of the investigation and because Defendant had categorically denied the Walther gun and rifle ammunition were in his possession that night. The Walther gun and the rifle ammunition were not more prejudicial to Defendant than probative under CRE 403 because the jury understood that neither could have fired the bullet

that produced the spent casing found in Defendant's driveway. But both items implicated Defendant's credibility, which made them admissible under CRE 402.

The repair amount for the damage to Lowery's car wasn't based on inadmissible hearsay. Lowery first testified to his own estimate of how much it would cost to repair the damage based on his personal knowledge, and then testified that a professional estimate was similar to his estimate. Lowery never testified to the amount of the estimate, and the jury was permitted to consider Lowery's estimate as owner of the damage to his vehicle.

The prosecutor properly argued to the jury that Defendant is not presumed credible and properly discussed the credibility of Defendant's statements after he chose to speak with officers at the crime scene. The prosecutor's argument that Defendant is not presumed credible was not flagrantly improper, and therefore it was not plain error.

Because the trial court appears to have imposed the mandatory victim assistance surcharge per conviction, instead of one surcharge per criminal action, the People agree that this case should be remanded for

correction of the mittimus. The People also agree that because the mandatory fees were imposed after Defendant's sentencing and not in his presence, remand is required so Defendant may request a waiver.

ARGUMENT

I. The trial court acted within its discretion when it admitted the Walther gun, the rifle ammunition, and testimony about the tactical gloves during the first bifurcated trial, as the evidence was relevant and not more prejudicial than probative.

Defendant contends that the trial court abused its discretion by admitting the Walther gun, rifle ammunition, and testimony about the tactical gloves because he didn't use the Walther gun or rifle ammunition to commit these crimes and probably wasn't wearing tactical gloves because he had GSR on his hands. OB, pp 11-13. Defendant also contends that this evidence's minimal probative value was outweighed by the danger of undue prejudice. OB, pp 13-15. Defendant is wrong as to both.

A. Preservation and Standard of Review

The People agree that Defendant partially preserved his contention that the Walther gun and the rifle ammunition were

irrelevant (TR 8/16/22, pp 10:8-11:23; TR 8/17/22, pp 5:22-8:10) and that the Walther gun was inadmissible under CRE 403 (TR 8/16/22, p 7:13-17). Defendant never argued below that admitting the rifle ammunition violated CRE 403, although he did argue that it was irrelevant. *Id.*; OB, pp 9-10. The People agree that Defendant didn't object to testimony about the tactical gloves. TR 8/17/22, p 107:1-7; OB, p 10.

The preserved portion of Defendant's argument (that the Walther gun and the rifle ammunition were irrelevant and the Walther gun violated CRE 403) is reviewed for general harmless error. *Hagos v. People*, 2012 CO 63, ¶12. This Court reverses only "if the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.* (internal citation and quotation marks omitted). The unpreserved portions of Defendant's argument (that the rifle ammunition violated CRE 403 and that testimony about the tactical gloves was both irrelevant and violative of CRE 403) is reviewed for plain error.

The unpreserved portion of Defendant's claims are reviewed for plain error. *See People v. Crabtree*, 2024 CO 40M, ¶27 (explaining that

for all unpreserved errors, plain error review applies). Plain error permits "an appellate court to correct particularly egregious errors[.]" *Id.*, ¶43 (quoting *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987)). For that reason, "the error must impair the reliability of the judgment of conviction to a greater degree than under harmless error to warrant reversal." *Hagos*, ¶14.

"Under the plain error standard, the defendant bears the burden to establish that an error occurred, and that at the time the error arose, it was so clear cut and so obvious that a trial judge should have been able to avoid it without benefit of objection[.]" *People v. Conyac*, 2014 COA 8M, ¶54. If the error is not obvious, this Court need not consider whether error occurred. *People v. Vigil*, 251 P.3d 442, 447 (Colo. App. 2010). "The unpreserved error must also have affected 'the substantial rights of the accused.'" *Crabtree*, ¶43 (quoting *People v. Stewart*, 55 P.3d 107, 120 (Colo. 2002)).

This Court reviews "a trial court's evidentiary rulings for an abuse of discretion." *People v. Owens*, 2024 CO 10, ¶105. "[A] trial court abuses its discretion when its ruling is manifestly arbitrary,

unreasonable, unfair, or based on an incorrect understanding of the law." *Id.*

B. Additional Background

Defense counsel argued during their opening statement that the police did not conduct a thorough investigation. TR 8/16/22, p 177:4-7. On the first day of trial, defense counsel argued that evidence of the Walther gun was inadmissible because "there's nothing that it advances for the People's case, and it would confuse the jury and be prejudicial to [Defendant]." *Id.*, p 7:13-17. The prosecutor responded that "relevance is a low bar under 401" and that evidence of the Walther gun

> goes to the bias and [the] credibility of the defendant who made statements to officers on the night of offense that he was not in possession of any weapons or…involved in the menacing at all. As well as to the thoroughness of the investigation, [because] officers did search the home. They did find this weapon, and they were able to rule it out as what was not used in the offense.

