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COLORADO SUPREME COURT
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Ave.
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals, 2016CA244
District Court, Adams County, 14CR1760

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

JORGE ORNELAS-LICANO,

Respondent.

▲ **COURT USE ONLY** ▲

Case No. 2020SC430

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PEOPLE'S 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:

The brief complies with C.A.R. 28(g).

It contains 9,247 words.

The brief complies with C.A.R. 28(k).

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

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

/s/ John T. Lee

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ISSUE GRANTED

Whether the court of appeals erred in adopting the Sixth Circuit's red flag checklist for discerning the reliability of scientific-based expert testimony and extending it to experience-based expert testimony to override the trial court's admission of an expert's opinion that the shapes of bullet holes through glass are indicative of the angle from where the shots were fired.

INTRODUCTION

When it comes to whether a party may call an experience-based expert, this Court recognized from its beginning that "There can be but one answer." *Colorado Midland Ry. Co. v. O'Brien,* 16 Colo. 219, 228, 27 P. 701, 704 (1891). Upon proper foundation, a party is "entitled to call . . . witnesses of skill and experience. …" *Id.* CRE 702 codifies that long-standing principle by allowing testimony from experts qualified "by knowledge, skill, experience, training, or education." This multitude of potential expert opinions is necessary because "[a]n intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge." Fed. R. Evid. 702, advisory committee's note; *accord People v. Williams*,

790 P.2d 796, 798 (Colo. 1990). To that end, the rules governing expert opinion demand a "broad" and "liberal" inquiry into the admissibility of expert testimony. *People v. Shreck,* 22 P.3d 68, 77-78 (Colo. 2001).

The question here is whether the district court correctly admitted the expert's experience-based opinion that a shot fired through glass from a non-perpendicular angle leaves a different shape than a shot fired through glass from a perpendicular angle. A majority of a division of the court of appeals rejected the district court's finding that the opinion was reliable and, in so doing, embraced the Sixth Circuit's red-flag checklist for reviewing all expert testimony. That the Sixth Circuit test was designed for scientific-based expert testimony did not deter the majority from applying it to the experience-based testimony here. The majority also built its opinion around its disagreement with the expert's ultimate opinion.

But the question now before this Court is resolved by a direct application of this Court's precedent—which disavows any set checklist and only requires proof that the underlying methods and data behind

the opinion are *reasonably* reliable. As the district court held, the expert's opinion was reliable because it was based on simple observation and empiricism gained through extensive personalized experience. The expert further proved the reliability of his opinion through a shooting reconstruction test, using the same gun, exit point, type of ammo, and type of windshields involved in the actual shooting. As the People's expert based his opinion on extensive empirical experience that was objective, testable, and actually tested and confirmed, this Court should reverse the court of appeals.

STATEMENT OF THE CASE

I. The crime and trial proceedings.

A. The defendant flees six officers and makes good on his threat that he would rather shoot at them than go to jail.

In December of 2014, two warrants were issued for the defendant's arrest. TR 11/3/15, pp 141-42. The defendant told a friend on multiple occasions that, rather than go to jail, if the police tried to arrest him, he "would shoot at the police and have a shootout." TR

11/3/15, pp 41-42. The defendant started carrying his gun with him at all times. TR 11/3/15, pp 41-42. The police became aware of that information as they planned on how to arrest the defendant on his outstanding warrants. TR 11/3/15, p 77:6-9.

When the police received a report about the defendant's location, six officers went to arrest him. TR 11/3/15, pp 77-82. At the scene, the officers found the defendant sitting in his parked truck and talking to two women outside of the truck. TR 11/3/15, p 92:1-20. The officers activated their lights, parked their cars around the defendant's truck, and ordered the two women to go across the street. TR 11/3/15, p 92:21-23. One of the officers told the defendant he was under arrest and to put his hands up. TR 11/3/15, p 95:5-24. The defendant complied and put his hands on his head. TR 11/3/15, p 98:23-24.

But then the officers noticed that the defendant's truck started rolling forward. TR 11/3/15, p 99:1-3. The defendant put his left hand against his head and told the officers to shoot him "right here." TR 11/3/15, p 99:10-12. The defendant dropped both of his hands out of

view and made hand movements. TR 11/3/15, pp 100-01, 151:6-10. The defendant then drove off. TR 11/3/15, pp 101-02. The officers got back in their cars and pursued the defendant. TR 11/3/15, p 103:4-20.

Officer Jacob Schneider heard about the chase over the radio, drove towards that area, and saw police cars chasing the defendant's truck. TR 11/6/15, pp 6-11. Officer Schneider stopped his car and activated his lights. TR 11/6/15, pp 13-14. The defendant turned right and headed towards Officer Schneider's car. TR 11/6/16, pp 11-16. As the cars drew near, the defendant fired a shot at Officer Schneider. TR 11/6/16, p 12:21-22. The defendant continued his flight from the officers. TR 11/6/16, pp 19-20.

The defendant later crashed his truck into another car and fled the scene. TR 11/5/16, pp 71-73. After hiding in a shed overnight, the defendant was arrested at a Dollar Store the next day. TR 11/5/16, p 95:2-7. During an interview at the police station, the defendant claimed he had put a gun in his hand because the police were acting like "Rambo," and he wanted to be "Rambo" too. Ex. 9B; TR 11/5/16, p 95:8-

15. Still, the defendant claimed that his gun accidentally discharged when he was holding it and shifting gears. TR 11/5/15, p 97:13-17, 122-23.

B. The People's expert testifies that shooting through glass from a non-perpendicular angle leaves a different shape than shooting from a perpendicular angle.

Although the defense received notice prior to trial that the People intended to call Investigator Daniel Gilliam as an expert in ballistics and crime scene investigation, the defense waited until trial before objecting to his proposed testimony. CF, p 23; TR 11/3/15, pp 228-30. Over the People's objection, the trial court held a *Shreck* hearing. TR 11/3/15, p 236:8-16; TR 11/4/15, p 52:15-17.

