COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED November 27, 2024 1:30 PM
El Paso County District Court Honorable Jann DuBois and Samuel Albert Evig, Judge Case No. 18CR801	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee v. PATRICK PESCHONG, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 23CA2
PHILIP J. WEISER, Attorney General ALEJANDRO SORG GONZALEZ, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-508-6000 E-Mail: AG.Appellate@coag.gov Registration Number: 53843 *Counsel of Record	

PEOPLE'S 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).

> It contains **9,376** words, including what are contained in the footnotes.

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).

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

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/ Alejandro Sorg Gonzalez
Signature of attorney or party

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STATEMENT OF THE CASE AND FACTS

I. Crime and Charges

The defendant, Patrick Peschong, was a backseat passenger of a car that was stopped by police for a traffic infraction. (TR 9/23/2019, pp 155-58). The driver could not provide proof of ownership, and the front passenger had outstanding warrants, so they were both arrested. (TR 9/23/2019, pp 155-58). Peschong and the other backseat passenger were released at the scene. (TR 9/23/2019, p 176:2-12). Before leaving the scene, however, Peschong offered to drive the car away. (TR 9/23/2019, pp 193-94, 222-24). When the police refused his offer, he immediately left the scene on foot, despite the cold and snowy weather. (TR 9/23/2019, pp 193-94, 222-24; 9/24/2019, 350-51).

The police then searched the car at the scene and found three grams of methamphetamine and drug paraphernalia underneath the driver's seat and a lunch pail underneath the backseat where Peschong had been sitting. The lunch pail contained 144 grams of methamphetamine and small Ziploc baggies. (TR 9/23/2019, pp 159-69, 173-74; People's Trial Exhibits 1-4, 8-10, 13-14).

For the contents inside the lunch pail, Peschong was charged with, as relevant here, count one: possession with intent to manufacture or distribute a controlled substance,[1] as a class-one felony offense; count two: distribution of a controlled substance,[2] as a class-three felony offense; and count three: possession of a controlled substance, as a class-four felony offense.[3] (CF, p 13; TR 9/23/2019, p 176:13-23)[4].

II. Jury Trial

At trial, the prosecution argued that Peschong possessed and intended to distribute the 144 grams of methamphetamine based on his close proximity to where the lunch pail was found, his obvious efforts to conceal it underneath the backseat, his further efforts to avoid the car's impoundment, and his immediate departure from the scene on foot after those efforts had failed. (TR 9/24/2019, pp 101-07, 114-21).

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[1] § 18-18-405(1), (2)(a)(I)(B), C.R.S. (2024)

[2] § 18-18-405(1), (2)(c)(II), C.R.S. (2024)

[3] § 18-18-403.5(1), (2)(a), C.R.S. (2024)

[4] Peschong was also charged with four counts of being a habitual offender, but the prosecution later dismissed those charges due to its inability to obtain records for one of his prior federal convictions. (CF, p 71; TR 1/31/2020, p 8:4-9).

Peschong argued that the prosecution could not prove that he possessed the lunch pail because he did not own the car, he did not own any of the other items found inside the car, he told the police that he did not know if there were any drugs inside the car, and he was fully cooperative with the police during the traffic stop. (TR 9/23/2019, p 193:8-18; TR 9/24/2019, pp 63:20-21, 107-14).

The jury convicted Peschong as charged. (CF, pp 157-62; TR 9/24/2019, pp 122-25).

III. Crim. P. 33 proceedings and Sentencing

Before sentencing, Peschong filed a motion for a new trial under Crim. P. 33. (CF, pp 167, 171-72).

During sentencing, Peschong argued, as relevant here, that the trial court erred during trial by excluding the driver's plea agreement and by allowing several instances of prosecutorial misconduct. (TR 1/30/2020, pp 12:5-11, 14:7-16). The plea agreement recorded the driver's *Alford*[5] plea to manufacturing the 144 grams of

[5] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)

methamphetamine. (Sealed File 2/7/2024, Defense Exhibit A, pp 1-2). And the alleged prosecutorial misconduct concerned the prosecution's closing arguments about the police finding the drugs between Peschong's feet when they testified that they found the drugs after he left the scene. (TR 1/30/2022, p 14:7-16). The court granted his motion on unrelated grounds. (TR 1/30/2020, pp 15-16).

The prosecution appealed. (CF, pp 219-22).

A division of this Court reversed the trial court's ruling and remanded the case for an evidentiary hearing. *People v. Peschong,* 20CA0519, ¶¶ 28-29 (June 24, 2019) (not published pursuant to C.A.R. 35(e)).

After an evidentiary hearing, a new trial court denied Peschong's motion. (TR 7/11/2022, pp 53-54, 55-58). With respect to driver's plea agreement, the court ruled that its preclusion under CRE 403 served the interests of justice because its admission would have confused and misled the jury. (TR 7/11/2022, pp 55-57). And with respect to the alleged prosecutorial misconduct, the court ruled that the prosecution's

closing arguments were based on reasonable inferences from the evidence at trial. (TR 7/11/2022, pp 53-54).

The court then merged Peschong's convictions on counts two and three with his conviction on count one and sentenced him to 12 years in prison. (TR 9/6/2022, p 26:6-17). But he was awarded an appeal bond thereafter. (CF, p 378).

SUMMARY OF THE ARGUMENTS

Peschong's challenge to the trial court's exclusion of the driver's testimony and plea agreement fails for a variety of reasons. First, he waived one of his arguments in support of his challenge to the exclusion of the driver's testimony. But even if he did not, any error in excluding the testimony was still not plain. He also invited any error with respect to the exclusion of the plea agreement. But if this Court disagrees, the agreement was still properly excluded because it lacked relevance and because it would have only confused and misled the jury about its legal significance. Regardless, any error in excluding it did not prevent Peschong from presenting a complete defense and was harmless.

The prosecution also did not commit any misconduct during its closing arguments because, as the new trial court found during the Crim. P. 33(b) proceedings, the prosecution's arguments were based on reasonable inferences from the evidence presented at trial. Regardless, any erroneous arguments were not plain.

The prosecution further presented sufficient evidence to reasonably infer Peschong's knowing possession of the lunch pail, as well as his intent to distribute the 144 grams of methamphetamine that were found within it.

Finally, Peschong's challenge to the jury instruction regarding count two is moot. He also waived or invited any error with respect to that instruction. But even if he did not, any error was not plain.

ARGUMENTS

I. The trial court did not abuse its discretion and prevent Peschong from presenting a complete defense by excluding the driver's testimony and plea agreement.

