

SUPREME COURT
STATE OF COLORADO

DATE FILED: October 4, 2022 3:29 PM
FILING ID: A1EF9EB91260E
CASE NUMBER: 2021SC665

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of
Appeals
Court of Appeals Case No. 18CA1212

Petitioner,

SYLVIA JOHNSON,

v.

Respondent,

THE PEOPLE OF THE STATE OF
COLORADO.

PHILIP J. WEISER, Attorney General
JOSEPH G. MICHAELS, Assistant Solicitor
General*

Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Floor
Denver, CO 80203

Telephone: 720.508.6000

E-Mail: joseph.michaels@coag.gov

Registration Number: 40403

*Counsel of Record

▲ COURT USE ONLY ▲

Case No. 21SC665

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

Choose one:

It contains 9,473 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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

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

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

/s/ Joseph G. Michaels

TABLE OF CONTENTS

	PAGE
ISSUE ACCEPTED FOR REVIEW.....	1
STATUTORY PROVISION	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT	7
I. Johnson waived any constitutional challenge to the meaning of “transfer”	7
A. Standard of Review	7
B. Relevant Facts.....	7
C. Law and Analysis.....	10
II. The unlawful purchase of firearms statute is not unconstitutionally vague as applied to Johnson.....	16
A. Standard of Review	16
B. Law and Analysis.....	18
1. Transfer carries its plain, ordinary, and everyday meaning.	21
2. A transfer is not restricted to a permanent divestment of property, but rather encompasses temporary transfers and bailments.	25
3. Prohibiting any transfer of a firearm to an ineligible person—be it permanent, temporary, or exclusive possession—promotes the statute’s purpose, and draws a	

TABLE OF CONTENTS

	PAGE
clear line between legal and illegal conduct that avoids guessing.	30
4. Because the statutory language is unambiguous, resort to legislative history is unwarranted.	32
5. Nevertheless, the statutory history confirms the plain, ordinary, and broad definition of transfer.	34
6. The United States Supreme Court’s explanation of a straw purchaser is consistent with the use of transfer in Colorado’s unlawful purchase of firearms statute.....	40
7. Johnson’s reliance on Chow, a foreign-jurisdiction case with different underlying statutory requirements, is inapposite.....	43
8. Section 18-12-111(1) is not vague as applied to Johnson.....	45
III. Sufficient evidence supports Johnson’s conviction for unlawful transfer of a firearm.	47
A. Standard of Review	47
B. Relevant Facts.....	47
C. Law and Analysis.....	48
CONCLUSION.....	54

TABLE OF AUTHORITIES

PAGE

CASES

A.P.E. v. People, 20 P.3d 1179 (Colo. 2001)	19
Abramski v. United States, 573 U.S. 169 (2014)	passim
Cardman v. People, 2019 CO 73.....	11
Carrera v. People, 2019 CO 83	34
Chow v. State, 903 A.2d 388 (Md. 2006)	43, 44, 45
City of Greenwood Village v. Petitioners for Proposed City of Centennial, 3 P.3d 427 (Colo. 2000).....	17
Clark v. People, 232 P.3d 1287 (Colo. 2010).....	48, 53
Cowen v. People, 2018 CO 96	29
Dubois v. Abrahamson, 214 P.3d 586 (Colo. App. 2009).....	29
Durham v. United States, 743 A.2d 196 (D.C. App. 1999)	26
Hagos v. People, 288 P.3d 116 (Colo. 2012).....	16
Jefferson County Bd. of Equalization v. Gerganoff, 241 P.3d 932 (Colo. 2010).....	37
Martinez v. People, 244 P.3d 135 (Colo. 2010).....	19
McCoy v. People, 2019 CO 44	29, 32, 43, 47
People in Interest of C.M., 630 P.2d 593 (Colo. 1981).....	19
People in the Interest of C.M.D., 2018 COA 172	27
People v. Alfaro, 2014 CO 19	17

TABLE OF AUTHORITIES

	PAGE
People v. Baer, 973 P.2d 1225 (Colo. 1999)	17, 20, 32, 47
People v. Bennett, 515 P.2d 466 (Colo. 1973).....	48, 51
People v. Cali, 2020 CO 20	18, 32
People v. Camarigg, 2017 COA 115.....	51
People v. Curtis, 681 P.2d 504 (Colo. 1984)	11
People v. Diaz, 2015 CO 28.....	27
People v. District Court, 713 P.2d 918 (Colo. 1986).....	35
People v. Durapau, 280 P.3d 42 (Colo. App. 2011).....	27
People v. Graybeal, 155 P.3d 614 (Colo. App. 2007)	18, 25, 34, 49
People v. Harris, 762 P.2d 651 Colo. 1988)	17
People v. Hickman, 988 P.2d 628 (Colo. 1999).....	17, 20, 46
People v. Johnson, 2021 COA 102	passim
People v. Kruse, 839 P.2d 1 (Colo. 1992).....	16
People v. Lucy, 2020 CO 68	21, 22, 30, 33
People v. Madden, 111 P.3d 452 (Colo. 2005).....	18, 27, 37
People v. Manzo, 144 P.3d 551 (Colo. 2006).....	22
People v. McBride, 228 P.3d 216 (Colo. App. 2009)	48
People v. McIntier, 134 P.3d 467 (Colo. App. 2005).....	20, 48
People v. Perez, 2016 CO 12.....	51

TABLE OF AUTHORITIES

	PAGE
People v. Raider, 2021 COA 1.....	32
People v. Rediger, 2018 CO 32.....	passim
People v. Rice, 198 P.3d 1241 (Colo. App. 2008)	33
People v. Runningbear, 753 P.2d 764 (Colo. 1988)	40
People v. Serra, 2015 COA 130.....	48
People v. Shaver, 630 P.2d 600 (Colo. 1981)	19
People v. Tee, 2018 COA 84.....	15
People v. Tweedy, 126 P.3d 303 (Colo. App. 2005).....	48
People v. West, 724 P.2d 623 (Colo. 1986).....	20, 32
People v. Yakas, 2019 COA 117.....	7
Peretz v. United States, 501 U.S. 923 (1991).....	11
Philips v. People, 2019 CO 72.....	11
Scott v. People, 2017 CO 16.....	18, 25, 34
Springer v. City & County of Denver, 13 P.3d 794 (Colo. 2000).....	28
State v. Nieto, 993 P.2d 493 (Colo. 2000)	25
Turbyne v. People, 151 P.3d 563 (Colo. 2007)	27
United States v. Zubia-Torres, 550 F.3d 1202 (10th Cir. 2008)	13
Watso v. Colo. Dep’t of Soc. Serv., 841 P.2d 299 (Colo. 1992)...	19, 20, 30, 31
Willhite v. Rodriguez-Cera, 2012 CO 29	23

TABLE OF AUTHORITIES

PAGE

Wright v. West, 505 U.S. 277 (1992) 53

CONSTITUTIONS

U.S. Const. amend. XIV, § 1 19

STATUTES

§ 18-12-108.5, C.R.S. 45

§ 18-12-108.7, C.R.S. (2021)..... 45

§ 18-12-111(1), C.R.S. passim

§ 18-12-112(6)(b), C.R.S. 28

§ 18-12-112(6)(e), C.R.S. 28

§ 2-4-101, C.R.S. (2021)..... 21

§ 2-4-303, C.R.S. (2021)..... 36

OTHER AUTHORITIES

2000 Colo. Sess. Laws, Ch. 156, sec. 1 (H.B.00-1214)..... 36

2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory
Construction § 47:14..... 37

Black’s Law Dictionary 1636 (9th ed. 2009)..... 22, 23

Cambridge Dictionary..... 24

H.B.20-1214, 2000 Leg. 62d Gen. Assemb., Comm. Rep. (Mar. 20,
2000) 37

S. Jud. Comm. Hearing on HB00-1214 (Feb. 23, 2000) 36

TABLE OF AUTHORITIES

PAGE

S. Jud. Comm. Hearing on HB00-1214 (Mar. 20, 2000) 38

Webster’s Third New Int’l Dictionary 1585 (2002) 23

ISSUES ACCEPTED FOR REVIEW

Whether the court of appeals reversibly erred and violated the petitioner's due process right in affirming the petitioner's conviction on the sole count of unlawful purchase of firearms where the government failed to prove that the petitioner purchased a firearm "for transfer to" a person ineligible to possess a firearm.

