DATE FILED: December 31, 2021 2:29 PM
FILING ID: F416FEECEB15B
CASE NUMBER: 2019CA2194

COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

El Paso County District Court
Honorable Larry E. Schwartz, Judge
Case No. 16CR3058

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JOSHUA P. TURNER,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 19CA2194

PHILIP J. WEISER, Attorney General
JACOB R. LOFGREN,
Senior Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
Denver, CO 80203
Telephone: (720) 508-6459
E-Mail: jacob.lofgren@coag.gov
Registration Number: 40904
*Counsel of Record

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains **8548** words.

The brief complies with the standard of review requires 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 C.A.R. 28.1, and C.A.R. 32.

/s/ Jacob R. Lofgren

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. The district court properly permitted the police officer's testimony which included eyewitnesses' out-of-court statements. 5

A. This Court reviews evidentiary rulings for an abuse of discretion; however, it reviews constitutional claims de novo. 5

B. Relevant background. 6

C. The out-of-court statements were admissible. 11

1. The out-of-court statements were excited utterances. 12

2. Alternatively, the out-of-court statements helped to explain the course of the investigation. 17

D. The admission of the statements did not violate the Confrontation Clause. 19

E. Any error does not require reversal under any standard. 21

II. The district court properly permitted the expert witness's testimony. 23

A. Review is for an abuse of discretion. 23

B. Relevant background. 24

C. Dr. Valentino's expert testimony was properly admitted. 29

1. No discovery violation occurred. 29

D. To the extent any violation occurred, the district court appropriately addressed it. 32

E. Dr. Valentino's testimony did not exceed the scope of his expertise. 37

TABLE OF CONTENTS

PAGE

III. No misconduct occurred during the prosecution's closing or rebuttal arguments. 40

A. Review is for an abuse of discretion. 40

B. Relevant background. 42

C. The prosecution did not misstate the evidence or mislead the jury. 44

CONCLUSION 47

TABLE OF AUTHORITIES

PAGE

CASES

Bernal v. People, 44 P.3d 184 (Colo. 2002) 5, 22
Compan v. People, 121 P.3d 876 (Colo. 2005) 13, 14, 15
Crider v. People, 186 P.3d 39 (Colo. 2008) 41
Davis v. Washington, 547 U.S. 813 (2006) 20
Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005) 41, 44, 45, 46
Golob v. People, 180 P.3d 1006 (Colo. 2008) 37
Lancaster v. People, 615 P.2d 720 (Colo. 1980) 14
Melville v. Southward, 791 P.2d 383 (Colo. 1990) 38
Michigan v. Bryant, 562 U.S. 344 (2011) 20
Nicholls v. People, 2017 CO 71 ..... *passim*
Ohio v. Clark, 576 U.S. 237 (2015) 20
People v. Abdulla, 2020 COA 109M 14
People v. Acosta, 338 P.3d 472 (Colo. App. 2014) 32, 33, 35
People v. Brooks, 950 P.2d 649 (Colo. App. 1997) 46
People v. Compan, 100 P.3d 533 (Colo. App. 2004) 17
People v. Davalos, 30 P.3d 841 (Colo. App. 2001) 45
People v. District Court, 793 P.2d 163 (Colo. 1990) 32
People v. Draper, 2021 COA 120 20
People v. Gaffney, 769 P.2d 1081 (Colo. 1989) 22
People v. Garcia, 2021 CO 7 20
People v. Gladney, 250 P.3d 762 (Colo. App. 2010) 46
People v. Gomez, 632 P.2d 586 (Colo. 1981) 38
People v. Hagos, 250 P.3d 596 (Colo. App. 2009) 13, 17, 37
People v. J.M., 22 P.3d 545 (Colo. App. 2000) 18

TABLE OF AUTHORITIES

PAGE

People v. Johnson, 2019 COA 159 20
People v. King, 121 P.3d 234 (Colo. App. 2005) 14, 16
People v. Kraemer, 795 P.2d 1371 (Colo. App. 1990) 35
People v. Lagunas, 710 P.2d 1145 (Colo. App. 1985) 14
People v. Lee, 18 P.3d 192 (Colo. 2001) 23, 33
People v. Martinez, 18 P.3d 831 (Colo. App. 2000) 16
People v. Martinez, 83 P.3d 1174 (Colo. App. 2003) 13
People v. McBride, 228 P.3d 216 (Colo. App. 2009) 41, 45
People v. McFee, 2016 COA 97 ..... 37, 38
People v. Pernell, 2014 COA 157 ..... 14, 17
People v. Phillips, 315 P.3d 136 (Colo. App. 2012) 17
People v. Pronovost, 773 P.2d 555 (Colo. 1989) 32
People v. Rhea, 349 P.3d 280 (Colo. App. 2014) 40, 41
People v. Robinson, 226 P.3d 1145 (Colo. App. 2009) 18
People v. Ruibal, 2015 COA 55 24
People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001) 14
People v. Stewart, 55 P.3d 107 (Colo. 2002) 5, 38
People v. Tenorio, 590 P.2d 952 (Colo. 1979) 18
People v. Vanderpauye, 2021 COA 121 12
People v. Vialpando, 804 P.2d 219 (Colo. App. 1990) 45, 46
People v. Vigil, 2015 COA 88M 33
United States v. Freeman, 816 F.2d 558 (10th Cir. 1987) 18
W.C.L. v. People, 685 P.2d 176 (Colo. 1984) 15
Wend v. People, 235 P.3d 1089 (Colo. 2010) 40, 41, 45
White v. People, 486 P.2d 4 (Colo. 1971) 37

TABLE OF AUTHORITIES

PAGE

Yusem v. People, 210 P.3d 458 (Colo. 2009) 22

RULES

CRE 702 37

CRE 801 ..... 12, 17, 18

CRE 802 12

CRE 803 12

Crim. P. 16 ..... *passim*

STATEMENT OF THE CASE AND OF THE FACTS

Joshua P. Turner (a.k.a. "Dirty Dog"), the defendant, (and other people) violently assaulted a fellow homeless man in a park in Manitou Springs. During the assault, the attackers hit the victim in the head, causing him to fall to the ground where the attackers, including the defendant, continued to hit and kick the victim (TR 7/17/2018, pp 110-19, 138-41). As a result of this attack, the victim sustained serious injuries which left him quadriplegic (TR 7/17/2018, pp 110-11, 160-64, 167-68; *see* Supp EX#2 (signed serious bodily injury ["SBI"] form)).[1]

Police officers quickly responded to the scene and encountered a chaotic scene (TR 7/18/2018, pp 5-7). Eyewitnesses provided responding officers with a description of the main attacker—the defendant, and the eyewitnesses pointed officers in the direction that he fled (TR 7/18/2018, pp 10-17, 50-52). During the quick search that followed, officers found the defendant, who matched the description offered by the witnesses,

[1] The SBI form is labeled as Exhibit 2 (*see* Supp EX#2); however, at trial, it was admitted as Exhibit 1 (TR 7/17/2018, pp 161-64).

hiding behind a bush (TR 7/18/2018, pp 10-17, 50-52). The officers detained him (TR 7/18/2018, pp 17:10-16).

