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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203 Appeal; Arapahoe District Court; Honorable Andrew Baum and Honorable Eric B. White; and Case Number 2019CR695	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant DAVID JOSEPH CHAPEL	
Megan A. Ring Colorado State Public Defender JEFFREY A. WERMER 1300 Broadway, Suite 300 Denver, CO 80203 Phone Number: (303) 764-1400 Fax Number: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #52370	Case Number: 2020CA711
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

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

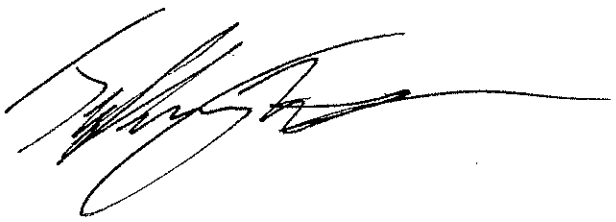
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 8,758 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

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

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



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2. Did the district court reversibly err by applying its *Miranda* suppression order to the defense and by excluding otherwise admissible statements as "self-serving"?

3. Did the prosecutor commit reversible misconduct by mischaracterizing and denigrating the defense and misleading the jury about its role as finder of fact?

STATEMENT OF THE CASE

The State charged Mr. Chapel with first degree criminal trespass[1] of Marixa Rivera-De Arteago and Patricia Balderrama's house and second degree criminal trespass of Kim Nguyen's backyard.[2] The jury convicted him of both charges. CF, pp 8-9, 107-08; TR 2/26/2020, p 138:7-14. The district court found Mr. Chapel's case to be "a deeply mitigated situation" and sentenced him to two years of probation with the possibility of early termination after one year. TR 2/26/2020, pp 145:23-146:17.

[1] F5, § 18-4-502, C.R.S.
[2] M3, § 18-4-503(1)(a), C.R.S.

STATEMENT OF THE FACTS

The Denver Metropolitan Area was exceptionally cold during the early morning hours of March 3, 2019. *See* Chris Spears, "Denver Weather: Coldest Early March Temps in Nearly 60 years," CBS Denver (March 3, 2019 7:00 a.m.), https://denver.cbslocal.com/2019/03/03/denver-weather-near-record-cold/. The City of Aurora had over a foot of snow on the ground with temperatures between -6 and 6 degrees Fahrenheit. TR 2/26/2020, pp 12:7-12, 94:7-11.

On the afternoon of March 2, 2019, Mr. Chapel's neighbors invited him to a house party. Mr. Chapel had been drinking and his memory of that night was imperfect. He remembered getting to the party before the sun went down but could not remember exactly when. Although the party was near his own house, he did not know to which house he went. He drank more at the party. ENV 1, EX 15, at 00:13-00:52.

While at the party, Mr. Chapel passed out and slept until he awoke around 4 a.m. to "a loud noise and everybody running." He did not know what the loud noise was, but said, "I woke up in a panic. I think somebody got into a fight." Mr. Chapel "freaked out." He followed one of the fleeing partygoers "out the back door, over the balcony, and over that fence . . . ." *Id.* at 00:53-1:32.

Mr. Chapel had difficulty remembering what happened after he fled the party. He told the police, he "hopped a couple fences in a panic" as he fled through the snow. *Id.* at 1:32-1:41.

Nguyen, who lived nearby, heard a noise in her backyard and checked her security camera. ENV 1, EX 1. She "saw a person running back and forth and trying to come up to my deck" and thought he was "try breaking in." TR 2/25/2020, p 174:15-175:2. She called the police. There was no evidence Mr. Chapel entered Nguyen's home.

Meanwhile, Mr. Chapel still panicked left Nguyen's backyard. While making his way through the snow, he lost a boot and twisted his ankle. He found himself at another house, which belonged to Rivera-De Arteago and Balderrama, and fell asleep against an outside door. He woke and found that the door pushed open into a garage. So he went inside where he huddled in the corner of the room for warmth. Mr. Chapel "fell asleep for a little bit longer" and awoke "in a panic because [his] fingers—felt like the skin was melting off of [his] fingers because it was so cold." ENV. 1, EX 15, at 1:30-1:45, 2:50-3:06.

Mr. Chapel stumbled through another door and down a stairway into Rivera-De Arteago's basement apartment. He said Rivera De-Arteago saw he "was in pain and all shook up so she helped me out." *Id.* at 3:49-3:52. Mr. Chapel said, "I was

startled like, I didn't know, I felt terrible." *Id.* at 4:40-4:42. He said, "She was in shock but then she seen I was in pain and she takes me to the stove." *Id.* at 4:50-4:55. Mr. Chapel said he left after she asked him to leave. *Id.* at 4:55-5:40.

Rivera De-Arteago and Balderrama generally agreed with Mr. Chapel's account. Rivera De-Arteago testified she woke around 4:00 a.m. to find an unfamiliar person in her home.[3] She testified:

> I found this person basically right in front of me. I saw him like he was in pain. It was—the weather was cold at the time, very cold. I saw this person and it impacted me to see this person right in front of me. I asked the person who he was. He answered to me in Spanish. He said something like (speaking in Spanish). I asked him what he was doing there. He didn't answer because he was very cold. He was shivering. I imagine that he came in because it was very cold outside. There was a thick layer of snow.

TR 2/25/2020, p 200:4-16.

Rivera De-Arteago was compassionate and "felt sorry for [Mr. Chapel] in that moment," so she lit her kitchen stove for him to warm his hands and feet. *Id.* at 205:11-19, 207:8-11. She thought his "feet were frozen" and noticed he could not stop shivering. *Id.* at 209:8-16.

[3] Rivera-De Arteago had difficulty identifying Mr. Chapel at trial. TR 2/25/2020, pp 201:18-202:14.