Id., p 8:2-10. The prosecutor highlighted that Defendant told officers that the Walther gun was "not a real weapon" so evidence of the gun went to "his knowledge and his statements to officers." *Id.*, p 8:13-14. Defense counsel responded that because the prosecution's theory

included that the Walther gun couldn't have been used to commit the crimes, it was irrelevant. *Id.*, 9:4-9. The court concluded that it didn't yet have enough information to rule. *Id.*, p 9:10-17, 10:8:15.

Defense counsel then argued that the rifle ammunition wasn't relevant in the first bifurcated trial because it couldn't have been fired by the Taurus handgun. *Id.*, pp 10:17-11:3. The prosecutor responded that the rifle ammunition went to "[Defendant's] bias and his credibility for the statements, as well as to the thoroughness of the investigation, making sure that officers are identifying the correct instrument used in this case, as well as excluding things that may be exculpatory to [Defendant]." *Id.*, p 11:9-13. Defense counsel replied that Defendant wasn't specifically questioned about the rifle ammunition, so it couldn't be relevant to Defendant's credibility. *Id.*, p 11:14-19. Again, the court concluded that it didn't have sufficient information to rule. *Id.*, p 11:20-21.

The next day, defense counsel renewed their argument that the Walther gun wasn't relevant and was prejudicial to Defendant because defense counsel confirmed that it couldn't fire a bullet. TR 8/17/22, p

5:22-6:2. The prosecutor responded that the Walther gun was relevant independent of its functionality because defense opened the door by asserting in their opening statement that the investigation wasn't thorough, that the Walther gun could fire a blank round, and that the defense didn't have an expert who could testify about the functionality of the Walther gun. *Id.*, p 6:14-7:10. The court concluded that this issue was "a question of fact for the jury to determine," and that again it didn't have enough information to decide otherwise. *Id.*, p 7:18-8:2.

During trial, the prosecution asked Schuster whether he collects evidence that is both inculpatory and exculpatory. Schuster said yes and explained that he does so because "[w]e want a full picture of the investigation." TR 8/17/22, pp 26:23-27:10. Over Defendant's objection based on previous argument, the court ultimately admitted the Walther gun and a photo of the rifle ammunition Schuster had found. TR 8/17/22, pp 33:6-22, 34:19-22. The prosecution also asked Schuster why he noticed and documented finding the Walther gun and ammunition. *Id.*, p 35:13-14. Schuster explained, "…[A]ny time we're investigating a shots fired or a shooting call, obviously anything that could be related to

a shooting is important. In this case, a firearm and ammunition." *Id.*, p 35:15-18.

Another officer also confirmed that when he's investigating a case, he searches for both inculpatory and exculpatory evidence. TR 8/17/22, p 73:2-6. The officer said that the Walther gun was found in the defendant's home, and even though it wasn't used to commit these crimes, documenting its presence "gives credence to all the other firearm-related things that we found within the house[.]" *Id.*, p 73:14-15.

During closing the prosecution mentioned "guns" once (TR 8/18/22, p 79:3) and tactical gloves one time in the context of the GSR on Defendant's hands (*id.*, p 81:6). During the prosecution's rebuttal closing, the prosecutor brought up the Walther gun and the rifle ammunition because Defendant argued in closing that the prosecution "might make an argument because he has one gun, he has all the guns. That's not why it's entered." *Id.*, p 111:17-21. The prosecutor explained that the officers searched for all relevant evidence, inculpatory and exculpatory, and the evidence supports that Defendant was "the only

person who had access to [the Taurus handgun]." *Id.*, pp 111:22-112:12. The prosecutor almost entirely focused on the .45 shell casing, the magazine with .45 caliber bullets, and the Taurus handgun during her closing and rebuttal. *Id.*, pp 68:12-84:17, 109:21-114:24.

C. Law and Analysis

Defendant's argument rests on a misunderstanding of relevance. Defendant argues that because he didn't use the Walther gun, the rifle ammunition, or the tactical gloves to commit these crimes, those items were irrelevant. OB, p 11-13. But this argument unreasonably limits the scope of relevant evidence.

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. Relevant evidence is admissible. CRE 402. And CRE 401's permissive definition of relevance is limited because even relevant evidence "may 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. Because "CRE 403 strongly favors admissibility of relevant evidence…when reviewing a trial court's exercise of discretion in performing the balancing required by CRE 403, an appellate court must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected." *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995).

The Walther gun, rifle ammunition, and testimony about the tactical gloves make it more probable that Defendant wasn't being truthful when he told officers he wasn't near a firearm the night of this incident and that he didn't possess any firearms. This evidence also makes it more probable that the police conducted a thorough investigation in determining that Defendant was the person who menaced Lowery and Ball. The evidence is therefore relevant under CRE 401.