Unable to initially confirm the defendant's involvement, officers released the defendant (TR 7/18/2018, pp 17-20). But after subsequent investigation confirmed the defendant attacked the victim, an arrest warrant issued (TR 7/18/2018, pp 20-22; *see* TR 7/17/2018, pp 145-49).

As a result of his criminal acts, the defendant was charged with first degree assault, second degree assault resulting in SBI, and three crime of violence sentence enhancers (CF, pp 6-8, 59-61).

Ultimately, a jury convicted the defendant of second degree assault resulting in SBI, but it acquitted him of first degree assault (CF, pp 89-92; TR 7/18/2018, pp 111-14).

The defendant filed a motion for a new trial, arguing the district court erred: (1) by permitting an expert witness to testify despite the lack of pretrial disclosure; and (2) by permitting inadmissible hearsay testimony identifying the defendant as A.M.'s attacker (CF, pp 98-104; *see* TR 10/15/2019, pp 2-3 (oral arguments)). At sentencing, the district court denied that motion (TR 10/15/2019, pp 4:22-6:5).

Thereafter, the district court sentenced the defendant to 13 years in prison (TR 10/15/2019, pp 13-15; CF, pp 235, 238).[2]

This appeal follows. On appeal, the defendant complains that: (1) the district court erred when it permitted a police officer to testify about various out-of-court statements made by eyewitnesses shortly after the incident; (2) the district court erred when it allowed an expert witness to offer testimony beyond the scope of agreed upon limits and beyond the scope of the witness's expertise; and (3) misconduct during the prosecution's closing and rebuttal arguments requires reversal.

[2] Sentencing was delayed significantly because, after his conviction, the defendant failed to appear for sentencing (*see* CF, pp 122, 123, 128, 129-30, 144, 160, 161, 163-65, 166; TR 10/1/2018, p 2; TR 7/1/2019, pp 3-4).

SUMMARY OF THE ARGUMENT

First, the district court properly allowed a police officer to testify about the out-of-court statements made by eyewitnesses following the incident because those statements were excited utterances, and the statements were admissible to explain the course of the investigation.

Second, the district court properly permitted a doctor's testimony at trial because: (1) no discovery violation occurred, and therefore, no sanction was necessary; and (2) the doctor's brief testimony fell within the scope of his expertise. And even if any discovery violation occurred, the court offered an appropriate remedy—namely, a continuance, and the defense declined that offer.

Third, and finally, no prosecutorial misconduct occurred during the prosecution's closing and rebuttal arguments. The prosecution's arguments appropriately relied on inferences drawn from the evidence introduced at trial, and the prosecution properly pointed the jury to the evidence and the instructions.

ARGUMENT

I. The district court properly permitted the police officer's testimony which included eyewitnesses' out-of-court statements.

The defendant complains the district court abused its discretion and violated his right to confrontation when it permitted a police officer to testify about out-of-court statements identifying the defendant as the person who attacked the victim (OB, pp 8-26).

A. This Court reviews evidentiary rulings for an abuse of discretion; however, it reviews constitutional claims de novo.

The People agree that the defendant preserved this issue (OB, p 8; *see* TR 7/17/2018, pp 9-14; *see also* CF, pp 98-104 (motion for new trial)).

The People further agree that this Court reviews a district court's evidentiary rulings for an abuse of discretion. *Nicholls v. People*, 2017 CO 71, ¶17. "A trial court abuses its discretion only when its ruling is manifestly arbitrary, unreasonable, or unfair." *Id.* (citing *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002)).

Finally, the People agree that confrontation claims are reviewed de novo. *Id.* (citing *Bernal v. People*, 44 P.3d 184, 198, 200 (Colo. 2002)).

B. Relevant background.

On the morning of the first day of trial, defense counsel asked the court to instruct the prosecution to admonish its witnesses not to testify to any out-of-court statements made by non-testifying witnesses (TR 7/17/2018, pp 9-10, 12-13). Defense counsel's concern was that police officers might testify to statements made by transient eyewitnesses who had not been subpoenaed to testify (TR 7/17/2018, pp 9-10, 12-13).

The prosecution responded that it believed it could and would lay a sufficient foundation to admit those statements as excited utterances, and there would be no confrontation violation because the statements were not testimonial (TR 7/17/2018, pp 10-12).

The district court declined to rule on any hearsay or confrontation objections until it heard the full context for the statements, but it did order the prosecution not to mention the potential testimony during its opening statement (TR 7/17/2018, pp 13:22-14:1).

On the second day of trial, Gary Johnson (formerly of the Manitou Springs Police Department) testified (*see* TR 7/18/2018, pp 3-52). After detailing his background, Johnson explained that, on June 9, 2016, he

responded to Soda Springs Park in Manitou Springs on reports of a disturbance or altercation (TR 7/18/2018, pp 3-5). When he arrived, he encountered "a group of people huddled around one male party, who was laying on the ground" (TR 7/18/2018, pp 5-6).

Johnson described the scene as "pretty chaotic" and "madness" with "a lot of people comin' up to me, pointing fingers, going this way and that way" (TR 7/18/2018, pp 6-7). With that foundation, Johnson explained that several people almost immediately came up to him to identify and describe the primary attacker (TR 7/18/2018, p 7:5-21).

At that point, the defense objected and asked to approach (TR 7/18/2018, p 7:22-25). At the bench, defense counsel asserted that the officer was about to testify to hearsay in violation of the defendant's right to confrontation (TR 7/18/2018, p 8:4-20, 9:25-10:11).

The prosecution responded that there was a sufficient foundation to establish the statements were excited utterances, and the statements were not testimonial because they were made "for purposes of meeting an ongoing emergency situation" (TR 7/18/2018, pp 8:21-9:18).

The court told the prosecution to lay additional foundation before asking the officer about the substance of the witness's statements (TR 7/18/2018, pp 9:19-24, 10:12-16).