Balderrama heard a noise and came downstairs. She testified, "I went downstairs to the basement. There was a man. He had taken his shoes off. It was very cold. He had his hands on the stove. [Rivera-De Arteago] was there with him and all he was saying was, I'm sorry, and that he was very cold." TR 2/26/2020, p 8:16-20. She thought "he was looking for shelter. It was a very cold evening." *Id.* at 10:22-23. She told Mr. Chapel to leave and called the police.

Rivera De-Arteago told a defense investigator "that she didn't know for how long [Mr. Chapel] ha[d] been there before she woke up, but since the moment they started interacting up until the moment he left it was around 15 to 20 minutes." *Id.* at 81:23-82:1. At trial, she testified she interacted with Mr. Chapel for "only a few instances." TR 2/25/2020, p 207:7.

Everyone agreed Mr. Chapel did not fight or argue when asked to leave. He left the house, and the police arrested him in the driveway. TR 2/25/2020, pp 200:16-22, 203:18-21, 206:21-207:1; TR 2/26/2020, pp 10:11-11:4.

SUMMARY OF THE ARGUMENT

1. A district court must allow the choice-of-evils affirmative defense when the defendant proffers some evidence supporting it. When the evidence contains some credible evidence or a scintilla of evidence supporting the defense, the court must instruct the jury on it. Failure to do so eliminates the prosecution's

constitutional burden to disprove an affirmative defense beyond a reasonable doubt and cannot be harmless.

Here, Mr. Chapel was entitled to the choice-of-evils affirmative defense. Viewing the evidence in the light most favorable to Mr. Chapel and resolving all reasonable inferences in his favor, his proffer and the subsequent evidence at trial contained some credible evidence he trespassed first to avoid the dangerous situation in the house where he fell asleep and then to avoid freezing to death. The district court erred by disallowing the defense, and that error lowered the prosecution's burden of proof and deprived the jury of understanding, considering, and applying the controlling law. Reversal is required.

2. The district court erred by prohibiting Mr. Chapel from introducing his statements in his defense. First, the district court erred by ruling that its *Miranda* suppression order prohibited Mr. Chapel from introducing his own statements. A court's suppression order for a *Miranda* violation prohibits the prosecution, not the defense—from using a defendant's statements as evidence of guilt in the prosecution's case-in-chief.

Second, the court erred by excluding Mr. Chapel's statements as "self-serving" even though his statements were admissible hearsay under CRE 803. The

improperly excluded statements were crucial to Mr. Chapel's defense, and reversal is required.

3. A prosecutor cannot mischaracterize or denigrate the defense, mislead the jury, or misstate the facts or law. Here, the prosecutor mischaracterized and denigrated the defense by suggesting that defense counsel sought to improperly introduce evidence in closing argument. The prosecutor misled the jury by arguing that the theory of defense had to be "cast out" and that the jury could "not consider it." Reversal is required.

ARGUMENT

I. Mr. Chapel was entitled to the choice-of-evils defense.

A. Relevant facts.

Before trial, Mr. Chapel endorsed the choice-of-evils defense. CF, p 33. He proffered the following evidence to support the affirmative defense:

- It was between -6 degrees and 6 degrees Fahrenheit on the alleged date of offense[4] with considerable snow on the ground. TR 2/25/2020, pp 25:18-21, 27:17-19, 28:14-15.

[4] The district court took judicial notice of those facts under CRE 201. TR 2/25/2020, pp 23-25.

- Mr. Chapel "was awoken from a safe place" where "he was supposed to stay" and "forced to walk home and it was too cold that night for him to continue on with the journey." Specifically, he heard a "commotion, some sort of fight and he was awoken and people were running out of the house such that other people were jumping off balconies to get out and he followed suit to escape whatever was going on there that was causing the commotion and so this was some sort of unforeseen circumstance." *Id.* at 28-29.
- As Mr. Chapel "was trying to walk back home he lost a boot and was experiencing issues getting home that created a further situation of him getting colder and colder . . . ." *Id.* at 28:14-18.
- Mr. Chapel had a "skin condition essentially, for lack of a better word at the time." *Id.* at 25:22-24.
- Mr. Chapel stated that "his hands [were] cold," that "his skin [was] sticking to each other," that "he felt as if the skin was melting off his hands," that "he [couldn't] feel his fingers or his hands," that he was "constantly saying 'ow' when being put into handcuffs," that he felt "as

if the skin is p[eeling][5] off of his hands as a sensation that he is feeling."

Id. at 25-26.

Defense counsel argued that, interpreting the proffer in the light most favorable to Mr. Chapel and drawing all reasonable inferences in his favor, the proffer fulfilled the constituent parts of a choice-of-evils defense. *Id.* at 25-29.

The prosecution argued that choice of evils was not appropriate and proffered its own facts. *Id.* at 30-32. The district court denied the choice-of-evils defense:

> So the proffer here is essentially that the defendant had been at a residence or place not on his own, had been using some form of substances, was awoken to a commotion and made a decision at that point not to remain in the home to determine—or the residence of the place to determine the source of the commotion but rather to exit that place, put himself into some frigid weather at which point he was then left with a decision about whether to avail himself of shelter not belonging to him or essentially be harmed.
>
> In looking at 18-1-702(1), the Court has to consider whether the defendant's actions were necessary as an emergency measure to avoid in this case imminent private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor. Through no conduct of the actor.
>
> The problem that the Court has here is that there's insufficient information on the proffer that suggests that the defendant was unsafe where he was and rather made a choice to leave what appears to be, from the proffer, a safe

[5] The transcript states the phrase "the skin is peopling off." TR 2/25/2020, p 26:6. When read in context, the transcript should read, "the skin is peeling off."

> place to be; that is, a warm place on a cold night and rather to flee the residence, placing himself in a situation where he was out in the cold and then saying, but then I had no choice but to break into a home, arguably, or to avail myself of the warmth of the house because I chose to leave a place that was otherwise safe and warm.
>
> And I recognize the defense is saying the defendant couldn't have known, arguably, that the place was safe but he didn't stick around long enough to find out, at least by the proffer. He chose to run that night, so I find based upon the proffer that the defendant put himself in the position he was in through his own conduct. He elected to leave a warm place; therefore, I don't find that there's sufficient evidence in the proffer to allow the defense to be given to the jury. I won't allow it.

