

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: July 11, 2022 4:30 PM FILING ID: D039EDE5AA294 CASE NUMBER: 2021SC665</p>
<p>Court of Appeal, State of Colorado 18CA1212 Opinion by Judge Lipinsky, Judges Roman and Harris, concurring</p> <p>Adams County District Court Honorable Donald Spence Quick and Honorable Brian Nathaniel Bowen, Judges Case Number(s): 17CR2274</p>	
<p>SYLVIA JOHNSON Defendant-Appellant</p> <p>v.</p> <p>THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee</p>	<p>COURT USE ONLY</p>
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<p style="text-align: center;">OPENING BRIEF</p>	

CERTIFICATE OF COMPLIANCE

This brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 57, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28.

It contains 9,500 words or less. Specifically, the opening brief contains 6,403 words, not including the case caption, certificate of service page, table of contents and authorities, and this certificate of compliance page.

It does not exceed 30 pages.

The brief complies with C.A.R. 28.

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

/S/ Patrick Henson
Signature of Attorney of Party

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STATEMENT OF THE ISSUES PRESENTED

I. Whether the court of appeals reversibly erred and violated Ms. Johnson’s due process right in affirming Ms. Johnson’s conviction on the sole count of unlawful purchase of firearms where the government failed to prove that Ms. Johnson purchased a firearm “for transfer to” a person ineligible to possess a firearm?

II. Whether the court of appeals reversibly erred in holding that Ms. Johnson waived her right to challenge whether C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and is unconstitutionally vague as applied to Ms. Johnson when defense counsel “resisted the prosecutor’s attempt to provide the jury with a definition of ‘transfer’”?

III. Whether C.R.S. § 18-12-111(1) is unconstitutionally vague as applied to Ms. Johnson because it does not define “transfer”?

NATURE OF THE CASE, RELEVANT FACTS, PROCEDURAL HISTORY, AND RULING/JUDGMENT/ORDER PRESENTED FOR REVIEW

On or about June 19, 2017, the government, in Adams County, Colorado, in case number 17CR2274, charged Ms. Johnson with one count of unlawful purchase of firearms (CF, p 7).¹

¹ A class four felony pursuant to C.R.S. § 18-12-111(1) in violation of C.R.S. § 18-12-111(1).

On August 4, 2017, the trial court appointed the Office of the Public Defender to represent Ms. Johnson (CF, p 21). On August 23, 2017, the public defender’s office filed a motion to withdraw as counsel and for the appointment of Alternate Defense Counsel (“ADC”) due to an irreconcilable conflict (CF, p 23). On September 5, 2017, the trial court granted that motion and appointed Danielle McCarthy—from ADC—to represent Ms. Johnson (CF, p 24).

Ms. Johnson tried her case—while represented by Ms. McCarthy—to a jury on May 14, 2018, May 15, 2018, and May 16, 2018. At trial the government alleged that Ms. Johnson knowingly purchased a firearm on behalf of, or for transfer to, Jaron Trujillo, a person who she knew, or reasonably should have known, was ineligible to possess a firearm. At the conclusion of the trial, the jury found Ms. Johnson guilty of the sole count of unlawful purchase of firearms (CF, pp 119-20). On May 16, 2018, the trial court sentenced Ms. Johnson to 18 months of probation (TR 5/16/19, p 14; CF, p 121).

Ms. Johnson appealed her conviction to the court of appeal in case number 18CA1212. On July 29, 2021, the court of appeals issued a published opinion affirming Ms. Johnson’s conviction. Subsequently, Ms. Johnson submitted a petition for writ of certiorari to this Court. On May 31, 2022, this Court entered its order granting Ms. Johnson’s petition for writ of certiorari, and wherein this Court announced the issues listed in the Statement of the Issues Presented section above.

Ms. Johnson now submits her opening brief.

SUMMARY OF THE ARGUMENT

First, the court of appeals reversibly erred and violated Ms. Johnson’s due process right in affirming Ms. Johnson’s conviction on the sole count of unlawful purchase of firearms where the government failed to prove that Ms. Johnson purchased a firearm “for transfer to” a person ineligible to possess a firearm. Indeed, in order to convict Ms. Johnson of the sole count of unlawful purchase of firearms, the prosecution needed to prove that Ms. Johnson purchased a firearm for transfer to a person ineligible to possess a firearm, namely, Jaron Trujillo. The government failed to prove that Ms. Johnson purchased a firearm “for transfer to” Jaron Trujillo.

The plain meaning and common usage—including dictionary definitions—of the word “transfer”—as used in C.R.S. § 18-12-111(1)—do not encapsulate Ms. Johnson’s alleged conduct or the government’s theory of liability in this case. Further, the legislative history—which demonstrates the legislature’s intent in using the word “transfer in C.R.S. § 18-12-111(1)—establishes that Ms. Johnson’s alleged conduct did not violate the provisions of C.R.S. § 18-12-111(1). Thus, Ms. Johnson respectfully requests that this Court reverse her conviction.