At the *Shreck* hearing, Investigator Gilliam testified that he had worked with firearms for thirty-six years. TR 11/4/15, p 56:25. He started training with firearms when he started as a patrol officer in 1981. TR 11/4/15, p 57:3-5. Since then, he had received yearly qualifications. TR 11/4/15, p 57:5. Investigator Gilliam spent six years

on the SWAT team, where he was the sniper, which required heavy firearms training. TR 11/4/15, pp 47-48. And for the past six years, he had worked as a firearm and tool mark examiner, shooting and testing guns almost daily. TR 11/4/15, p 57:8-10.

With respect to terminal ballistics, Gilliam had attended several training sessions. TR 11/4/15, p 58:1-6. When he was a sniper, given that he was required to shoot at distances between 25 to 1,000 yards, he had to "understand the effect of the bullet traveling down the barrel, the friction, the heat, the departure of that bullet from the barrel into an environment, because it changes whether you're shooting with a standard barrel or a suppressed barrel. And then the flight of that bullet, that affects the wind, temperature, humidity, all those things." TR 11/4/15, p 58:7-12. He also used terminal ballistics when he investigated crime scenes and did autopsies because they required understanding what a bullet does upon impact. TR 11/4/15, p 58:13-15. To that end, he had tested shooting through different barriers, to learn

the "terminal effect" of those barriers, such as glass or car doors on fired bullets. TR 11/4/15, p 58:18-19.

While Investigator Gilliam had no formal education in physics, he had "quite a bit" of experience in dealing with physics as it related to ballistics. TR 11/4/15, p 59:3-5. Concerning a bullet's impact through a windshield, he had shot through a windshield "many times" and "pretty much every which way." TR 11/4/15, p 59:11; 60:5-7. He had also taken a training class held by a sniper team from Pittsburg, where he spent 40 hours shooting through windshields and other glass then studying the impact and patterns the shots had on the glass. TR 11/4/15, p 59:14-23 ("Some would fall apart; others would create spalling pattens, and so on and so forth.").

In this case, after examining the windshield of the defendant's truck, Investigator Gilliam opined from his experience that the shot came from a different angle than the one described by the defendant's account of the shooting. TR 11/4/15, p 60:14-15. Investigator Gilliam purchased two new windshields, procured the same type of ammunition

and firearm used in the shooting, and shot from the angle he thought it could have come from and from the angle that the defendant had claimed. TR 11/4/15, p 60:16-23; *Shreck* Ex. 1. Investigator Gilliam then compared the two different bullet holes from the two shots in the windshields and reached an opinion on which angle the shot came from. TR 11/4/15, p 61:8-19.

On cross-examination, the investigator acknowledged that terminal ballistics was entirely based on physics and he had no special training in that area. TR 11/4/15, p 66:1-13. After establishing that windshields are made out of laminated glass and that it behaves differently from other glass, defense counsel asked the witness if he had any specific training on evaluating bullet holes in laminated glass. TR 11/4/15, p 66:9-17. The witness explained that his knowledge on that topic was based on experience, as he had shot through approximately 100 windshields. TR 11/4/15, p 66:19-20.

The trial court found that the evidence was reliable and relevant. TR 11/4/15, p 74:4-7. Although Investigator Gilliam lacked formal

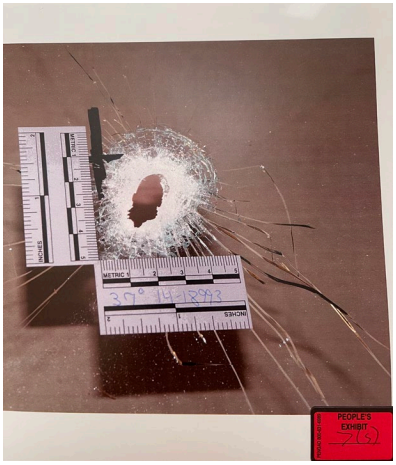
education in physics, the trial court found he was qualified by his training and wealth of experience. TR 11/4/15, p 74:20-23.

Before the jury, Investigator Gilliam testified that in looking at the shape of the bullet hole in the defendant's windshield, he did not think that the shot came from the defendant holding the gun near the stick shift. TR 11/4/15, pp 95-96. A shot from such a position would have been from a perpendicular angle and left a different impact on the glass. TR 11/4/15, pp 99-101.

Investigator Gilliam then testified about his re-creation tests. TR 11/4/15, pp 109-10; *see* Ex. 8A and Ex. 8B (recorded video of shooting test). He explained that using the same gun, and the same type of ammunition and windshield, he re-created a shot from the angle of a "natural shooting position" and one replicating a shot from the stick shift. TR 11/4/15, pp 111-13, 121-22; Exs. 7A-7Z (photographs of shooting reconstruction and results). Based on the test, and the shape of the hole left on the glass, Investigator Gilliam thought that the shot

had come "closer to the natural shooting position" and not from the stick shift. TR 11/4/15, pp 116-23.

Consistent with his opinion, the shot taken during the reconstruction test from the natural angle left an elliptical hole:



That hole also matched the elliptical shape of the hole left in the defendant's windshield:

Actual shot next to test shot from natural shooting position.

On the other hand, the shot taken from the stick shift angle left a more circular hole:

Still, the defendant later called his own expert in "external and terminal ballistics as well as shooting reconstruction." TR 11/9/15, pp 24-25. The defense's ballistics expert testified that the existence of too many unknown variables diminished the precision of any shooting reconstruction, and he could not reach any specific conclusions as to where the gun was located at the time of the shooting. TR 11/9/15, pp 32-35. Relying on that evidence, the defendant's theory at trial was that the gun went off accidentally from the stick shift. TR 11/3/15, pp 30-38; TR 11/10/15, pp 58-74.

C. The jury finds the defendant guilty.

Among other crimes, the People charged the defendant with attempted first-degree murder after deliberation, attempted second-degree murder, and attempted first-degree assault – extreme indifference. CF, pp 1-22. At trial, the court submitted attempted second-degree murder and attempted first-degree assault – extreme indifference to the jury as lesser-included offenses of the attempted first-degree murder charge. CF, pp 155-64. The jury found the defendant guilty of attempted second-degree murder, vehicular eluding, possession of a defaced firearm, leaving the scene of an accident, reckless driving, and prohibited use of a weapon. CF, pp 128-32, 198-200; TR 11/12/15, pp 2-4. The trial court sentenced the defendant to 24 years in prison. CF, pp 198-200.