A. Preservation and Standards of Review

The People agree this issue is preserved but only as it relates to the exclusion of the driver's plea agreement. (Amended Opening Br. 8; TR 9/24/2019, pp 50-51, 54-55, 61:7-19). For reasons provided below, he waived his challenge to the exclusion of the driver's testimony on the basis that the plea agreement already exposed the driver to federal prosecution. He also invited any error with respect to the exclusion of the plea agreement. Consequently, those challenges should not be addressed by this Court. *See People v. Bryant*, 2013 COA 28, ¶ 13 n.2 ("a 'waived' claim of error presents nothing for an appellate court to review.") (quotation omitted); *see also People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989) (the invited error doctrine precludes appellate review).

But if this Court disagrees, then it should, at least, review the exclusion of the driver's testimony for plain error because Peschong

never objected to its exclusion during trial. *See Hagos v. People*, 2012 CO 63, ¶ 14 (all errors that were not preserved by objection are reviewed for plain error). To constitute plain error, the error must have been "obvious" at the time it was made, and it must be "substantial" enough to "cast serious doubt on the reliability of the … conviction[s]." *People v. Crabtree,* 2024 CO 40M, ¶ 72; *see also Hagos*, ¶ 14. For an error to be "obvious" at the time it was made, it "must [have] contravene[d] (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law." *Scott v. People,* 2017 CO 16, ¶ 34. Appellate courts need not decide whether a trial court actually erred if the alleged error was not obvious at the time. *People v. Vigil*, 241 P.3d 442, 447 (Colo. App. 2010).

With respect to Peschong's preserved challenge to the exclusion of the plea agreement, the People agree that it concerns a trial court's evidentiary decision that should be reviewed for an abuse of discretion. *People v. Elmarr*, 2015 CO 53, ¶ 20. A trial court abuses its discretion only when its ruling is manifestly arbitrary, unreasonable, unfair, or based on an erroneous view of the law. *Id*. But a defendant's claim that

he was prevented from presenting a complete defense at trial is reviewed de novo. *Rios-Vargas v. People*, 2023 CO 35, ¶ 19.

Lastly, the People disagree that any error with respect to that preserved challenge should be reviewed under the constitutional harmless error standard. Instead, for reasons more explained below, the nonconstitutional harmless error standard should apply because the exclusion did not deprive Peschong from a *meaningful* opportunity to subject the prosecution's case through adversarial testing. *Krutsinger v. People*, 219 P.3d 1054, 1062-64 (Colo. 2009) (emphasis added). Under the nonconstitutional harmless error standard, appellate courts reverse only if the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Hagos,* ¶ 12. This standard is outcome-determinative and must account for the error's impact in light of the evidence as a whole. *Krutsinger*, 219 P.3d at 1058.

B. Additional Facts

On the first day of trial, the trial court released the driver from the prosecution's subpoena. (TR 9/23/2019, pp 7-9, 148:10-16). The driver, who was not listed as a co-defendant in this case, invoked his

Fifth Amendment rights against self-incrimination after he was not guaranteed federal immunity for his expected testimony about his plea agreement and the statements he made during his custodial interrogation, in which he accused Peschong of selling him the three grams of methamphetamine that were found underneath his car seat and denied owning the 144 grams of methamphetamine. (TR 9/23/2019, pp 66:8-17, 82-83, 127-29, 135-39, 148:10-16). Peschong never objected or raised any concerns about the driver's excusal from testifying. (TR 9/23/2019, pp 82-83, 127-29, 135-39, 148:10-16).

After the prosecution presented its evidence, Peschong requested the trial court to take judicial notice of the driver's plea agreement as Defense Exhibit A. (TR 9/24/2019, p 50:14-19).[6] He argued that it was relevant under CRE 401 to show the driver had admitted to possessing the 144 grams of methamphetamine, that it was admissible under CRE

[6] While citing to the trial transcript from September 24, 2019, during this issue and the remaining issues in this brief, the People cite to the electronic numbering of the pages because the physical numbers on the pages inexplicably start at page 232. The People believe that this will be easier for this Court to follow.

804(b)(3) as a statement against interest of a now unavailable witness, and that it was also admissible under CRE 803(22) as a judgment of a previous conviction. (TR 9/24/2019, pp 51-55, 58:3-16, 61:7-19). He also argued that it could be admitted simply by judicial notice without any accompanying testimony because its relevance can be explained during closing arguments. (TR 9/24/2019, pp 51-55, 58:3-16, 61:7-19)

The prosecution objected. (TR 9/24/2019, pp 55-57, 68-69). It first argued that the evidence was irrelevant under CRE 401 because the driver's *Alford* plea did not make it less likely that Peschong possessed the drugs with the intent to distribute them. (TR 9/24/2019, pp 55-56, 68-69). It also argued that simply taking judicial notice of the plea agreement without any accompanying testimony to explain its relevance would confuse the jury under CRE 403. (TR 9/24/2019, pp 55-57). The prosecution alternatively argued that, if the trial court was inclined to admit the plea agreement, then its admission should constitute a waiver of Peschong's confrontation rights against the driver, and it should be allowed to present the driver's custodial

statements and the reasons why he accepted the *Alford* plea as rebuttal evidence. (TR 9/24/2019, pp 55-57).

Ultimately, the trial court excluded the plea agreement under CRE 403. (TR 9/24/2019, pp 66-69, 75:7-21). Before doing so, the court noted that it had minimal relevance in determining the issue of whether Peschong possessed the 144 grams of methamphetamine with the intent to distribute them. (TR 9/24/2019, pp 68-69). But the court then concluded that whatever relevance it had in determining that issue was substantially outweighed by the considerations of CRE 403. (TR 9/24/2019, pp 66-67, 74-75). Specifically, the court agreed with the prosecution that simply taking judicial notice of the plea agreement without any accompanying testimony would confuse the jury about its relevance to this case, and the parties could not simply argue its relevance or lack thereof during closing arguments without referencing testimony from trial. (TR 9/24/2019, pp 74-75). But the court disagreed with the prosecution that admitting the plea agreement should constitute a waiver of Peschong's confrontation rights against the driver because Peschong was never afforded an opportunity to cross-examine

the driver about his custodial statements. (TR 9/24/2019, pp 66-67, 74-75). The court did not reach the issues of whether the plea agreement was admissible under CRE 804(b)(3) or CRE 803(22). (TR 9/24/2019, pp 66-69, 74-75).

Peschong objected to the trial court's ruling on the basis that it violated his constitutional rights to present a complete defense. (TR 9/24/2019, pp 70:8-9, 75-76).