Whether the court of appeals reversibly erred in holding that the petitioner waived her right to challenge whether section 18-12-111(1), C.R.S. (2021) is unconstitutionally vague on its face and is unconstitutionally vague as applied to the petitioner when defense counsel "resisted the prosecutor's attempt to provide the jury with a definition of 'transfer.'"

Whether section 18-12-111(1), C.R.S. (2021) is unconstitutionally vague as applied to the petitioner because it does not define "transfer."

STATUTORY PROVISION

Section 18-12-111(1), C.R.S., the unlawful purchase of firearms statute, provides that "[a]ny 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."

STATEMENT OF THE CASE

A jury convicted Sylvia Johnson of unlawful purchase of a firearm. (CF, pp. 119-20.) The court sentenced her to 18 months of probation. (CF, p. 121.)

The court of appeals affirmed. *See People v. Johnson*, 2021 COA 102. It explained that the unlawful transfer of firearms statute had been enacted in response to the Columbine High School shooting, specifically because the juvenile shooters had been ineligible to purchase the firearms that had been sold to them. *Johnson*, ¶ 1.

The court held that sufficient evidence supported Johnson's conviction, *Johnson*, ¶¶ 15-29; that the statute contained a broad definition of "transfer" to guard against "straw purchasers," *Johnson*, ¶¶ 15-22; that "transfer" included temporary transfers, *Johnson*, ¶¶ 21-22; that the definition of "transfer" was unambiguous, *Johnson*, ¶ 28; and that Johnson waived her right to challenge the constitutionality of the statute as vague because trial counsel affirmatively argued that the district court should not give the jury further instruction defining "transfer," *Johnson*, ¶¶ 42-55.

Section 18-12-111 does not define “transfer.” This Court has now accepted certiorari review.

STATEMENT OF THE FACTS

Johnson and her long-term boyfriend, Jaron Trujillo, visited a pawnshop, where Johnson and Trujillo looked at guns together. (*See generally* Env. Exh. 9.) Although Johnson ultimately purchased the firearm, it was Trujillo who held, tested, and physically examined the guns; he just left at the time of the sale. (*See generally id.*; *see also* TR 5/15/18, pp. 23-24, 41-42, 93-94.) Johnson did not handle or examine any guns once Trujillo left. (Env. Exh. 9; TR 5/15/18, p. 47:4-7.)

Trujillo later insisted he had gone to the pawnshop to buy jewelry, but neither he nor Johnson ever approached the jewelry counter. (Env. Exh. 9; TR 5/14/18, pp. 21-22, 184-87.) At the apartment where Trujillo lived with Johnson, Johnson put the gun in her closet. Trujillo retrieved it when he would go outside for a smoke. (*Id.* at 180-84.) Johnson knew he’d been convicted of a felony. (*Id.* at 179-80.)

Police subsequently arrested Trujillo at Johnson's apartment complex, in violation of a protection order. (*Id.* at 142-44, 146-47, 157:4-11.) Under the protection order, Trujillo couldn't be in the apartment or have a firearm (he also couldn't have a firearm because of his prior felony conviction). (*Id.* at 149-50, 157-58.) When he was arrested, he had the loaded gun in his pocket. (*Id.* at 151-54.)

Trujillo admitted he did not want Johnson to get in trouble for him having the gun. (*Id.* at 188-89.) He admitted Johnson "let him borrow it." (TR 5/15/18, p. 12:8-9.) Police told Johnson in a phone call that Trujillo told the police that Johnson had given him the gun; Johnson agreed she had, explaining that Trujillo needed the gun for protection and she'd told him where it was so he could use it. (Env. Exh. 10, 00:04:20-00:05:17.)

Johnson testified that she purchased the gun because she wanted *Trujillo* to have it for protection while he smoked. (TR 5/15/18, p. 47:19-21; *accord* Env. Exh. 10, 00:04:20-00:05:17.) Johnson said she told Trujillo where the gun was, even though she knew he was prohibited from having a firearm. (TR 5/14/18, pp. 71-72, 77:3-5, 78:14-17.)

Johnson agreed Trujillo did not have to ask for permission to use things in the apartment. (*Id.* at 81-82.) She admitted she bought the gun out of concern about Trujillo’s safety. (*Id.* at 83-84, 86:2-4, 95:14-20.) She acknowledged admitting to police that she let Trujillo use the gun. (*Id.* at 85:13-15; Env. Exh. 10, 00:04:20-00:05:17.)

In a phone call with Johnson, Trujillo admitted to having previously committed a felony. (TR 5/14/18, pp. 223-24; Env. Exh. 6, 00:02:20-00:03:30.) Finally, Johnson signed a document when she bought the gun affirming that the firearm would not be in the possession of anyone who was ineligible to have a firearm. (TR 5/15/18, pp. 16-17; Env. Exh. 8.)

SUMMARY OF THE ARGUMENT

The court of appeals, meticulously applying this Court’s precedent, correctly held that Johnson waived her vagueness challenge. When directly asked about whether to further define “transfer” for the jury, defense counsel explicitly opposed doing so. That is the definition

of an intentional relinquishment as this Court has required for waiver of a claim.

The unlawful purchase of firearms statute is not unconstitutionally vague as applied to Johnson. The statute's goal is to prevent the possession of firearms by ineligible persons. Such ineligible possession encompasses both permanent possession and temporary use. Both are consistent with the statutory purpose, and the word "transfer" encompasses both meanings. The word "transfer" is capable of ordinary, commonsense understanding. Further, Johnson's actions precisely demonstrate her awareness that transfer to her ineligible partner was prohibited.

Sufficient evidence supports Johnson's conviction, particularly given the video evidence of Johnson and Trujillo jointly shopping for the gun, Trujillo leaving while Johnson purchased it, their admissions that Trujillo was ineligible and that the gun was for his protection, and Johnson's statement that she provided Trujillo access to the firearm and had bought it for Trujillo to have when he went outside their apartment.

ARGUMENT

I. Johnson waived any constitutional challenge to the meaning of “transfer.”

A. Standard of Review

This Court reviews de novo whether a party has waived an issue.

People v. Yakas, 2019 COA 117, ¶ 14.

B. Relevant Facts

During the jury instruction conference, Johnson requested a unanimity instruction regarding the date of the offense,¹ arguing the offense could have been committed either on the date the gun was purchased on behalf of Trujillo or at a later date when the gun was transferred to him. (TR 5/14/18, pp. 234-39.) The parties agreed the instruction would require that Johnson have purchased a firearm “for transfer” to Trujillo, but would not include the statutory language prohibiting a purchase “on behalf of” Trujillo. (TR 5/15/18, pp. 4-5);

¹ Unanimity is not at issue on appeal. Rather, the People include it because it is relevant to why the elemental instruction was narrower than the statutory language.

compare § 18-12-111(1) (prohibiting purchasing a firearm “on behalf of or for transfer to a[n]” ineligible person).

Consistent with this agreement and the statutory language, the court instructed the jury that for Johnson to be guilty of unlawful purchase of firearms, she must have knowingly purchased a firearm for transfer to Trujillo, a person whom Johnson knew or reasonably should have known was not eligible to possess a firearm. (CF, p. 48.) The court properly defined “knowingly.” (CF, p. 49.)