II. A divided division of the court of appeals reverses the defendant's judgment of conviction.

A. The majority finds that the expert's opinion was not reliable.

A majority of the court of appeals concluded that the trial court abused its discretion in admitting the People's expert's testimony that

he could tell based on the shape of an impact hole in a windshield the angle where the shot likely came from. In the majority's view, the record was "devoid of any showing" that the shape of a bullet hole in a windshield is determinative of the angle at which the bullet struck the glass." *People v. Ornelas-Licano*, 2020 COA 62, ¶ 46. "No evidence was presented that the existence of such a relationship had been subject to peer review or was scientifically sound or generally accepted." *Id.* at ¶ 47. Applying a "red flag" checklist from the Sixth Circuit that cautions against certifying an expert, the majority concluded that the People had failed to establish that the methodology for the opinion was reliable because all of the "red flags" were present. *Id.* at ¶¶ 57-58. For example, the majority found that the expert's hypothesis regarding the relationship between the angle of impact and the shape of a bullet hole was based on anecdotal observations from his training and experience. *Id.* The majority determined that the error was not harmless, and it reversed the defendant's attempted second-degree murder conviction.

B. The dissent finds that the record supported admitting the expert's opinion.

Judge Berger dissented and would have affirmed. According to Judge Berger, the witness's experience of shooting through glass hundreds of times and observing the impact it had established a sufficient relationship between the expert's opinion and methodology. *Id.* at ¶ 78. The reliability of his opinion was buttressed by his empirical test of reconstructing the shooting through two windshields at two different angles. *Id.* at ¶ 79. Accordingly, Judge Berger concluded that the trial court did not abuse its discretion in admitting the evidence. *Id.* at ¶ 80.

STANDARDS OF REVIEW

A trial court has broad discretion to determine the admissibility of expert opinion evidence. *See, e.g. Golob v. People*, 180 P.3d 1006, 1011 (Colo. 2008). This deference reflects the superior opportunity of the trial judge to assess the competence of the expert and to assess whether the

expert's opinion will be helpful to the jury. *Rector v People*, 248 P.3d 1196, 1120 (Colo. 2011).

The defendant preserved his objection that the expert's opinion and his shooting reconstruction were inadmissible because they lacked reliability. TR 11/3/15, pp 226-33, 41-43; TR 11/4/15, pp 51-55. This Court recently twice reviewed what it believed to be the erroneous admission of expert opinion for harmless error. *See People v. Baker*, 2021 CO 29, ¶ 38; *Lawrence v. People*, 2021 CO 28, ¶ 56. Harmless error review permits reversal only if the error "affects the substantial rights of the parties." *Baker*, ¶ 38. An error affects a party's substantial rights if it "substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.* (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)).

SUMMARY OF THE ARGUMENT

The majority's opinion is flawed in several respects, but the central flaw is its failure to apply the appropriate legal standard. The majority improperly imported a stringent reliability test from the Sixth

Circuit that was designed to apply to scientific-based testimony. It further misconstrued the appropriate standard when it focused its analysis on whether it agreed with the expert's conclusion rather than reviewing whether the means he used to arrive at his opinion were reasonably reliable.

The majority's approach flouts this Court's precedent and should be reversed. This Court's cases have always taken a flexible and pragmatic approach and have held that no set of immutable factors apply. The necessity for that flexible approach is at its apex in the context of experience-based expert testimony. Although experience-based experts may not have relied on the same scientific principles as some scientific experts, as this Court's cases have found, experience-based expert testimony can be relevant and reliable. The majority's analysis also requires reversal because it pays no heed to this Court's repeated emphasis that a court should review the reliability of the methods the expert used, not the conclusions they generate.

Accordingly, the district court's reliability determination should be reviewed under this Court's standard of whether the methods the expert used were reasonably reliable. But under any standard, his opinion was properly admitted. Under this Court's correct standard, the expert's experience shooting through windshields with firearms and noticing what impacts different shots left through the glass was reliable because it was based on objective observation. Any potential reliability concerns were resolved when the expert tested and confirmed his opinion—using the same firearm, type of ammo, type of windshield, and shooting angles potentially involved in the case. Even if the Sixth Circuit factors apply, those factors favor admitting the expert's opinion. Because that test provides that when those factors are present an expert's opinion should not be admitted, and none of those factors were present here, that test confirms that the district court properly found the expert's opinion was reliable.

ARGUMENT

I. The majority wrongly applied factors that pertain to the validity of scientific-based opinion and improperly focused on the conclusion rather than the method by which it was reached.

Experience-based expert testimony was traditionally favored over theory-based expert testimony, and adopting the idea it should "be distrusted and targeted for exclusion ... would turn evidence law on its head." *Marron v. Stromstad*, 123 P.3d 992, 1007 (Alaska 2005) (internal quotations omitted). Yet that is what the majority did. Although the majority correctly recognized that a court need not consider any specific set of factors in evaluating the reliability of an expert's opinion, the majority discarded that principle when it imported a "red flag" checklist from the Sixth Circuit. By requiring that the expert's opinion needed to overcome that "red flag" checklist, the majority improperly slammed the door shut on relevant and reliable experience-based expert evidence. The majority compounded its analytical error by improperly focusing on whether it agreed with the expert's ultimate opinion. In so doing, the majority answered the wrong question and got the issue backwards.

The operative question was whether the district court abused its discretion by finding that Investigator Gilliam's opinion was based on reasonably reliable methods. It was.

A. The majority wrongly imported factors that pertain to the validity of scientific-based and not experience-based expert opinion.

Even before the enactment of the Colorado Rules of Evidence, this Court defined an expert as "one who has superior knowledge of a subject, and is therefore able to afford the tribunal having the matter under consideration a special assistance, and his knowledge may have been acquired by professional, scientific, or technical training or by *practical experience in some field of human activity* conferring on him an especial knowledge not shared by men in general." *Ausmus v. People*, 47 Colo. 167, 188, 107 P. 204, 212 (1909); *see also Venalonzo v. People*, 2017 CO 9, ¶ 23.

Even then, a witness's experience alone could serve as a reliable basis for an expert opinion. *See, e.g.*, *Bradford v. People*, 22 Colo. 157, 160, 43 P. 1013, 1015 (1896) (holding that bank employee's two-years of

experience examining handwriting provided him with a superior and reliable basis to offer an expert opinion on handwriting).

