DATE FILED
December 5, 2024 9:17 AM

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	
Arapahoe County District Court Honorable Ryan J. Stuart, District Judge Case Number 20CR3054	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. SAMUEL ISAIAH BIRCH, Defendant-Appellant	▲ COURT USE ONLY ▲
Attorney for Defendant-Appellant: MARK G. WALTA, #30990* WALTA LLC 7761 Shaffer Parkway, Suite 105 Littleton, CO 80127 (303) 953-5999 (Telephone) mwalta@walta-law.com (Email) **Under Contract with Alternate Defense Counsel*	Case Number: 22CA928

REPLY BRIEF OF DEFENDANT-APPELLANT

Court of Appeals, State of Colorado **2 East 14th Avenue Denver, CO 80203** Name of Lower Court(s): Arapahoe County District Court Trial Court Judges(s): Honorable Ryan J. Stuart Case Number(s): 20CR3054 **Appellee(s): THE PEOPLE OF THE STATE OF COLORADO** **v.** **Appellant(s): SAMUEL ISAIAH BIRCH**	▲ ***COURT USE ONLY*** ▲
MARK G. WALTA, #30990 Walta LLC 7761 Shaffer Parkway, Suite 105 Littleton, CO 80127 (303) 953-5999 (Telephone) mwalta@walta-law.com (Email)	Case Number: 22CA928
CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32:

The brief complies with C.A.R. 28(g):

✓ It contains **2,274** words.

The brief complies with C.A.R. 28(a)(7)(A):

✓ 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.

s/ Mark G, Walta, #30990
Signature of attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

In response to the matters raised in the State's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Mr. Birch respectfully submits the following Reply Brief.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO ALLOW MR. BIRCH TO PRESENT EVIDENCE THAT CALLED INTO QUESTION THE INTEGRITY AND ADEQUACY OF THE INVESTIGATION, BECAUSE IT PURPORTEDLY RAN AFOUL OF THE LIMITATIONS ON ALTERNATE SUSPECT EVIDENCE SET FORTH IN *PEOPLE v. ELMARR*, 2015 CO 53, 351 P.3D 431, ENCUMBERED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND DIMINISHED THE PROSECUTION'S BURDEN OF PROOF.

A. PRESERVATION AND STANDARD OF REVIEW

The parties concur that this issue is preserved and furthermore agree as to the applicable standard of review. Opening Br. at 14; Answer Br. at 4. However, there is a dispute as to the appropriate standard for reversal.

Mr. Birch asserts that, because the trial court's erroneous decision deprived him of his state and federal constitutional due process right to a fair trial, his right to present a complete defense, his confrontation rights, and his right to effective assistance of counsel, the constitutional harmless error standard applies. Opening Br. at 14-15. Notably, defense counsel specifically argued below that the trial court's ruling excluding the evidence at issue here violated each of these constitutional rights. (TR 3/9/22, p 61:15-22). Having properly preserved his constitutional objections, it

is incumbent on this Court to apply the constitutional harmless error standard in assessing whether reversal is warranted.[1] *People v. Johnson*, 2021 CO 35, ¶ 17, 486 P.3d 1154, 1158.

Relying primarily on *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009), the State argues that the constitutional harmless error standard applies **only** if the exclusion of evidence deprives the defendant of **any** meaningful opportunity to test the prosecution's case or otherwise present a complete defense. Answer Br. at 5 (citing cases) (emphasis added). Because the State contends that Mr. Birch has failed to clear this high bar, it avers that the nonconstitutional harmless error standard necessarily applies. *Id.* at 5-6.

While *Krutsinger* contains some fairly expansive language that arguably imposes a more onerous burden on defendants seeking reversal under the constitutional harmless error standard – particularly based on the exclusion of defense evidence or limitations on the ability to impeach prosecution witnesses – the opinion as a whole affirms that United States and Colorado Supreme Court precedent does not require

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[1] Mr. Birch would note – as he did in his Opening Brief at 15 n.10 – that neither party complied with the procedures set forth in *People v. Dye*, 2024 CO 2, 541 P.3d 1167, for litigating this issue. Those procedures, of course, were not in place at the time of trial in this case, and the supreme court's implementation of those particular procedures was not foreseeable. The State's complaints on this point ring hollow. Answer Br. at 6-7.

defendants to make an unassailable showing of constitutional injury in order to warrant application of the constitutional harmless error standard:

> Error in limiting a defendant's ability to challenge the credibility of the evidence against him, either by restricting the cross-examination of prosecution witnesses or by restricting the presentation of defense evidence, implicates "the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" […] Whether the guarantee of a *meaningful* opportunity to present a complete defense is "rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment," it cannot be denied without violating the federal constitution. . .
>
> At least with regard to impeachment of the prosecution's case, the Supreme Court has largely resolved the question of the appropriate standard. . . Although the nature and extent of any ruling limiting the presentation of defense evidence will necessarily determine whether it amounts to constitutional error, just as the nature and extent of the trial court's limitation on cross-examination were determinative in [*Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)], the focus of the inquiry remains on individual witnesses rather than the trial as a whole. As the Supreme Court made clear with regard to the Confrontation Clause in particular, a defendant necessarily states a violation of his constitutional right to present a defense by demonstrating that "(a) reasonable jury might have received a significantly different impression of a witness's credibility" had the court not erroneously excluded otherwise appropriate evidence. . .
>
> Nor has this court previously suggested otherwise. . .