In closing argument, defense counsel contended that, because of the protection order, it had been Trujillo’s “responsibility” to not be at the shared apartment or the pawn shop with Johnson, and to not have had possession of the gun Johnson had purchased. (TR 5/15/18, pp. 126-27.) The defense explained that for Johnson to be guilty, the jury had to decide that she purchased the gun with the intent to “pass the gun on and transfer it to” Trujillo. (*Id.* at 132:10-16.) Defense counsel argued there was no evidence of a “transfer.” (*Id.* at 133-34.)

The prosecution explained that Trujillo’s presence at the pawn shop, advice about the firearm, and assistance in selecting it, combined

with Johnson’s admission to police that she bought the gun for Trujillo’s safety for when he smoked outside—evidence supported by both video and audio recordings—conveyed that Johnson bought the firearm for transfer to Trujillo. (*Id.* at 139-40.) The prosecution explained that “transfer” is “not defined in these instructions because *it’s the common sense meaning of it.*” (*Id.* at 143:5-10) (emphasis added). The prosecution emphasized that the core question for Johnson’s legal accountability was whether “she knowingly for transfer purchased th[e] gun.” (*Id.* at 143:14-17.)

During deliberations, the jury asked “if there is a legal definition, of a transfer of a firearm or otherwise.” (TR 5/16/18, p. 2:8-9.) The court found a definition in the Merriam-Webster dictionary, but not in case law. (*Id.* at 2:10-13.) Defense counsel agreed, stating they had researched the issue before trial and found no definition. (*Id.* at 2:21-23.) The prosecution asked the court to tell the jurors to use their common sense or best judgment in defining transfer. (*Id.* at 2-3.) Defense counsel rejected the prosecution’s suggestion and contended that the court’s response should only tell the jury that it had received

all the instructions. (*Id.* at 3-4.) The court so instructed the jury, referring them back to the already-given instructions. (*Id.* at 5:9-20.) When asked if any further record was necessary, defense counsel explicitly declined. (*Id.* at 6:3-7.)

The jury subsequently asked to “see the statute for the law pertaining to the charge of unlawful purchase of a firearm.” (*Id.* at 6:14-17.) The parties all agreed that the court should instruct the jury that the elemental instruction (Instruction 9) tracked the statute. (*Id.* at 6-7, 8:10-17.) And again, before the jury rendered its verdict, the court asked counsel if there was anything to address; defense counsel again said no. (*Id.* at 9:5-8.)

C. Law and Analysis

This Court has provided specific requirements for an argument to be waived on appeal. The court of appeals rigorously applied this Court’s precedent in holding that Johnson waived any challenge to the definition of “transfer.”

Waiver requires an “intentional relinquishment of a known right or privilege.” *People v. Rediger*, 2018 CO 32, ¶ 39. In contrast,

forfeiture is not an intentional relinquishment but rather a failure to assert a right. *Rediger*, ¶ 40 (citation omitted). If waiver occurs, it erects a procedural bar to appellate review. *Philips v. People*, 2019 CO 72, ¶¶ 16-18; *Rediger*, ¶ 40. Even fundamental rights can be waived. *Philips*, ¶ 16 (citing *Peretz v. United States*, 501 U.S. 923, 936-37 (1991)).²

In *Philips*, ¶ 5, and *Cardman v. People*, 2019 CO 73, ¶¶ 10-18, this Court held that defendants do not waive their right to challenge Fifth Amendment suppression issues by not raising such a challenge below. In *Rediger*, ¶ 41, this Court declined to find intentional waiver of a

² Fundamental rights include the right to be present, the right to a public trial, certain Fourth and Fifth Amendment claims, and double jeopardy protections. *See Peretz*, 501 U.S. at 936-37 (collecting cases). The test this Court imposed in *Rediger*, that of indulging presumption against waiver and of requiring record evidence of the intentional relinquishment of a known right is akin to the knowing, voluntary, and intelligent waiver standard reserved for *fundamental* rights. Indeed, this Court in *Rediger* relied on just such a case—*People v. Curtis*, 681 P.2d 504 (Colo. 1984), and its discussion regarding waiver of the fundamental right to testify—in crafting the waiver requirements. *See Rediger*, ¶ 39 (quoting *Curtis*). Whether the right here is fundamental or not, the *Rediger* test applies and establishes counsel’s intentional relinquishment.

known right through general acquiescence to a jury instruction proposed by the prosecution. In so determining, this Court relied on the absence of “any evidence that Rediger knew of the discrepancy between the People’s tendered jury instructions and the charging document.”

Rediger, ¶ 43.

In contrast here, defense counsel was demonstrably on notice and aware of any potential infirmity concerning the use of “transfer” in the unlawful purchase of firearms statute. For instance, there was an ongoing discussion about whether to further define “transfer.” Defense counsel made their position clear when they contended that no further definition was necessary. Further, defense counsel told the court they were fully aware of the issue, having researched the definition of transfer before trial—*and then declining to seek further definition.*

To determine waiver, this Court looks to the type of unequivocal act indicating waiver. *Rediger*, ¶ 42. Counsel’s position here cannot be attributed to a lack of knowledge or oversight; the question was squarely presented, and counsel had researched for a definition. Nor was this just a “rote statement that [counsel wa]s not objecting,” *United*

States v. Zubia-Torres, 550 F.3d 1202, 1207 (10th Cir. 2008); quite the contrary, it was an affirmative position that no further definition or explanation was necessary.

Counsel, by telling the court that the elemental instruction was appropriate and by affirmatively telling the court *not* to further define “transfer,” removed that issue from the court’s consideration and thereby waived any challenge to the definitional scope of “transfer.”

The record unambiguously confirms that defense counsel knew of the definitional issue and opted not to seek further clarification. *Cf.*

Rediger, ¶ 43 (no waiver where no evidence indicated defendant “knew of the discrepancy” at issue). By creating a record conveying satisfaction with the elemental instruction *and* rejecting the need to further define “transfer,” defense counsel intentionally relinquished that “known right.” In this respect, the factual basis here is the diametric opposite of what this Court in *Rediger* held wasn’t a waiver. Counsel’s position here both asserted that no further definition of “transfer” was necessary while simultaneously expressing to the court that the definition wasn’t constitutionally infirm.

To the extent Johnson contends her waiver as to further defining “transfer” to the jury would not impact her ability to challenge the statute on vagueness grounds, such a position is not well-taken:

- **First**, the record conveys Johnson’s position at trial concerning “transfer” that further defining “transfer” was unnecessary.

- **Second**, the fact that the parties explicitly discussed whether to further define “transfer” indicates the issue was appropriately flagged for Johnson to have raised a vagueness challenge had she believed it necessary.

- **Third**, defense counsel told the court they were aware of the absence of a legal definition of “transfer” and had researched it—before declining to have it further defined.

(TR 5/16/18, p. 2:21-23.) Taken together, the affirmative decision not to request any definition of “transfer” affirms Johnson’s waiver of the issue under this Court’s waiver principles.

Even if counsel’s position arguing against further definition of “transfer” wasn’t an explicit waiver, it was an implicit one. *See Rediger*, ¶ 42 (recognizing waiver may be “either express or implied”). Unlike

Rediger where this Court didn't find implied knowledge, here the question of "transfer" and any perceived deficiencies from Johnson's point of view was *directly* placed before the court and defense counsel—to the point where they discussed further definitions and where counsel acknowledged researching the definition. In declining additional instruction, the record conveys that counsel knew about the issue and did not seek to address it further. Further unlike *Rediger*, the "totality of defense counsel's statements" demonstrated counsel's involvement in resolving the question of whether "transfer" was ambiguous, specifically in counsel's assertions that no further definition was needed. *See People v. Tee*, 2018 COA 84, ¶¶ 32-37.