The Colorado Rules of Evidence now "provide the modern guidelines for the admissibility of expert testimony." *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007). The rules favor "the admissibility of relevant evidence unless otherwise directed by constitution, statute, or rule." *Kaufman v. People*, 202 P.3d 542, 442 (Colo. 2009). Under CRE 402, all relevant evidence is admissible, except as otherwise provided by Constitution, rules, or statute. "Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401.

CRE 702 governs the admissibility of expert testimony. *See, e.g., Venalonzo*, ¶ 18. When interpreting a rule, this Court employs the same interpretive rules applicable to statutory construction. *See People v. Steen*, 2014 CO 9, ¶ 10. Thus, the Court strives to adopt the construction that best carries out the purposes of the rule. *See Kazadi v.*

People, 2012 CO 73, ¶ 11. To do so, the language of a Rule is given its "commonly understood and accepted meaning." *Leaffer v. Zarlengo*, 44 P.3d 1072, 1078 (Colo. 2002). If the language of the rule is unambiguous, this Court applies "the rule as written." *People v. Angel*, 2012 CO 34, ¶ 17. Under CRE 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

According to the majority, the Sixth Circuit "developed a useful framework for evaluating the reliability of an expert's opinion, explaining that there are a number of "red flags" that caution against certifying an expert." *Ornelas-Licano*, ¶ 57 (internal quotations omitted) (citing *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012) (listing the "red flags" as (1) "reliance on anecdotal evidence"; (2) "improper extrapolation"; (3) "failure to consider other possible causes"; (4) "lack of testing"; (5) "subjectivity"; and (6) that "a

purported expert's opinion was prepared solely for litigation")). Importing that test, the majority reasoned that "[e]ach of these red flags, to one degree or another, is present here." *Ornelas-Licano*, ¶ 58. The majority determined, therefore, that the "prevalence of these red flags" established the trial court abused its discretion by admitting the "officer's expert testimony. *See id.* ¶ 58.

The majority's reliance on the Sixth Circuit's "red flag" checklist was misplaced at the start. *Newell* listed a number of "red flags" for considering "whether the reasoning or methodology underlying the testimony was scientifically valid" under the reliability test set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *See Newell*, 676 F.3d at 527. But *Daubert*'s scientific validity test is "not designed for experience-based specialized knowledge." *Brooks v. People*, 975 P.2d 1105, 1106 (Colo. 1999). Indeed, the *Newell* checklist traces back to *Downs v. Perstorp Components, Inc.*, 126 F. Supp.2d 1090, 1125-28 (E.D. Tenn. 1999), and as that case provides, the checklist was designed for and based on cases addressing the admissibility of scientific-based

expert testimony, *see id.* at 1126-28 (explaining how the factors apply to scientific and technical testimony).

The majority's opinion is also flatly inconsistent with CRE 702 and this Court's precedent interpreting it. Reflecting the diverse grounds upon which an expert's opinion may be based, the plain language of CRE 702 "requires a 'broad' and 'liberal' inquiry into the admissibility of expert testimony." *Golob*, 180 P.3d at 1011; *accord People in Interest of Strodtman,* 293 P.3d 123, 129 (Colo. App. 2011) (noting the CRE 702 has a "broad scope" and should be liberally construed); *People v. Jimenez,* 217 P.3d 841, 866 (Colo. App. 2008) ("[T]he rules of evidence reflect a liberal approach to the admissibility of expert testimony."). This Court has therefore unwaveringly rejected the wooden application of any set of factors in evaluating the admissibility of *experience-based* expert testimony. *See Kutzly v. People*, 2019 CO 55, ¶ 18; *Ruibal v. People*, 2018 CO 93, ¶ 12; *People v. Ramirez,* 155 P.3d 371, 378 (Colo. 2007); *People v. Martinez,* 74 P.3d 316, 322-23 (Colo. 2003); *Shreck*, 22 P.3d at 77-78; *Brooks*, 975 P.2d at 1106; *accord*

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1999) (acknowledging that the factors it identified in *Daubert* "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."). As this Court most recently emphasized, "[d]etermining if expert testimony is reasonably reliable requires considering the totality of the circumstances surrounding the proposed expert testimony and is not contingent on any specific list of factors." *Kutzly*, ¶ 12.

Adherence to the Sixth Circuit's red-flag checklist not only contravenes this Court's controlling framework for admitting expert opinion, but there are problems with the checklist's factors. Under the "red flag" approach, the "lack of testing," which is when "the expert has not even tested the hypothesis he is testifying to, [is] an extremely negative factor." *Downs*, 126 F. Supp. at 1127. But that factor is irreconcilable with CRE 702, as this Court has acknowledged that even an untestable expert opinion may be admissible. *See Est. of Ford v. Eicher*, 250 P.3d 262, 268-69 (Colo. 2011) (holding court could admit

opinion about intrauterine forces theory even though it would be impossible and unethical to test). And while the majority found that the "failure to rule out alternate causes" factor was present, even the Sixth Circuit has recognized the inapplicability of that factor to experience-based testimony. As the Sixth Circuit has explained, while more exacting scrutiny might apply to some experts, so long as the expert meets the level of practice in ruling out causes used by a professional in that field, any weaknesses in methodology will affect the weight and not its admissibility. *See Best v. Lowe's Home Centers*, 563 F.3d 171, 181-82 (6th Cir. 2009).

The checklist's "reliance on anecdotal evidence" factor is also incompatible with the plain language of CRE 702. Under the "anecdotal evidence" factor, an expert should not base "expert opinion upon the expert's own experience or on a few case studies." *Downs*, 126 F. Supp.2d at 1126. But CRE 702 expressly recognizes that an expert may be qualified by virtue *of any one* of the five factors enumerated—

"knowledge, skill, *experience*, training, or education." CRE 702 (emphasis added).