219 P.3d at 1061 (internal citations omitted) (emphasis in original).

In the final analysis, the State places the cart before the horse: a defendant need not conclusively establish that he suffered a **complete** denial of his constitutional rights in order to avail himself of the constitutional harmless error standard; he must simply assert a cognizable deprivation of his constitutional rights in order to trigger application of the standard, at which point the burden shifts to the government to prove beyond a reasonable doubt that that the alleged error was harmless. *Chapman v. California*, 386 U.S. 18, 23–24 (1967). Mr. Birch has made that showing. Accordingly, the analysis as to whether reversal is warranted under the particular facts and circumstances of this case should proceed under the constitutional harmless error standard.

Regardless, even if the court concludes that the nonconstitutional harmless error standard applies, Mr. Birch maintains that reversal is still required. Under that standard, the Court must reverse if the error "substantially influenced the verdict or affected the fairness of trial." *Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116, 119. For the reasons set forth below and in his Opening Brief, Mr. Birch maintains that the trial court's exclusion of evidence that impaired his ability to challenge the adequacy of the underlying investigation and otherwise attack the credibility of prosecution witnesses, substantially influenced the verdict or affected the fairness of the trial. Mr. Birch's primary defense was that he was not the individual who committed the crimes.

The exclusion of fairly compelling evidence that law enforcement failed to pursue evidentiary leads that either could affirm or dispute that Mr. Birch was the sole suspect satisfies the nonconstitutional harmless error test.

B. DISCUSSION

The State's argument – reduced to its essence – is that the inadequate or deficient investigation/*Bowden*[2] defense pursued in this case is unrecognized, somehow controversial, or merely a back-door effort to avoid *Elmarr*'s limitations on the assertion of the alternate suspect defense. Answer Br. at 10-16. The State's argument fails on all counts.

First, the contention that an argument by the defense that law enforcement and the prosecution did not adequately investigate the case, and that the failure to conduct a thorough investigation creates reasonable doubt as to one or more elements of the crimes charged, is somehow novel or controversial borders on frivolous. This has long been recognized as a common defense. *See* Opening Br. at 21-23 (citing cases and authorities). There is no "debate nationwide" about the obvious viability or widespread use of this defense in state and federal courts.[3] Answer Br. at 11.

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[2] *See Commonwealth v. Bowden*, 399 N.E.2d 482, 486 (Mass. 1980).

[3] The State cites to *United States v. Elysee*, 993 F.3d 1309, 1340 (11th Cir. 2021), in support of its assertion that there is some sort of unresolved national debate about

However the defense is characterized – and *Bowden* certainly does a good job of encapsulating the basic elements of the defense – it is simply a challenge to the integrity, reliability, and thoroughness of the criminal investigation for purposes of casting doubt on one or more elements of the charged offenses. Opening Br. 21-23 (citing cases and authorities). This is a time-worn defense.

Second, there can be no question that the Mr. Birch was not pursuing anything approaching an alternate suspect defense, as defined by, and recognized under, Colorado law. Defense counsel affirmed this again and again. (TR 3/9/22, pp 5-6, 8-11, 13-14, 16-19, 34-35). The only evidence in this vein that the trial court allowed was limited testimony suggesting that an individual roughly matching the description of the suspect in the Circle K robbery unsuccessfully attempted to pick up an online order from a Subway franchise located nearby at around the time of the robbery. (TR 3/9/22, pp 121-22). As defense counsel made clear, far from being an alternate suspect defense, this evidence conceivably could have established that Mr. Birch was the individual who attempted to pick up the online order. (TR 3/9/22, pp 121-22). The basic thrust of the evidence was that law enforcement failed to properly

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this well-settled issue. Answer Br. at 11. *Elysee* does not remotely support this proposition and is clearly distinguishable. The Court needn't expend any energy on this argument.

investigate the case – even leads that could have connected Mr. Birch to the robberies. The fact this evidence was admitted is of no moment, because it cut both ways: while it may have suggested that someone roughly matching Mr. Birch's description was in the vicinity of the first robbery, it did not preclude the possibility that the person was, in fact, Mr. Birch.