Defendant cites two cases in support of his argument that the evidence is irrelevant: *People v. Carlson*, 712 P.2d 1018 (Colo. 1986),

and *Kaufman v. People*, 202 P.3d 542 (Colo. 2009). A closer look at them shows why Defendant is wrong.

Carlson concerned an insurance company claims manager's testimony that the insurance company believed the defendant committed arson and thus denied the defendant's claim, which wasn't relevant to culpability. *See* 712 P.2d at 1020-22. The claims manager's testimony wasn't probative of the "*mens rea* element of the charge" but rather went to "the corporate state of mind," and the evidence was admitted "solely for that purpose." *Id.*, 1022. The corporate state of mind, its belief that the defendant committed arson, was not relevant under CRE 401 because it "was of no consequence to the resolution of the arson charge." *Id.*

In contrast, firearms-related evidence in Defendant's home was relevant to the resolution of the charges against him because it was circumstantial evidence of his guilt, specifically that he shot a firearm to menace the victims. Defendant denied using a firearm that night, yet GSR was found on his hands and forearms. The jury had to determine

Defendant's credibility based on his statements, and the complained-of evidence was relevant to that credibility determination.

Kaufman, by contrast, concerned other acts evidence, which Defendant did not raise during the first phase of the trial and has not argued on appeal. In *Kaufman*, "the prosecution introduced evidence over the course of the trial that Kaufman possessed eight knives other than the murder weapon, a machete and brass knuckles" to prove "the assertion that Kaufman always carried a knife on his person[.]" 202 P.3d at 554. *Kaufman* held that this evidence failed the third *Spoto* prong that the logical relevance of the evidence must be independent of the inference that the defendant has bad character. *Id.*, 555. In the court's words, the prosecution "parad[ed] evidence before the jury merely to paint a picture of Kaufman as a bad person." *Id.*

Here, the prosecution did no such thing. The Walther gun, the rifle ammunition, and testimony about the tactical gloves were relevant to Defendant's credibility because he insisted that he hadn't fired a gun that night and didn't even possess guns. They were also relevant to the quality and thoroughness of the investigation, which Defendant

questioned in his opening statement, thus opening the door to the prosecution presenting this evidence. TR 8/16/22, pp 175:17-18, 177:3-7.

This evidence wasn't other acts evidence, and it had nothing to do with Defendant's character, or Defendant would have argued on appeal that the trial court didn't properly evaluate the evidence under *Spoto*.[6] Officers found this evidence at Defendant's home the same night Lowery and Ball were menaced at the end of Defendant's driveway, and it contradicted his statement that he didn't possess any guns. *See* EX 17, 1:42-2:00, 7:00-7:02. The Walther gun, which couldn't fire the .45 caliber shell casing found in Defendant's driveway, rifle ammunition that couldn't be fired from either the Walther gun or the Taurus gun, and tactical gloves weren't inherently prejudicial. By contrast, the *Kaufman* evidence involved an arsenal of usable weapons that carried with it an inference of bad character.

This relevant evidence was not excludable under CRE 403. The jury's 52 witness questions evince full understanding of the strengths

---

[6] Defendant should not be permitted to raise this argument in the Reply Brief. *Gomez v. Walker*, 2023 COA 79, ¶9 fn 3.

and weaknesses of evidence at issue. CF, pp 276-325. Among other topics, the jury asked detailed questions about the shell casing found in Defendant's driveway; the weapons found at Defendant's home and the grandfather's building and if they were connected to the shell casing; whether fingerprints were taken; whether the bullet cartridge found on the coffee table matched the spent casing in the driveway; eight questions about the magazine police found; whether Defendant could have GSR on his hands if he hadn't fired a gun; about any material difference in the amount of GSR particles detected between direct contact versus transferred contact; about motion detector lights in front of Defendant's home and Defendant's surveillance video setup; and whether CBI tested the magazine. TR 8/17/22, pp 54:14-57:3, 87:7-88:6, 94:12-15, 96:7-15, 146:17-149:21, 152:11-16, 153:15-20, 188:13-189:24, 216:7-9, 219:7-9; TR 8/18/22, pp 29:8-31:20, 49:11-21.

These questions show the jury thoughtfully considered the evidence before it and differentiated between handgun shells and rifle cartridges, as well as between the .45 caliber Taurus handgun found at the grandfather's building and the Walther weapon found at

Defendant's home. The jury distinguished evidence found at each place and focused on evidence found at the grandfather's building. The jury asked very few questions about the Walther handgun, the rifle ammunition, or the tactical gloves, and the questions they did ask clarified the lack of any relationship between those items and the .45 caliber spent casing, the .45 caliber Taurus handgun, and the .45 caliber magazine.