Second, the court of appeals reversibly erred in holding that Ms. Johnson waived her right to challenge whether C.R.S. § 18-12-111(1) is unconstitutionally

vague on its face and is unconstitutionally vague as applied to Ms. Johnson when defense counsel “resisted the prosecutor’s attempt to provide the jury with a definition of ‘transfer.’” Indeed, defense counsel’s objection to the jury receiving an imprecise—and perhaps wholly inapplicable— “Merriam-Webster Dictionary” definition of “transfer” did not demonstrate that Ms. Johnson was intentionally relinquishing her right to challenge the constitutionality of the statute. Thus, the court of appeals’ conclusion that Ms. Johnson waived her right to challenge the constitutionality of the statute should be reversed.

Third, C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and is unconstitutionally vague as applied to Ms. Johnson. Specifically, because the criminal code does not define “transfer” as used in C.R.S. § 18-12-111(1), and because the term “transfer” is susceptible of more than one interpretation by a person of common intelligence, C.R.S. § 18-12-111(1) is unconstitutionally vague on its face. Moreover, C.R.S. § 18-12-111(1) is void for vagueness as applied because it does not, with sufficient clarity, prohibit the conduct for which Ms. Johnson was convicted. Thus, Ms. Johnson respectfully requests that this Court reverse her conviction.

ARGUMENT

I. The court of appeals reversibly erred and violated Ms. Johnson’s due process right in affirming Ms. Johnson’s conviction on the sole count of unlawful purchase of firearms where the government failed to prove that Ms.

Johnson purchased a firearm “for transfer to” a person ineligible to possess a firearm.

A. Standard of Review

This issue was preserved on May 15, 2018, when the defendant—via counsel—made a motion for judgment of acquittal (TR 5/15/18, pp 48-49). This issue was further preserved on May 15, 2018, when the defendant renewed her motion for judgment of acquittal after the defense presented its case (TR 5/15/18, p 106).

Appellate courts review preserved sufficiency arguments de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, was both substantial and sufficient to support the conclusion by a reasonable mind that the defendant was guilty beyond a reasonable doubt. *People v. Perez*, 367 P.3d 695, 697 (Colo. 2016). Further, because sufficiency-of-the-evidence claims raise constitutional concerns, appellate courts will reverse for any error unless it was constitutionally harmless. These errors require reversal unless the appellate court is able to declare a belief that the error was harmless beyond a reasonable doubt. *People v. Springsted*, 410 P.3d 702, 709 (Colo. App. 2016). “The constitutional harmless error test ‘is not whether, in a trial, that occurred without the error a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.’”

Bernal v. People, 44 P.3d 184, 200-01 (Colo. 2002) (quoting *Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998)).

B. Applicable Facts

On or about June 19, 2017, the government, in Adams County, Colorado, in case number 17CR2274, charged Ms. Johnson with one count of unlawful purchase of firearms pursuant to C.R.S. § 18-12-111(1) (CF, p 7). In the complaint and information, the government alleged that:

On or about May 2, 2017, Sylvia Johnson unlawfully, feloniously, and knowingly purchased or otherwise obtained a firearm on behalf of, or for transfer to, Jaron Trujillo, a person whom the defendant knew or reasonably should have known was not eligible to possess a firearm pursuant to federal or state law; in violation of section 18-12-111(1), C.R.S.

(CF, p 8). Subsequently, on June 21, 2017 and May 11, 2018, the complaint and information was amended as to the date of offense (CF, pp 11, 35; TR 5/11/18, p 7).

At trial, the government introduced surveillance video from an EZPawn pawnshop on March 12, 2017, which allegedly showed Ms. Johnson and Mr. Trujillo shopping for a firearm (EX 10). Further, the video allegedly showed Ms. Johnson purchasing a handgun out of Mr. Trujillo's presence (EX 10). In the video, Mr. Trujillo looked at some of the firearms, but also the video showed Mr. Trujillo tending to his and Ms. Johnson's children who accompanied them to the pawnshop (EX 10).

At trial, Mr. Trujillo testified that he accompanied Ms. Johnson to the pawnshop where she purchased a firearm (TR 5/14/18, pp 184-87). Further, Mr. Trujillo testified that (1) Ms. Johnson placed the firearm in her clothes closet after purchasing it (2) he knew that Ms. Johnson placed the firearm in her closet (3) on March 28, 2017, while Ms. Johnson was at work, he took the firearm from the closet and put it in his pocket (4) he then went outside of Ms. Johnson's apartment to smoke a cigarette with the firearm in his pocket and was arrested with the firearm in his pocket (TR 5/14/18, pp 180-84).