Thereafter, the prosecution asked Johnson to describe the specific demeanor of the people who made statements to him (TR 7/18/2018, pp 10-11). Johnson described the witnesses as "excited" and under "the stress of the chaotic situation" (TR 7/18/2018, p 11:6-19). With that added foundation, the prosecution asked Officer Johnson about the specific statements made by the witnesses:

> [PROSECUTION:] Okay. And what did those individuals tell you at that time regarding who the attacker was?
>
> [JOHNSON:] Um, they told me it was a – a male party with a baseball cap on with metal clips around the bill from lighters, and then they said he had a Confederate flag on his – on his chest. And I can't remember exact details, but it was – it was – that was the basic description, saying that he left, going – it would be northeast from the park.
>
> [PROSECUTION:] Okay. And if I showed you a copy of your report, would that help you refresh your memory as to exactly what he was wearing – what he told you that he was wearing?

[JOHNSON:] I have a copy of it, if that helps.

THE COURT: Yes, you can refer to it.

[PROSECUTION:] Okay. I'm gonna – I'm gonna step back, away from that – I apologize – and give me just one moment here, Officer.

(Pause.)

[PROSECUTION:] And whenever you talked to these individuals and they told you that's what happened, about how long was that from the time that you arrived when you heard that from them?

[JOHNSON:] Um, I'm gonna say five minutes? Ten minutes? It was – it was quickly after.

[PROSECUTION:] And they told you that the person went northeast from the park; is that correct?

[JOHNSON:] Um, yeah, I believe it's northeast. It's towards the intersection of Park and Canon Avenue.

[PROSECUTION:] Okay. And did you get a specific description of where that person might be?

[JOHNSON:] Um, I had some people say he – he was going towards the park, near the post office there.

(TR 7/18/2018, pp 11:20-12:24).

Armed with that information, Johnson and his partner quickly searched the area and found the defendant hiding underneath a nearby bush toward the location of the post office; the defendant's appearance matched the description provided by the eyewitnesses (TR 7/18/2018, pp 12-17, 50-52).

Later, after closing arguments, defense counsel made a further record about the admission of the out-of-court statements, asserting the admission of those statements violated the defendant's confrontation rights and prejudice resulted because the prosecution relied on those statements during closing argument (TR 7/18/2018, pp 106:16-108:6).

The court rejected that argument:

> Well, I didn't indicate it, but this is a classic *Crawford*[3] issue, and that is whether or not there was interrogation of those witnesses or testimonial-type questions being asked by the police officer. The officer's testimony was that this was, essentially, spontaneous by the numerous people that were present, apparently, during the time of the alleged assault, and that they spontaneously gave that type of information and basically pointed to a location where somebody could be found.

[3] *Crawford v. Washington*, 541 U.S. 36 (2004).

> *Crawford* exempts from the usual type of analysis those matters that are firmly rooted exceptions to the hearsay rule, which include an excited utterance. I concluded that the Prosecution had met this – the establishment sufficiently that this was spontaneous explanations by transient parties who were not produced at trial, and accordingly, that it was *Crawford* exempt and is admissible.
>
> So I note your record. It's the same record that you made before. But I find that the Prosecution had laid a sufficient foundation for excited utterance, and that's why I permitted it. And it also established why the officer took the steps he did next, so it was offered for the impact that it had on the officer. So I note your objection.

(TR 7/18/2018, pp 108:7-109:3).

Following trial, the defendant requested a new trial, arguing the district court erred by permitting Johnson's testimony relaying various out-of-court statements (CF, pp 98-104, ¶¶18-34). The court denied that motion (TR 10/15/2019, pp 4:22-6:5).

C. The out-of-court statements were admissible.

Hearsay is a "statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." CRE 801(c). Hearsay is not admissible "except as provided by [the Colorado Rules of Evidence] or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado." CRE 802.

Here, the defendant contends the district court erred by allowing a police officer to testify concerning statements made by eyewitnesses in the immediate aftermath of the violent assault which paralyzed the victim. Not so.

The eyewitnesses' out-of-court statements were admissible as excited utterances or to explain the course of the officers' investigation.

1. The out-of-court statements were excited utterances.

One exception to the hearsay rule is an excited utterance. CRE 803(2). "An excited utterance is a 'statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.' " *People v. Vanderpauye*, 2021 COA 121, ¶31 (quoting CRE 803(2)). For a hearsay statement to be admissible under this exception, it must satisfy three requirements:

> (1) the event must be sufficiently startling to render normal reflective thought processes of the observer inoperative; (2) the statement must be a spontaneous reaction to the occurrence; and (3) direct or circumstantial evidence must exist to allow the jury to infer that the declarant had the opportunity to observe the startling event.

People v. Martinez, 83 P.3d 1174, 1177 (Colo. App. 2003); *see People v. Hagos*, 250 P.3d 596, 622 (Colo. App. 2009) (same); *see also Compan v. People*, 121 P.3d 876, 882 (Colo. 2005) ("[T]he event or condition must be sufficiently startling to render normal reflective thought processes of the declarant inoperative, and the statement must be a spontaneous reaction to the event rather than the result of reflective thought."), *overruled on other grounds by Nicholls v. People*, 2017 CO 71.

Here, the defendant focuses on the second of those requirements, arguing the witnesses' statements to the officer were not spontaneous, and thus, they should not have been admitted (OB, pp 15-18).[4]

[4] The defendant does not appear to contest that the first and third requirements were satisfied in this case (*see* OB, pp 15-18). Thus, the People do not separately address those requirements.

The spontaneity of a declarant's statement is determined, not by its contemporaneousness, but rather by assessing the circumstances surrounding its making. *People v. King*, 121 P.3d 234, 238 (Colo. App. 2005). Indeed, "[while] the temporal proximity of the statement to the startling event or condition is important, the two do not have to be contemporaneous if the declarant is still under stress when the statement is made." *Compan*, 121 P.3d at 882 (citing *People v. Lagunas*, 710 P.2d 1145, 1148 (Colo. App. 1985)). " 'What is of critical significance . . . is the spontaneous character of the statement and its natural effusion from a state of excitement.' " *Id.* (quoting *Lancaster v. People*, 615 P.2d 720, 723 (Colo. 1980)); *see People v. Abdulla*, 2020 COA 109M, ¶65 ("While there is no 'bright-line time limitation' for an excited utterance, the statement must be a spontaneous reaction rather than the operation of 'normal reflective thought processes.' " (quoting *People v. Stephenson*, 56 P.3d 1112, 1115-16 (Colo. App. 2001)); *People v. Pernell*, 2014 COA 157, ¶32 [*Pernell I*] (same), *aff'd on other grounds*, 2018 CO 13 [*Pernell II*].

"Several factors aid this inquiry: the lapse of time between the startling event or condition and the out-of-court statement; whether the statement was a response to an inquiry; whether the statement is accompanied by outward signs of excitement or emotional distress; and the declarant's choice of words to describe the startling event or condition." *Compan*, 121 P.3d at 882-83 (citing *W.C.L. v. People*, 685 P.2d 176, 180 (Colo. 1984) (citing cases)).