Id. at 34:24-36:6 (paragraph breaks inserted for readability).

Defense counsel noted the court had to view the evidence and all rational inferences in the light most favorable to Mr. Chapel. She argued, in that light, Mr. Chapel fled the house because it was too dangerous to stay there:

> [W]hen someone hears a loud noise and is awoken by multiple people around them running out of the house and a couple people running of the balcony to get away in the light most favorable to the defense that would indicate that something happened in that house and Mr. Chapel needed to get out and that's the determination that he made.

Id. at 36:7-20. The district court replied, "Thank you for the record. I'll persist in my ruling." *Id.* at 36:21-22.

At trial, the prosecution introduced Mr. Chapel's account to the police about being awoken by a loud noise, people running out of the house off balconies, following them out, and getting lost in the snow. ENV 1, EX 15. And the prosecution's witnesses all agreed it had snowed and was very cold. Balderrama estimated about a foot of snow was on the ground. TR 2/26/2020, p 12:11-12. Rivera-De Arteago testified, "I asked him what he was doing here. He didn't answer because he was very cold. He was shivering. I imagine that he came in because it was very cold outside. There was a very thick layer of snow." TR 2/25/2020, p 200:13-16. She said he would not stop shivering and she thought his feet were frozen. *Id.* at 209:8-16.

The district court's order prevented the jury from considering the choice-of-evils defense. Still, during deliberation, the jury asked, "Is there ever an exception to the law regarding trespassing due to humanitarian reasons or extreme conditions?" CF, p 84.

DATE FILED: February 26, 2020

(For Court use only)

Case No. 19CR695 Question No. 1

JUROR DELIBERATION COMMUNICATION

Communication/Question: Is there ever an exception to the law regarding trespassing due to humanitarian reasons or extreme conditions?

Court Response:
You have receeived all of the law that you may consider in making your decision.

CF, p 84.

When discussing that question with counsel, the district court stated, "[W]hat they want is a new legal theory. They want the theory I've decided they can't consider is the thing." TR 2/26/2020, p 136:2-4. Because the court precluded the choice-of-evils defense, the parties agreed to the court instructing the jury, "You have received all of the law that you may consider in making your decision." *Id.* at pp 136:2-137:7; CF, p 84.

B. Preservation and standard of review.

This claim is preserved. As outlined above, after Mr. Chapel endorsed the choice-of-evils defense and proffered evidence supporting it. The district court precluded the defense. TR 2/25/2020, pp 25-36; CF, p 33.

This Court reviews de novo whether there was a "scintilla of evidence, or some evidence" to raise an affirmative defense. *People v. Wakefield*, 2018 COA 37, ¶¶ 8, 12 (quoting *People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998)); *People v. Brandyberry*, 812 P.2d 674, 678 (Colo. App. 1990). This Court—like the trial court—must view the evidence and all reasonable inferences in the light most favorable to the defendant. *Brandyberry*, 812 P.2d at 678. "It is too well settled to merit further discussion that a trial court is obliged to instruct the jury on a requested affirmative defense if there is any credible evidence, including

even highly improbable testimony of the defendant himself, supporting it." *People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011).

C. The choice-of-evils defense.

Colorado law provides for the affirmative defense of choice of evils. § 18-1-702, C.R.S. The defense justifies otherwise criminal conduct when "necessitated by a specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged." *People v. Robertson*, 36 Colo.App. 367, 369, 543 P.2d 533, 534 (1975); *see Andrews v. People*, 800 P.2d 607, 609-10 (Colo. 1990) (approving *Robertson* and discussing choice of evils in the context of protestors unlawfully obstructing a roadway).[6]

[6] Section 18-1-702(1), C.R.S., provides:

> Unless inconsistent with [the justifiable use of force statutes], or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

Choice of evils serves as an affirmative defense to nearly every crime. *Brandyberry*, 812 P.2d at 677 ("Because of the breadth of the intended applicability of that defense, it is virtually impossible to specify either the character of conduct or the circumstances to which it might apply."). The choice between risking one's life or health in extreme weather and trespassing on another's property is a classic example of choice of evils. *See, e.g.*, *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908) ("It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop."); Wayne R. LaFave, 2 Subst. Crim. L. § 10.1(c) (3d ed.) ("The master of a ship forced by a storm to take refuge in a port in order to save the lives of those on board is not guilty of violating an embargo forbidding entry into that port." (citing *The William Gray*, 29 F. Cas. 1300 (No. 17,694) (C.C.D.N.Y. 1810))); *id.* (discussing the Model Penal Code commentators suggesting the defense is available where "a mountain climber lost in a storm takes refuge in a house and appropriates provisions"). "This doctrine of necessity applies with special force to the preservation of human life."[7] *Ploof*, 71 A. at 189.

[7] Before state and federal law codified the choice-of-evils defense, common law sources referred to it as the doctrine or defense of necessity. *See* Wayne R. LaFave, 2 Subst. Crim. L. § 10.1(a) (3d ed.) (discussing the common law doctrine and the codified choice-of-evils defense).

D. When viewed in the light most favorable to Mr. Chapel, the evidence and rational inferences showed he went onto another's property to save himself from freezing to death.

When the defendant presents some evidence to support the choice-of-evils defense, the district court must allow the defense. *Brandyberry*, 812 P.2d at 678. In determining whether there was some evidence, this Court, like the district court, must view the evidence and all rational inferences in the light most favorable to the defendant. *Id.*

Here, when viewed in the light most favorable to Mr. Chapel and resolving all reasonable inferences in his favor, Mr. Chapel's offer of proof[8] and the subsequent evidence at trial raised some credible evidence to support the choice-of-evils defense. The district court erred because it neither viewed the evidence in the light most favorable to Mr. Chapel nor resolved all reasonable inferences in his favor.