Ms. Johnson similarly testified that (1) she purchased a firearm from the pawnshop (2) she placed the firearm in her clothes closet (3) Mr. Trujillo knew where she kept the firearm and (4) Mr. Trujillo was arrested on March 28, 2017, with the firearm in his pocket while she was at work (TR 5/15/18, pp 67, 70, 71, 73, 74). Ms. Johnson further testified, however, that she never gave, transferred, or sold the firearm to Mr. Trujillo and she never instructed Mr. Trujillo to use the firearm (TR 5/15/18, pp 71, 72, 73).

At the end of the first day of trial, during a jury instruction conference, defense counsel requested that the court provide the jury with an unanimity instruction (TR 5/14/18, p 234). In response, the court asked defense counsel to tender an unanimity instruction for it to consider (TR 5/14/18, p 238).

On the second day of trial, the prosecutor informed the court that it submitted a new elemental instruction which omitted the phrase “on behalf of” to alleviate some of defense counsel’s unanimity concerns (TR. 5/15/18, p 5). The court then indicated that it believed that the prosecution’s amended elemental instruction cured any unanimity issues (TR 5/15/18, p 5).

Prior to deliberations, the court provided the jury with—among others—“Instruction No. 9” which, in pertinent part, stated:

The elements of the crime of Unlawful Purchase of Firearms are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. purchased a firearm for transfer to, Jaron Trujillo, a person whom the defendant knew or reasonably should have known was not eligible to possess a firearm pursuant to federal or state law.

....

(CF, p 48).

During closing arguments, the prosecution argued that it proved that Ms. Johnson knowingly purchased a firearm for transfer to Mr. Trujillo. Regarding its obligation to prove that Ms. Johnson purchased a firearm “for transfer to” Mr. Trujillo, the prosecution argued that it proved that Ms. Johnson bought the firearm “for transfer to” Mr. Trujillo because it demonstrated that:

she went, and she bought a gun. She put the gun in her closet in the home that she shares with Jaron Trujillo, and she made sure that he knew where to find it. Ladies and gentlemen, based on Sylvia Johnson's actions, was it practically certain that this firearm was going to end up in the hands of Jaron Trujillo? Absolutely yes.

(TR 5/15/18, pp 124-25).

Moreover, during closing arguments, the government attempted to define "transfer" for the jury as follows: "[Ms. Johnson] could have intended to have the [firearm] herself and give him access to it...that is transfer when we are talking about firearms." (TR. 5/15/18, p 145).

During deliberations, the jury submitted two questions. First, in jury question number one, the jury asked the court to provide it with the legal definition of "transfer." The court, prosecution, and defense counsel then discussed the jury's question (TR 5/16/18, pp 2-5). The parties all agreed that the legislature did not provide a definition of "transfer" as used in C.R.S. § 18-12-111. The prosecution asked that the court try to craft some definition to guide the jury (TR 5/16/18, pp 3-4). Defense counsel requested that the court instruct the jury that it received all instructions for the case (TR 5/16/18, pp 3-4). Ultimately, the court brought the jury into the courtroom and stated "I certainly understand the question. However, there is no statutory definition under these circumstances for transfer. So I would once again state you received the instructions of law you will receive

from the Court. You should apply those in making your decision.” (TR 5/16/18, p 5).

A few hours later, the jury submitted its second question which asked if it could “see the statute for the law pertaining to the charge of unlawful purchase of firearms” (CF, p 55). In response to the jury’s second question, the court, prosecution, and defense counsel agreed that the court would inform the jury that Instruction No. 9 tracked the language of the statute (TR 6/15/18, pp 6-7). The court then brought the jury into the courtroom and stated “I will let you know Instruction No. 9 in your packet, that tracks the language of the statute.” (TR 6/15/18, p 8).

Approximately twenty minutes later, the jury returned with its verdict finding Ms. Johnson guilty of the sole count of unlawful purchase of firearms (TR 5/16/18, pp 9-10).

C. Law and Analysis

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *People v. Santana*, 255 P.3d 1126, 1130 (Colo. App. 2011) (citing *Francis v. Franklin*, 471 U.S. 307, 313 (1985)).

C.R.S. 18-12-111(1) provides that “Any person who knowingly purchases or otherwise obtains a firearm on behalf of or for transfer to a person who the transferor knows or reasonably should know is ineligible to possess a firearm pursuant to federal or state law commits a class 4 felony.”

The Model Jury Instructions for the crime of unlawful purchase of a firearm provide:

12-1:34 Purchasing or Obtaining a Firearm for a Person Who Is Ineligible

The elements of the crime of purchasing or obtaining a firearm for a person who is ineligible are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. purchased or otherwise obtained a firearm,
5. on behalf of, or for transfer to, a person whom the transferor knew, or reasonably should have known, was ineligible to possess a firearm pursuant to federal or state law....

Colo. Jury Instr., Criminal 12-1:34.