Applying those factors here, the record does not support the claim that the district court erred when it admitted the officer's testimony about the out-of-court statements.

First, the statements to the officer occurred only a few minutes after the eyewitnesses observed the violent assault that paralyzed the victim (TR 7/18/2018, pp 6-7, 10-12).

Second, the statements occurred in a "pretty chaotic" environment where "a lot of people [were] comin' up to [the officer], pointing fingers, going this way and that way" (TR 7/18/2018, pp 6-7).

Third, the record does not suggest that the statements were the result of any leading questions intended to prompt a specific response

(*see* TR 7/18/2018, pp 6-7, 10-12). And to the extent that the witnesses' statements were responsive to any generalized questions, they were not rendered non-spontaneous for that reason alone. *See King*, 121 P.3d at 238 ("[T]he excited utterance exception extends to statements made in response to questioning."); *People v. Martinez*, 18 P.3d 831, 835 (Colo. App. 2000) ("[T]he fact that the victim's statements were made in response to questions does not preclude them from being excited utterances.").

Finally, despite the defendant's assertion (*see* OB, p 17), the fact that the witnesses apparently refused to provide their names or written statements for fear of retribution does not suggest that their initial statements to police officers were not spontaneous. If anything, this fact instead tends to support a finding that the witnesses' initial, spur-of-the-moment statements made during the chaos and "madness" in the immediate aftermath of the assault were excited utterances. Indeed, any reluctance to offer more detailed information later suggests the initial "excitement" waned with the passage of time, allowing the witnesses to consider the possible risks of any continued involvement.

On this record, the district court did not abuse its discretion in admitting the statements as excited utterances. *See Pernell I*, ¶32 ("The trial court is in the best position to consider the effect of the startling event on the declarant and is therefore accorded wide discretion in determining admissibility under the excited utterance exception." (quoting *People v. Compan*, 100 P.3d 533, 536 (Colo. App. 2004), *aff'd* 121 P.3d 876 (Colo. 2005)); *Hagos*, 250 P.3d at 622 ("The trial court is afforded wide discretion in determining whether a statement is admissible under the excited utterance exception . . . .").

2. Alternatively, the out-of-court statements helped to explain the course of the investigation.

Alternatively (or additionally), the out-of-court statements helped to explain the court of the officers' investigation.

"Under CRE 801(c), if an out-of-court statement is offered solely to show its effect on the listener, it is not offered to prove the truth of the matter asserted and is not hearsay." *People v. Phillips*, 315 P.3d 136, 161 (Colo. App. 2012) (citing *People v. Robinson*, 226 P.3d 1145, 1151

(Colo. App. 2009)); *see People v. Tenorio*, 590 P.2d 952 (Colo. 1979); *People v. J.M.*, 22 P.3d 545, 547 (Colo. App. 2000).

Here, the officer's testimony about the out-of-court statements was not hearsay because it was not offered to prove the truth of the matter asserted. *See* CRE 801(c). Instead, the statement was admissible for the non-hearsay purpose of showing its effect on the investigator—that is, to show why he took the steps that he took during his investigation. *See Robinson*, 226 P.3d at 1152-54 (informant's statements introduced for the non-hearsay purpose of showing their effect on the listening officers); *see also United States v. Freeman*, 816 F.2d 558, 563-64 (10th Cir. 1987). Indeed, the officer referenced those statements to explain why he searched the area that he searched where he ultimately found the defendant hiding in some bushes (TR 7/18/2018, pp 10-17).

Accordingly, the district court properly ruled that the statements were admissible also for the non-hearsay for the purpose of explaining the course of the officers' investigation.

The defendant does not seem to dispute that the evidence could serve that purpose; rather, he argues it was not *necessary* in this case

(*see* OB, p 19). Contrary to the defendant's assertion, the statements offered critical context explaining why the officers quickly searched the area where they ultimately found the defendant. Absent that context, there is no explanation for the officers' decision to search that area of the park as opposed to any other area, and more importantly, there would be little, if any, explanation for the officers' belief that the person found in the bushes—the defendant—was involved in the attack.[5]

D. The admission of the statements did not violate the Confrontation Clause.

The United States and Colorado Constitutions provide that a criminal defendant with a right to confront his accusers. U.S. Const. amend. VI.; Colo. Const. art. II, § 16. But both the federal and state Confrontation Clauses apply only to testimonial statements. *See Nicholls*, ¶¶19-34. "A testimonial statement is one made 'under

---

[5] In effect, the defendant asserts Johnson should have testified only that he was dispatched to a disturbance in the park and, after arriving, he quickly searched the area and stumbled upon a completely random homeless man in some nearby bushes—end of story (*see* OB, p 19). Placing such limits on the officer's testimony would hinder the truth-seeking function of the jury trial as it would present an incomplete and inaccurate account of the police investigation.

circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *People v. Johnson*, 2019 COA 159, ¶50 (quoting *Nicholls*, ¶22); *see People v. Draper*, 2021 COA 120, ¶78 (same). Conversely, even if made to law enforcement, a statement is nontestimonial if it is made for the purpose of addressing an ongoing emergency. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

"To determine whether a statement is 'testimonial,' courts analyze whether, in light of all the circumstances, viewed objectively, the primary purpose of procuring the statement was to create an out-of-court substitute for trial testimony." *People v. Garcia*, 2021 CO 7, ¶9 (quoting *Ohio v. Clark*, 576 U.S. 237, 245 (2015)) (cleaned up). "Thus, in determining a statement's primary purpose for Confrontation Clause purposes, [this Court] examine[s] the statement's primary purpose when it is made, not its primary purpose when it is introduced at trial." *Id.*, ¶10 (citations omitted); *see Michigan v. Bryant*, 562 U.S. 344, 359-78 (2011) (developing and applying the "primary purpose" test).

Here, an objective evaluation of the out-of-court statements made by frantic eyewitnesses when officers arrived on scene shortly after the violent assault shows that the primary purpose for those statements was to address an ongoing emergency. Indeed, during a "chaotic" scene, eyewitnesses pointed officers to the defendant's location, so that he would be apprehended immediately (TR 7/18/2018, pp 6-7, 10-12).[6]

Accordingly, the witnesses' statements were nontestimonial, and thus, the admission of them did not violate the Confrontation Clause.

E. Any error does not require reversal under any standard.

If any error occurred in the district court's evidentiary ruling, a nonconstitutional harmless error standard of reversal applies. *Nicholls*, ¶17. Under that standard, reversal is not required unless the ruling affects the defendant's substantial rights. *Id.* (citing *Yusem v. People*,

---

[6] Arguing the contrary, the defendant again hangs his hat on the fact that the eyewitnesses refused to give their names or written statements (*see* OB, pp 24-25). But again, the eyewitnesses refusal to provide their names or to prepare written statements—the type of formal, *testimonial* statement likely to be used for litigation—supports the conclusion that the eyewitnesses' initial statements, which were made in the heat of the moment, were nontestimonial.