These questions also show that the jury didn't convict Defendant based on a connection between the evidence they challenge, on the one hand, and the Taurus .45 handgun, the spent .45 caliber shell casing in the driveway, and the .45 caliber cartridge in Defendant's living room, on the other. *See* OB, pp 11, 15. Instead, the jury considered the role GSR played in this case, how that was investigated, and Defendant's statements. The jury asked questions specific to the Taurus handgun and the driveway shell casing, including whether they were fingerprinted. The jury didn't ask whether the Walther gun was fingerprinted, showing they understood that law enforcement did not believe the gun was used to menace Lowery and Ball. The jury also

asked whether the tactical gloves had been tested for GSR, which showed they weren't confused about them because they were focused on what would have been important—whether Defendant was wearing them when he fired the shot that menaced the victims. The question about the tactical gloves also shows that the jury considered Defendant's credibility, which is always permissible and relevant.

Even assuming the evidence wasn't initially admissible, the defense opening statement opened the door to the evidence. *People v. Pernell*, 2014 COA 157, ¶40 (concluding that opening statements opened the door to other evidence), *aff'd on other grounds* 2018 CO 13. Specifically, the defense argued that the police jumped to conclusions and did not thoroughly investigate the case. TR 8/16/22, p 177:4-7. Evidence of the investigation, including what the police did and what tied Defendant to the crime both directly and circumstantially, was relevant to prevent a misleading impression and to provide the jury context for the investigation. *People v. Cohen*, 2019 COA 38, ¶23.

If this Court concludes that the trial court abused its discretion in admitting the Walther gun, the rifle ammunition, and testimony about

the tactical gloves, despite their relevance to Defendant's credibility and the quality of the investigation, any error was harmless as to the Walther gun and rifle ammunition being irrelevant and the Walther gun violating CRE 403. As summarized earlier, the jury raised 52 questions in the first bifurcated trial. CF, pp 276-325. True, the court did not ask each question the jury generated. Still, this Court can consider the number, quality, and substance of the jury's questions, as discussed above. *See Washington v. People*, 2024 CO 26, ¶34 (concluding in a misjoinder case that juror questions asked while witnesses were testifying demonstrated juror engagement, not confusion). The record reveals no reasonable possibility, given the jury's demonstrated understanding of the evidence, that the Walther gun, the rifle ammunition, and testimony about the tactical gloves, which themselves were not admitted into evidence, substantially influenced the verdict or affected the fairness of the trial.

Additionally, any error was not plain as to admission of the rifle ammunition violating CRE 403 and the testimony about the tactical gloves being both irrelevant and violative of CRE 403. The People have

not found any case law stating that evidence that wasn't used to commit the crime(s) at issue is never relevant, which makes sense given the facts here where they were relevant to Defendant's credibility and the quality of the investigation. Nor does Defendant cite any case law saying that admitting evidence found as part of an investigation violates CRE 403 unless it was used to commit the crime(s) at issue. Given this lack of authority, any error couldn't have been so obvious to the trial court that it should have avoided it without the benefit of a specific objection.

And given the jury's thorough understanding of the evidence before it and its cogent questions about the tactical gloves (whether they were tested for GSR), the GSR testing, how GSR can be transferred or direct deposited, as well as differentiating between the rifle ammunition and the handgun ammunition, any error wasn't substantially prejudicial because the jury clearly wasn't erroneously relying on the evidence to reach their verdict, nor were they confused. The jury was far more focused on the evidence found at 711 Wilcox and the spent .45 caliber bullet casing in the driveway. The jury also asked

questions about the slingshot and how law enforcement connected it to Defendant, so it carefully considered that part of this case as well.

For all these reasons, this Court should conclude that the trial court acted within its discretion by admitting the Walther gun, the rifle ammunition, and testimony about the tactical gloves and error, if any, was not plain.

II. The repair estimate for the damage to Lowery's car wasn't based on inadmissible hearsay; it was based on Lowery's testimony, which was premised on his personal knowledge.

Defendant contends that the prosecution offered an estimate Lowery obtained for the repair cost for the damage to his car, which was inadmissible hearsay. OB, pp 19-20. Defendant also argues that Lowery improperly bolstered his testimony about the repair cost by testifying about the estimate. OB, pp 20-22. He is wrong.

A. Preservation and Standard of Review

The People agree that Defendant partially preserved this argument. TR 8/16/22, pp 220:10-223:8. Defense counsel first objected on speculation grounds, which was overruled, and then objected when

Lowery explained that he hadn't repaired the damage to his car because he didn't want to pay for it out of pocket and asked to approach the bench. *Id.*, pp 220:10-221:3. During the bench conference, defense counsel specified that the estimate was hearsay and that "the hardship which this has caused" wasn't relevant. *Id.*, p 221:5-15. In response to the prosecution argument, defense counsel argued that "there's been no foundation laid to [his estimate of damage] or where he's getting to that number," and renewed their objection to the hardship testimony. *Id.*, p 222:2-10. Defense counsel never argued that Lowery "improperly bolstered his higher valuation through hearsay testimony that a professional, third-party estimate was 'very similar' to his valuation," as Defendant argues in the opening brief. OB, p 21. This portion of Defendant's argument should be reviewed for plain error because it wasn't preserved. *Crabtree*, ¶27. Please see section I(A) for a discussion of plain error.