Here, the court instructed the jury on the elements of unlawful purchase of a firearm in Instruction No. 9 (CF, p 48). In that elemental jury instruction, the court—at the prosecution’s request—removed from the model jury instructions the phrase “Or otherwise obtained” from element 4 and “on behalf of” from element 5.

Thus, the prosecution was required to prove—pursuant to Instruction No. 9—that Ms. Johnson purchased a firearm for transfer to a person ineligible to possess a firearm, namely, Jaron Trujillo (CF, p 48). C.R.S. 18-12-111(1); Colo. Jury Instr., Criminal 12-1:34.

The government failed to prove that Ms. Johnson purchased a firearm “for transfer to” Jaron Trujillo.

1. Principles of Statutory Construction

An appellate court’s responsibility in interpreting a statute is to give effect to the General Assembly’s purpose or intent in enacting the statute. *Martin v. People*, 27 P. 3d 846, 851 (Colo. 2001). When interpreting a statute, appellate courts must begin by reviewing the language of the statute itself. *Id.* Appellate courts read words and phrases in context and construe them literally according to common usage unless they have acquired a technical meaning by legislative definition. *People v. Yascavage*, 101 P.3d 1090, 1093 (Colo. 2004).

If the statutory language unambiguously sets forth the legislative purpose, appellate courts need not apply additional rules of statutory construction to determine the statute’s meaning. *Martin*, 27 P. 3d at 851. Conversely, if the statutory language does not unambiguously establish the General Assembly’s purpose in enacting the statute, or if the statute appears to conflict with other provisions, then appellate courts may rely on other factors to determine the

meaning of the statute, including the legislative history, prior law, the consequences of a given construction of the statute, and the end to be achieved by the statute. *Id.*

2. Plain Meaning and Common Usage of “Transfer” as Used in C.R.S. § 18-12-111(1).

“Transfer” is not defined in C.R.S. § 18-12-111 or elsewhere in the criminal code. The prosecution in this case, however, argued that transfer included Ms. Johnson’s actions of (1) purchasing a firearm while Mr. Trujillo—a person ineligible to possess a firearm—was present and (2) placing that firearm in her clothes closet and telling Mr. Trujillo where the firearm was located. Further, during closing arguments, the government attempted to define “transfer” for the jury as follows: “[Ms. Johnson] could have intended to have the [firearm] herself and give him access to it...that is transfer when we are talking about firearms.” (TR. 5/15/18, p 145).

Thus, when analyzing whether Ms. Johnson purchased a firearm “for transfer to” Mr. Trujillo, the meaning of “transfer” as used in C.R.S. § 18-12-111(1) must be ascertained. To ascertain the meaning of the word “transfer”, this Court must begin by reviewing the plain meaning and common usage of the word “transfer.” *Yascavage*, 101 P.3d at 1093; *Martin*, 27 P. 3d at 851.

In *Chow v. State*, the Court of Appeals of Maryland was faced with the similar challenge of “divin[ing] the meaning of transfer.” *Chow v. State*, 903 A.2d

388, 394 (Md. 2006). In that case, the defendant argued that “transfer,” as used in the Maryland statute, only meant a permanent exchange of title or possession of a regulated firearm rather than a mere loan or temporary exchange of such firearm. *Id.* The government, on the other hand, argued that the statute in question prohibited all exchanges of regulated firearms, temporary or permanent, whether by sale, rental, gift, loan, exchange, or otherwise and no matter how temporary. *Id.*

The Court of Appeals of Maryland concluded that each party could find dictionary definitions to support their argument. *Id.* at 398. Yet, the court went on to look at the use of the term “transfer” within the context of the particular statute in question and the surrounding related laws and concluded that transfer referred only to a permanent exchange of title or possession. *Id.* at 398-402. Indeed, the court found that the term “transfer” as used in the “straw purchase” bill referred a permanent exchange of possession of a firearm. *Id.* at 398. Further, the court found that even if the term “transfer” was ambiguous, the legislative intent demonstrated that the term “transfer” meant permanent exchange of title or possession. *Id.*

As the Court of Appeals Maryland noted, one can easily find numerous definitions of the word “transfer” in the dictionary. For instance, Merriam-Webster’s Dictionary defines “transfer” in the following ways:

transitive verb

1 a: to convey from one person, place or situation to another:
move, shift

b: to cause to pass from one to another: transmit

c: transform, change

2 to take over the possession or control of: convey

3 to print or otherwise copy from one surface to another by
contact

....

noun

1 a: conveyance of right, title, or interest in real or personal
property from person to another

b: removal or acquisition of property by mere delivery with
intent to transfer title

2 a: an act, process, or instance of transferring: transference
sense 2

....

Merriam Webster's Dictionary, *available at:* <https://www.merriam-webster.com/dictionary/transfer>.