Applying this Court's liberal approach to admitting expert testimony and not the Sixth Circuit's test is particularly necessary given this Court's commonsense understanding of what constitutes expert testimony. The critical factor in distinguishing between lay and expert testimony is the basis for the witness's opinion. *Venalonozo*, ¶ 22. The proper inquiry is not whether a witness draws on his or her personal experiences to inform her testimony; all witnesses rely on their personal experience when testifying. *Id.* An expert's testimony "is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have." *Id.* Under that definition of expert testimony, depending on the depth of the testimony, experience-based expert evidence may include opinions on the common reactions of child sex assault victims, drug jargon, and industry standards. To the extent the Sixth Circuit's "anecdotal evidence" factor and other factors would exclude such

experience-based expert testimony, the test improperly excludes relevant and reliable expert opinion that this Court and others have found admissible. *See Kutzly*, ¶ 18 (affirming admission of expert opinion on common reaction of child sex assault victims and offenders); *United States v. Martinez*, 476 F.3d 961, 967 (D.C. Cir. 2007) ("Expert testimony about the methods of drug organizations is common in drug cases."); *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 415 (Colo. 2004) ("The aid of expert witnesses is often required in order to establish objective evidence of industry standards.").

The "anecdotal evidence" factor also leads to an absurd result that this Court has already gone to lengths to reject: "The rules regarding expert witnesses do not contemplate a result where a [witness] is forbidden to testify as an expert because she was too directly involved in researching and authoring a particular study." *Garrigan v. Bowen*, 243 P.3d 231, 235-39 (Colo. 2010). When a court excludes an expert because he or she was the one who led a particular test or study, "the result is to exclude the individual most likely to render a complete and reliable

explanation" of that test or study. *Id.* "Such a result runs contrary to the truth-seeking purposes of our judicial system." *Id.*

In short, the majority's import of the Sixth Circuit's "red flag" checklist to the experience-based testimony here violates this Court's precedents and the Colorado Rules of Evidence. Those authorities do not require, as the court of appeals determined, that the trial court exclude otherwise reliable experience-based expert opinion because it fails to meet a specific checklist, especially one designed to apply to scientific or technical expert testimony.

B. The majority wrongly focused on the expert's opinion rather than whether the methods used to reach the opinion were reasonably reliable.

The majority's error also has its roots in its sub rosa upending of the operative legal standard. The majority built its analysis around its disagreement with the expert's ultimate opinion. That inquiry proceeded from the entirely wrong premise.

The key in assessing reliability is that determination focuses on the "principles the expert employed. …" *Eicher*, 250 P.3d at 267.

Therefore, the focus "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595; *accord e.g., Kutzly,* ¶18 (analyzing whether the expert's methodology was reasonably reliable); *Eicher*, 263 P.3d at 269 (same); *Shreck*, 22 P.3d at 79 (same); *Martinez*, 74 P.3d at 323 (same).

Just three years ago, this Court considered a case remarkably comparable to this one and found that an expert's opinion based on his experience was reliable. *Kutzly*, ¶ 18 (emphasis added). In *Kutzly*, a child social worker testified about common characteristics of sexual abuse relationships and how children react to sexual abuse. *Id.* at ¶ 5. He based his opinions on an educational background in conjunction with his experience counseling over 1,000 purported child victims of sexual abuse and over 250 purported sex offenders. *Id.* at ¶ 18. Kutlzy argued on appeal that, as a condition of reliability for his opinion, there had to be definitive confirmation "that each suspected victim had been abused and that each suspected offender had committed abuse." *Id.* In rejecting that argument, this Court stressed that a "trial court should

apply a liberal standard that *only requires proof* that the underlying scientific principles are *reasonably* reliable." *Id.* at ¶ 12. There, the suspected offenders and victim's counseled were individuals who were referred to him from entities such as the Sex Offender Management Board. *Id.* Accordingly, this Court held that it was reasonably likely that the expert's patients were actual victims and offenders. *Id.* Thus, his opinions were admissible because they were based on his reasonably reliable experience. *Id.*

Here, the majority's analysis turned that controlling legal standard on its head. Brushing aside this Court's instruction that a court should look at the reliability of the principles used to arrive at the opinion and whether they are reasonably reliable, the majority centered its analysis on whether the People established that the expert's actual opinion was correct. *Ornelas-Licano*, ¶¶ 46-47. According to the majority, "[a]side from Inspector Gilliam's own hypothesis, the record is *devoid of any showing* that the shape of a bullet hole in a windshield is demonstrative or indicative of the angle at which the bullet struck the

glass." *Id.* at ¶ 46. Nor was there "evidence that anyone other than Inspector Gilliam had analyzed the relationship between the angle of impact and the shape of a bullet hole in glass or that his opinion that the existence of a relationship had been subject to peer review or was scientifically sound or generally accepted." *Id.* at ¶ 47 (internal quotations omitted). But it is wrong to disqualify an expert "based on what these witnesses did not know rather than what they did know." *People v. Hankin*, 179 Colo. 70, 75, 498 P.2d 1116, 1118 (1972). By focusing on whether the People proved that the ultimate opinion about the shape of a bullet hole was indicative that it was shot at an angle, the majority improperly disregarded what it was supposed to analyze—whether the methods used to reach the opinion were reasonably reliable.

To the extent the majority demanded proof of "general acceptance" of either the expert's methods or the conclusion he generated, that reasoning resurrected a test that has long since been rejected. *Frye*'s "general acceptance" test was explicitly renounced in the federal courts

nearly thirty years ago. *See Daubert,* 509 U.S. at 593-94. Even before *Daubert*, this Court had repeatedly limited the application of the *Frye* test because it was incongruent with the more liberal approach set forth under the Colorado Rules of Evidence. *See, e.g., Cambell v. People*, 814 P.2d 1, 7 (Colo. 1991) (rejecting that the *Frye* test applied to expert opinion on eyewitness identification); *People v. Hampton*, 746 P.2d 947, 951 (Colo. 1987) (rejecting that *Frye* applied to the admissibility of rape trauma syndrome evidence). In both of those cases, this Court found that general acceptance was irrelevant to expert opinion not relating to novel scientific theories. *Cambell*, 814 P.2d at 7; *Hampton*, 746 P.2d at 951. Even when it comes to novel scientific expert opinion, this Court has repudiated the *Frye* test because "CRE 702 rather than *Frye,* governs a trial court's determination as to whether scientific or other expert testimony should be admitted." *Shreck*, 22 P.3d at 70. As this case shows, the danger in requiring general acceptance is that it unduly restricts the admissibility of reliable evidence that has not yet been qualified as generally accepted. *See id.*

It should therefore come as no surprise there is no support for the majority's assertion that "Colorado case law further supports [its] conclusion." *Ornelas-Licano*, ¶ 52. The majority cited to *Brooks*, *Salcedo v. People*, 999 P.2d 833 (Colo. 2000), and *Ruibal*. *See Ornelas-Licano*, ¶¶ 52-55. But those cases—like this Court's other cases—emphatically affirm that reasonable reliability *of the methods* and not the opinion is the overarching standard.