210 P.3d 458, 469 (Colo. 2009)). " 'If a reviewing court can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial, the error may properly be deemed harmless.' " *Id.* (quoting *People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989)).

If any error occurred relative to the defendant's confrontation rights, a constitutional harmless error standard of reversal applies. *Id.* Under that standard, reversal is required "unless the reviewing court is 'confident beyond a reasonable doubt that the error did not contribute to the guilty verdict.' " *Id.* (quoting *Bernal*, 44 P.3d at 198, 200).

Here, any error was harmless and harmless beyond a reasonable doubt given the victim's testimony at trial that the defendant was one of his attackers (TR 7/17/2018, pp 110-19, 138-41). Given this testimony, it is highly unlikely that the out-of-court statements contributed in any meaningful way to the jury's guilty verdict.

Accordingly, if any error occurred, reversal is not required under any standard.

II. The district court properly permitted the expert witness's testimony.

The defendant complains the district court abused its discretion when it allowed a doctor to testify without full and appropriate pretrial disclosures and beyond the scope of his expertise (OB, pp 27-42).

A. Review is for an abuse of discretion.

The People partially agree that the defendant preserved the issues that he raises on appeal. The People agree the defendant preserved his discovery objections; however, the People do not agree the defendant adequately preserved his complaint that the testimony offered by Dr. Valentino exceeded the scope of his expertise (OB, p 27; *see* TR 7/17/2018, pp 5-9, 164-68; *see also* CF, pp 98-104 (motion for new trial)).

The People agree that the district court's decisions with respect to discovery sanctions are reviewed for an abuse of discretion. *People v. Lee*, 18 P.3d 192, 196 (Colo. 2001) ("Because of the multiplicity of considerations involved and the uniqueness of each case, great deference is owed to trial courts in this regard . . . .").

Finally, the district court's decision to admit expert testimony is reviewed for an abuse of discretion. *See People v. Ruibal*, 2015 COA 55, ¶16 ("[T]rial courts have broad discretion to determine the admissibility of expert testimony, and we will not overturn a court's decision absent a showing of an abuse of discretion."), *aff'd* 2018 CO 93.

B. Relevant background.

Before trial, the prosecution endorsed Dr. Daniel Valentino, the doctor who initially treated the victim, as an expert in emergency medicine (CF, pp 54-55; *see* TR 7/17/2018, pp 159-61).

On the first day of trial, the defense objected to the prosecution calling Dr. Valentino as a witness, arguing: (1) the prosecution failed to provide any of the victim's medical records in discovery aside from a signed serious bodily injury ["SBI"] form (*see* Supp EX#2 (signed SBI form)); (2) the doctor's testimony should be limited to the contents of the SBI form; and (3) the victim's medical records might have included exculpatory information—specifically, the victim's level of intoxication at the time of the assault (TR 7/17/2018, pp 5-7).

The prosecution responded that the victim's medical records were never collected and had never been in the possession of the prosecution, and, regardless, the prosecution planned to limit its questions of Dr. Valentino to his SBI finding and his independent recollections of this case (TR 7/17/2018, pp 7-8).

Ultimately, the district court denied the defendant's request to bar Dr. Valentino's testimony, and to the extent the defendant desired any lesser remedy for any perceived discovery violation, the court offered to grant a continuance:

> Well, I find that there's only limited prejudice by the Defense not having those records in light of the fact that we have a victim who can describe – an alleged victim who can describe his injuries and can actually show the injuries based on the limited testimony that the Prosecution is offering. I would find that excluding his testimony altogether would be disproportionate. I would grant a continuance, however, if the Defense feels they need one to investigate the medical opinion or medical records that might be behind it. But absent that, I won't exclude it.

(TR 7/17/2018, pp 8:19-9:3).

The defendant declined the court's offer of a continuance, and the court declined to impose any harsher sanctions (TR 7/17/2018, p 9:4-12).

Later, Dr. Valentino testified (*see* TR 7/17/2018, pp 156-68). He described his education and experience, noting that he worked as an attending general and trauma surgeon (TR 7/17/2018, pp 156-60). After being qualified as an expert, Dr. Valentino described the care that he offered to the victim following the assault, and he detailed the SBI that the victim sustained (TR 7/17/2018, pp 160-64; *see* Supp EX#2).

Next, the prosecution asked Dr. Valentino whether the types of injuries suffered by the victim might knock a person unconscious (TR 7/17/2018, p 164:11-13). The defendant objected, arguing that question exceeded the scope of Dr. Valentino's expert endorsement and was a violation of Crim. P. 16 (TR 7/17/2018, p 164:14-15).

At a bench conference, the prosecution responded that it was not asking for any information specific to this case, but rather a general question (TR 7/17/2018, pp 164:20-25, 166:1-3). Defense counsel argued that the prosecution's question went beyond the four corners of the SBI

form in discovery and nothing else in discovery supported this area of inquiry (TR 7/17/2018, pp 165:1-11, 165:22-25, 166:4-7).

After considering those arguments, the district court overruled the defense objection, noting it would "permit some latitude . . . within the four corners of [the SBI form]" (TR 7/17/2018, pp 164-66). Thereafter, this exchange occurred:

> [PROSECUTION:] So once again, Doctor, would you expect somebody who experiences paralysis quadriplegia to experience some level of unconsciousness associated with that symptom – or, with that condition?
>
> [DR. VALENTINO:] It's very situational, dependent on the mechanism of injury that led to this, but it is very possible that somebody would have loss of consciousness with it.
>
> [PROSECUTION:] Is it possible that somebody would also experience some sort of memory loss with that condition?
>
> [DR. VALENTINO:] Very possible.
>
> [PROSECUTION:] Would you expect whenever somebody suffers that condition that that person might eventually regain some of that short-term memory loss?

> [DEFENSE COUNSEL:] I'll object. Again, this is all outside this expert's endorsement. None of this was provided to Defense.
>
> THE COURT: I'll permit the question. The objection is overruled.
>
> [DR. VALENTINO:] Can you repeat the question, please?
>
> [PROSECUTION:] Yes. Would you generally expect somebody who suffers that short-term memory loss to eventually regain, even in pieces, some of that memory?
>
> [DR. VALENTINO:] Again, very possible. It depends on why exactly they have short-term memory loss.

(TR 7/17/2018, pp 166:14-167:11).

Following that, the prosecution concluded Dr. Valentino's direct examination with a few questions about quadriplegia, and it confirmed that the victim sustained SBI (TR 7/17/2018, pp 167:12-168:2).