The court of appeals correctly applied this Courts precedent in finding waiver. *Johnson*, ¶¶ 51-54. This Court should affirm its holding that Johnson waived this claim.

II. The unlawful purchase of firearms statute is not unconstitutionally vague as applied to Johnson.

A. Standard of Review

Should this Court find that the as-applied vagueness question isn't waived, Johnson did not object below. Thus, this Court reviews for plain error. *People v. Kruse*, 839 P.2d 1, 3 (Colo. 1992) (constitutional claims require specific and timely objections or are waived for all but plain error review). A plain error is one that is obvious, substantial, and that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Hagos v. People*, 288 P.3d 116, 119-20 (Colo. 2012) (plain errors must “seriously affect the fairness, integrity, or public reputation of the judicial proceedings”).

This Court considers both facial³ and as-applied challenges to the constitutionality of a statute under de novo review. *City of Greenwood*

³ This Court did not grant certiorari review as to a facial vagueness challenge. Nor did Johnson petition for review on a facial challenge. In her opening brief, however, Johnson repeatedly argues the statute is facially unconstitutional. Because this issue was neither petitioned for nor accepted for certiorari review, this Court should not address it. *See*

Village v. Petitioners for Proposed City of Centennial, 3 P.3d 427, 440 (Colo. 2000). “[D]eclaring a statute unconstitutional is one of the gravest duties impressed upon the courts,” and this Court must presume that the General Assembly comports with constitutional standards in enacting a statute. *Id.*

Because statutes are presumed to be constitutional, Johnson bears the burden of establishing its unconstitutionality beyond a reasonable doubt, particularly as applied to her. *People v. Baer*, 973 P.2d 1225, 1230-31 (Colo. 1999); accord *City of Greenwood Village*, 3 P.3d at 440 (requiring party challenging statute on constitutional grounds to “prove the statute’s unconstitutionality beyond a reasonable doubt”) (quoting *People v. Hickman*, 988 P.2d 628, 634 (Colo. 1999)).

People v. Alfaro, 2014 CO 19, ¶ 6 n.1 (“express[ing] no opinion with regard to” questions not included in grant of certiorari); *People v. Harris*, 762 P.2d 651, 661 n.9 (Colo. 1988) (“Because we did not grant certiorari on these issues, we will not address them.”). Nevertheless, because Johnson cannot demonstrate that the statute is impermissibly vague as to *all* its applications—let alone as applied to her—any facial challenge must fail. See *Baer*, 973 P.2d at 1233.

For error to be obvious and require reversal under plain error, it “must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law.” *See Scott v. People*, 2017 CO 16, ¶¶ 15-16. Johnson’s vagueness challenge contravenes none of these, particularly since there was no prior published case on the definition of “transfer” in the unlawful purchase of firearms statute; thus the question would be neither plain nor reversible. On the contrary, the court of appeals has previously approved the definition of “transfer” conveyed by Black’s Law Dictionary. *See People v. Graybeal*, 155 P.3d 614, 618 (Colo. App. 2007).

B. Law and Analysis

When interpreting a statute, this Court gives effect to the legislature’s purpose and intent by examining the plain and ordinary meaning of the statutory language. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005); *accord People v. Cali*, 2020 CO 20, ¶ 15 (courts “look first to the statutory language”). If the statute is susceptible to different interpretations, this Court adopts the interpretation

comporting with constitutional standards. *People in Interest of C.M.*, 630 P.2d 593, 594 (Colo. 1981).

The Constitution requires due process before depriving any person of life, liberty, or property. U.S. Const. amend. XIV, § 1.⁴ Due process is satisfied by notice, “which is given through publication of the statutes.” *People v. Shaver*, 630 P.2d 600, 604 (Colo. 1981). “A statute that forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application violates due process protections afforded by the” Constitution. *Watso v. Colo. Dep’t of Soc. Serv.*, 841 P.2d 299, 309 (Colo. 1992); *accord A.P.E. v. People*, 20 P.3d 1179, 1190 (Colo. 2001).

“Vague laws offend due process because they (1) fail to give fair notice of the conduct prohibited, and (2) do not supply adequate standards for those who apply them in order to prevent arbitrary and

⁴ Johnson did not below and does not on appeal raise a challenge under the Colorado Constitution. *See Martinez v. People*, 244 P.3d 135, 139 (Colo. 2010) (“[A]ppellate courts should not reach Colorado Constitutional arguments raised for the first time on appeal.”).

discriminatory enforcement.” *Baer*, 973 P.2d at 1233. But statutes “contain broad terms to ensure their applicability to varied circumstances”; indeed, “neither scientific nor mathematical certainty is required.” *Watso*, 841 P.2d at 309. A “law is unconstitutional only if it ‘is vague, not in the sense that it requires a person to conform h[er] conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’” *People v. McIntier*, 134 P.3d 467, 474 (Colo. App. 2005) (quoting *Hickman*, 988 P.2d at 643).

The statute here does not rise to such a level. On the contrary, the term “transfer” establishes a standard of conduct capable of ordinary, commonsense understanding. And Johnson’s underlying behavior aptly demonstrated this understanding.

When a statute permits persons of ordinary intelligence to “distinguish between permissible and illegal conduct and provides workable standards for those responsible for the enforcement and application of the law, due process of law [is] satisfied.” *People v. West*, 724 P.2d 623, 626 (Colo. 1986).

1. Transfer carries its plain, ordinary, and everyday meaning.

Statutory words should be “construed according to the rules of grammar and common usage.” § 2-4-101, C.R.S. (2021). Since the statute does not define the term “transfer,” this Court applies its ordinary meanings, including by “consulting a recognized dictionary.” See *People v. Lucy*, 2020 CO 68, ¶ 31.

The unlawful purchase of firearms statute gives fair notice of the prohibited conduct: it proscribes purchasing a firearm for transfer to an ineligible person. This prohibition includes allowing or facilitating possession of that firearm by the ineligible person. The statute’s language is necessarily broad to effect its purpose: preventing access to that firearm for ineligible persons. By design, the broad statutory language includes a range of conduct—from a full possessory transfer that wholly divests ownership from the original defendant-purchaser, to simple conditional transfers like short-term loans. Nothing about possessory transfer or conditional short-term transfers is either vague or incomprehensible. On the contrary, either yields the same result:

ensuring that a person ineligible to have a firearm isn't provided with a firearm.

Nor is the statute is vague just because the legislature did not provide a legal definition of "transfer". As above, words and phrases are read in context and according to their ordinary meaning. *See Lucy*, ¶ 31; *accord People v. Manzo*, 144 P.3d 551, 554 (Colo. 2006) ("[W]e look to the plain and ordinary meaning of the statutory language[.]").

Black's Law Dictionary defines "transfer," as a verb, as "to convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of" or "to sell or give." BLACK'S LAW DICTIONARY 1636 (9th ed. 2009). As a noun, Black's defines "transfer" generally as the direct or indirect, or voluntary or involuntary, means of disposing of property, including "conditional" transfers and retention of title in the property by the original transferor, as well as a "conveyance of property *or* title from one person to another." *Id.* (emphasis added). A "transfer" includes a "gift," or a "release" or a "lease," as well as the "creation of a lien or

other encumbrance.” *Id.* Finally, it includes conveyance of property from one person to another. *Id.*

In this respect, Black’s Law Dictionary endorses both full possessory change of ownership *and* temporary transfer of “control of” a firearm to an ineligible person. The fact that Black’s explicitly recognizes “conveyance of property *or* title,” *id.* (emphasis added), expresses that full ownership is not necessary to effect a transfer of the property. *See Willhite v. Rodriguez-Cera*, 2012 CO 29, ¶ 18 (use of the word “or” conveys disjunctive use that “reflects a choice of equally acceptable alternatives”) (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 1585 (2002) (“or” indicates a “choice between alternative things, states, or courses”).