Indeed, quite apart from holding that experience-based testimony requires an "extensive" foundation *that the opinion is accurate*, *Brooks* expressly rejected the "general acceptance" standard. As this Court explained, "the 'general acceptance' standard is cumbersome and of little value when applied beyond the realm of true 'science.'" 975 P.2d at 1112. Such an "approach does not fit well when applied to expertise which, like that of the dog handler in this case, is based on years of experience and individualized 'know-how' instead of some purportedly universal scientific principle." *Id.* Thus, in listing what elements a proper foundation would include, such as whether a dog is of a breed

characterized by acute power of scent, whether the dog had been trained to follow a track by scent, and whether the dog was found by experience to be reliable in pursuing human tracks and was placed on the trail where the person being tracked was known to have been, *Brooks* explained what factors would make an expert's opinion that the dog tracked a suspect's scent reasonably reliable. *See id.*

This Court's decision in *Ruibal* does not suggest a different standard. There, a forensic pathologist testified that the victim's injuries demonstrated "overkill," which was "a formal term describing multiple injuries focused on one area of the victim's body, indicating that the assailant likely had either a real or perceived emotional attachment to the victim." *Ruibal*, ¶ 9. But that testimony was devoid of support, because the witness "relied on a single treatise as support for the theory of "overkill," which even he did not accept as generally authoritative. …" *Id.* at ¶ 15. Although the witness testified that he had performed many autopsies himself and knew "who confessed to doing what," "he failed to offer even anecdotal, much less empirical, evidence

supporting his conclusion that beatings like the one in this case were likely committed by someone with an emotional connection to the victim." *Id.* That was particularly fatal because the witness defined "overkill" far too narrowly to fit the injuries inflicted in the case to support the witness's opinion. *Id.* Thus, the problems in *Ruibal* were that the expert admitted the data for his opinion was not reasonably reliable nor was his opinion reasonably related to that data.

Nor did *Salcedo* purport to place a greater burden when admitting experience-based expert testimony. In *Salcedo*, an expert based his opinion that there was a "drug courier profile" on the grounds that such a person wears crosses, does not wear wristwatches, travels in blue jeans, decides not to bring books, magazines, or carry-on luggage on planes, and exhibits nervousness. 999 P.2d at 839. But the problem was that law-abiding citizens often exhibited those same behaviors. *Id.* Therefore, the issue in *Salcedo* was that the expert's opinion was not based on reasonably reliable data. *Id.*

What the majority missed here is that its concerns went to weight and not admissibility. *See, e.g.*, *Eicher*, 250 P.3d at 266. If there are concerns about certainty, they are properly addressed through vigorous cross-examination and presentation of contrary evidence—like the defense counter-expert presented here. *See id.*; *accord Daubert,* 509 U.S. at 590. It was not the role of the court of appeals to decide which of the experts was more persuasive. The majority's approach was unprecedented and wrong.

II. The expert's opinion was reasonably reliable.

Considering its flawed analysis, it should therefore come as no surprise that the majority reached the wrong result. Under the proper framework, the record supports the trial court's determination that the objective and testable *methodology* guiding the expert's opinion was reasonably reliable under CRE 702.

The expert did not rely on an unreliable sixth sense or undisclosed secret science to reach his opinion. His opinion was reliable because it was based on simple observation and empiricism gained through

extensive personalized experience. And any concerns that his opinion was nonetheless inadmissible was dispelled by testing his opinion through the shooting reconstruction test and objectively documenting the results.

Even if the majority had been correct in applying the Sixth Circuit's checklist to experience-based expert opinion, it applied those factors wrong. Those factors favored admitting the expert's testimony.

A. Under the correct test, the expert utilized reliable methodologies.

Under the proper framework, the record supports the trial court's determination that the *methodology* guiding the expert's opinion was reasonably reliable under CRE 702. As Judge Berger found, the expert's opinion was reliably based on his past experiences. *Ornelas-Licano*, ¶ 82. The expert had worked with firearms for thirty-six years, including time as a sniper on the swat team as well as a firearm and tool mark examiner, which required the shooting and testing of guns almost daily. He had shot through windshields over a hundred times and "pretty much every which way." He had also taken a training class held by a

sniper team from Pittsburg, where he spent 40 hours shooting through windshields and other glass then studying the resulting patterns on the glass. His opinions gained through shooting through glass at different angles and observing the holes rested on reliable methodology. *Kumho*, 526 U.S. at 156 ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."); *People v. Davis*, 2012 COA 56, ¶ 47 (holding expert's opinion about 211 Crew gang was reliable because it was based on detective's "extensive exposure to the gang"); *see also People v. Wilkerson*, 114 P.3d 874, 876-78 (Colo. 2005) (rejecting expert testimony under CRE 702 because there was no empirical or methodological justification for the expert's opinion); *Trujillo v. Vail Clinic, Inc.*, 2020 COA 126, ¶ 19 applying this Court's standard for determining the reliability of expert opinion, and holding concerns that expert's theory had not been tested, published in peer-reviewed journals, nor gained wide acceptance in the medical field went to weight, not admissibility, when the theory was based on reasonable methods and concepts).