The parties then proceeded to closing arguments, where the prosecution argued that the lunch pail only belonged to Peschong, while the three grams of methamphetamine and drug paraphernalia that were found underneath the driver's seat only belonged to the driver. (TR 9/24/2019, pp 101-05, 115-21).

C. Law and Analysis

On appeal, Peschong argues that the trial court erred by:

a) excluding the driver's testimony on the basis that he lacked federal immunity because he had already exposed himself to federal prosecution by pleading guilty to manufacturing 144 grams of methamphetamine, (Amended Opening Br. 12-13);

b) allowing the driver to assert his Fifth Amendment rights outside the presence of the jury because requiring him to do so in front of the jury, as *Rios-Vargas* instructs, would have informed the jury about his conviction and the inaccuracy of the prosecution's characterization of him as only being a drug user, (Amended Opening Br. 13-14); and, lastly,

c) excluding the driver's plea agreement because it was relevant under CRE 401 to show that the driver had admitted to possessing the 144 grams of methamphetamine, because it was admissible under CRE 803(22) as a judgment of a previous conviction, and because CRE 403 did not require its preclusion since its relevance was readily apparent from the paperwork.

(Amended Opening Br. 15-18). Each of these arguments fail for the following reasons.

1. Peschong waived his argument concerning the lack of federal immunity for the driver.

A waiver is the "intentional relinquishment of a known right or privilege." *Phillips v. People*, 2019 CO 72, ¶16 (quoting *People v. Rediger*, 2018 CO 32, ¶39). Courts do not presume waiver; "to the contrary, [they] 'indulge every reasonable presumption against [it].'" *Phillips*, ¶ 16. Nevertheless, "[a] waiver may be explicit, [such as] when a party expressly abandons an existing right or privilege, or it may be implied, [such] as when a party engages in conduct that manifests an intent to relinquish a right or privilege or acts inconsistently with its assertion." *Forgette v. People*, 2023 CO 4, ¶ 28.

Implicit waivers require more than a mere acquiescence to an error however. Instead, they require a showing that defense counsel knew about the alleged error and still proceeded without objecting. *Compare Stackhouse v. People*, 2015 CO 48, ¶¶ 2, 8, 17 (the defendant implicitly waived his Sixth Amendment right to a public trial when defense counsel did not object to a known closure of the courtroom); *Forgette*, ¶¶ 34-35 (the defendant implicitly waived his objection to a

sleeping juror when defense counsel knew about the juror but did not object or ask for any remedial measures); *with People v. Turner*, 2022 CO 50, ¶¶ 10-15 (no implicit waiver when defense counsel expressed not knowing enough about the reasons behind the exclusion of the co-defendant's wife to object to her exclusion from the courtroom); *Rediger*, ¶¶ 42-44 (no implicit waiver of a jury instruction issue when defense counsel did not know about the discrepancy).

Here, similar to *Stackhouse* and *Forgette*, the record shows that Peschong's counsel knew about all the surrounding circumstances behind the driver's excusal in order to make the unpersuasive argument that his guilty plea to manufacturing 144 grams of methamphetamine already exposed to him to federal prosecution, and, yet, counsel still proceeded with the trial without making that argument. *See* 21 U.S.C.A. § 841(a)(1), (b)(1)(A)(viii) (2024); *see also People v. Birdsong*, 958 P.2d 1124, 1127-28 (Colo. 1998) (an *Alford* plea is treated like a guilty plea only for sentencing purposes in part because a defendant had to have considered his own best interests and the strength of the

prosecution's case before entering such a plea) (citing *Alford*, 400 U.S. at 37).

Hence, Peschong implicitly waived his right to raising this argument on appeal.

2. In any event, the trial court still did not plainly err by excluding the driver's testimony.

If this Court disagrees with the People's waiver argument, the trial court still did not plainly err by excluding the driver's testimony on the basis that he lacked federal immunity for two reasons.

First, because of the "well-settled legal principles" that *Alford* pleas are treated like guilty pleas only for sentencing purposes in part because defendants maintain their innocence while being sentenced as if they had committed their convicted charges, the driver would have obviously risked jeopardizing that benefit by testifying about any other matters that were not involved with his *Alford* plea, such as any involvement or awareness of Pechong's distribution scheme at the time of the traffic stop. *Scott*, ¶ 34; *see also Birdsong*, 958 P.2d at 1127

("*Alford* plea[s] permit[] a defendant to assert innocence … but consent to the imposition of the conviction and penalty.").

Second, even if that risk did not exist, and the trial court obviously erred by excluding the driver's testimony on that basis, the exclusion still does not "cast serious doubt on the reliability of the … conviction[s]." *Hagos*, ¶ 14. As the prosecution correctly argued at trial, if the driver had testified at trial, his testimony would have certainly "opened the door" to cross-examination about his custodial statements and his reasons for accepting the plea agreement, which would have shown the jury that the driver never admitted to possessing the 144 grams of methamphetamine, and he only accepted the plea agreement for the benefit of the *Alford* plea. *See People v. Rincon*, 140 P.3d 976, 979 (Colo. App. 2005) ("The 'opening the door' doctrine 'represents an effort by courts to prevent one party from gaining an unfair advantage by presenting evidence that, without being placed in context, creates an incorrect or misleading impression.'"). Thus, the driver's testimony would not have added much more benefit to Peschong's theory of

defense. To the contrary, it would have only strengthened the prosecution's case against him. *Krutsinger*, 219 P.3d at 1058.

Peschong's other argument that relies on *Rios-Vargas* also fails under plain error review.

True, in *Rios-Vargas*, the Colorado Supreme Court overruled *People v. Dikeman*, 555 P.2d 519 (Colo. 1976), and held that, in order to better protect defendants' constitutional rights to present a complete defense, trial courts must now allow them to subpoena and present "nonparty alternative suspects," who have a "non-speculative connection" to the crimes they are charged with, so they can question those suspects in front of a jury about topics that benefit their theory of defense. ¶¶ 4, 20-44, 46-52. Those suspects could then invoke their Fifth Amendment rights after each question asked of them if they so choose. *Id. Dikeman* had allowed for the opposite, meaning that defendants could not present nonparty alternative suspects if they asserted their Fifth Amendment rights outside the presence of a jury. *Id.* at ¶¶ 31-32.

But *Rios-Vargas* was not published until after Peschong's trial, so the trial court could not have obviously erred by following the prior

precedent established in *Dikeman*. *Crabtree*, ¶ 72; *see also Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) ("Trial courts have no discretion to disregard binding appellate rulings ….."). Thus, this argument can be rejected on this basis alone. *Vigil*, 241 P.3d at 447.