None of the dictionary definitions of “transfer,” however, encapsulate the government’s theory of transfer in this case. Specifically, the government argued that Ms. Johnson transferred the firearm to Mr. Trujillo by (1) purchasing a firearm while Mr. Trujillo—a person ineligible to possess a firearm—was present and (2) placing that firearm in her clothes closet and telling Mr. Trujillo where the

firearm was located. Moreover, the government attempted to define “transfer” for the jury as follows: “[Ms. Johnson] could have intended to have the [firearm] herself and give him access to it...that is transfer when we are talking about firearms.” (TR. 5/15/18, p 145).

These theories and definitions used by the prosecutor, however, simply do not fall within any of the definitions of transfer in the dictionary. Thus, the evidence, even when viewed in the light most favorable to the prosecution, was not both substantial and sufficient to support the conclusion by a reasonable mind that Ms. Johnson purchased a firearm “for transfer” to Mr. Trujillo. *Perez*, 367 P.3d at 697.

Furthermore, the court of appeals’ conclusion to the contrary must be vacated. The court of appeals, in its opinion, held that “transfer” as used in C.R.S. § 18-12-112—the statute that addresses private firearm transfers by unlicensed gun dealers—can be read to include a “temporary transfer of a firearm in the form of shared use,” and, therefore, the use of the word “transfer” in C.R.S. § 18-12-111 could also be read to include a “temporary transfer of a firearm in the form of shared use” (Opinion, ¶ 21). First, C.R.S. § 18-12-112 is inapplicable because it does not relate to the provisions of C.R.S. § 18-12-111. C.R.S. § 18-12-112 governs private firearms transfers and requires background checks to be completed when a firearm transfer occurs between an unlicensed gun dealer and a transferee.

No such transfer was alleged to have occurred in this case, thus, C.R.S. § 18-12-112 is inapplicable.

Second, the court of appeals relied on C.R.S. § 18-12-112(6)(e),(g), and (h) to conclude that a transfer can include a “temporary transfer of a firearm in the form of shared use.” However, C.R.S. § 18-12-112(6)(e),(g), and (h) specifically exempts the requirements of C.R.S. § 18-12-112 from applying to “temporary transfers of a firearm in the form of shared use.” And the court of appeals did not explain in its opinion why such temporary transfers of firearms in the form of a shared use should apply to the provisions of C.R.S. § 18-12-111 but not the terms of C.R.S. § 18-12-112.

Third, C.R.S. § 18-12-112(1)-(2) explains in more exact terms which type of transfers are subject to the requirements provided therein. None of the transfers described in C.R.S. § 18-12-112 occurred in this case. Thus, C.R.S. § 18-12-112 further bolsters Mr. Johnson’s contention that she did not knowingly transfer a firearm to Mr. Trujillo.

Finally, as noted below, it is clear that the legislature knew how to restrict persons from having unsupervised possession/access to a firearm because it did so in the same title, article, and section of the Criminal Code. *See* C.R.S. § 18-12-108.5, C.R.S. § 18-12-108.7. Yet it chose not to do so in relation to C.R.S. § 18-12-111. Thus, the court of appeals misconstrued the legislature’s intent in enacting

C.R.S. § 18-12-111, and the court of appeals’ interpretation of the use of the word “transfer” as used in C.R.S. § 18-12-111 did not harmonize the meaning of “transfer” as used in related statutes. (Opinion, ¶ 20 (citing *People v. Roletto*, 2015 COA 41, ¶ 18, 370 P.3d 190, 194 (Colo. App. 2015)). To the contrary, the court of appeals’ interpretation resulted in an inharmonious definition of “transfer” as used in related statutes. *See e.g.* C.R.S. § 18-12-108.5, C.R.S. § 18-12-108.7; C.R.S. § 18-12-112. Ms. Johnson, therefore, respectfully requests that this Court reverse her conviction.

3. Legislative History: “Straw Purchases” and “Straw Purchaser”

In its opinion, the court of appeals found that there were multiple definitions applicable to the term “transfer” (Opinion, ¶ ¶ 18-22). Yet, the court of appeals determined that the term “transfer” as used in C.R.S. § 18-12-111 was unambiguous because it was able to divine the meaning of transfer despite the plethora of various potential applicable definitions (Opinion, ¶ 17). However, because there are various potential applicable definitions of “transfer” that could apply to C.R.S. § 18-12-111, it is likely that the meaning of “transfer,” as used in the statute, is ambiguous. And the legislative history demonstrates that Ms. Johnson did not purchase a firearm “for transfer to” Mr. Trujillo.