At a basic level, what the majority derides as "fatally" unreliable is nothing more than simple observation confirmed by extensive personalized experience—that shooting through glass at a non-perpendicular angle leaves an elliptical shape while shooting through glass perpendicular does not. The expert's opinion was based on reliable comparative observation. *See, e.g.*, *Martinez*, 74 P.3d at 323 (concluding that the expert's methods were reliable because they were based on empirical data); *Stone v. People*, 157 Colo. 178, 182-83, 401 P.2d 837, 839-40 (1965) (holding that court properly admitted expert's opinion that the glass found on co-defendant was the "same" as the glass from a company's door that was broken into, when the expert, based in part on his practical experience, used an x-ray spectrum to compare the two pieces of glass); *National Fuel Co. v. McNulty*, 65 Colo. 176, 181-82, 177 P. 979, 981 (1919) (a witness was allowed to testify based on experience as an expert coal miner on whether an entry into a mine was a safe place to work); *People v. Fears*, 962 P.2d 272, 284 (Colo. App. 1997) (expert's testimony was reliable because the "comparative processes and

techniques" used to reach the opinion were based on comparing shoe imprints and "assessment on observable factors). The results of Investigator Gilliam's methodology and opinion were self-evident—lining up a non-perpendicular shot and then firing through glass left a particular imprint shape—firing a perpendicular shot did not. The objective nature of the expert's methods alone justifies the district court's admission of the evidence. *See United States v. Martinez-Armestica*, 846 F.3d 436, 445-46 (1st Cir. 2017) (holding that when expert's opinion required him to determine whether the features of the chosen reference gun were consistent with those of the pictured gun, it "was a simple task, requiring a visual comparison of two photographs," and given the "simplicity" of that method, "the district court did not have to consider technical data, such as the method's error rate or whether it had been subjected to peer review, in order to make its reliability determination"); *see also Ramirez*, 155 P.3d at 378 (unreliable evidence is that which has no "analytically sound basis"); *People v. Shanks*, 2019 COA 160, ¶ 36 (holding that experts could testify about

the defendant's general location through cell site analysis, when "prosecution experts generally explained how cell towers work and identified the variables and limitations incorporated into their analysis").

To the extent there was any concern that the expert's opinion was verified only by his "bare assertions," any concern was more than answered by the shooting reconstruction. The expert obtained two new windshields that were the same type as the one in the defendant's truck. The expert fired the defendant's gun through one of the windshields at approximately the same angle as a shot fired from the level of the defendant's truck stick shift as the defendant had alleged. *See* Exs. 71-7Z; *see also* Ex. 8A and Ex. B. He then fired the gun through the second windshield at approximately the same angle as a shoulder-height shot. *See* Exs. 71-7Z; *see also* Ex. 8A and Ex. B. Photos from the shooting reconstruction confirmed that the shot from shoulder height left more of an elliptical bullet hole and the non-perpendicular shot from the stick shift left more of a circular bullet hole. *Compare* Ex.

7F (shot from stick shift angle) *with* Ex. 7S (shot from natural shooting position). The bullet hole from the defendant's actual shot matched the shot taken from the natural position during the reconstruction test. *Compare* Ex. 4O with 7S. Even the defendant's expert agreed that the hole from the shooting reconstruction taken from the shoulder position looked more similar to the hole from the charged shot than the reconstruction shot taken from the stick shift angle. TR 11/9/15, p 46:20-24. As the expert's opinion was based on reliable methodology and confirmed through reliable and repeatable testing—his opinion was neither anecdotal nor based only on his own subjective opinions.[1] *See Martinez*, 74 P.3d at 323; *see also Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345-46 (11th Cir. 2003) (court properly

[1] The reliability of the expert's opinion was also buttressed by the crime scene investigation. As the expert explained in his investigation report which was considered by the district court during the *Shreck* hearing, given the proximity and angle of the stick shift to the bullet hole, he would have expected to have seen soot or stippling on the dash of the defendant's truck had the shot come from the stick shift position, but there was none. *See Shreck* Ex. 1.

exercised in admitting flight path opinion evidence when, despite potential flaws, the methods and results were discernible and empirically testable). Indeed, the reliability of the expert's opinion was confirmed by the defense's own expert. *See Martinez,* 74 P.3d at 323 (when evaluating whether a reliable basis supported an expert's opinion, taking into consideration that at "trial, the defense did not contest" the expert's opinion that subdural hematomas result from massive, violent force). Gilliam's shooting reconstruction test was given to the defendant prior to trial. The defendant hired a ballistics expert, who conducted his own investigation of the defendant's truck. TR 11/9/15, pp 27-35. But the defense expert never "dispute[d] the central assumption of the prosecution expert — that the angle of impact bears a causal relationship with the shape of the bullet hole." *See Ornelas-Licano*, ¶ 89 (J. Berger, dissenting). He instead contended that there were additional variables that Gilliam should have considered when conducting the shooting reconstruction test. As any concerns went to weight not reliability, the district court properly admitted the evidence.

See e.g., *Eicher*, 250 P.3d at 266; *accord Bazemore v. Friday,* 478 U.S. 385, 400 (1986) ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.").

B. Even considering the Sixth Circuit's factors, they favor the admissibility of the expert's opinion.

The majority never should have applied the Sixth Circuit's test to experience-based expert testimony. Nonetheless, those factors, even under Sixth Circuit precedent, support the district court's exercise of its discretion in admitting the expert's testimony.

Improper extrapolation. First and foremost, the officer's opinion did not leap from an accepted premise to an unsupported conclusion as the majority reasoned. *See Downs*, 126 F. Supp. 2d. at 1125 (explaining this factor and providing examples such as when, without any demonstrated connection between a certain chemical substance and injury, an expert opines that there is a connection because there is a demonstrated connection between a similar chemical substance and that injury). Here, there was a direct and demonstrated connection

between the expert's data and his opinion that a perpendicular shot would not have left an elliptical hole in the glass. The expert's opinion was directly tied to his data—the shape of a hole left in glass depending on whether it was fired from a perpendicular or non-perpendicular angle. To the extent the expert's opinion needed a more demonstrated connection, his reconstitution test supplied it. As the non-perpendicular shot left an elliptical hole and the perpendicular shot did not—the results of the reconstruction test demonstrated the connection between his methods and his opinion.

Reliance on anecdotal evidence. As discussed, the expert tested his hypothesis in a shooting reconstruction and that should more than satisfy the reliance on anecdotal evidence factor. That test was recorded, documented, and confirmed the expert's opinion. Moreover, as discussed, experience alone can form the basis of an expert's opinion. And this expert's opinion was based on extensive practical evidence. That much of the expert's data was done in the course of practicing shooting does not make his experience less valid. *Farmland Mut. Ins.*

Companies v. Chief Indus., Inc., 170 P.3d 832, 837-38 (Colo. App. 2007) (holding that although expert had never worked for a crop dryer manufacturer and was not a design engineer, he could testify about the standard of care appropriate to the crop drying industry based on his other reliable experience and training); *see also Melville v. Southward*, 791 P.2d 383, 387 (Colo. 1990) ("The text of CRE 702 is an implicit acknowledgement that the primary consideration in determining a witness' qualifications is the witness' actual "knowledge, skill, experience, training or education," rather than the particular title attributed to the witness."). As he shot through glass "every which way" and observed the holes the shots left in the glass, his opinion was reliably tethered to his experience.