Defense counsel's proffer—and the evidence at trial—showed that, on the alleged date of offense, it was between -6 degrees and 6 degrees with a foot of snow on the ground. Mr. Chapel fell asleep at a neighbor's house until a loud commotion

[8] Unlike other affirmative defenses, "when evidence relating" to the choice-of-evils defense "is offered by the defendant, before it is submitted for consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification." § 18-1-702(2). Mr. Chapel fulfilled that procedural requirement by making an offer of proof before trial.

woke him. He thought there was a fight and saw people fleeing the house, even jumping off the balcony. Mr. Chapel was frightened and fled the house. Without hat, gloves, or heavy coat, Mr. Chapel soon began to freeze and felt like his hands were melting. Mr. Chapel found his way inside the home to save his health and his life. The unknown danger within the house, the extremely cold weather conditions, and the lack of hat, gloves, and winter jacket left Mr. Chapel with a choice of evils: find shelter in someone's home or endanger his health and his life. That proffer raised some credible evidence supporting each constituent part of the choice-of-evils defense. Accordingly, the district court had to instruct the jury about the choice-of-evils defense.

The only Colorado case to address the choice-of-evils defense to the crime of trespass provides little guidance. In *People v. Trujillo*, 682 P.2d 499 (Colo. App. 1984), the trial court presided over a bench trial where, as factfinder, it rejected the defendant's choice-of-evils defense and convicted him of trespass. Unlike in *Trujillo*, the jury here was prohibited from considering and applying the choice-of-evils defense.

Contrary to the district court's determination, Mr. Chapel did not simply "elect[] to leave a warm place." TR 2/25/2020, p 36:3-6. Indeed, the court's ruling shows it improperly weighed the evidence against Mr. Chapel: "I recognize that the

defense is saying the defendant couldn't have known, arguably, that the place was safe but he didn't stick around long enough to find out, at least by the proffer. He chose to run that night, so I find based upon the proffer that the defendant put himself in the position he was in through his own conduct." TR 2/25/2020, pp 35:23-36:3.

Such weighing was a duty for the jury, not the district court. As defense counsel said, when viewed in the light most favorable to Mr. Chapel, being awoken by a loud noise with people running around and running off the balcony would lead a person to believe he was not safe and had to leave the house immediately: "[S]omething happened in that house and Mr. Chapel needed to leave and that's the determination that he made." *Id.* at 36:14-20.

The district court erred by weighing the evidence against Mr. Chapel and precluding the jury from applying the choice-of-evils defense.

E. Disallowing the choice-of-evils defense lowered the prosecution's burden of proof.

The United States and Colorado Constitutions require the prosecution to prove every element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Colo. Const. art. II, § 25. In Colorado, an affirmative defense becomes an additional element of the crime. *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005). Disallowing a properly raised affirmative defense lowers the prosecution's burden of proof. *Id.* "[S]uch error cannot be deemed harmless." *Id.*

The error here was not harmless. During deliberation, the jury expressed concern about whether the law might justify Mr. Chapel's conduct "due to humanitarian reasons or extreme conditions." TR 2/26/2020, p 134:20-22; CF, p 84. The court's error removed the prosecution's burden to disprove an element of the offense and prevented the jury from considering the governing law. Reversal is required.

II. The district court reversibly erred by applying its *Miranda* suppression order to the defense and by excluding otherwise admissible statements as "self-serving."

A. Standard of review and preservation.

This Court reviews questions of law de novo. *People v. Delgado*, 2019 CO 82, ¶ 13. Generally, this Court reviews evidentiary issues for an abuse of discretion. *People v. Dominguez*, 2019 COA 78, ¶ 13. However, the district court has no discretion to misapply or misunderstand the law, and the district court's application or interpretation of the law when making an evidentiary ruling is a question of law reviewed de novo. *Id.* (reviewing trial court's application of hearsay law de novo).

This claim is preserved as outlined below.

B. Relevant facts.

After arresting and placing Mr. Chapel in a police car, the police questioned him without first reading the *Miranda* warnings. After taking him to the police

station, the police read Mr. Chapel the *Miranda* warnings and interrogated him. Mr. Chapel moved to suppress his statements in the car for a *Miranda* violation and the statements at the police station as the result of a two-step interrogation process. CF, pp 28-31. After hearing testimony and reviewing body camera footage, the court suppressed most[9] of the statements Mr. Chapel made in the police car. TR 1/8/2020, pp 65:20-66:3. The district court did not suppress his statements at the police station. *Id.* at 66-69.

The body camera showed that, while in the police car, Mr. Chapel repeatedly moaned in pain and told the police he was in shock, he was freezing, his hands were cold, his fingers hurt, and he felt like his fingertips were falling off. He repeatedly asked for gloves and asked the police to look at his fingers. Supp ENV 1, People's EX 1, Gruszeczka, Roch_2019-03-03_04-34-42.AVI, at 00:50-5:50.

At trial, Mr. Chapel sought to elicit his statements in the car describing his physical condition to the police. The prosecution objected, arguing the court had suppressed those statements. TR 2/26/2020, p 48:10-17.

Defense counsel argued the suppression order applied to the prosecution's case-in chief and did not preclude the defense from introducing the statements. And

[9] The court found his one statement was spontaneous and did not suppress that statement. TR 1/8/2019, p 65:6-19.

she argued the statements were admissible under CRE 803(3)'s exception to the hearsay bar as statements of Mr. Chapel's then-existing physical condition. *Id.* at 48:18-49:13. At the court's request, defense counsel cited cases describing how a suppression order suppresses unwarned custodial statements in the government's case-in-chief. *Id.* at 52-55.

The district court asked defense counsel whether she was withdrawing her objection to any *Miranda* violation. Defense counsel said she was for "[t]hese specific statements, yes." *Id.* at 57:8-11.