But for three reasons, this Court can also reject this argument on the basis that any error does not "cast serious doubt" on Peschong's convictions. *Hagos*, ¶ 14.

First, even if *Rios-Vargas* had been published by the time of Peshcong's trial, it would not have applied here because Peschong never sought to present the driver to the jury. ¶¶ 4, 20-44, 46-52. As the record shows, Peschong never subpoenaed the driver, so any presentation of the driver as a witness would have derived solely from the prosecution's subpoena.

Second, even if *Rios-Vargas* applied here, the driver would still not have qualified as a credible nonparty alternate suspect that would have entitled Peschong to an opportunity to question him in front of the jury. Again, the driver never admitted to possessing or manufacturing the 144 grams of methamphetamine during his custodial interrogation,

and he only accepted the plea agreement for the benefit of the *Alford* plea. *See Medina v. People*, 2023 CO 46, ¶ 24 (recognizing that defendants accept *Alford* pleas to receive more lenient sentences); *see also Birdsong*, 958 P.2d at 1127. Hence, the plea agreement was not supported by any factual basis, so any connection between the driver and the drugs would have been entirely speculative and in direct contradiction of the requirements established in *Rios-Vargas,* ¶¶ 4, 20-44, 46-52; *see also People v. Medina*, 2021 COA 124, ¶ 60 (recognizing that plea agreements are sometimes based on fictitious charges for the benefit of a defendant).

Third, even if the driver had qualified as a credible nonparty alternate suspect under *Rios-Vargas*, his testimony would have, as already explained above, "opened the door" to cross-examination about his custodial statements and his reasons for accepting the plea agreement. *Rincon*, 140 P.3d at 979. Again, those topics of cross-examination would not have supported Peschong's theory of defense; instead, it would have only strengthened the prosecution's list of

circumstantial evidence proving the drugs only belonged to Peschong. *Krutsinger*, 219 P.3d at 1058.

In sum, the trial court did not plainly err by excluding the driver's testimony on any of basis asserted by Peschong.

3. Peschong invited any error with respect to the exclusion of the driver's plea agreement.

The invited error doctrine applies when "one party expressly acquiesces to conduct by the court or the opposing party." *Horton v. Suthers*, 43 P.3d 611, 619 (Colo. 2002). While the doctrine is generally limited to specific admissions and subsequent contradictions, *see Rediger*, ¶ 37, our facts nonetheless fall within the doctrine.

Here, Peschong's counsel did not object or raise any concerns about the exclusion of the driver's testimony despite knowing that he later planned on introducing his plea agreement at trial. But he now seeks to benefit from any error the trial court may have committed while analyzing the effect that such an exclusion had on the admissibility of the driver's plea agreement. *See Erskine v. Beim*, 197 P.3d 225, 229 (Colo. App. 2008) ("The invited error doctrine prevents a

party from inducing an erroneous ruling and then seeking to benefit by appealing that error."). Because Peschong induced any error with respect to the exclusion of the plea agreement, he should be barred from appealing that error.

4. Still, the trial court did not abuse its discretion by excluding the driver's plea agreement.

"Trial courts have broad discretion in determining the admissibility of evidence based on its relevance, its probative value, and its prejudicial impact." *Elmarr*, ¶ 20 (citation omitted). Relevant evidence is admissible. CRE 402. Evidence is relevant if it has "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. Such evidence may prove "ultimate facts," which are facts that directly establish a particular element or defense, or "intermediate or evidentiary facts," which are probative of a separate, ultimate fact. *People v. Clark*, 2015 COA 44, ¶31.

Here, contrary to Peschong's assertion, the driver's *Alford* plea was not relevant in determining whether the driver had possessed the 144 grams of methamphetamine. As explained above, the plea did not reflect any admission by the driver that he had possessed the drugs; it only reflected his willingness to be sentenced as if he had manufactured the drugs for the benefit of a more lenient sentence. *See Medina*, ¶¶ 24, 60; *see also Birdsong*, 958 P.2d at 1127. And the prosecution never asserted that Peschong had manufactured the drugs. Thus, the trial court did not abuse its discretion by finding that the plea agreement had little relevance in determining the "ultimate fact" of knowing possession at trial. *Elmarr*, ¶ 20; *see also Clark*, ¶31.

The plea agreement was also not admissible as a judgment of a previous conviction under CRE 803(22). True, it pertained to the driver's guilty plea to a class-three felony offense that was punishable of more than a year in prison, but it did not disprove any fact that was essential to Peschong's convictions for the same reasons stated above that explain why it was not relevant. *See People v. Tafoya*, 985 P.2d 26, 30 (Colo. App. 1999) ("CRE 803(22) provides that '[e]vidence of a final

judgment entered after a trial or upon a plea of guilty or nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment of more than one year, *to prove any fact essential to sustain the judgment* ...' is not excluded by the hearsay rule.") (emphasis added). Hence, the trial court would have been correct if it had found the plea agreement inadmissible under this rule.

But even if the plea agreement was relevant and admissible under CRE 803(22), the trial court still did not abuse its discretion by excluding it under CRE 403.

Relevant evidence can still be excluded under CRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *People v. Salazar*, 2012 CO 20, ¶ 16. Evidence is unfairly prejudicial if it has an undue tendency to confuse or mislead the jury. *Id.*

Contrary to Peschong's assertion, simply introducing the plea agreement through judicial notice would not have made its relevance readily apparent for the jury. Again, pleading guilty to manufacturing the 144 grams of methamphetamine was not akin to admitting to he

possessed those same drugs during the time of the traffic stop with the intent to distribute them. As a result, any attempt by Peschong to make such an argument during closing remarks would have unfairly characterized the plea agreement. *See People v. McMinn*, 2013 COA 94, ¶ 61 (closing arguments must be based on reasonable inferences drawn from the evidence at trial). The prosecution would have also been particularly prejudiced by Peschong's unfair characterization of the plea agreement because, as the trial court correctly held, Peschong's confrontation rights would have barred the prosecution from introducing the driver's custodial statements as rebuttal evidence. *See Compan v. People,* 121 P.3d 876, 880-881 (Colo. 2005) (statements implicate confrontation rights if they are considered testimonial, which are statements that are made under circumstances that would lead an objective witness to reasonably believe that the statements would be later used in a criminal trial) (overruled on other grounds).