Defense counsel preserved Defendant's argument that Lowery's testimony "that the estimate he received tracked his opinion of the damage to his car was inadmissible hearsay" because "[a]n itemized

estimate was never introduced at trial." OB, p 19. This Court reviews preserved evidentiary rulings "for an abuse of discretion under the harmless error standard[.]" *People v. Jaeb*, 2018 COA 179, ¶9. Please see section I(A) for a discussion of abuse of discretion and general harmless error.

B. Additional Background

During trial, the prosecution established the foundation for Lowery's personal knowledge about his car's repair cost:

Prosecutor:	How long had you had your Audi A4 at that time?
Lowery:	I had it for, I want to say, maybe four months, 2021. So yeah, four or five months, new.
Prosecutor:	Can you describe to the jury how you cared for your car?
Lowery:	I love that vehicle. I'm really into cars. I treat it very well. I—anything I can—I wash it all the time. I keep very good care of my car. That's kind of what I was—my parents do the same thing, kind of pride of ownership.
Prosecutor:	On that day, on September 11 of 2021, did your car have a lot of dents or dings?

Lowery:	Can you repeat that? Sorry.
Prosecutor:	On September 11 of 2021, did your car have a lot of dents or dings?
Lowery:	No, ma'am, nothing.
Prosecutor:	Would you know if there was a large dent or ding in your car?
Lowery:	Yes.
Prosecutor:	And how would you know?
Lowery:	I look at my car all the time. I love that vehicle. I look at it all the time to make sure that it's completely running fine, the same way I bought it, which was new.

TR 8/16/22, p 210:1-25.

Then the prosecution asked Lowery the following questions about his car's repair cost:

Prosecutor:	Mr. Lowery, you mentioned you're kind of a car person. **Did you know about how much damage was done to your car?**
Lowery:	Yes. It was about a couple thousand dollars. It was—

Defense counsel: Objection, Your Honor. That's speculation.

Trial court: Overruled.

Prosecutor: If you would continue.

Lowery: It was $2,000.

Prosecutor: Have you had this fixed at all?

Lowery: No, I have not.

Prosecutor: Why not?

Lowery: I don't want to pay for it out of pocket, and I don't have the money at 25 years old to go spend on that.

Defense counsel: Objection, Your Honor. May we approach?

Trial court: Sure.

(Bench conference.)

Defense counsel: Your Honor, the defense objection is twofold. First, it's a hearsay statement that Mr. Lowery is getting into in regards to an estimation. That is an outside statement.…

Prosecutor: Your Honor, the witness can testify as to value based on his own estimation. I'm going to ask a separate question

about the estimate, and a contemporaneous objection can be made there. But lay witnesses can estimate value. There's no prohibition on that.…

Defense counsel: In regards to Mr. Lowery testifying to his estimation, just based on his own perspective, there's been no foundation laid to that or where he's getting to that number. So I think that is improper at this time.…

Trial court: …He can testify to the damage to his own car, and he can testify to the extent he knows the value. He testified about being a car guy. He testified about having information about cars and babying his car. If it comes to an exact estimate or exact damages, that's a different topic.…

(Bench conference concluded.)

Prosecutor: And Mr. Lowery, at some point **did you seek out some information** about what it would cost to fix your car as well?

Lowery: Yes, ma'am, I did.

Prosecutor: **Did that change your estimate** of the value of damage done to your car?

Lowery: It was very similar to what I was quoted.

TR 8/16/22, pp 220:10-223:1 (emphases added). The prosecution did not offer the information Lowery said he obtained about the repair cost. Godfrey, one of the investigating police officers, later testified that his estimate based on his personal knowledge of the repair cost for Lowery's car was "around 500 bucks." TR 8/17/22, p 68:2-5.

During closing argument, the prosecutor referred to Godfrey's estimate of approximately $500 and Lowery's estimate of $2,000. TR 8/18/22, p 75:16-18. The prosecutor also told the jury that Lowery "told you he got an estimate that can confirm that amount." *Id.*, p 75:18-19. The defense did not object to this statement, does not raise it on appeal, and did not mention the criminal mischief value during its closing. The prosecution also did not discuss criminal mischief value during rebuttal.