Other dictionaries similarly define “transfer.” For example, Merriam-Webster “transfer” as “to convey from one person, place, or situation to another”; “to cause to pass from one to another”; and “to make over the possession or control of” an item.⁵ And the Cambridge

⁵ <https://www.merriam-webster.com/dictionary/transfer> (last visited Aug. 15, 2022).

Dictionary defines “transfer” as “to move someone or something from one place, vehicle, person, or group to another.”⁶ What these definitions have in common is that none restricts “transfer” to a permanent divestment of title or possession, but rather encompasses conveying control of the object to another.

Here, under a common and ordinary meaning, “transfer” reflects the conveyance of property from one person to another, regardless of the permanence of that conveyance. Indeed, it would be illogical for the General Assembly to intend to keep firearms out of the hands of impermissible person, but then allow guns to be loaned to, borrowed by, or conditionally transferred to such persons. Such a reading would defeat the entire point of the statute, especially in light of its purpose and enactment in response to Columbine. *See State v. Nieto*, 993 P.2d

⁶ <https://dictionary.cambridge.org/dictionary/english/transfer> (last visited Aug. 15, 2022). While Cambridge also includes a definition encompassing making something the legal property of another, that is but one of several definitions, all of which are consistent in terms of conveying an item to another’s control.

493, 501 (Colo. 2000) (“[I]n construing a statute, we must seek to avoid an interpretation that leads to an absurd result.”) (citations omitted).

2. A transfer is not restricted to a permanent divestment of property, but rather encompasses temporary transfers and bailments.

The statute, by its plain terms and purpose does not support a definition of “transfer” as limited only to exclusive ownership. Such definition is not given, either explicitly or contextually. And such definition is narrower than those given by dictionaries and case law. Reinforcing the absence of any plain error with respect to the question of transfer, the court of appeals previously approved Black’s Law Dictionary’s definition of “transfer.” *See Graybeal*, 155 P.3d at 618 (explaining that “[t]he term ‘transfer’ encompasses both direct and indirect methods of disposing of property”) (citing BLACK’S LAW DICTIONARY 1535 (8th ed. 2004)). Because the court of appeals previously approved of the Black’s Law Dictionary’s definition of “transfer,” the court’s use here cannot be plain. *See Scott*, ¶¶ 15-16.

Further, other courts have explained that a defendant may “transfer” an item to a recipient and have that recipient “transfer” the item back to the defendant. *See Durham v. United States*, 743 A.2d 196, 201 (D.C. App. 1999) (recognizing that with each transfer back and forth, the “transfer of actual control’ occurred anew”). Indeed, even if the defendant temporarily is “only a bailee of some kind,” the conduct amounts to a “transfer.” *Id.* at 203.

Here, too, while Trujillo may or may not have *permanently* owned the firearm, possession of the gun was transferred to him, and that transferred possession was the point behind the purchase. He had possessory control of it, and Johnson’s purchase was made to facilitate a transfer to him. Per both Johnson and Trujillo, this was for his protection, since Trujillo could not get the gun for himself. The statutory elements sufficiently convey that a transfer of possession—regardless of duration, permanence, or exclusive possession—is prohibited.

There is significant public policy behind the statute: to prevent ineligible felons, domestic violence offenders, ineligible youths such as

the Columbine shooters, or those subject to protection orders from being able to acquire a gun and commit more acts of violence or inflict greater casualties. The commonly understood meaning of “transfer”—be it temporary or permanent, conditional or without limitation—promotes that policy goal. *See Madden*, 111 P.3d at 457 (courts interpret statutes for plain and ordinary meaning).

In other words, the statute doesn’t solely prohibit transfers only as to exclusive use or exclusive ownership, and this Court should not read in such a narrowing requirement. *Cf. Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) (recognizing that courts do “not add words to a statute”); *accord People v. Diaz*, 2015 CO 28, ¶ 12. Had the legislature intended such a narrow definition, it would have provided a technical statutory definition. *See People in the Interest of C.M.D.*, 2018 COA 172, ¶ 28 (legislature’s prerogative to set statutory criteria and address policy concerns). Rather, this Court “appl[ies] facially clear and unambiguous statutes as written because [this Court] presume[s] the General Assembly meant what it clearly said.” *People v. Durapau*, 280 P.3d 42, 45 (Colo. App. 2011).

Finally, this Court does not read additional restrictions into a statute where the legislature could have limited application but chose not to. *See Springer v. City & County of Denver*, 13 P.3d 794, 804 (Colo. 2000). The court of appeals rightly concluded that because other provisions of the firearms statutes in section 18-12-101, C.R.S., *et seq.* specifically and separately consider temporary transfers and since section 18-12-111(1) does not single out temporary transfers, temporary transfers necessarily must be included in the definition of “transfer” for purposes of the unlawful transfer of firearms statute, § 18-12-111(1). *See Johnson*, ¶¶ 20-21.

The fact that the very next statute addresses private firearms transfers and identifies temporary transfers as a recognized type of transfer indicates that the General Assembly intended a broad understanding of “transfer” to include temporary transfers in section 18-12-111(1). *See Johnson*, ¶ 21 (discussing § 18-12-112(6)(b) & (e), C.R.S., which recognize that a transfer can be a “bona fide gift or loan between immediate family members” or a “temporary transfer of possession without transfer of ownership or a title to ownership”)

(emphases added). These provisions—which limit background checks for such transfers—underscore that the legislature was able to carve out exceptions to specifically address when it needed to address limitations on temporary transfers. In not doing so in section 18-12-111(1), however, the legislature conveyed that “transfer” includes temporary transfers. *Cf. Dubois v. Abrahamson*, 214 P.3d 586, 588 (Colo. App. 2009) (explaining that where “the General Assembly could have included th[e] limitation in the statute, but did not, [then reviewing courts] will not read th[o]se terms into” the statute”).

There is good reason the legislature *rejected* such a narrow focus: it would have defeated the policy goal of keeping firearms away from ineligible persons. *See McCoy v. People*, 2019 CO 44, ¶ 37 (in construing statutes, appellate courts effectuate legislature’s intent); *cf. Cowen v. People*, 2018 CO 96, ¶ 12 (“cardinal rule” of statutory interpretation requires courts to look at statute’s plain and ordinary meaning; where language is unambiguous, courts look no further).

Had the legislature wanted a technical definition of “transfer” to mean “permanent conveyance” or “exclusive possession,” it would have

said so. On the other hand, the legislature did not *exclude* temporary transfers; to say now that the statute prohibits temporary transfers would force this Court to add or change words in the statute. *Cf. Lucy*, ¶ 30 (recognizing that where statute did not exclude particular interpretation, it would be inappropriate to read in such exclusion).

3. Prohibiting any transfer of a firearm to an ineligible person—be it permanent, temporary, or exclusive possession—promotes the statute’s purpose, and draws a clear line between legal and illegal conduct that avoids guessing.

The statute applies broadly by design, and its phrasing conveys what is prohibited: acquiring firearms to provide to ineligible persons, *period*. *Cf. Watso*, 841 P.2d at 310 (generality does not amount to vagueness). One such method is transfer of ownership. Another equally valid—and equally dangerous—method is transfer for conditional or temporary use. Yet another is non-exclusive possession. The statute prohibits all these forms of providing a firearm to an ineligible person because there is no difference as to the ultimate result:

a person has obtained a firearm for the purpose of providing it to an ineligible person. In the end, the ineligible person would receive possessory “control of” a firearm that the person is not allowed to have—not allowed to have for the safety of greater society.

Further, the statute is sufficiently drawn such that it clearly conveys that the defendant-transferor must have knowingly purchased the firearm for transfer—i.e., the defendant must have purchased the firearm intending to transfer. *And* it conveys that the defendant-transferor must have known or reasonably should have known that the transferee was ineligible to possess the firearm. These limiting principles support the reason for prohibiting the acquisition for transfer—i.e., that the person to whom the firearm would be transferred has been deemed unfit, or unsafe, to possess it.