Consequently, the trial court's exclusion of the plea agreement under CRE 403 was not "manifestly arbitrary, unreasonable, [or] unfair." *Elmarr*, ¶ 20. To the contrary, it ensured that Peschong would

not misled or confuse the jury about its legal significance. *See People v. Smalley*, 2015 COA 140, ¶ 61 (trial courts have an obligation to ensure that juries do not use exhibits in a prejudicial manner against the parties, especially when they are used as substitutions for trial testimony).

5. Regardless, any error in excluding the plea agreement was harmless and did not prevent Peschong from presenting a complete defense.

Finally, Peschong argues that the trial court's error in excluding the plea agreement requires reversal under the constitutional harmless error standard because it prevented him from presenting a complete defense at trial. While making this argument, he suggests that the circumstances here are similar to those in *Rios-Vargas*. (Amended Opening Br. 18-22). They are not.

In *Rios-Vargas,* the defendant was convicted of second-degree burglary after the police ignored credible and ample evidence showing that her cousin had likely committed the burglary and then implicated her in the crime. ¶¶ 6-13. The defendant had subpoenaed her cousin to

testify at trial, but the trial court precluded her cousin's testimony after her cousin invoked her Fifth Amendment rights outside the presence of the jury. *Id*. at ¶¶ 14-15. After overruling *Dikeman*, the Colorado Supreme Court then determined that the trial court's error in excluding the cousin's testimony "was of a constitutional dimension" because it deprived the defendant of an opportunity to present a complete defense against the prosecution's unfair characterization of her alternate suspect defense as being entirely "imaginary and speculative," despite the ample and credible evidence in support of it. *Id*. at ¶¶ 53-58. In other words, the error deprived her from a *meaningful* opportunity to subject the prosecution's case through adversarial testing. *Krutsinger*, 219 P.3d at 1062-64 (emphasis added).

But here, Peschong was afforded a meaningful opportunity to contest the prosecution's case when he highlighted the facts that he did not own the car, he did not own any of the other items found inside the car, his statement to the police that he did not know if there were any drugs inside the car, and his full cooperation with the police during the traffic stop. Such were the only relevant facts to support his alternative

suspect theory as opposed to the plea agreement, which could not be credibly relied upon for that purpose for the same reasons why it was not relevant. Therefore, because Peschong was able to present all credible and relevant evidence in support of his theory, he was not prevented from presenting a complete defense, and the nonconstitutional harmless error standard should apply here. *See Hagos*, ¶ 11 (only preserved trial errors of constitutional dimension are reviewed under the constitutional harmless error standard).

Under that standard, any error in excluding the plea agreement does not require reversal for the same reasons why any error in excluding the driver's testimony was not substantial under plain error review. Specifically, the exclusion of the driver's plea agreement could not have "substantially influenced the verdict[s]," *Id.* at ¶ 12, because it only related to the manufacturing of the 144 grams of methamphetamine, and the prosecution never argued that Peschong had manufactured those drugs at trial. Moreover, any argument that Peschong could have made about its relevance to the issue of possession would have been easily rebutted by the prosecution's other strong list of

circumstantial evidence, such as Peschong's close proximity to the drugs, the manner in which they were hidden, the lack of access to those drugs after all the occupants exited the car, Peschong's obvious efforts to avoid the car's impoundment, and his immediate departure from the scene after those efforts had failed. *Krutsinger*, 219 P.3d at 1058.

II. The prosecution did not commit any misconduct during closing arguments.

A. Preservation and Standards of Review

The People agree this issue is not preserved. (Amended Opening Br. 22). As a result, it is reviewed for plain error. *Hagos*, ¶ 14.

Prosecutorial misconduct in closing argument rarely rises to this level. *People v. Van Meter*, 2018 COA 13, ¶ 26. That is because only prosecutorial misconduct that is "flagrantly, glaringly, or tremendously improper" warrants reversal under plain error review. *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005). An appellate division may consider the lack of a contemporaneous objection as indicating "defense counsel's belief that the live argument, despite its appearance in a cold

record, was not overly damaging." *Id.* at 1054. The division may also focus on the cumulative effect of the prosecution's statements, looking at the language used, the nature of the misconduct, the degree of prejudice to the defendant, the surrounding context, and the strength of the evidence against the defendant. *People v. Vialpando,* 2020 COA 42, ¶ 111; *see also People v. Serpa*, 992 P.2d 682, 685 (Colo. App. 1999) (a claim that the prosecutor engaged in improper argument must be reviewed in the context of the argument as a whole and in light of the evidence).

B. Additional Facts

During trial, the police officer, who initiated the traffic stop, and the officer who assisted that officer with the stop testified to finding the lunch pail on the backseat floor where Peschong had been sitting in the car. (TR 9/23/2019, pp 159-63, 166:9-11, 191-94, 204:6-20, 217-19). Those officers also clarified that Peschong had already left the scene by the time of their discovery, that he left the scene after being given him permission to do so, and that he displayed no signs of nervousness while he was there. (TR 9/23/2019, pp 182-84, 223-25).

During its closing arguments, the prosecution argued that:

- the driver only bought the three grams of methamphetamine and drug paraphernalia that were found underneath the driver's seat from Peschong, (TR 9/23/2019, pp 335-36, 346-49);
- Peschong knowingly possessed the lunch pail because: it was found by his feet, (TR 9/24/2019, pp 334-35, 347:7-8); it was within his arm's reach when he was sitting in the car, (TR 9/24/20219, p 347:7-8); drug dealers typically keep their drugs close to them, (TR 9/24/2019, p 335:7-11); and the manner in which the pail was hidden revealed his intent to conceal it from the officers. (TR 9/24/2019, pp 335-36); and, lastly;
- Peschong revealed his consciousness of guilt by immediately departing from the scene on foot instead of waiting for transportation despite the cold and snowy weather because he wanted to avoid being there when the police discovered the drugs. (TR 9/24/2019, pp 118-20).

Peschong never objected to any of these arguments. (TR 9/24/2019, pp 101-07, 114-21).

During his closing argument, Peschong emphasized that the lunch pail was not discovered between his feet but after he had already left the scene and that he was given permission to leave the scene from the police. (TR 9/24/2019, pp 107-14).

C. Law and Analysis

In examining a claim of prosecutorial misconduct, an appellate division engages in a two-step analysis. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, it must determine whether the prosecution's conduct was improper based on the totality of the circumstances and, second, whether the improper conduct warrants reversal according to the proper standard of review. *Id.* Each step is analytically independent of the other. *Id.*

"The purpose of closing argument is to 'sharpen and clarify the issues for resolution by the trier of fact.'" *People v. Evans*, 710 P.2d 1167, 1168 (Colo. App. 1985) (citation omitted).