C. Law and Analysis

The prosecution charged Defendant with criminal mischief in violation of section 18-4-501(1), (4)(d), as a class six felony. CF, p 1. "A person commits criminal mischief when he or she knowingly damages

the real or personal property of one or more other persons… in the course of a single criminal episode." §18-4-501(1), C.R.S. (2024). Criminal mischief is a class six felony "when the aggregate damage to the real or personal property is two thousand dollars or more but less than five thousand dollars[.]" §18-4-501(4)(d). Thus, the prosecution had to present competent evidence that the repair cost for the damage to Lowery's car was $2,000 or more but less than $5,000. *See People v. Dunoyair*, 660 P.2d 890, 895 (Colo. 1983) (discussing the damage element in criminal mischief) ("In cases of partial damage, the appropriate measure of economic loss will generally be the reasonable cost of repair or restoration.").

Lowery's testimony based on his personal knowledge that the repair cost for the damage to his car was $2,000 was competent evidence and not inadmissible hearsay. The property owner is generally competent to testify regarding the market value of their property. *People v. Jensen*, 172 P.3d 946, 949 (Colo. App. 2007). The actual costs associated with its repair or maintenance are fairly included. The

prosecution did not elicit hearsay testimony from Lowery. The prosecutor carefully phrased her questions of Lowery.

She laid the foundation for Lowery's personal knowledge of both his car and cars in general, that he maintained his car in excellent condition, and that he knew his car's condition before Defendant launched rocks at it using a slingshot. She first asked Lowery whether he knew how much damage was done to his car. That went to Lowery's personal knowledge, and he answered consistent with his personal knowledge. She never asked Lowery what the estimate said.

Then the prosecutor asked Lowery whether he sought out some information about what it would cost to repair his car. The scope of that question was not the content of the estimate. Then the prosecutor asked whether that information changed Lowery's own estimate that he'd previously testified about based on his personal knowledge and experience. Again, the scope of the question was not the content of the estimate. Notably, Lowery never testified to what the estimate amount was. He said only that his personal estimate was very similar to the estimate amount. The third-party estimate couldn't have bolstered

Lowery's testimony because the actual estimate amount was never presented to the jury.

Lowery's testimony that the information he sought out was "very similar" to his personal estimate was not impermissible as to the criminal mischief value because "an owner is always competent to testify as to the value of his or her property…[.]" *Jensen*, 172 P.3d at 949. Lowery's testimony about the repair cost to his car was especially proper because apart from this general rule, the prosecutor laid the foundation for his personal knowledge that informed that testimony. *See People v. Evans*, 612 P.2d 1153, 1155 (Colo. App. 1980) (holding that testimony by the owner of a stolen watch and some food stamps was sufficient to establish the value of those items). Although this case doesn't involve valuation of stolen property, "the damage element in criminal mischief relates to economic loss caused by the knowing infliction of damage to the real or personal property of another." *Dunoyair*, 660 P.2d at 894. That economic loss can include the cost of repair. *Id.*, 895.

If this Court concludes that the trial court erred by allowing Lowery's testimony that the estimate was similar to his own, despite the absence of defense objection to that specific statement, any error wasn't plain. First, the error wasn't obvious. Lowery's testimony was based on his personal knowledge and thus wasn't inadmissible hearsay. The prosecution did not offer and the trial court did not admit the other information Lowery said he relied on. Lowery never testified about the content of the estimate he obtained.

This case is distinguishable from *Golob v. People*, 180 P.3d 1006, 1010 (Colo. 2008), which Defendant cites to support his argument (OB, p 22). In *Golob*, an expert witness testified "that he had received independent verification of his conclusions[.]" *Id. Golob* concluded that an expert witness's independent verification of his own conclusions was inadmissible hearsay because "the prosecutor used the…independent verification to prove the truth of the matter asserted[.]" *Id.*, 1011. Lowery was not an expert, he did not suggest that he was an expert, and he told the jury that he was familiar with his car because he loved it, cared for it, and had looked into repair costs. Thus, unlike *Golob*, the

basis for Lowery's testimony was not solely hearsay, but also his actual ownership of the car.

During closing, the prosecutor said that Lowery estimated the repair cost for his car to be "a couple thousand dollars, and he told you that he got an estimate that can confirm that amount." TR 8/18/22, p 75:17-19. But without Lowery's testimony as to the estimate amount, that estimate was not used to prove the truth of the matter asserted, which was the repair cost for Lowery's car, unlike in *Golob*.

The error was not substantially prejudicial because Godfrey also provided an estimate of the repair cost, Lowery's estimate was not the only evidence of repair cost, and the jury could have chosen either. *See Jaeb*, ¶36 (concluding that error wasn't harmless because hearsay evidence was either the only or primary source of evidence at issue). Finally, if this Court concludes that the error was plain, it should "remand for entry of judgment for the lesser offense[,]" which is criminal mischief as a class one misdemeanor. *Id.*, ¶44; §18-4-501(4)(c).

For all these reasons, this Court should conclude that the prosecution did not rely on inadmissible hearsay to prove the damage element of Defendant's criminal mischief conviction.