The court asked, "So you think—you think you can pick and choose which statements you elect to ask me to admit and which violations I should decide benefit you and which ones benefit the People?" *Id.* at 57:12-15.

Defense counsel argued a defendant could waive a constitutional violation and introduce statements suppressed in the government's case-in-chief. She argued, "This is essentially the same thing as the impeachment exception, admitting certain statements and the prosecution being able to challenge then those statements and get into them despite the Court's ruling." *Id.* at 59:19-23.

The prosecution argued the defense should have selected which statements she wanted to suppress during the motions phase instead of filing "a blanket suppression motion." *Id.* at 60:5-10. The prosecution also argued that it could not

"impeach here because of course the officer's on the stand, not the defendant." *Id.* at 60:18-20.

The court ruled:

> Court: There are two issues. The first is essentially this ability the defense asserts that it has to pick and choose which of these suppressed statements it should be able to inquire of of [sic] this witness, so this isn't a question of whether the defendant ultimately chooses to testify and may be cross-examined about those statements, this is about a hearsay witness being now permitted to testify as to those statements. I'm not persuaded that the authority I have before me is sufficient to allow the defense to now go into an area that I had ordered suppressed at their request without a waiver or withdrawal of their request that I take action based upon what I found to be a *Miranda* violation. Even if I were to allow the defense to go into this area, specifically the proffer was the defense wants to ask the officer a series of questions leading up to the fact that the defendant says his hands hurt or they're cold, something to that effect. That's self-serving hearsay, particularly in light of the defense that seems to be on track here; therefore, even if I were to admit this statement, that is, if I were to allow the defense to get into an area that I had deemed to be suppressed, it still is self-serving hearsay, so the result, even if I were to allow it is that I would sustain the People's objection as this is self-serving hearsay so I'll not allow the defense to ask that question.

Defense: Can I verify two things?

Court: Sure, you can.

Defense: So is this Court ruling that it made a suppression order to suppress the statements for both the defense and the prosecution?

Court: Yeah.

Defense: Okay. So I'm objecting to that order under the U.S. and Colorado Constitutions as I don't believe that it is consistent with the case law and I don't believe that the Court has the authority to suppress statements for purposes of the defense under the right to present a defense, right to due process.

Further, so is this Court saying—is this Court ruling that statements that "hands hurt" does not fall under the 803.3 hearsay exception?

Court: I'm finding that their violative of the self-serving hearsay exception, so they may relate to his condition, however, I find that their self-serving nature essentially trumps the other exception.

Defense: So you're finding that the defense could never meet a hearsay exception, it's always hearsay—self-serving hearsay regardless of whether the defense meets a hearsay exception?

Court: No, not at all. I'm not saying that at all. I'm ruling on this argument at this time on this issue.

> Defense: That that statement doesn't meet the 803.3 exception?
>
> Court: That's right, that it's self-serving hearsay.
>
> Defense: Because it's self-serving hearsay it doesn't meet the exception?
>
> Court: Yes.
>
> Defense: Is the Court finding that that's not a statement of present emotional or physical condition?
>
> Court: I'm finding that it is self-serving hearsay. That's what you're going to get out of me, [counsel].
>
> Defense: Okay. And I'm objecting to that as well under the right to present a defense and right to due process under the U.S. and Colorado Constitutions.
>
> Court: Sure. Noted. All right. So that's what we've got here.

Id. at 61:11-64:3 (emphasis added). The court did not allow defense counsel to elicit those statements.

Later, defense counsel informed the court she intended to call Officer Godfrey as a defense witness but she was concerned the court would not admit Godfrey's testimony based on its earlier ruling. *Id.* at 67:16-68:6. She explained, "Officer Godfrey would testify that he assessed [Mr. Chapel's] hands and he decided not to call medical, but it wasn't Mr. Chapel who denied care, he just left it up to the

officers." Officer Godfrey would also testify that Mr. Chapel said, "I can't feel my fingers." *Id.* at 68:10-18.

The prosecution objected that the statements were suppressed, irrelevant, and self-serving hearsay. *Id.* at 68:24-69:18. Defense counsel argued Mr. Chapel's "physical condition at that time" was relevant to whether he formed the requisite culpable mental state. *Id.* at 69:22-25. She continued:

> With regard to the suppression ruling, I maintain my position prior that the case law says it's the prosecution's cases in chief. Cross-examination is not the prosecution's case in chief and this would meet the 803.3 exception which applies to self-serving hearsay. Self-serving hearsay is subject to hearsay exceptions as well and the defense is able to admit statements under hearsay exceptions as well.

Id. at 70:8-14.

She explained she was waiving the *Miranda* violation only "with regard to specific statements that we are eliciting." *Id.* at 70:19-25.

The following exchange then occurred:

> Court: Do you agree that this statement to Officer Godfrey would fall within the time period that I suppressed based on the lack of *Miranda*?
>
> Defense: Yes. We are waiving the violation of his constitutional rights with regard to certain statements.

Court: All right. So you, again, you want to waive as to the statements you want to elicit but not all statements that were improperly obtained?

Defense: Yes, as is the defendant's right.

Court: All right. So as it relates to these statements—and I'll view this kind of a motion in limine—as it relates to these statements made by the defendant to Officer Godfrey during the time period that I have found would be improperly obtained, that is, post lack of *Miranda*, the Court will persist in its prior evidentiary ruling on the same grounds logically that I earlier ruled that this is an area that's been suppressed. I cannot find that the defense may pick and choose which statements that have been suppressed it may then turn to having received the blanket suppression order. I'll persist in that prior ruling.

As it relates to the hearsay issue, I view this as different than the prior statement. These statements as they relate to hearsay, directly relate to the defendant's medical condition and so were I to permit this area of inquiry as non-violative of *Miranda*, my decision would be different as it relates to hearsay because Officer Godrey was specifically talking to the defendant about his condition as it relates to medical issues; however, based upon my concern and my earlier ruling related to the defense's ability to selectively pick and choose suppressed statements to talk about to produce evidence regarding cross-examination during the People's case in

> chief, I will persist for all the logical reasons
> I noted earlier as consistent with that ruling.