The prosecution has "wide latitude" in the language and style it employs when addressing the jury and replying to an argument by defense counsel. *McMinn*, ¶ 60. While doing so, it may employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance while referring to the strength and significance of the evidence, conflicting evidence, and the reasonable inferences that may be drawn from the evidence. *Id.* at ¶ 61; *see also People v. Rhea*, 2014 COA 60, ¶ 46; *People v. Gladney*, 250 P.3d 762, 769 (Colo. App. 2010) (the prosecution may urge the jury to take a certain view of the evidence). And "[b]ecause arguments delivered in the heat of trial are not always perfectly scripted, [appellate courts] accord the prosecution the benefit of the doubt when their remarks are ambiguous or simply inartful." *McMinn,* ¶ 60.

But the prosecution must still not misstate the evidence, *People v. Eckert*, 919 P.2d 962, 967 (Colo. App. 1996), appeal to the emotions of the jurors, *Harris v. People*, 888 P.2d 259, 265 (Colo. 1995), attempt to inject irrelevant issues into the case, mislead the jury, or accomplish

some other improper purpose. *People v. Carter*, 2015 COA 24M-2, ¶ 70; *see also People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003).

Here, Peschong argues that the prosecution misstated the evidence and misled the jury by telling the jury that:

- the driver was only a drug user because it knew the driver had pled guilty to manufacturing the 144 grams of methamphetamine;
- the police had found the 144 grams of methamphetamine between his feet because the police testified that they found those drugs after he left the scene; and
- he showed a consciousness of guilt by leaving the scene despite him showing no signs of nervousness while he was there and leaving only after he was given permission to do so by the police.

(Amended Opening Br. 25-30, 32-35).[7] The record demonstrates otherwise.

[7] Because Peschong characterizes the prosecution's closing arguments about the police finding the 144 grams of methamphetamine between

1. The prosecution's arguments were based on reasonable inferences from the evidence at trial.

The prosecution did not mislead the jury by characterizing the driver as only a drug user. To the contrary, that characterization was reasonably drawn from such evidence as the driver not providing proof of ownership for the car, and the police only finding three grams of methamphetamine and drug paraphernalia underneath his car seat. *McMinn*, ¶ 61. Such facts reasonably inferred that the driver only possessed the three grams of methamphetamine and that he intended to consume them. *Gladney*, 250 P.3d at 769. So, the prosecution was permitted to make that characterization during closing arguments, despite its knowledge of the plea agreement, which was not admitted at trial anyways. *See People v. Vasquez*, 2022 COA 100, ¶ 62 ("closing arguments 'must be confined to the evidence admitted at trial, the inferences that can reasonably and fairly be drawn therefrom, and the

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his feet as improper during his sufficiency-of-the-evidence challenge, the People address its properness here.

instructions of law submitted to the jury.'") (citing *People v. DeHerrera*, 697 P.2d 734, 743 (Colo. 1985)).

Similarly, the prosecution's argument that Peschong showed a consciousness of guilt by leaving the scene was also a reasonable inference drawn from the evidence at trial. *McMinn*, ¶ 60. That is because the inference was drawn from the fact that, despite getting permission to leave the scene early in the traffic stop, Peschong waited to leave until after his offer to drive the car away was rejected. And when his offer was rejected, and he knew the car was getting impounded, he immediately left the scene on foot without waiting for transportation, despite the cold and snowy weather. Based on these facts, it was thus reasonable for the prosecution to argue that Peschong's actions revealed a guilty conscious. *Gladney*, 250 P.3d at 769.

Lastly, because the officers testified that they found the lunch pail where Peschong had been sitting in the car, the prosecution's argument that the police had found the drugs between his feet simply represented an effort by the prosecution to employ "rhetorical devices" or "oratorical

embellishment" to relay a reasonable inference from that evidence: that the drugs were between Peschong's feet when the traffic stop occurred. *McMinn*, ¶ 61. Any inartfulness or ambiguousness about those statements should thus be afforded deference by this Court. *Id.* at ¶ 60.

2. Nevertheless, any errors with the prosecution's arguments were not plain.

In any event, any error with the prosecution's arguments do not warrant reversal under plain error review for two reasons. *Wend*, 235 P.3d at 1096 (Colo. 2010).

First, because the prosecution's arguments were obvious attempts to draw reasonable inferences from the evidence at trial, they were not "flagrantly, glaringly, or tremendously improper." *Domingo-Gomez*, 125 P.3d at 1053.

Second, because the jury was presented with evidence that clarified what occurred during the traffic stop, which were emphasized by Peschong during closing arguments, any errors do not "cast serious doubt on the reliability of" his convictions. *Hagos*, ¶ 14. Recall that the officers clarified during trial that they did not find the lunch pail until

after Peschong had left the scene and that Peschong showed no signs of nervousness during the traffic stop. Peschong also emphasized those facts during his closing arguments. And yet, the jury still convicted him.

III. The prosecution presented sufficient evidence to convict Peschong of all the charges against him.

A. Preservation and Standards of Review

A sufficiency-of-the-evidence claim need not be preserved at trial, *McCoy v. People*, 2019 CO 44, ¶¶ 17, 27, and it is reviewed de novo. *People v. Allman,* 2012 COA 212, ¶ 23.

A conviction that is not supported by sufficient evidence should be set aside. *People v. Albright*, 722 P.2d 430, 431 (Colo. App. 1986).

B. Additional Facts

In addition to presenting the evidence provided above under the statement of the facts and case section, the prosecution also presented evidence showing that:

- no one else had access to the backseat area between the time that Peschong exited the car and the police conducted their search, (TR 9/23/2019, p 163:7-10, 203:11-14);

- meth dealers typically carry large quantities with them, (TR 9/24/2019, pp 28-29);
- it would take an average meth user about six months to consume 144 grams of methamphetamine, (TR 9/24/2019, p 34:10-12);
- the amount of methamphetamine and small Ziploc baggies that were found inside the lunch pail suggests the meth was intended to be sold, (TR 9/24/2019, pp 33-34); and
- 144 grams of meth is worth thousands of dollars on the streets, (TR 9/24/2019, pp 28-29, 34-35).

During cross-examination, Peschong emphasized how the police did not find any weight scales or prepackaged baggies inside the car or lunch pail. (TR 9/24/2019, pp 38-40).

C. Law and Analysis

To determine if the evidence presented at trial was sufficient to sustain a defendant's convictions, appellate courts employ a substantial evidence test. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010).