Failure to consider other possible causes. The expert made a reasonable attempt to consider the *other* possible cause. Under his opinion, shots from a non-perpendicular angle leave an elliptical hole—perpendicular shots did not. As a shot could only be fired either perpendicular or from an angle, as the expert tested both positions, he

eliminated the only possible alternative—that a shot not fired at an angle also leaves an elliptical hole. *See Best*, 563 F.3d at 181 (holding that an expert need not rule out every conceivable cause in order for their opinions to be admissible); *cf. People v. Laurent*, 194 P.3d 1053, 1058 (Colo. App. 2008) (rejecting the defendant's claim that a forensic chemistry expert is required to follow a "written analytical method," because that argument was "premised solely on the testimony of defendant's expert, which the trial court was free to disregard").

Lack of Testing. The expert tested his theory. He did so with the same gun, and the same type of windshield, ammo, and two shot positions, including the one alleged by the defendant. The expert's opinion was tested and proven. This factor strongly supports the district court's admission of the expert's opinion.

Subjectivity. Under this factor, "[i]t follows that if an expert's methodology cannot be explained in objective terms, and is not subject to be proven incorrect by objective standards, then the methodology is presumptively unreliable." *Downs*, 126 F. Supp. 2d at 1127. In the

instant case, the expert's method was explained in basic and objective terms. His test was even recorded. This consideration also supported admitting the expert's opinion. *See Downs*, 126 F. Supp. 2d. at 1106 (holding that expert's opinion was supported by objective and not subjective grounds because the tests expert administered were verifiable, in part, because they were reproducible).

Prepared-solely-for-litigation. The expert's opinion was not prepared solely for this litigation, it instead flowed naturally from his specialized and extensive experience. As the exhibit considered by the court during the *Shreck* hearing showed, before he was asked to testify as an expert, he was investigating the scene, and he thought it was unlikely that the defendant shot through the glass from a perpendicular angle because of the shape of the hole in the windshield. At the *Shreck* hearing, the expert explained that his opinion was formed from his thirty-six years working with firearms, almost all of which took place long before the defendant shot at the officer. Even in the Sixth Circuit, this factor weighs heavily in support of admitting the expert's opinion.

See Johnson v. Mainitowoc Boom Trucks, Inc., 484 F.3d 426, 435 (6th Cir. 2007) ("[I]t is clear that a proposed expert's testimony flows naturally from his own current or prior research (or field work), then it may be appropriate for a trial judge to apply the *Daubert* factors in somewhat more lenient fashion).

Although the majority erred in importing the Sixth Circuit's checklist factors to a case involving experience-based testimony, those factors nonetheless support the district court's admission of the expert's opinion. Reversal is warranted on this ground as well.

III. The majority's conclusion that any error was not harmless was wrong.

"Even a properly objected-to trial error will be disregarded as harmless whenever the error did not substantially influence the verdict or affect the fairness of the trial proceedings." *Ruibal*, ¶ 17. The strength of properly admitted evidence supporting the verdict is one important consideration when evaluating such error. *Id.* Where the evidence overwhelmingly demonstrates the defendant's guilt, the error must be disregarded as harmless. *Id.*

To begin with, the defendant's claim that he did not aim and shoot the gun but that it instead accidentally discharged when he was holding it near the stick shift was unavailing on its own terms. *See Campbell v. People*, 2019 CO 66, ¶ 40 (holding any error was harmless in part because evidence did not support the defendant's theory). Although the defendant disputed whether he intentionally fired the shot, there was no dispute over the events that led to that shooting. As even defense counsel asserted during closing, the defendant was surrounded by armed officers and told he was under arrest. TR 11/10/15, pp 61-62. While he initially put his hands on his head, the defendant disobeyed the armed officers, told them to shoot him, and drove away. He then fled from that large group of armed officers and drew his gun. At some point, the defendant took out a gun and put it in his hand. And when he was evading the police, he fired a shot at a police car blocking his path at an intersection. The defendant's aggressive behavior significantly undercut any claim of accident. A reasonable jury would not have thought that he just happened to shoot towards the officer by accident.

Perhaps recognizing some of that implausibility, when being interviewed by the police, the defendant claimed that he always drove while holding a gun because he thought gang members or someone else was trying to hurt him. But that explanation only made his claim of accidental discharge even less availing. The defendant knew he was being pursued by a group of police cars. Given that he had just driven away from that armed group of officers, it would make little sense to conclude that he pulled out his gun because he was worried about being attacked by a gang. And as he was being chased by a group of officers, the defendant also would not have deliberately thought he needed the gun to protect himself from gang members as there was strong police presence in the area. Worst, even his own statement that he always drove around with a gun undermined his theory, as there was no evidence presented indicating that it had ever accidentally discharged before.

Moreover, the evidence was also contradicted by other evidence. Prior to the shooting, the defendant told his friend that he was going to

have a "shootout" with police if they tried to arrest him because he was too old to go to prison. TR 11/3/15, p 48:12-13. When the police first tried to stop him, the defendant put his hand on his head, told the officers to shoot him, and then drove away. Quite apart from testifying that the shot came from the stick shift, the defendant's own expert offered no opinion on where the shot came from. TR 11/9/15, pp 35-36. Any error in admitting Investigator Gilliam's testimony was harmless. *See, e.g.*, *Tevlin*, 715 P.2d at 342 (concluding that the trial court's erroneous admission of certain expert testimony was harmless "[i]n light of the overwhelming evidence of guilt produced in th[e] case").

CONCLUSION

Based upon the foregoing arguments and authorities, the People respectfully request that this Court reverse the judgment of the court of appeals and affirm the defendant's judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S OPENING BRIEF** upon **JAMES S. HARDY** via Colorado Courts E-filing System (CCES) on July 12, 2021.

/s/ Tiffiny Kallina