These narrowing principles also allow persons of ordinary intelligence to distinguish between permissible and illegal conduct. They further allow for application to varied circumstances. *Watso*, 841 P.3d at 309. Finally, a construction prohibiting acquisition for transfer of any type to an ineligible person provides proper guiding principles to

citizens, to those subject to the statute, and to law enforcement. These workable standards ensure due process. *See West*, 724 P.2d at 626. A person cannot knowingly acquire a firearm for transfer to an ineligible person, be it temporarily or permanently. That is an appropriate, clear line that eliminates guessing.⁷

4. Because the statutory language is unambiguous, resort to legislative history is unwarranted.

Because the statute is clear and unambiguous, this Court need not resort to other methods of statutory interpretation. *Cali*, ¶ 18; *accord McCoy*, ¶ 38. As above, the word “transfer” carries its ordinary and commonsense meaning. This language is unambiguous. *See Johnson*, ¶¶ 17, 28. Put simply, “transfer” is not susceptible to “multiple reasonable interpretations,” *People v. Raider*, 2021 COA 1, ¶ 14, but rather has one broad, consistent interpretation.

⁷ Although, a facial challenge is not before this Court, because the statute is capable of not just one, but multiple constitutionally permissible applications, it cannot be facially unconstitutional for vagueness. *See Baer*, 973 P.2d at 1233 (facial vagueness challenge only sustained where statute is impermissibly vague in all its applications).

A statutory term is not ambiguous just because it is undefined; rather, it simply calls for using the term's commonsense and ordinary definition, including by way of a dictionary. *Lucy*, ¶ 31. And where the ordinary meaning is not confusing, overly technical, or susceptible to endless sets of facts, the ordinary definition doesn't give rise to a vagueness problem. *See People v. Rice*, 198 P.3d 1241, 1244-45 (Colo. App. 2008) (broadly defining "access" by its ordinary meaning does not render statute unconstitutionally vague).

Here, as in *Rice*, the statute has a limiting principle in that it requires the defendant to knowingly transfer the firearm. *Compare id.* (statute "limits its application by providing that "a person commits the crime "if the person knowingly..." (emphasis in original); with § 18-12-111(1) (prohibiting "knowingly purchases" a firearm for transfer). Notably, *Rice* looked to the definition in Black's Law Dictionary. *See* 198 P.3d at 1245. Likewise here, the word "transfer" is capable of ordinary, commonsense understanding. Contextual considerations underscore this meaning.

Johnson contends the legislative history suggests various meanings of “transfer.” But those meanings are not inconsistent with commonly recognized meanings of “transfer,” including those in Black’s Law Dictionary, discussed *supra*, and one the court of appeals previously approved in *Graybeal*—again, meaning Johnson cannot establish plain error as to the definition of transfer. Indeed, Johnson’s very reliance on legislative history underscores that any error could not have been plain or obvious. *Cf. Scott*, ¶¶ 15-16.

Further, the common understanding of “transfer” is consistent with the prohibitions in, and the policy underlying, the statute. *See Carrera v. People*, 2019 CO 83, ¶¶ 17-18 (courts look no further than statute’s plain and ordinary meaning when words and phrases, in context, are clear under rules of grammar and common usage).

5. Nevertheless, the statutory history confirms the plain, ordinary, and broad definition of transfer.

Johnson, citing legislative history, argues that the bill was intended to prevent “straw man” purchases of firearms for ineligible

people. That is *precisely* what occurred here: Johnson, the “straw purchaser,” bought the firearm because Trujillo could not and because, in her view, Trujillo needed a gun for protection. By allowing Trujillo access to the firearm, by purchasing it *for his* protection, Johnson transferred it to him for his use. This also is why the statute is not unconstitutionally vague as applied to Johnson (discussed further, *infra* section II.B.8 and section III).

Should this Court worry that the statute is ambiguous, the legislative intent affirms that a “transfer” broadly includes both permanent and temporary transfers of possession. This construction is consistent and harmonious with the statutory purpose. *See People v. District Court*, 713 P.2d 918, 921 (Colo. 1986) (where statutory ambiguity can be reconciled by one construction but would conflict under another, this Court adopts the construction that results in harmony, not inconsistency).

The legislative declaration broadly states that the law’s goal was to prohibit the purchase of firearms “by persons on behalf of other persons who are ineligible to possess firearms.” 2000 Colo. Sess. Laws,

Ch. 156, sec. 1, at 1 (H.B.00-1214). This language does not limit “transfer” of the firearm, but rather conveys the expectation that a firearm cannot be obtained *at all* to enable possession by an ineligible person. *See* § 2-4-303, C.R.S. (2021) (in resolving ambiguous provisions, court must consider the legislature’s intended objective, consequences of a particular construction, and the legislative declaration or purpose). As the court of appeals rightly explained, the General Assembly enacted the unlawful transfer of firearms statute to prevent “straw purchasers” from buying firearms for those ineligible to possess them, in response to the discovery that adults had sold guns to the teenaged Columbine High School shooters. *See Johnson*, ¶ 1; *e.g.*, S. Jud. Comm. Hearing on HB00-1214, at 41:00-42:30, 43:30-45:00 (Feb. 23, 2000). The legislative history conveys that the General Assembly intended a broad application of the statute. For example, in the committee report, the legislators broadened the statute from just prohibiting a transferor from buying a gun for someone who is “ineligible to *purchase*” a firearm for themselves to prohibiting buying a gun for someone who is “ineligible to *possess*” a firearm at all. This conveys that the legislature intended the statute to

reach broadly to prevent ineligible persons from accessing firearms. *See* H.B.20-1214, 2000 Leg. 62d Gen. Assemb., Comm. Rep. p. 1:7 (Mar. 20, 2000) (substituting in “possess” and striking “purchase”), *available at* http://www.leg.state.co.us/2000/inetcbill.nsf/fsbillcont/B2E89E000B0ED40E8725685E00821811?Open&file=HB1214_C_003.pdf.

Even the statute’s title—unlawful purchase of firearms—conveys that the statute is meant to prohibit a person from buying a firearm for an unlawful purpose, e.g., for an ineligible person to possess it. *See Jefferson County Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 936 (Colo. 2010) (“[T]he heading of a statute, although not dispositive of legislative intent, can aid in determining legislative intent.”) (citation omitted); *see also* 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:14 at 336, 339-40; *accord Madden*, 111 P.3d at 457 (recognizing that statute’s title is relevant in construing legislative intent).

Johnson suggests that because one senator said a straw person “refer[s] to someone who is intentionally [fronting] for another, someone is playing a conscious, willing role of the middleman,” that the

definition necessarily is ambiguous, contrary to *Abramski v. United States*, 573 U.S. 169 (2014),⁸ and inapplicable to Johnson. (OB, p. 20) (citing S. Jud. Comm. Hearing on HB00-1214, at 06:30-06:50 (Mar. 20, 2000)). Quite the contrary, Johnson acted *precisely* as a middleperson. She played a conscious, intentional role in acquiring the firearm and, as discussed in the next subsection, this is fully consistent with the straw person role *Abramski* contemplated.

Nor does Johnson’s assertion that the bill was intended to stop a person “selling” or “giving” firearms to ineligible persons avail her. Johnson admittedly acquired the gun for Trujillo’s use—thereby satisfying any “giving” component.

Finally, Johnson suggests that because a definition of “transfer” was proposed but not adopted, that the proposed definition somehow impacts the statutory language. (OB, pp. 24-25.) But it is fruitless to read anything into a definition not adopted. Indeed, the legislature likely rejected adopting any definition because the meaning was clear—

⁸ Discussed *infra*, section II.C.6.

i.e., capable of plain and ordinary understanding—and no technical definition was needed.

In context, “transfer” means transfer of control, irrespective of whether that transfer is permanent or temporary, or whether that transfer amounts to sole ownership of or shared access to the prohibited firearm by a person ineligible to possess the gun. The whole point in enacting the statute was to avoid a person ineligible to possess a gun from having a gun. That purpose necessarily encompasses temporary possession. Nobody would argue that a person could buy and temporarily transfer a gun to a school shooter otherwise ineligible to possess a gun, that that shooter could conclude the shooting and return the gun, and that the person who provided—i.e., loaned, gave, or temporarily transferred—the firearm would not fall under this statute.

Johnson’s position is no different and no more tenable. This Court should not read in a narrower definition of transfer where the ordinary and plain meaning supports a definition that encompasses both permanent and temporary transfers, and where the legislature clearly intended broad applicability to situations precisely such as the transfer

Johnson committed here. *Cf. People v. Runningbear*, 753 P.2d 764, 767 (Colo. 1988) (“The rule of strict construction of penal statutes will not be used to defeat the General Assembly’s intent.”).

6. The United States Supreme Court’s explanation of a straw purchaser is consistent with the use of transfer in Colorado’s unlawful purchase of firearms statute.

The Supreme Court addressed a similar claim in assessing the requirements for licensed firearms dealers to sell firearms to a would-be purchaser, including how those requirements for sale apply to straw purchasers; it ultimately held that such a straw purchaser misrepresentation violates the federal statute. *Abramski*, 573 U.S. at 171. In *Abramski*, the Court explained that a straw purchaser is “a person who buys a gun on someone else’s behalf while falsely claiming that it is for h[er]self.”⁹ *Id.* Johnson contends *Abramski* means that

⁹ *Abramski* addressed a discrete question of whether such a person is a straw purchaser even if the true buyer could have purchased the gun himself. But *Abramski*’s treatment of the “straw purchaser” is important, since it encompasses a situation where “had [the straw] revealed that he was purchasing the gun on [the true buyer’s] behalf,

Colorado's unlawful purchase of firearms statute does not reach her conduct. This assertion misses the mark.

On the contrary, Johnson's conduct of purchasing a gun for someone who could not purchase the firearm himself, while falsely claiming it was for herself, is precisely the bullseye *Abramski* hit. The Supreme Court's explanation does not require exclusive ownership or exclusive use. Rather, it encompasses the situation here: a person is a straw purchaser where that person, claiming it for herself, buys a gun so someone else can have it. Under *Abramski* and under section 18-12-111(1), that person has used her legal ability to buy the firearm to provide it to someone who does not have the legal ability to get it.

The U.S. Supreme Court expressly recognized the statute would not work "if the statute turned a blind eye to straw purchases," *Abramski*, 573 U.S. at 180, such as Johnson's straw purchase here.

the sale could not have proceeded under the law." 573 U.S. at 189. Tellingly, the defendant in *Abramski* "assume[d] that the Government can make its case when a straw hides the name of an underlying purchaser who is legally ineligible to own a gun." *Id.* That is exactly what Johnson did here.

Abramski, in fact, rejected any interpretation that would allow a straw purchaser to buy a gun by presenting herself as the actual buyer, specifically because, as here, it “would undermine—indeed, for all important purposes, would virtually repeal—the gun law’s core” concerns, including the “elaborate system to verify a would-be gun purchaser’s identity and check on his background.” *Id.* at 179-80.

Here, Trujillo could not legally have a gun, which Johnson knew; had *he* tried, instead of *her*, a simple background check would have confirmed his ineligibility—precisely why only Johnson could execute the purchase. Both Johnson and Trujillo knew this: when it came time to purchase the gun, Trujillo removed himself. By purchasing the gun for his use, Johnson presented herself as the actual buyer in a situation where Trujillo would have the gun. Thus, having Johnson purchase the gun prevented Trujillo having to undergo a background check that would have confirmed his ineligibility. As the Court recognized in *Abramski*, an exception here would “virtually repeal” the core purpose of ensuring guns did not fall into ineligible users’ hands. *Id.*

Finally, *Abramski* explicitly noted that any narrow reading of the terms “person” and “transferee” in the federal Gun Control Act of 1968 would render the statute ineffective “because the identification and background check would be of the wrong person.” *Id.* at 181. So, too, here: the identification and background check would have been, and ultimately were, of the wrong person.

7. Johnson’s reliance on *Chow*, a foreign-jurisdiction case with different underlying statutory requirements, is inapposite.

Johnson cites *Chow v. State*, 903 A.2d 388 (Md. 2006), for the proposition that “transfer” in *Maryland’s statutory language* means a permanent exchange of title or possession. But nothing in Colorado’s statute suggests such a narrow approach, and Johnson’s proposed reading would effectively undercut the statute’s purpose. *Cf. Abramski*, 573 U.S. at 179-80 (cautioning against narrow reading to ensure statutory purpose not eviscerated); *accord McCoy*, ¶ 37 (courts read statutes to effectuate legislative intent).

Fatal to Johnson’s position, the Maryland statute contains different elements. For example, it prohibits the “illegal” transfer of regulated firearms. *See Chow*, 903 A.2d at 394. The word “illegal” in Maryland’s statute modified “transfer” in a way that conveyed a permanent exchange.¹⁰ *Id.* at 397-98. But Colorado’s unlawful purchase of a firearm statute contains no such modifier.

Moreover, at issue in *Chow* was the exchange of a firearm between two individuals who both could legally possess a gun; the core question concerned whether such an exchange needed regulation *at all*. *Id.* at 390-91. *Chow* explicitly recognized that the fact both transferor and transferee were eligible gun owners made a difference, since there was no public policy or protection interest at issue. *Id.*

In contrast here, the statute’s purpose is to prevent the possession of firearms by ineligible persons. Unlike in *Chow*, where both parties were eligible gun holders, there is no dispute that Trujillo could not

¹⁰ Notably, Maryland amended its statute to make clear that it prohibited loans, borrowing, or temporary transfers. *See* Md. Code Ann., [Public Safety] § 5-134 (West. 2019).

have a gun. Nor is there any dispute that Trujillo exercised a possessory interest in the gun. Finally, *Chow* relied heavily on *state-specific* language in Maryland’s regulation of firearms statutes, which provided for permanent transfers. *Id.* at 398-99. But the statutes surrounding Colorado’s unlawful purchase of firearms statute contain no such limitation.¹¹

8. Section 18-12-111(1) is not vague as applied to Johnson.

All the preceding discussion leads to one inescapable conclusion: section 18-12-111(1) is not unconstitutionally vague as applied to Johnson.

¹¹ To the extent Johnson suggests that “transfer” in section 18-12-111(1) necessarily means a permanent transfer because sections 18-12-108.5, C.R.S. (2021), and 18-12-108.7, C.R.S. (2021), require a transfer with parental consent for juveniles, this distinction is unavailing. First, even those statutes do not suggest “transfer” narrowly requires “permanent” change of title. Second, there are numerous principled reasons for parental consent before any sort of transfer of a gun to a juvenile, and those reasons are not exclusive to permanent change of title. Regardless, those sections are narrowly drawn and specific to juveniles. They are inapplicable here.

As above, it is Johnson's burden to show that section 18-12-111(1) is unconstitutional as applied to her. *E.g., Hickman*, 988 P.2d at 634. As applied to Johnson, the statute directly and unambiguously prohibited exactly what occurred: the purchase of a firearm for transfer to an ineligible person. As discussed in section III, *infra*, the evidence established *exactly* what the statute prohibited: that Trujillo and Johnson both knew Trujillo was ineligible; that Johnson knew Trujillo could not purchase a gun; and that Johnson purchased the gun for Trujillo's use. As applied to Johnson, the statute put her on notice that she could not purchase and then provide a firearm to Trujillo.