Id. at 71:1-72:10. Following the court's ruling, defense counsel did not call Officer Godfrey.

C. Legal principles.

i. A suppression order under Miranda *does not prohibit the defendant from eliciting his statements.*

The Fifth Amendment guarantees the right against self-incrimination, and the *Miranda* warnings protect that right during custodial interrogation. U.S. Const. V; *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *People v. Cline*, 2019 CO 33, ¶ 15. Before subjecting a defendant to custodial interrogation, the police must advise the defendant of certain procedural safeguards: e.g. the right to silence and to an attorney. *Cline*, ¶ 15.

"The sanction for failing to advise a suspect of his *Miranda* rights is to deny the government the opportunity to introduce the statement as part of its case-in chief." *Pollard v. Garza*, 290 F.3d 1030, 1036 (9th Cir. 2002); *accord. Miranda*, 384 U.S. at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."); *Cline*, ¶ 15 (quoting same). But a statement suppressed

for a *Miranda* violation may be admitted for other purposes. *See Harris v. New York*, 401 U.S. 222, 225-26 (1971) (admissible to impeach defendant's trial testimony); *see also Michigan v. Tucker*, 417 U.S. 433, 451 (1974) (testimony of third-party witness was admissible despite its discovery from *Miranda* violation). "Of course, the inability of the prosecution to use the defendant's statements would not prevent their admission where the defendant voluntarily seeks their introduction." *Groshart v. United States*, 392 F.2d 172, 178 n.4 (9th Cir. 1968), *abrogated on other grounds by Harris*, 401 U.S. 222.

ii. The Colorado Rules of Evidence do not exclude a defendant's statements that fall under an exception to the hearsay bar because those statements were "self-serving."

The Colorado Rules of Evidence strongly favor the admission of relevant evidence. *King v. People*, 785 P.2d 596, 603 n.7 (Colo. 1990). Although hearsay evidence is generally inadmissible under CRE 802, CRE 803 provides numerous exceptions that allow for admissibility. Such statements "are not excluded by the hearsay rule, even though the declarant is available as a witness." CRE 803.

CRE 803(3) provides for admitting "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it

relates to the execution, revocation, identification, or terms of declarant's will." CRE 803(3). A contemporaneous description of the declarant's physical pain falls under that exception and is admissible. *See People v. Pena*, 173 P.3d 1107, 1112 (Colo. 2007) (declarant's statement that "her wrists were sore from being held down" was "within the scope of CRE 803(3) and thus was admissible"); *People v. Phillips*, 2012 COA 176, ¶ 119 (declarant's statement "about his ear hurting was admissible for its truth under CRE 803(3), as an indication of [the declarant's] then existing physical condition.").

CRE 803(4) provides for admitting "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

So-called "self-serving hearsay" does not appear in the Rules of Evidence. *See* CRE 801-807. The rules do not contain a "self-serving" exception to admissibility under CRE 803. CRE 803 does not distinguish between statements by a defendant or any other declarant. *Cf.* CRE 801(d)(2) (providing that statements

made by a party opponent is not hearsay and, by inference, that statements made by the offering party must meet a hearsay exception to be admissible).[10]

D. The district court misunderstood and misapplied the law.

The district court excluded Mr. Chapel's evidence based on a misunderstanding and misapplication of the law. Neither its suppression order nor the Rules of Evidence provide a basis for excluding his statements.

First, the court erred by applying its suppression order to the defense. *Miranda* prohibits the prosecution from using unwarned statements in the government's case-in-chief. *See Miranda*, 384 U.S. at 444; *Cline*, ¶ 15. Unlike involuntary statements, unwarned statements are admissible for other purposes. Failing to warn a defendant before custodial interrogation does not prohibit the defendant from introducing his own statements.[11] *See People v. Grant*, 174 P.3d

[10] Under CRE 106 and the rule of completeness, when a defendant seeks admission of his statement to correct a misleading impression from the prosecution's introduction of a partial statement, our courts are split on whether a district court may exclude the defendant's statement as "self-serving." *See People v. Short*, 2018 COA 47, ¶¶ 43-49 (holding that "otherwise inadmissible self-serving hearsay was admissible under the rule of completeness" and rejecting the contrary positions taken in *People v. Zubiate*, 2013 COA 69, ¶ 33, and *People v. Davis*, 218 P.3d 718, 731 (Colo. App. 2008)). But that questionable doctrine does not apply here because Mr. Chapel's statements were admissible under CRE 803.

[11] In a case with no majority opinion, three Supreme Court justices opined that *Miranda* is not violated until the prosecution introduces an unwarned statement in its case-in-chief. *United States v. Patane*, 542 U.S. 630, 641-42 (2004) (opinion of

798, 803 (Colo. App. 2007) (defendant could not argue admitting his statements violated *Miranda* where he introduced his statements in his defense).

The district court was concerned about potential unfairness of allowing defense counsel to introduce inculpatory statements while preventing the prosecution from introducing exculpatory statements. But the remedy for such potential unfairness is more evidence, not less. If introducing some statements would risk confusing or misleading the jury, the prosecution may invoke the rule of completeness to place the statement in context. *See* CRE 106; *People v. Melillo*, 25 P.3d 769, 775-776 (Colo. 2001) (discussing the rule of completeness). And under the doctrine of opening the door, the district court may allow the prosecution to inquire into the matter further. *Melillo*, 25 P.3d at 775 (discussing opening the door). Under either principle, the prosecution's evidence must still be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. *See id.* at 775-77 (holding that evidence otherwise barred by the rape shield statute was not admissible under either principle because its probative value was substantially outweighed by the danger of unfair prejudice).