This test considers "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that [a] defendant is guilty of the charge[s] beyond a reasonable doubt." *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973). In short, it seeks to determine whether there was "sufficient evidence to establish guilt – 'no more, no less.'" *People v. Harrison*, 2020 CO 57, ¶ 31 (quotation omitted); *see also Coleman v. Johnson*, 566 U.S. 650, 656 (2012) (the only question is whether [a] jury's finding was "so insupportable as to fall below the threshold of bare rationality"); *People v. McBride*, 228 P.3d 216, 226 (Colo. App. 2009) (characterizing this standard as "daunting" for a defendant to overcome).

While applying this test, appellate courts recognize that: (1) direct and circumstantial evidence carry the same weight, *Bennett*, 515 P.2d at 469; (2) it is for the fact finder to determine the difficult questions of witness credibility and the weight to be given to conflicting items of evidence, *People v. Gibson*, 203 P.3d 571, 575 (Colo. App. 2008); (3) a

fact finder is not required to accept or reject a witness's testimony in its entirety; it may believe all, part, or none of a witness's testimony, *Gordon v. Benson*, 925 P.2d 775, 778–79 (Colo. 1996); (4) a defendant's state of mind is normally not subject to direct proof and must be inferred from his actions and the circumstances surrounding the occurrence, *People v. Phillips*, 219 P.3d 798, 800 (Colo. App. 2009); (5) the prosecution must be given the benefit of every inference that may fairly be drawn from the evidence, *People v. Heywood*, 2014 COA 99, ¶ 1; (6) "[i]f there is evidence upon which one may reasonably infer an element of the crime, the evidence is sufficient to sustain that element," *People v. Chase*, 2013 COA 27, ¶ 50; (7) the stacking of inferences is not barred so long as it does not reach the level of guessing, speculation, or conjecture, *People v. Donald*, 2020 CO 24, ¶¶ 19, 26-29, 32-33; and (8) "[w]here reasonable minds could differ, the evidence is sufficient to sustain a conviction," *People v. Bondurant*, 2012 COA 50, ¶ 58 (quotation omitted); *see also People v. Arzabala*, 2012 COA 99, ¶ 13 ("An appellate court is not permitted to act as a 'thirteenth juror' and set

aside a verdict because it might have drawn a different conclusion had it been the trier of fact.").

Here, Peschong argues that the prosecution failed to present sufficient evidence to prove his knowing possession of the 144 grams of methamphetamine and his intent to distribute those drugs because it did not present any evidence showing that he exclusively possessed the lunch pail, that his fingerprints were on it, that any witnesses saw him with it, that any prepackaged baggies were inside it, or that he was carrying any cash to suggest that he was selling the drugs inside it. (Amended Opening Br. 32-40).

But the lack of such evidence does not undermine the other evidence "upon which [a jury] may reasonably infer an element of [each] crime" charged against Peschong. *Chase*, ¶ 50; *see also Clark*, 232 P.3d at 1292 (the substantial evidence test does not require the prosecution to disprove the defendant's theory or exonerate other possible suspects).

As shown above, the prosecution presented evidence at trial showing: (a) the location of the lunch pail; (b) Peschong being the only person close to that location before the search; (c) Peschong attempting

to regain control of the car; (d) the high value amount of the methamphetamine and items associated with drug sale found inside the lunch pail; and (e) the fact that drug dealers normally keep their drugs close to them.

Drawing every reasonable inference from this evidence in favor of the prosecution, *Heywood*, ¶ 1, a jury could have inferred, without relying on guessing, speculation, or conjecture, *Phillips*, 219 P.3d at 800; *see also Donald*, ¶¶ 19, 26-29, 32-33, that Peschong tried to hide his lunch pail once he and the others were pulled over by the police and then he tried to dissuade the officers from impounding the car in order to avoid them finding it during a search. But once his efforts failed, he immediately took off because he did not want to be there when they found it.

In short, Peschong's actions after being granted permission to leave revealed his guilty conscious and proved that he knowingly possessed the lunch pail, whereas the Ziploc baggies revealed his intent to sell those drugs. *See People v. Warner,* 251 P.3d 556, 564-65 (Colo. App. 2010) (to prove possession, "the controlled substance need not be

found on … the defendant, as long as it is found in a place under his … dominion and control[;] [h]owever, where a [defendant] is not in exclusive possession of the premises in which drugs were found, such an inference may not be drawn unless there are … other circumstances tending to buttress the inference of possession."); *see also People v. Summitt*, 132 P.3d 320, 324 (Colo. 2006) ("evidence of flight and concealment to avoid arrest can be admissible to show consciousness of guilt").

Therefore, the prosecution presented sufficient circumstantial evidence proving Peschong's knowing possession of the 144 grams of methamphetamine and his intent to sell them. *See Phillips*, 219 P.3d at 800; *see also* COLJI-Crim. 18:01 (2024); COLJI-Crim. 18:05 (2024). And for reasons provided below, the trial court's usage of COLJI-Crim. 18:05 to define both count one and two for the jury does not affect this outcome.

IV. The trial court correctly instructed the jury on count two: distribution of a controlled substance.

A. Preservation and Standards of Review

This issue is not preserved. (Amended Opening Br. 40). To the contrary, it is moot and/or waived for the reasons provided below. But even if not, it should still be reviewed for plain error. *Hagos*, ¶ 14.

"[W]hether [] jury instructions accurately informed [a] jury of the law is reviewed de novo." *Galvan v. People*, 2020 CO 82, ¶ 35 n. 11 (citing *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011)). But trial courts retain "broad discretion over the style and form of the instructions," so long as they are correct statements of the law and fairly and adequately cover the issues presented. *People In Interest of J.G.*, 2016 CO 39, ¶ 33; *see also People v. Wheeler*, 170 P.3d 817, 819 (Colo. App. 2007).

B. Additional Facts

Before deliberations, the trial court instructed the jury on the elements for each crime charged against Peschong. (TR 9/24/2019, pp 87-99). Those instructions were proffered by the prosecution. (TR 9/24/2019, p 76:9-17).

As relevant here, with respect to count one: possession with the intent to distribute a controlled substance, the jury was instructed that it must find beyond a reasonable doubt:

1. That the defendant
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed a controlled substance with [the] intent to manufacture, dispense, sell, or distribute.

(CF, p 143). Peschong never objected to this instruction. (TR 9/24/2019, pp 76-82). If the jury found him guilty of this offense, it was further instructed to determine whether the controlled substance was methamphetamine and whether the methamphetamine weighed more than 112 grams. (CF, pp 144-47).

With respect to count two: distribution of a controlled substance, the jury was given the following identical instruction:

1. That the defendant

2. In the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed a controlled substance with intent to manufacture, dispense, sell, or distribute.