The defendant elected not to cross-examine Dr. Valentino, and the jury had no questions for him (*see* TR 7/17/2018, p 168:3-9).

Following trial, the defendant requested a new trial, arguing the district court erred by permitting the above testimony (CF, pp 98-104, ¶¶5-17, 34). The court denied that motion (TR 10/15/2019, pp 4:22-6:5).

C. Dr. Valentino's expert testimony was properly admitted.

On appeal, the defendant raises three complaints related to the Dr. Valentino's testimony. First, he claims the prosecution violated its discovery obligations when it did not obtain and disclose the victim's medical records (OB, pp 32-34). Second, he argues the district court abused its discretion by failing to limit Dr. Valentino's testimony as a discovery sanction (OB, pp 34-39). Third, he asserts Dr. Valentino's testimony exceeded the scope of his expertise (OB, pp 39-41). Each claim is addressed in turn.[7]

1. No discovery violation occurred.

The defendant asserts the prosecution violated discovery rules when it failed to disclose the victim's medical records (OB, pp 32-34).

---

[7] The defendant's claims operate on the assumption that the district court found a discovery violation occurred (*see* OB, pp 29, 33, 34). But it did not. Instead, the court appears to have skipped over that question and instead found that any *potential* violation resulted in "only limited prejudice" to the defense, and thus, the remedy sought by the defense—namely, the exclusion of Dr. Valentino's testimony—would not be appropriate (*see* TR 7/17/2018, pp 8:19-9:3). Put differently, the court found, even if a violation occurred, the requested remedy went too far.

Crim. P. 16(I)(a)(1)(III) requires the prosecution to provide the defense with "[a]ny reports or statements of experts made in connection with the particular case, including results of physical or mental examinations" which are in its possession or control. Further, Crim. P. 16(I)(a)(2) requires the prosecution to provide the defense with "any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged[.]"

These prosecution's discovery obligations "extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to [the prosecution's] office." Crim. P. 16(I)(a)(3).

Despite the defendant's assertion, no discovery violation occurred here. True, the prosecution did not disclose A.M.'s medical records, but those records were never in the possession of the prosecution, and thus, it had no duty to disclose them (*see* TR 7/17/2018, pp 7-8). Moreover, Dr. Valentino did not prepare any expert reports or statements about

his treatment of the victim beyond the SBI form provided to the defense in pretrial discovery. Because no additional reports or statements exist, the prosecution could not have been required to disclose them.

Under these circumstances, no discovery violation occurred.

In passing, the defendant relies on Crim. P. 16(I)(b)(4) to suggest that the prosecution had an obligation to obtain A.M.'s medical records for disclosure (OB, p 34). That rule requires only that the prosecuting attorney "ensure that a flow of information is maintained between the *various investigative personnel* and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged." Crim. P. 16(I)(b)(4) (emphasis added). The defendant cites no authority for the sweeping proposition that hospital physicians, like Dr. Valentino, constitute "investigative personnel" for purposes of Crim. P. 16(I)(b)(4), and the People are aware of none. This Court should reject the defendant's strained reading of Crim. P. 16(I)(b)(4), and it should decline to extend that rule as far as the defendant requests.

D. To the extent any violation occurred, the district court appropriately addressed it.

The defendant next argues the district court abused its discretion by failing to limit Dr. Valentino's testimony as a discovery sanction (OB, pp 34-39).

Our supreme court has observed that, under Crim. P. 16, district courts have broad discretion to fashion remedies for violations. *People v. District Court*, 793 P.2d 163, 168 (Colo. 1990); *People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989). "In exercising that discretion, the court should take into account the reason why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." *District Court*, 793 P.2d at 167 (quoting 2 C. Wright, Federal Practice & Procedure § 260, at 119-20 (1982)); *see People v. Acosta*, 338 P.3d 472, 476 (Colo. App. 2014) (same). In the end, when a court fashions a remedy, it "should impose the *least severe sanction* that will ensure that there is full compliance with the court's discovery orders." *District Court*, 793 P.2d at 168 (emphasis added).

Further, if possible, the court "should avoid excluding evidence as a means of remedying a discovery violation because the attendant windfall to the party against whom such evidence would have been offered defeats, rather than furthers, the objectives of discovery." *People v. Vigil*, 2015 COA 88M, ¶74 (internal quotes omitted), *aff'd* 2019 CO 105; *see Acosta*, 338 P.3d at 477 ("In considering sanctions, a trial court should 'be cautious not to affect the evidence to be introduced at trial or the merits of the case any more than necessary,' and should, if at all possible, 'avoid excluding evidence as a means of remedying a discovery violation because the attendant windfall to the party against whom such evidence would have been offered defeats, rather than furthers, the objectives of discovery.' " (quoting *Lee*, 18 P.3d at 197)). Instead, "[a]ny prejudice from a discovery violation should be cured by less severe sanction . . . whenever possible." *Lee*, 18 P.3d at 197.

Here, the defendant contends a severe sanction should have been imposed because the prosecution willfully violated Crim. P. 16 (OB, pp 34-35). However, as argued above, there was no discovery violation, let alone a willful violation. Thus, no sanction was necessary, much less a

severe sanction. And if any remedy was appropriate, it was precisely the remedy offered by the court—namely, a continuance to permit any further investigation desired by the defense; the defense declined that offer (TR 7/17/2018, pp 8:19-9:12).

To the extent the defendant also asserts that, by not obtaining and disclosing the victim's medical records, the prosecution failed to disclose exculpatory evidence (*see* OB, p 35, n.7 (arguing the victim's "medical records *likely* contained exculpatory information about his intoxication and head injuries" (emphasis added)), no demonstrable prejudice exists even assuming a violation occurred. Indeed, defense counsel cross-examined a police officer about the victim's high level of intoxication; thus, defense counsel successfully presented the evidence that the defendant suggests *might* have been included in the medical records (TR 7/18/2018, pp 29-31, 34-38).

Finally, the defendant complains that Dr. Valentino's testimony exceeded the scope of the pretrial agreement to limit his testimony to the SBI form. It did not. The SBI form referenced the victim's "spinal cord injury and paralysis" and his "quadriplegia" (*see* Supp EX#2). The

few questions the prosecution asked about memory loss related to those conditions—that is, the prosecution asked if unconsciousness or short-term memory loss might result from those conditions (TR 7/17/2018, pp 166:14-167:11).

Accordingly, to the extent any discovery violation occurred, the district court appropriately addressed it.

Finally, even if this Court were to rule that a discovery violation occurred and the district court's sanction was not sufficiently severe, the defendant cannot establish that any prejudice resulted in this case. *See People v. Kraemer*, 795 P.2d 1371, 1376 (Colo. App. 1990) ("Absent a cogent demonstration of prejudice to the defendant[,]" a discovery violation does not cause reversible error); *see also Acosta*, 338 P.3d at 477 (the goal of any discovery sanction is to cure any prejudice resulting from a violation; thus, absent a showing of prejudice, there cannot be reversible error).