At the hearings on HB 00-1214—enacted as C.R.S. § 18-12-111—in the House and Senate Judiciary Committees, as well as the hearings in the full House

and Senate, multiple representatives, witnesses, and sponsors repeatedly stated that the purpose of the bill was to stop “straw purchases” of firearms and to stop “straw purchasers.” *See* Concerning Prohibition of the Purchase of Firearms by Persons on Behalf of Other Persons Who are Ineligible to Possess Firearms, and Making and Appropriation Therefor: Hearing on HB 00-1214; Before the House Judiciary Committee, 1/27/2000; Before the House as a Whole, 2/11/2000, 2/14/2000, 4/27/2000; Before the Senate Judiciary Committee, 2/23/2000, 3/1/2000, 3/20/2000; Before the Senate as a Whole, 4/25/2000 (Colo. 2000).

In *Abramski v. U.S.*, 573 U.S. 169, 171 (2014), the United States Supreme Court defined a “straw purchaser” as “a person who buys a gun on someone else’s behalf while falsely claiming that it is for himself.”

Similarly, at the March 20, 2000 hearing before the Colorado Senate Judiciary Committee on HB 00-1214, one senator stated “we need a clearer definition of this adjective, ‘straw,’ even though we are only using it informally since it does not appear in the title or the bill. I always understood it to refer to someone who is intentionally [fronting] for another, someone who is playing a conscious, willing role of the middleman.” *See* Concerning Prohibition of the Purchase of Firearms by Persons on Behalf of Other Persons Who are Ineligible to Possess Firearms, and Making and Appropriation Therefor: Hearing on HB 00-1214; Before the Senate Judiciary Committee, 3/20/2000: 6:30-6:56 (Colo. 2000).

In this case, the evidence failed to establish that Ms. Johnson made a “straw purchase” or acted as a “straw purchaser”—the conduct that the bill was designed to prohibit. Indeed, Ms. Johnson allegedly purchased a firearm—for herself—in the company of a person who was ineligible to purchase a firearm, Mr. Trujillo. Ms. Johnson then allegedly placed that firearm in her clothes closet. Mr. Trujillo then took the firearm from Ms. Johnson’s clothes closet—while she was at work—and went outside of Ms. Johnson’s apartment to smoke a cigarette with the firearm in his pocket.

Such alleged conduct does not establish that Ms. Johnson acted as a “straw purchaser” by “buy[ing] a gun on someone else’s behalf while falsely claiming that it [was] for [her]self.” *Abramski v. U.S.*, 573 U.S. at 171. Similarly, such evidence did not allege or establish that Ms. Johnson “intentionally [fronted] for another” and played a “conscious, willing role of the middleman.” *See Concerning Prohibition of the Purchase of Firearms by Persons on Behalf of Other Persons Who are Ineligible to Possess Firearms, and Making and Appropriation Therefor: Hearing on HB 00-1214; Before the Senate Judiciary Committee, 3/20/2000: 6:30-6:56 (Colo. 2000).*

Thus, the evidence, even when viewed in the light most favorable to the prosecution, was not both substantial and sufficient to support the conclusion by a reasonable mind that Ms. Johnson made a “straw purchase” or acted as a “straw

purchaser.” *Perez*, 367 P.3d at 697. Ms. Johnson, therefore, respectfully requests that this Court reverse her conviction.

4. Legislative History: “Selling” and “Giving” Firearms

At the hearings on HB 00-1214—enacted as C.R.S. § 18-12-111—in the House and Senate Judiciary Committees, as well as the hearings in the full House and Senate, multiple representatives, witnesses, and sponsors repeatedly stated that the purpose of the bill was to stop people from “selling” or “giving” firearms to persons ineligible to possess a firearm pursuant to federal or law. *See Concerning Prohibition of the Purchase of Firearms by Persons on Behalf of Other Persons Who are Ineligible to Possess Firearms, and Making and Appropriation Therefor: Hearing on HB 00-1214; Before the House Judiciary Committee, 1/27/2000: 6:26, 17:05, 1:13:07; Before the House as a Whole, 2/11/2000: 14:00, 29:28; Before the Senate Judiciary Committee, 3/1/2000: 24:00; Before the Senate as a Whole, 4/25/2000: 4:15 (Colo. 2000).*

Here, the evidence failed to establish that Ms. Johnson sold or gave a firearm to Mr. Trujillo—the conduct, by all accounts, the bill was designed to prevent. Thus, the evidence, even when viewed in the light most favorable to the prosecution, was not both substantial and sufficient to support the conclusion by a reasonable mind that Ms. Johnson “sold” or “gave” a firearm to Mr. Trujillo.

Perez, 367 P.3d at 697. Ms. Johnson, therefore, respectfully requests that this Court reverse her conviction.