Thomas, J.). Following that reasoning, the defense's introduction of unwarned statements cannot violate *Miranda*.

But here, the court improperly extended its suppression order to the defense. Upon retrial, the prosecution may argue for introducing some of the suppressed statements under the rule of completeness or the doctrine of opening the door. When determining admissibility, the district court must apply CRE 401, 402, and 403 in light of its order suppressing those statements in the prosecution's case-in-chief. *See Melillo*, 25 P.3d at 775-77.

Second, the district court erred by misapplying Colorado's hearsay rules. While in the police car, Mr. Chapel told the police he was cold, shocked, freezing, his fingers hurt, and he felt like his fingers were falling off. Those statements were descriptions of his then-existing physical condition and admissible under CRE 803(3). *See Pena*, 173 P.3d at 1112. Because the statements were relevant to his defense and fell within a hearsay exception, the court should have admitted the statements. To the extent the district court believed those statements were not statements of physical condition under CRE 803(3), the court abused its discretion by misunderstanding the law.

So-called "self-serving hearsay" was not a basis for excluding Mr. Chapel's statements. To the extent the district court believed a "self-serving hearsay exception" trumped CRE 803(3), that was incorrect. The rule contains no such exception. *See* CRE 803.

Because Mr. Chapel's statements were admissible under CRE 803(3) and (4) and because they were relevant to his defense, the court should have admitted the statements.

E. Reversal is required.

The United States and Colorado Constitutions guarantee a defendant a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Krutsinger v. People*, 219 P.3d 1054, 1060-61 (Colo. 2009). The improper restriction of defense evidence can violate the right to present a complete defense. *Crane*, 476 U.S. at 690; *Krutsinger*, 219 P.3d at 1061.

When the improper restriction of defense evidence "deprives the defendant of any meaningful opportunity to present a complete defense[,]" that error requires reversal unless the State proves the error was harmless beyond a reasonable doubt. *Krutsinger*, 219 P.3d at 1060-61. Such an error requires reversal unless "the guilty verdict in [the] trial was surely unattributable to the error." *People v. Osorio-Bahena*, 2013 COA 55, ¶ 17; *see also Bernal v. People*, 44 P.3d 184, 200 (Colo. 2002) (the court must be "confident beyond a reasonable doubt that the error did not contribute to the guilty verdict"). The State bears the burden of proving an error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *James v. People*, 2018 CO 72, ¶ 18.

Here, the State cannot meet that burden. Mr. Chapel's theory of defense was that he did not knowingly trespass because he was freezing and in intense pain. The court's error excluded crucial evidence supporting that defense. Mr. Chapel described himself as freezing, panicked, and in shock. He described his fingers as hurting, freezing, melting, and falling off. He made those statements moments after his alleged trespass. The statements were significant evidence of his mental state.

Moreover, the prosecutor exploited the court's erroneous ruling to argue that there was no evidence that Mr. Chapel "was so cold that he was not aware he was trespassing." TR 2/26/2020, p 121:11-13. Mr. Chapel's statements supported that defense, but the prosecutor successfully removed them from the jury's consideration.

Reversal is required.

III. The prosecutor mischaracterized and denigrated the defense and misled the jury.

A. Relevant facts.

Mr. Chapel's theory of defense was that he was so cold he did not form the requisite mental state of knowingly. [12] In closing, defense counsel argued, "Mr. Chapel was in such a physical state of freezing numbness that he was not aware that

[12] Defense counsel did not argue Mr. Chapel was incapable of forming the requisite mental. Rather, counsel argued he did not form the requisite mental state.

he was trespassing." TR 2/26/2020, p 118:11-12. And she directed the jury to evidence supporting the defense. *Id.* at 116-119.

In rebuttal, the prosecutor argued Mr. Chapel's defense "cannot be considered" by the jury:

> At the beginning of this trial I told you that it would be critically important for you to keep track of what is evidence in this case versus what is argument. As we all know, evidence is what comes from the witness stand and it is the only thing that you can rely upon in determining your verdict. Everything else that does not come from the witness stand is therefore argument and cannot be considered, so it's necessary to actually categorize some of the things that you heard in defense counsel's closing as either evidence versus argument, what you cannot consider.
>
> What has been asserted as argument here? Again, that the defendant was so cold that he was not aware he was trespassing. Members of the jury room, you have only heard that from one place, that's defense counsel. No one in this case ever said that. There's not a single fact, not a single piece of evidence in this case which came from the witness stand which would support it, which means that the entire argument, the entire defense actually has to be cast out. You cannot consider it.

Id. at 120:25-121:19 (paragraph break inserted for clarity).

Defense counsel objected:

> For the district attorney to say that our entire defense has to be cast out is, in my opinion,

> disparaging our defense, disparaging defense counsel, disparaging the defendant. He's essentially saying that everything that we have said is false and not supported by the evidence. If he wants to say that's not supported by the evidence or that they don't have evidence to come to our defense that is one thing, but to say that our entire defense must be cast out I feel is taking it too far.

TR 2/26/2020, pp 121:24-122:7.

The prosecution simply responded, "This is closing argument." The district court overruled the objection and said in front of the jury, "You may continue."

The prosecutor then said, "Thank you. This entire defense can be cast out." *Id*. at 122:15-16.

B. Standard of review and preservation.

Courts use a two-step analysis for prosecutorial misconduct claims. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010); *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). First, the court determines "whether the prosecutor's questionable conduct was improper based on the totality of the circumstances . . . ." *Wend*, 235 P.3d at 1096. Second, the court determines whether the misconduct "warrant[s] reversal according to the proper standard of review." *Id.*

This claim is preserved. Mr. Chapel objected to the prosecutor's argument that the "entire defense has to be cast out," arguing it was "disparaging our defense, disparaging defense counsel, disparaging the defendant." Counsel continued, "He's

essentially saying that everything that we have said is false and not supported by the evidence. If he wants to say that's not supported by the evidence or that they don't have evidence to come to our defense that is one thing, but to say that our entire defense must be cast out I feel is taking it too far." TR 2/26/2020, pp 121:24-122:7. The district court overruled the objection. *Id*. at 122:10-11. Crim. P. 52(a); *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (courts do not require "talismanic language" to preserve an objection).

C. The prosecutor misled the jury, misstated the evidence, and mischaracterized and denigrated the defense.

Prosecutors have "a duty to avoid using improper methods designed to obtain an unjust result." *Domingo-Gomez*, 125 P.3d at 1048. "Closing argument can never be used to mislead or unduly influence the jury." *Domingo-Gomez*, 125 P.3d at 1048. Prosecutors cannot misstate the facts or the law and cannot mischaracterize or denigrate the defense. *People v. Monroe*, 2020 CO 67, ¶ 16 ("It is improper for counsel to misstate the law or 'misinterpret[] for the jury how the law should be applied to the facts' during closing argument." (quoting *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723, 732 (1978)); *People v. Nardine*, 2016 COA 85, ¶¶ 35, 67 (prosecutor committed misconduct by "mischaracteriz[ing] and denigrat[ing] the defense theory"). "Even in light of the wide latitude given for oral arguments,

arguments and rhetorical flourishes must stay within the ethical boundaries" drawn by the supreme court. *Domingo-Gomez*, 125 P.3d at 1048.

Here, the prosecutor's argument misled the jury about the role of circumstantial evidence and reasonable inferences, and by mischaracterizing and denigrating Mr. Chapel's defense.

Colorado law gives jurors the right to consider direct and circumstantial evidence and to "draw reasonable inferences from" that evidence. *People v. Donald*, 2020 CO 24, ¶ 27; *accord. People v. Bennett*, 183 Colo. 125, 515 P.2d 466, 469 (1973) (discussing the factfinder's "right to draw all justifiable inferences of fact from the evidence"). Circumstantial evidence is "indirect" and "based on observations of related facts that may lead [the jury] to reach a conclusion about a fact in question." COLJI-Crim. D:01. Indeed, "[d]irect evidence will rarely be available to establish a defendant's mental state," and juries routinely consider "circumstantial evidence and permissible inferences drawn therefrom" to determine what a defendant was thinking at a particular moment in time. *People v. Frayer*, 661 P.2d 1189, 1191 (Colo. App. 1982). "No person can pinpoint thoughts in the mind of another, but a jury can examine the facts to conclude what another must have been thinking." *White v. Muniz*, 999 P.2d 814, 817 (Colo. 2000).

Accordingly, the district court here instructed the jury, "You are to consider only the evidence in the case and reasonable inferences therefrom. An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved." CF, p 93. Defense counsel asked the jury to consider the evidence and reasonable inferences therefrom that supported its theory of defense: Mr. Chapel did not knowingly trespass because he was so cold and in pain. That theory was supported by the following evidence: Mr. Chapel was outside in the dark in a foot of snow while it was -6 degrees; his hands and feet were freezing; he could not stop shivering; he could not answer Rivera-De Arteago's questions because he was so cold. While no witness testified that Mr. Chapel was so cold he did not knowingly trespass, such direct evidence of a mental state would be unusual.

Still, the prosecutor argued, "[T]he entire argument, the entire defense must be cast out. You cannot consider it." But, of course, the jury can consider closing argument, otherwise courts would prohibit argument altogether. Defense counsel argued reasonable inferences from the evidence that supported the theory of defense. The prosecutor's argument mischaracterized the defense and misled the jury about its role during deliberation. *See Nardine*, ¶ 46 (prosecutor's mischaracterizing and denigrating defense theory was error).

That the prosecutor could have made a similar, proper argument—e.g. asking the jury to consider whether the evidence and inferences supported the theory of defense—does not diminish the error here. The prosecutor's argument suggested defense counsel either made up evidence or snuck in improper evidence. Prosecutors cannot denigrate the defense or defense theory. *See id.*

Because Mr. Chapel objected to the prosecutor's improper argument, this Court reviews for harmless error and must reverse unless the State can prove the error was harmless. *James*, ¶ 18. To be harmless, the State must demonstrate "that there is no reasonable probability the error adversely affected the outcome." *People v. Williams*, 2020 CO 78, ¶ 24.

The State cannot do so here. The prosecutor improperly argued that the jury was prohibited from considering the theory of defense. In doing so, the prosecutor mischaracterized and denigrated the defense and misled the jury about the facts and law. "Because the prosecutor represents the State and the People of Colorado, their 'argument is likely to have significant persuasive force with the jury.'" *Domingo-Gomez*, 125 P.3d at 1049 (quoting ABA Standards, § 3-5.8 cmt.).

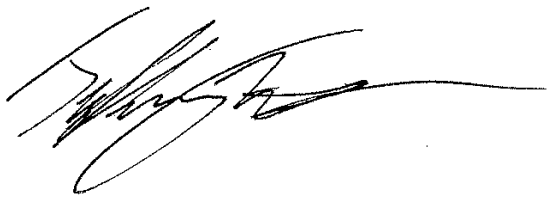
By overruling defense counsel's objection and telling the prosecutor to continue, the district court effectively told the jury that the prosecutor was correct. It effectively told the jury it could not consider Mr. Chapel's defense. *Cf. People v.*

Anderson, 991 P.2d 319, 321 (Colo. App. 1999) ("When a court, upon proper objection, declines to direct the jury that the prosecutor's version of the instructions is incorrect, the court improperly permits the jury to adopt the prosecutor's version of the law."). Reversal is required.

CONCLUSION

For the reasons and authorities presented, Mr. Chapel respectfully requests this Court reverse the conviction.

MEGAN A. RING
Colorado State Public Defender



JEFFREY A. WERMER, #52370
Deputy State Public Defender
Attorneys for DAVID JOSEPH CHAPEL
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on January 22, 2021, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's Office through their AG Criminal Appeals account.

K. Root