Dr. Valentino's testimony constituted a small portion of the trial, and it primarily focused on an uncontested fact—that is, the victim suffered SBI (TR 7/17/2018, pp 160-64). Any testimony beyond the SBI

finding was brief, generalized, and not specific to this case. Indeed, the questions the defendant identifies as improper constitute less than one page of transcript (TR 7/17/2018, pp 166:14-167:11), and the prosecution did not rely on those responses during argument (*see* TR 7/17/2018, pp 78-87, 98-102).[8]

Accordingly, no demonstrable prejudice occurred here, and thus, reversal is not required.

---

[8] The defendant suggests that "the prosecution used [Dr.] Valentino's testimony to bolster the credibility of [the victim's] later statements" (OB, p 38 (citing TR 7/18/2018, p 83:20-25)). But the five sentences from the prosecution's closing argument that the defendant relies on do not mention Dr. Valentino or his testimony; instead, the prosecution urged the jury to rely on reason and common sense:

> Over time [the victim's] been trying to piece together exactly what happened. *And you use your reason and common sense and your own life experiences, and you know that sometimes those memories come back in patches, and sometimes you fill in the gaps a little bit.* But since the night after his attack, whenever he was first fully conscious, [the victim] has always had one thing the same, and that is that [the defendant] was at least one of his attackers. Since he regained consciousness fully, that has never changed.

(TR 7/18/2018, pp 83:19-84:1) (emphasis added).

E. Dr. Valentino's testimony did not exceed the scope of his expertise.

The defendant's final contention is that Dr. Valentino's testimony exceeded the scope of his expertise (OB, pp 39-41).[9]

Experts may be qualified to offer scientific, technical, or specialized knowledge if it will assist the jury and they are qualified by knowledge, skill, experience, training, or education. CRE 702. Courts have broad discretion to determine whether an expert is qualified in an area based on professional experience. *White v. People*, 486 P.2d 4, 6 (Colo. 1971). The standard for expert qualification is broad—to be qualified, an expert "need not hold a specific degree, training certificate, accreditation, or membership in a professional organization." *Golob v. People*, 180 P.3d 1006, 1012 (Colo. 2008) (internal quotation omitted).

"A witness must be qualified as an expert before testifying about his or her expert opinions." *People v. McFee*, 2016 COA 97, ¶88 (citing

---

[9] While defense counsel objected that "this is all outside this expert's endorsement" and "[n]one of this was provided to Defense," defense counsel did not argue Dr. Valentino's testimony fell outside of the scope of his expertise (*see* TR 7/17/2018, pp 164-67). Thus, this claim should be reviewed only for plain error. *See Hagos*, ¶14.

Stewart, 55 P.3d at 124). "Even after a witness has been qualified as an expert, however, the witness's expert opinion testimony must still be limited to the scope of his or her expertise." *Id.* (citing *Melville v. Southward*, 791 P.2d 383, 388 (Colo. 1990); *People v. Gomez*, 632 P.2d 586, 593 (Colo. 1981)).

Here, Dr. Valentino was endorsed as an expert in emergency medicine (CF, p 54), and after he detailed his education and experience at trial, he was qualified as an expert in that field (TR 7/17/2018, pp 156-60). Dr. Valentino explained that he is board certified in "general surgery and critical care," and in practice, he "specialize[s] in general surgery and what's called acute care surgery: emergency, general surgery, and trauma" (TR 7/17/2018, pp 157:6-8, 158:6-9). When asked, he described his duties as follows:

> I'm an attending general and trauma surgeon. So I evaluate patients in the emergency room that have been traumatically injured, and I care for them throughout the hospital stay, either taking them to surgery, caring for them in the intensive care unit, or on the wards as needed.

(TR 7/17/2018, pp 158:22-159:3).

On appeal, the defendant contends Dr. Valentino's brief testimony about memory loss fell outside the scope of his expertise, because he did not outline specific training related to brain functioning, memory loss, or behavioral neurology (OB, pp 40-41). But common-sense dictates that any medical doctor would be qualified to offer the type of general testimony that Dr. Valentino offered—that is, that short-term memory loss might result from a serious brain injury and that such memory loss might be recovered later. And in any event, Dr. Valentino's expertise in treating traumatically injured patients sufficiently supported his brief testimony that a person might be rendered unconscious or suffer from some short-term memory loss following a serious head injury (*see* TR 7/17/2018, pp 156-60, 166:14-167:11).

Regardless, Dr. Valentino's testimony was not so *obviously* beyond the scope of his expertise that the district court should have stopped it without the benefit of an objection to that effect. And any error was not substantial given that Dr. Valentino's testimony about memory loss was brief and did not refer to the victim or the victim's specific situation. Thus, no plain error occurred (and any preserved error was harmless).

III. No misconduct occurred during the prosecution's closing or rebuttal arguments.

The defendant complains the prosecution committed misconduct by misstating the facts during closing argument (OB, pp 42-45).

A. Review is for an abuse of discretion.

When evaluating prosecutorial misconduct claims, this Court engages in a two-step analysis: "First, it must determine whether the prosecutor's questionable conduct was improper based on the totality of the circumstances and, second, whether such actions warrant reversal according to the proper standard of review." *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). Each step of this analysis is independently analyzed; thus, conduct could be improper, but not require reversal. *Id.*

The People agree that the defendant only partially preserved this issue (OB, p 42; *see* TR 7/18/2018, pp 80:13-81:5, 100-01).

Where a claim of misconduct is preserved, the standard of review is abuse of discretion. *See People v. Rhea*, 349 P.3d 280, 291 (Colo. App. 2014) (prosecutorial misconduct occurs only when there has been a gross abuse of discretion resulting in prejudice and a denial of justice).

Where the defendant objected, his claim is preserved. Thus, if any instances of prosecutorial misconduct occurred, a non-constitutional harmless error standard of reversal applies. *See id.* (misconduct claims are reviewed for constitutional harmless error only in "limited circumstances"); *see also Wend*, 235 P.3d at 1097 (Only errors that "specifically and directly affect a defendant's constitutional rights are 'constitutional' in nature . . . .' " (quoting *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008))).

Where the defendant did not object, review is only for plain error. *People v. McBride*, 228 P.3d 216, 221 (Colo. App. 2009). Plain error is an extremely high bar and prosecutorial misconduct rarely constitutes plain error. *Id.* To prevail under plain error, the defendant must show that the misconduct was "flagrantly, glaringly, or tremendously improper." *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). And "courts do not reverse convictions to punish prosecutors[; thus,] the defendant must show the arguments so undermined the trial's fundamental fairness as to cast doubt on the judgment's reliability." *McBride*, 228 P.3d at 221 (internal citation omitted).