5. Legislative History: Unsupervised Possession of a Firearm

At the February 23, 2000 hearing before the Colorado Senate Judiciary Committee on HB 00-1214, former Denver District Attorney Bill Ritter—who appeared as a witness throughout numerous hearings on HB 00-1214—addressed how HB 00-1214 related to other firearm provisions in the criminal code. Specifically, Mr. Ritter addressed how HB 00-1214 would affect C.R.S. § 18-12-108.5, C.R.S. § 18-12-108.7, and HB 00-1243, all of which address juveniles’ access to firearms. Importantly, Mr. Ritter noted that, among other things, HB 00-1214 differed from the provisions dealing with juveniles’ access to firearms insofar as the former merely restricted “transferring” a firearm to someone who is ineligible to possess a firearm pursuant to federal or state law, while the latter barred anyone from “transfer[ring] ownership or allow[ing] unsupervised possession of a firearm” without parental consent.

Thus, based on Mr. Ritter’s testimony in front of the Senate Judiciary Committee—to which no one objected or offered a differing account—it is clear that the legislature knew how to restrict persons from having unsupervised possession/access to a firearm. The legislature did so in C.R.S. § 18-12-108.5, C.R.S. § 18-12-108.7, and HB 00-1243 (which became an amendment to C.R.S. §

18-12-108.7) when it included the language “allow unsupervised possession of a firearm” in those provisions.

Here, the government alleged that Ms. Johnson purchased a firearm “for transfer to” Mr. Trujillo by allowing him to have unsupervised possession/access to a firearm. However, as Mr. Ritter’s testimony made clear, the legislature knew how to restrict ineligible persons from having unsupervised possession/access to firearms and did so in C.R.S. § 18-12-108.5, C.R.S. § 18-12-108.7, and HB 00-1243. No such similar language appears in HB 00-1214 or C.R.S. § 18-12-111. Thus, the government’s evidence at trial failed to establish Ms. Johnson transferred a firearm to Mr. Trujillo. Instead, the government’s evidence merely alleged that Ms. Johnson allowed Mr. Trujillo to have unsupervised possession/access to a firearm, which does not run afoul of the language of C.R.S. § 18-12-111 which only bars the purchase of firearms for “transfer” to an ineligible person.

Thus, the evidence, even when viewed in the light most favorable to the prosecution, was not both substantial and sufficient to support the conclusion by a reasonable mind that Ms. Johnson purchased a firearm “for transfer” to Mr. Trujillo. *Perez*, 367 P.3d at 697. Ms. Johnson, therefore, respectfully requests that this Court reverse her conviction.

6. Legislative History: Definition of “Transfer”

Written amendments to HB 00-1214 were suggested and preserved in the Pages from the House Judiciary Committee on HB 00-1214. Importantly, Amendment H stated that “‘Transfer’ means sale, trade, or rental by a transferor to a transferee.” Concerning Prohibition of the Purchase of Firearms by Persons on Behalf of Other Persons Who are Ineligible to Possess Firearms, and Making and Appropriation Therefor: Pages from HB 00-1214; Before the House Judiciary Committee, p. 60 (Colo. 2000).

While Amendment H was never adopted as part of the final bill, the amendment does provide insight into the legislature’s intent; to wit, by including the word “transfer” in HB 00-1214, the legislature intended to bar any person from purchasing a firearm to then sell, trade, or rent to a person that is ineligible to possess a firearm pursuant to federal or state law.

Here, Ms. Johnson allegedly purchased a firearm—for herself—in the company of a person who was ineligible to purchase a firearm, Mr. Trujillo. Ms. Johnson then allegedly placed that firearm in her clothes closet. Mr. Trujillo then took the firearm from Ms. Johnson’s clothes closet—while she was at work—and went outside of Ms. Johnson’s apartment to smoke a cigarette with the firearm in his pocket. This evidence, even when viewed in the light most favorable to the prosecution, was not both substantial and sufficient to support the conclusion by a reasonable mind that Ms. Johnson purchased a firearm so that she could sell, trade,

or rent that firearm to Mr. Trujillo. *Perez*, 367 P.3d at 697. Ms. Johnson, therefore, respectfully requests that this Court reverse her conviction.

II. The court of appeals reversibly erred in holding that Ms. Johnson waived her right to challenge whether C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and is unconstitutionally vague as applied to Ms. Johnson when defense counsel “resisted the prosecutor’s attempt to provide the jury with a definition of ‘transfer.’”

A. Standard of Review

This issue was preserved when Ms. Johnson argued in her reply brief before the court of appeals—in response to the government’s claim of waiver in the answer brief—that she did not waive this issue. Whether a defendant waived or forfeited a right is a question of law that appellate courts review *de novo*. *People v. Richardson*, 486 P.3d 282, 289 (Colo. App. 2018).

B. Law and Analysis

A waiver is an “*intentional* relinquishment of a *known* right or privilege.” *Cardman v. People*, 445 P.3d 1071, 1077 (Colo. 2019). On appeal, Ms. Johnson challenged whether C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and unconstitutionally vague as applied to her. The court of appeals, however, held that Ms. Johnson waived her right to challenge the constitutionality of C.R.S. § 18-12-111(1) because (1) the jury asked a question regarding the “legal definition of a transfer of a firearm or otherwise,” and (2) defense counsel

requested that the jury not receive an instruction on the Merriam-Webster dictionary definition of the word “transfer” (Opinion, ¶¶ 49-54).

Whether the jury received an instruction on the “Merriam-Webster Dictionary” definition of a term used in a statute has no bearing on the constitutional validity of a statute. Put another way, when defense counsel asked that the jury not receive a dictionary definition of a term used in C.R.S. § 18-12-111(1), this did not demonstrate Ms. Johnson’s intent to relinquish her ability to challenge the constitutionality of the statute under which she received an erroneous conviction. *See Cardman*, 445 P.3d at 1077. Simply put, defense counsel’s objection to the jury receiving an imprecise—and perhaps wholly inapplicable—“Merriam-Webster Dictionary” definition of “transfer” did not demonstrate that she was *intentionally relinquishing her right to challenge the constitutionality of the statute*. Instead, counsel’s objection was a trial strategy decision occasioned by the lack of a definition of transfer as used in the statute, and which forms the basis for Ms. Johnson’s claim that the statute was unconstitutional. Wherefore, the court of appeals’ conclusion that Ms. Johnson waived her right to challenge the constitutionality of the statute should be reversed.

III. C.R.S. § 18-12-111(1) is unconstitutionally vague as applied to Ms. Johnson because it does not define “transfer.”

A. Standard of Review

This issue was not preserved. The constitutionality of a statute is a question of law subject to de novo review. *People v. Graves*, 368 P.3d 317, 322 (Colo. 2016).

B. Applicable Facts

See Argument I, *supra*, for the facts applicable to Argument III.

C. Law and Analysis

Due Process requires that a penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). “A statute is unconstitutionally vague under the void-for-vagueness doctrine if it fails to provide the kind of notice that will enable the ordinary citizen to conform his or her conduct to the law or its standards are so ill-defined as to create a danger of arbitrary and capricious enforcement.” *People v. Stotz*, 381 P.3d 357, 363 (Colo. App. 2016) (internal citations and quotations omitted).

A statute may be challenged as unconstitutionally vague either on its face or as applied to particular conduct. *Id.* A law is void for vagueness on its face if its prohibitions are not clearly defined and may reasonably be susceptible of more than one interpretation by a person of common intelligence. *People v. Helms*, 396 P.3d 1133, 1144 (Colo. App. 2016). A law is void for vagueness as applied if it

does not, with sufficient clarity, prohibit the conduct against which it is enforced. *People v. Shell*, 148 P.3d 162, 173 (Colo. 2006).

Here, C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and is unconstitutionally vague as applied to Ms. Johnson. The criminal code does not define “transfer” as used in C.R.S. § 18-12-111(1). Further, and as noted in Argument I, *supra*, the term “transfer” is susceptible of more than one interpretation by a person of common intelligence. Thus, C.R.S. § 18-12-111(1) is unconstitutionally vague on its face. *Helms*, 396 P.3d at 1144.

Moreover, C.R.S. § 18-12-111(1) is void for vagueness as applied because it does not, with sufficient clarity, prohibit the conduct for which Ms. Johnson was convicted. *Shell*, 148 P.3d at 173. Indeed, as noted above, Ms. Johnson allegedly purchased a firearm—for herself—in the company of a person who was ineligible to purchase a firearm, Mr. Trujillo. Ms. Johnson then allegedly placed that firearm in her clothes closet. Mr. Trujillo then took the firearm from Ms. Johnson’s clothes closet and went outside of Ms. Johnson’s apartment to smoke a cigarette with the firearm in his pocket while Ms. Johnson was at work. Such conduct on the part of Ms. Johnson did not demonstrate that she purchased a firearm “for transfer to” Mr. Trujillo. Nevertheless, the jury found Ms. Johnson guilty on the sole count of violating C.R.S. § 18-12-111(1). Thus, the lack of clarity regarding the term “transfer” as used in C.R.S. § 18-12-111(1) allowed the prosecution to

convict Ms. Johnson based on conduct not prohibited by the statute. Therefore, C.R.S. § 18-12-111(1) is unconstitutionally vague as applied to Ms. Johnson.

Because C.R.S. § 18-12-111(1) is unconstitutionally vague on its face and as applied, Ms. Johnson respectfully requests that this Court reverse her conviction.

CONCLUSION

For the reasons and authorities presented in arguments I-III above, Ms. Johnson respectfully requests that this Court reverse her conviction.

Respectfully submitted,

/s/ Patrick R. Henson

Patrick R. Henson

CERTIFICATE OF SERVICE

I certify that I have duly served the within OPENING BRIEF upon all parties below via the Integrated Colorado Courts E-Filing System (ICCES) and/or via regular U.S. mail service on this 11th day of July 2022.

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