(CF, p 148). Peschong did not object to this instruction because it "seem[ed] appropriate." (TR 9/24/2019, p 76:11-13). If the jury also found him guilty of this offense, it was further instructed to determine whether the controlled substance was methamphetamine. (CF, p 149).

During its initial closing argument, the prosecution reviewed the instructions, said the "elements [were] very repetitive," and noted "the second charge [was] the same" as the first charge. (TR 9/24/2019, pp 101-02).

During its rebuttal argument, the prosecution argued that Peschong had clearly sold the three grams of methamphetamine that were found underneath the driver's seat to the driver based on the driver's close proximity to those drugs and his disheveled appearance, whereas Peschong's close proximity to the 144 grams of

methamphetamine in the backseat proved that he was a dealer. (TR 9/24/2019, pp 115-16).

C. Law and Analysis

On appeal, Peschong argues that the jury was not correctly instructed on count two because it was not instructed that, in order to convict him of that charge, it must find that he actually distributed a controlled substance, not simply that he possessed the controlled substance with the intent to distribute it. In other words, because the instruction for count two was identical to count one, the jury improperly convicted him twice on count one. (Amended Opening Br. 41-44). This challenge fails for the following reasons:

1. This issue is moot, and Peschong waived or invited any error with respect to it.

This issue is moot because, as shown above under the statement of the case and facts, the trial court merged count two with count one while sentencing Peschong, and he does not challenge the legal accuracy of the instruction for count one. Therefore, any prejudice was nullified.

See Rhea, ¶ 19 (any error with the defendant's mulitplicitous charges were rendered moot by the trial court's merger at sentencing).

Peschong also waived or invited any error with respect this issue because his counsel specifically refrained from objecting to the prosecution's proffered instruction on the basis that he believed it was appropriate. *See Forgette*, ¶ 28 ("[a] waiver [is] explicit … when a party expressly abandons an existing right or privilege ...."); *see also Horton*, 43 P.3d at 619 (the invited error doctrine applies when "one party expressly acquiesces to conduct by the court or the opposing party.").

2. In any event, any error was not obvious under plain error review.

A defendant is entitled to a correctly instructed jury. *People v. Burke*, 937 P.2d 886, 890 (Colo. App. 1996). A trial court therefore "has a duty to instruct a jury properly concerning each element of an offense." *People v. Salazar*, 920 P.2d 893, 897 (Colo. App. 1996). In this regard, a jury instruction defining an offense that is framed in the language of the statute is generally sufficient and proper. *People v. Archuleta*, 2017 COA 9, ¶ 52; *see also People v. Zukowski*, 260 P.3d 339,

343 (Colo. App. 2010); *People v. Pahl*, 169 P.3d 169, 185 (Colo. App. 2006).

Section 18-18-405(1)(a) (2024) provides that "it is unlawful for any person [to knowingly] manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell, or distribute, a controlled substance …." Subsection (2)(a)(I)(B) of this statute provides that a person commits a level one drug felony offense if the violation under this statute involves more than 112 grams of methamphetamine. And subsection (2)(c)(II) of this statute provides that a person commits a level three felony offense if the violation under this statute involves 7 grams or less of methamphetamine.

Thus, the first subsection of section 18-18-405 criminalizes an entire range of conduct that "are not … mutually exclusive but overlap in various ways and cover a continuum of conduct," while the other sections are "devoted entirely to the appropriate sentence …." *People v. Abiodun*, 111 P.3d 462, 466 (Colo. 2005). "Nothing in … the statute … suggests an intent [by the legislature] to create a separate offense for each proscribed act." *Id.* at 466-67. To the contrary, it "strongly suggests

an intent to … 'encompass[] every act and activity which could lead to the proliferation of drug traffic[king] ….'" *Id.* at 467. In short, "by joining alternatives disjunctively in a single provision of the criminal code," rather than proscribing conduct in different provisions of the penal code under a different title, "the legislature intended to describe alternate ways of committing a single crime rather than to create separate offenses." *Id.* at 466, 477.

COLJI-Crim. 18:05 (2024) embodies that intent by instructing courts that the elements of the crime of unlawful distribution, manufacturing, dispensing, or sale are:

> 1. That the defendant,
> 2. in the State of Colorado, at or about the date and place charged,
> 3. knowingly,
> [4. manufactured, dispensed, sold, or distributed a controlled substance.]
> [4. possessed a controlled substance with intent to manufacture, dispense, sell, or distribute.]

[4. induced, attempted to induce, or conspired with one or more other persons to manufacture, dispense, sell, or distribute a controlled substance.]

[4. induced, attempted to induce, or conspired with one or more other persons to possess a controlled substance with intent to manufacture, dispense, sell, or distribute.]

[4. possessed one or more chemicals or supplies or equipment with intent to manufacture a controlled substance.]

[5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] ___.]

Thus, the trial court could not have obviously erred by relying on the same subsection in COLJI-Crim. 18:05 to define counts one and two because the entire instruction is "framed in the language of the statute," *Archuleta*, ¶ 52, which describes "alternate ways of committing" the same crime. *Abiodun*, 111 P.3d at 466, 477; *see also Scott*, ¶ 34 (an error is obvious only if it contravenes a clear statutory command or Colorado case law). The lack of any obvious error is also reinforced by the admission of Peschong's counsel's belief that the

instruction was appropriate, as well as the fact that the instructions and special verdict findings were consistent with the charging document and the class of felonies within it.

3. Any error was also not substantial under plain error review.

Regardless, any error does not "cast serious doubt on the reliability of" Peschong's conviction on count two because the prosecution reminded the jury during its closing rebuttal remarks of its theory that Peschong had sold the three grams of methamphetamine that were found underneath the driver's seat and that met the statutory criteria to convict him on count two. *Hagos*, ¶ 14; *see also Domingo-Gomez*, 125 P.3d at 1052 ("Rebuttal closing is the last thing a jur[y] hears from counsel before deliberating, and it is therefore foremost in their thoughts.").

CONCLUSION

For these reasons, this Court should affirm Peschong's convictions.

PHILIP J. WEISER
Attorney General

/s/ Alejandro Sorg Gonzalez
ALEJANDRO SORG GONZALEZ,
53843*
Assistant Attorney General
Criminal Appeals
Attorneys for Plaintiff-Appellee
*Counsel of Record

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **ELIZABETH A. MCCLINTOCK** and all parties herein via Colorado Courts E-filing System (CCES) on **November 27, 2024**.

/s/Alejandro Sorg Gonzalez