III. The prosecution's argument that Defendant "is not presumed credible" during closing argument was not flagrantly, glaringly, or tremendously improper.

Defendant contends that the prosecution's argument during closing that Defendant is not presumed credible and that the jury doesn't have to give him a presumption of being credible was prosecutorial misconduct. OB, pp 24-25. More specifically, he asserts that the prosecution's argument "misstated the law on the presumption of innocence[.]" OB, p 25. Defendant is wrong.

A. Preservation and Standard of Review

The People agree that Defendant did not preserve this argument. *See* OB, p 24. Because defense counsel did not object to the prosecutor's statements, this Court reviews for plain error. *People v. Vergari*, 2022 COA 95, ¶31. Please see section I(A) for discussion of plain error. "Only prosecutorial misconduct which is flagrantly, glaringly, or tremendously improper warrants reversal under the plain error standard." *Id.*

(internal citations and quotation marks omitted). "Prosecutorial misconduct in closing argument rarely constitutes plain error." *People v. Strock*, 252 P.3d 1148, 1152-53 (Colo. App. 2010).

Whether a prosecutor's statements are improper and constitute misconduct is reviewed for abuse of discretion. *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). "We will not disturb the court's ruling absent an abuse of discretion resulting in prejudice and a denial of justice." *People v. Van Meter*, 2018 COA 13, ¶25 (internal quotation marks and citation omitted). "Under this standard, we ask not whether we would have reached a different result but, rather, whether the trial court's decision fell within a range of reasonable options." *Id.* (internal quotation marks and citation omitted).

B. Additional Background

During closing argument, the prosecutor argued the following:

> I want to talk to you about something the Court has instructed and talked to you about. 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 8/18/22, pp 80:20-81:3.

C. Law and Analysis

"In reviewing a claim of prosecutorial misconduct, we engage in a two-step analysis. First, we must determine whether the prosecutor's challenged conduct was improper based on the totality of the circumstances. Second, we must consider whether such conduct warrants reversal according to the proper standard of review." *People v. McMinn*, 2013 COA 94, ¶59. This Court determines "whether any misconduct warrants reversal[,]" evaluating claims of improper argument "in the context of the argument as a whole and in light of the evidence before the jury." *Van Meter*, ¶23 (internal citation omitted). "[P]rosecutors have wide latitude in the language and style they choose to employ, as well as in replying to an argument by opposing counsel." *People v. Cuellar*, 2023 COA 20, ¶65. "Prosecutors may comment on the evidence admitted at trial and the reasonable inferences that can be drawn therefrom." *McMinn*, ¶61.

Defendant asserts that the prosecution's argument that Defendant's statements aren't presumed to be credible equates to arguing that Defendant isn't presumed to be innocent. OB, pp 26-27. But a jury can presume that a defendant is innocent while also evaluating his credibility, which is what this jury did, per the instructions the court provided. *See* CF, pp 330 (jury instruction informing the jury that the charges against Defendant "are just accusations" that are not evidence that he "committed any crimes"); 331 ("The presumption of innocence remains with [Defendant] throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that [Defendant] is guilty beyond a reasonable doubt."); 334 ("You are the sole judges of the credibility of each witness and the weight to be given to the witness's testimony.").

Defendant cites to no authority, and the People are not aware of any, providing that a criminal defendant's presumption of innocence somehow includes a presumption of credibility. It does not, and that determination always rests with the jury. *See People v. McCants*, 2021

COA 138, ¶¶45-46 (discussing instructions related to jury's role in assessing credibility). Here, the prosecutor's arguments were consistent with the legal principles embodied in the instructions of law the jury received, and the prosecutor's comments were effectively explaining to the jury how the presumption of innocence and the credibility instruction worked together.

Although Defendant didn't testify during the first bifurcated trial, he chose to speak with officers the night of the charged offenses, and the jury heard about Defendant's voluntary statements to them. The prosecutor commented on reasonable inferences from Defendant's statements specifically relating to his credibility, but never connected his lack of credibility to an argument that he was guilty. TR 8/18/22, pp 81:4-84:3. Calling into question a defendant's credibility is different from attacking the presumption of innocence, which the prosecution didn't do.

Additionally, counsel's failure to object to this comment is indicative of his lack of contemporaneous concern. *See People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990). "[C]ounsel may properly

argue from reasonable inferences anchored in the facts in evidence about the truthfulness of a witness' testimony." *Domingo-Gomez*, 125 P.3d at 1051. As well, at every step, the prosecutor tied her specific arguments Defendant's credibility to reasonable inferences from Defendant's statements, which was permissible.

Because none of the prosecutor's statements can be considered flagrantly, glaringly, or tremendously improper, there was no plain error.

IV. This Court should remand so the trial court may correct the mittimus to reflect one victim assistance surcharge per criminal action and so Defendant may demonstrate his inability to pay mandatory fees.

Lastly, Defendant contends that the court erroneously imposed a victim assistance surcharge for each conviction, as opposed to each criminal action. OB, p 32. Defendant also contends that because the court did not impose the mandatory fees for Defendant's conviction in his presence, he wasn't given the opportunity to demonstrate inability to pay them, which was reversible error. OB, pp 35-36. The People agree with Defendant that the court erred.

A. Preservation and Standard of Review

Defendant does not address preservation, but this issue seems to be an illegal sentence claim despite Defendant's lack of citation to Crim. P. 35(a). An illegal sentence claim under Rule 35(a) need not be preserved. *Fransua v. People*, 2019 CO 96, ¶10. The People agree that this Court reviews whether Defendant's sentences were authorized by law de novo. *Waddell v. People*, 2020 CO 39, ¶10.

B. Additional Background

During Defendant's sentencing hearing, the prosecution requested $536.33 for the cost of prosecution and $1,673.28 for restitution; Defendant did not object to either of those requests.[7] TR 10/17/22, pp 16:19-17:19. Nor did Defendant mention inability to pay or request to be heard on indigence.

The court asked Defendant if he had any questions, and asked defense counsel if there were "any points of clarification or anything you think I was going to address that I didn't[.]" *Id.*, p 28:16-20. Defendant

[7] An estimate Lowery obtained for the repair cost to his vehicle four days after this incident was for $1,673.28. CF, pp 405-10.

said nothing and defense counsel "just wanted to go through credit for time served that Mr. Kolacny has on each of these cases, and that would be the last note from the defense." *Id.*, p 28:21-24. After a discussion about credit for time served, the judge asked again if there was anything else, and defense counsel said, "Nothing from defense." *Id.*, p 29:16-19. There was no discussion of fees, including the victim assistance surcharge, by either of the parties or the court.

The same day as the sentencing, the court filed the mittimus, which reflected assessed fees and restitution of $3,283.11. CF, p 401. Information from the Colorado State Courts Data Access website, attached as Exhibit 1, showed that the court assessed $35.00 in court costs, $5.00 for the court security cash fund, $2.50 for the genetic testing surcharge, $25.00 for the public defender accounts receivable code, $10.00 for the restorative justice surcharge, $25.00 for the time payment fee, $163.00 for the victim compensation fund, and $808.00 for

the victim assistance fund, in addition to restitution and cost of prosecution, for a total of $3,283.11.[8]

C. Law and Analysis

A victim assistance fund surcharge must be assessed

> equal to thirty-seven percent of the fine imposed for each felony, misdemeanor, or class 1 or class 2 misdemeanor traffic offense, or a surcharge of one hundred sixty-three dollars for felonies, seventy-eight dollars for misdemeanors, forty-six dollars for class 1 misdemeanor traffic offenses, and thirty-three dollars for class 2 misdemeanor traffic offenses, whichever amount is greater, except as otherwise provided in subsection (1)(b) of this section, is levied on each criminal action resulting in a conviction or in a deferred judgment and sentence, as provided in section 18-1.3-102, which criminal action is charged pursuant to state statute.

§24-4.2-104, C.R.S. (2024).

Defendant was convicted of four felonies and two misdemeanors. CF, p 400. The trial court appears to have imposed four $163.00 victim assistance surcharges (one per each felony conviction) and two $78.00 surcharges (one per each misdemeanor conviction). CF, p 401. The

[8] This information was not otherwise available in the Court File or in transcripts, thus it was necessary to cite to the Data Access information.

court's imposition of $808.00 for the victim assistance fund surcharge was not consistent with section 24-4.2-104, which calls for the imposition of whichever amount is greater for each criminal action resulting in a conviction. Here, that would have been $163.00 since Defendant was convicted of at least one felony. This case should be remanded so the trial court can amend the assessed fees amount in the mittimus.

Additionally, the court should have imposed all mandatory fees, including the victim assistance surcharge, in Defendant's presence during the sentencing hearing so that the court could make findings with respect to his ability to pay. *See People v. Thames*, 2019 COA 124, ¶78 (trial court erred when it imposed mandatory surcharges "without giving [the defendant] an opportunity to prove he falls within one or more of the exemptions."). 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

For all the above reasons, this Court should remand to correct the mittimus and make findings concerning Defendant's ability to pay the mandatory surcharges, but otherwise affirm Defendant's convictions.

PHILIP J. WEISER
Attorney General

/s/ Sonia R. Russo

SONIA RAICHUR RUSSO, 53300*
Senior Assistant Attorney General
Criminal Appeals
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon Robin Rheiner, Deputy State Public Defender, via the Colorado Courts E-filing System (CCES) on August 29, 2024.

/s/ Sonia R. Russo

SONIA RAICHUR RUSSO, *53300
Criminal Appeals Section
Senior Assistant Attorney General
Attorneys for Plaintiff-Appellee
*Counsel of Record