Finally, contrary to the State's assertions, Mr. Birch is not urging the Court to effectively overrule governing case law establishing the parameters of, and limitations on, the alternate suspect defense in Colorado. Answer Br, at 12-13. The aim of an alternate suspect defense is to point the accusing finger at someone specific; the primary purpose of an inadequate investigation defense is to create reasonable doubt about the processes that led to the defendant's arrest and prosecution. To the extent that the State suggests that evidence casting doubt on the quality, focus, or purpose of law enforcement's investigation was irrelevant or inconsequential, it's wrong. Answer Br. at 13-17.

The State characterizes the evidence at issue here as unworthy of consideration in light of the countervailing evidence of guilt. Answer Br. at 20-22. Although there was certainly some evidence linking Mr. Birch to the crimes at issue here, identity was a primary question, and the excluded evidence went directly to that issue. The purpose of introducing the evidence in question was not to suggest that another person

committed the crime, but rather that investigators did not conduct the requisite investigation in determining who may have been involved in the robberies.

Accordingly, the judgment must be reversed.

II. THE TRIAL COURT PLAINLY ERRED, AND DEPRIVED MR. BIRCH OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL, BY INCORRECTLY INSTRUCTING THE JURY THAT SELF-INDUCED INTOXICATION DOES NOT APPLY TO THE CRIME OF TAMPERING WITH PHYSICAL EVIDENCE, AS DEFINED BY SECTION 18-8-610(1)(A), C.R.S. (2020).

A. PRESERVATION AND STANDARD OF REVIEW

The State contends that the deficient instruction was invited error, because defense counsel proposed the instruction and did not otherwise take any action to modify the instruction. Answer Br. at 22-23, 26-29. The State's challenge is fair, but wrong. Yes, defense counsel proposed the instruction; and, yes, defense counsel accepted the instruction more or less without objection. But this was not invited error. *See People v. Perez-Rodriguez,* 2017 COA 77, ¶ 25, 411 P.3d 259, 266 ("Invited error is sometimes referred to as a strategic error. But this does not mean that the 'strategy' must be competent or well planned. It simply means that the action that results in invited error must be deliberate rather than inadvertent. . . . Thus, whether analyzed as waiver or invited error, there must be intentional or deliberate action in order to preclude plain error review."). This was plainly not a strategic error. Trial

counsel – along with the prosecution and trial court – simply had no idea that the defense of self-induced intoxication applied to tampering with physical evidence.

B. DISCUSSION

The State's extensive arguments as to why this obvious instructional error doesn't merit reversal on this count are not persuasive. Answer Br. at 30-34. There's little doubt that the defense of self-induced intoxication applies to the crime of tampering with evidence. Opening Br. at 28-30. There was evidence to suggest that Mr. Birch may have been under the influence of drugs when allegedly destroying, or persuading others to destroy, evidence relevant to this prosecution. The jury should have been instructed accordingly. *People v. Mattas*, 645 P.2d 254, 259 & n.7 (Colo. 1982) ("Where the evidence supports an intoxication defense, it is appropriate for a trial court to instruct on that defense. . . Under some circumstances a court's failure to instruct sua sponte on intoxication may result in reversible error.") (citing *Martinez v. People*, 172 Colo. 82, 470 P.2d 26 (1970)). The conviction must therefore be reversed.

III. MR. BIRCH'S SENTENCE OF LIFETIME IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE (LWOP) FOR FIRST DEGREE MURDER-FELONY MURDER IS CONSTITUTIONALLY DISPROPORTIONATE UNDER THE STATE AND FEDERAL CONSTITUTIONS, IN LIGHT OF RECENT CHANGES TO COLORADO'S CRIMINAL CODE RECLASSIFYING FELONY MURDER AS A SUBSET OF SECOND DEGREE MURDER SUBJECT TO A POTENTIAL SENTENCING RANGE OF 8 TO 48 YEARS IMPRISONMENT.

The primary issue here is whether the challenge is rendered moot by virtue of the fact that the sentence for felony murder and first degree murder – intent and after deliberation merged. Answer Br. at 34-40. It's not.

The record is somewhat muddled, but it's clear that life without parole (LWOP) sentences entered on both Counts 1 and 2, and that the counts merged into a single count. (TR. 4/22/22, pp 10:14-18, 1212:17-19).

Mr. Birch's position is simply that, based on governing law, the felony murder conviction is still potentially live. *See Candelaria v. People,* 148 P.3d 178, 180–81, 183-84 (Colo. 2006). Accordingly, proportionality review should proceed in accordance with the supreme court's recent pronouncements in *Sellers v. People*, 2024 CO 64.

CONCLUSION

For the reasons set forth in Part I, Mr. Birch respectfully asserts that the judgment of conviction must be reversed and the cause remanded for a new trial. As to Part II, the conviction on that count should be reversed. With respect to Part III, the sentence should be vacated and remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on December 5, 2024, a copy of this **REPLY BRIEF OF DEFENDANT-APPELLANT** was delivered electronically via the Colorado Courts E-Filing (CCE) System to:

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