Johnson's conduct—and Trujillo's—demonstrably conveyed her understanding of the prohibited conduct:

- Johnson repeatedly affirmed that she knew Trujillo could not have access to the gun;
- Johnson shopped for the gun with her ineligible boyfriend, Trujillo;
- Trujillo examined the purchase options;
- Trujillo removed himself when it came time for Johnson to purchase the gun;
- Johnson told Trujillo where the gun was; and

- Johnson explained she bought the gun for Trujillo to have while he smoked outside.

The fact that Trujillo left while Johnson purchased the firearm fully underscores their understanding that she could not purchase the gun for him. In short, Johnson has not borne her burden of establishing the statute is unconstitutional as applied. *See Baer*§, 973 P.2d at 1231.

III. Sufficient evidence supports Johnson’s conviction for unlawful transfer of a firearm.

A. Standard of Review

This Court reviews sufficiency of the evidence challenges de novo, regardless of preservation. *McCoy*, ¶ 19.

B. Relevant Facts

After the prosecution rested, the trial court denied Johnson’s motion for acquittal. (*Id.* at 50-52.) It identified how Trujillo handled and tested the gun and was present in the store during the decision-making process leading to the gun’s purchase, and how a jury could find that that involvement was indicative of direction and intent to transfer. (*Id.* at 51-52.) It also identified Johnson’s comment about Trujillo needing the gun for protection as would support a jury finding. (*Id.*)

C. Law and Analysis

In the sufficiency context, the question is “whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010); accord *McIntier*, 134 P.3d at 471 (prosecution receives benefit of every reasonable inference). The sufficiency test considers “both direct and circumstantial” evidence equally. *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973). The standard is “daunting.” *People v. McBride*, 228 P.3d 216, 226 (Colo. App. 2009).

Determinations of witness credibility, as well as the weight given to evidence, lie with the fact-finder. *McIntier*, 134 P.3d at 471. The appellate court does not sit as a thirteenth juror, and where reasonable minds could differ, the evidence is sufficient. *People v. Tweedy*, 126 P.3d 303, 306 (Colo. App. 2005); see also *People v. Serra*, 2015 COA 130, ¶ 17 (if evidence is “close,” it is sufficient).

As above, a defendant commits unlawful purchase of firearms when she “knowingly purchases ... a firearm ... for transfer to a person

who the transferor knows or reasonably should know is ineligible to possess a firearm.” § 18-12-111(1). Given the commonly understood meaning of “transfer,” given *Graybeal*’s approval of Black’s Law Dictionary’s definition of “transfer”—a definition that includes “conditional” transfers and retention of title in the property by the original transferor, *see* 155 P.3d at 618—and given both the evidence and counsels’ arguments that Johnson must have intended the “transfer” at the time she bought the gun, the evidence here sufficiently supports the conviction.

Johnson contends that because the phrase “transfer” was not defined the evidence necessarily was insufficient to establish that she knowingly purchased a firearm to transfer to Trujillo. That question, however, goes either to the legal sufficiency of the jury instructions—an issue not raised on appeal—or to the constitutionality of the statute itself (an issue addressed in section II, *supra*). And Johnson’s behavior, both at the time of the gun’s purchase and subsequently upon ensuring Trujillo could, and did, possess the gun, provide sufficient evidence of the offense.

Further, the record, the tailored jury instruction, and both the prosecution's and defense counsel's specific arguments otherwise belie this claim. Specifically, the parties argued that "transfer" in this context meant that *at the time* Johnson purchased the gun, she intended to transfer that gun to Trujillo. As discussed above, defense counsel explicitly rejected the idea that additional definition was required after the jury sent out a question inquiring about any legal definition of "transfer."

Here, the evidence established the following:

- Trujillo was the one asking the pawn shop clerk about the gun.
- Trujillo was the one trying out the guns by holding, manipulating, and examining them.
- Trujillo disappeared when it was time to purchase the gun so Johnson could purchase it without him being directly associated with its ownership.
- Johnson admitted, several times, that the gun was for Trujillo's protection when he was outside smoking.
- Johnson told Trujillo where the gun was.
- Johnson explicitly told police that she got the gun for Trujillo's protection and told him where he could get it. (Env. Exh. 10, 00:04:20-00:05:17.)

To the extent Trujillo and Johnson testified that the gun wasn't for Trujillo, but that it was generally for "protection" (specifically for Trujillo to smoke outside, but also for the apartment), that is, at worst, a conflicting inference based on the evidence. But it's the jury's prerogative to perform its fact-finding function, and this Court does not second-guess the jury's conclusion when the record supports the jury's findings. *See People v. Perez*, 2016 CO 12, ¶ 31; *see also Bennett*, 515 P.2d at 469 (prosecution need not "exclude every reasonable hypothesis other than guilt" or disprove the defendant's theory for the evidence to be sufficient).

That the record may contain evidence that could support a contrary conclusion does not change the fact that there was sufficient evidence to support the jury's conclusion. *People v. Camarigg*, 2017 COA 115, ¶ 58 ("The prosecution is entitled to the benefit of every reasonable inference that may fairly be drawn from the evidence, *even if the record also contains evidence to the contrary.*") (emphasis added).

Finally, even had Johnson intended to have the gun herself and allow Trujillo access to it, she still necessarily purchased the firearm

with intent to transfer it to Trujillo. “Transfer” does not require exclusive divestment of ownership from one party to another. Rather, a “transfer” encompasses the use of a gun by multiple parties, particularly where the original owner authorizes the use of the second party.

Importantly, Johnson never testified that Trujillo stole the gun or she did not permit him to have it. Instead, she acknowledged that they bought the gun together, where he could not buy it for himself; that he knew where it was; and that she bought the gun for protection, while additional evidence confirmed that “protection” meant for Trujillo’s protection—particularly while outside smoking. The jury could properly conclude from her testimony that she had *not* bought the gun for herself solely to use for protection, but instead that she had intended to transfer it to Trujillo for his protection while he smoked outside.

In other words, the jury was free to assess Johnson’s credibility and disbelieve any of her testimony and use it to find against her. *See,*

e.g., *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion)¹²; *Clark*, 232 P.3d at 1293 (recognizing that jury’s disbelief of defendant’s version could contribute to guilty verdict). In this respect, the jury could have concluded that Johnson, in conjunction with her admissions in her testimony that she purchased it for Trujillo’s use, had purchased it for him—primarily, exclusively, temporarily, or otherwise. Regardless, the jury was not bound by Johnson’s version of events, as it could just her credibility from her testimony and use that in reaching its determination about her purchase of the gun and intent for transferring the gun to Trujillo.

Equally importantly, Trujillo was arrested with the gun in *precisely* the manner Johnson indicated she had purchased it for him to use: for his protection while he went outside for a smoke at their apartment. This, too, confirms that Johnson purchased the gun with the intent to transfer it to Trujillo.

¹² All the justices agreed with the plurality’s discussion regarding sufficiency of the evidence. *See Wright*, 505 U.S. at 297, 310.

For all these reasons, sufficient evidence supports Johnson's conviction.

CONCLUSION

This Court, consistent with its precedent, should hold that Johnson waived any as-applied challenge by declining further definition of "transfer" when explicitly asked whether further definition was necessary. This Court should hold that the illegal transfer of firearms statute is not unconstitutionally vague, and it should affirm Johnson's conviction.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

/s/ Joseph G. Michaels

JOSEPH G. MICHAELS, 40403*
Assistant Solicitor General
Criminal Appeals Section
Attorneys for the People of the State of
Colorado
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **PATRICK R. HENSON**, via Colorado Courts E-filing System (CCES) on October 4, 2022.

/s/ Paul Schumaker