B. Relevant background.

During its initial closing argument, the prosecution laid out the timeline of events as developed through the testimony at trial, including the fight between A.M. and "Journey" about a dog that was a precursor to this violent assault (*see* TR 7/18/2018, pp 78-84). While setting forth that timeline, the prosecution stated without objection:

> Ladies and gentlemen, whether Journey left to go get help in attacking [the victim] or whether it was a crime of opportunity, again, is immaterial. I would argue that the evidence suggests, using your reason and common sense, that this was orchestrated, this was planned, that Journey had his fight with [the victim]. He was so mad, he left.
>
> He wanted to really hurt [the victim] as much as he possibly could, and he enlisted help. Dirty Dog, being new to town, "I'll help you out; I don't have anything else goin' on today." And they find [the victim] under the pavilion, and that's where the attack takes place.
>
> Immediately afterwards, police find Dirty Dog hiding in the bushes a hundred yards away, after witnesses on scene say the person who did this is wearing a baseball cap with metal clips on it, a vest with the Confederate flag, and the name "Dirty Dog" on the vest. [The defendant] is found in the bushes less than a minute's walk away,

> hiding underneath those bushes within five minutes of the attack, matching that description.

(TR 7/18/2018, pp 80:13-81:5).

During defense counsel's closing argument, counsel responded by calling the prosecution's theory a "grand conspiracy" based on "complete speculation" (TR 7/18/2018, pp 87-88). And he maintained this theme throughout his argument, asserting the evidence failed to demonstrate that the defendant was the person who attacked and injured the victim and the victim's account of the incident could not be relied upon (TR 7/18/2018, pp 87-98).

In rebuttal, the prosecution responded to that line of argument by focusing on the evidence offered at trial and urging the jury to focus on the evidence which showed the defendant's involvement in the attack (TR 7/18/2018, pp 98-102). In doing so, the prosecution again suggested that, when he attacked the victim, the defendant might have been assisting "Journey":

> Perhaps Journey got Dirty Dog to do his dirty work for him. Journey needed help. He was not happy about that dog. I don't think that that's going to be disputed by anybody. This was going

> on for two weeks. He was so mad about that dog. Dirty Dog was new in town. Maybe he approached him, said, "I need help with somethin' " and he decided he'd go along with it. But why on earth would the witnesses make up this grand story about seeing this happen and watching him run over to the bushes by the police station when he was brand-new to town? That doesn't make sense. What makes sense is that Journey got help from somebody else to help him do his dirty work.

(TR 7/18/2018, p 100:14-24).

The defendant objected to that argument, asserting "[t]his is facts not in evidence" (TR 7/18/2018, pp 100:25-101:1). The court overruled that objection but reminded the jurors that it was their responsibility to determine what facts had been proven (TR 7/18/2018, p 101:2-3).

C. The prosecution did not misstate the evidence or mislead the jury.

The prosecution has wide latitude during closing arguments to comment on the evidence presented at trial and reasonable inferences drawn therefrom. *Domingo-Gomez*, 125 P.3d at 1047-48. Argument can also point to different pieces of evidence and explain their significance within the case, and it may also touch upon the instructions of law. *Id.* Further, the prosecution may employ rhetorical devices so long as those

devices stay within ethical boundaries in that they do not induce the jury to determine guilt based on passion or prejudice, state a personal opinion about the guilt or credibility of witnesses, or attempt to inject irrelevant issues into the case. *Id.* at 1048-49.

The prosecution may strike hard blows, but not foul ones. *Wend*, 235 P.3d at 1096. "Given the sometimes fuzzy line between hard-but-fair blows and foul blows, and because arguments delivered in the heat of trial are not always perfectly scripted, reviewing courts accord prosecutors the benefit of doubt where remarks are 'ambiguous,' or simply 'inartful.' " *McBride*, 228 P.3d at 221. And the "contention that the prosecution engaged in improper argument must be evaluated in the context of the argument as a whole and in light of the evidence presented." *People v. Davalos*, 30 P.3d 841, 844 (Colo. App. 2001).

During rebuttal argument in particular, a prosecutor is afforded considerable latitude in replying to an argument raised by opposing counsel. *People v. Vialpando*, 804 P.2d 219, 225 (Colo. App. 1990). And in considering whether prosecutorial remarks during rebuttal are improper, this Court must weigh the impact of the remarks on the trial

while also considering the remarks in light of defense counsel's "opening salvo." *Id.* Thus, when a prosecutor's remarks are properly responsive to defense counsel's arguments and are based on reasonable inferences from the evidence, they generally will not be considered improper. *See, e.g., People v. Gladney*, 250 P.3d 762, 769-70 (Colo. App. 2010); *People v. Brooks*, 950 P.2d 649, 653-54 (Colo. App. 1997).

Factors to consider, in evaluating the cumulative effect of a closing argument, include: (1) the language used; (2) the context in which the statements were made; and (3) the strength of the evidence supporting the conviction. *Domingo-Gomez*, 125 P.3d at 1053.

Here, the prosecution's argument relied on fair inferences drawn from the evidence at trial—that is, the evidence of verbal disagreements between many people, including the victim, "Journey," and "Dirty Dog"—the defendant (*see* TR 7/17/2018, pp 110-19). Furthermore, the prosecution's argument was that the evidence showed the defendant was part of the fight *whatever his reason* for getting involved in it, and the prosecution emphasized that point with references to the complicity instruction (*see* TR 7/18/2018, pp 78-87).

Accordingly, the prosecution did not misstate the evidence and it did not mislead the jury; thus, no prosecutorial misconduct occurred.

Even if the prosecution's argument was inartful, any misconduct here was harmless and certainly not plain given the victim's testimony identifying the defendant as an attacker (TR 7/17/2018, pp 110-19, 138-41). Moreover, the jury was told the arguments of counsel were not evidence, and the court reinforced that message in its response to the defense objection during the prosecution's rebuttal argument (*see* TR 7/17/2018, pp 92:7-12, 93:9-17; TR 7/18/2018, p 101:2-3).

Accordingly, if any misconduct occurred during closing or rebuttal arguments, reversal is not required under any standard.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the defendant's convictions.

PHILIP J. WEISER
Attorney General

/s/ Jacob R. Lofgren
JACOB R. LOFGREN, 40904*
Senior Assistant Attorney General
Criminal Appeals Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **JULIA CHAMBERLIN**, Deputy State Public Defender, and all parties herein via Colorado Courts E-filing (CCE) on December 31, 2021.

/s/ Jacob R. Lofgren

MATTER ID: 7878
AG FILE: