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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Gilpin County District Court
Honorable Dennis James Hall, Judge
Case No. 2018CR212

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

ROBERT S. SCHWEIZER,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 2019CA1019

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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

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

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

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

/s/ Daniel J. De Cecco

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INTRODUCTION

Defendant, Robert S. Schweizer, directly appeals the judgment of conviction entered on a jury verdict finding him guilty of possession of a controlled substance, driving under the influence (DUI), failure to display proof of insurance, and operating an unregistered vehicle. He contends the trial court reversibly erred in: (I) failing to suppress evidence found during an illegal search incident to arrest; (II) admitting evidence that he asked to consult with counsel before choosing whether to submit to a blood test; and (III) instructing the jury regarding his refusal to submit to testing. This Court should reject these contentions and affirm the judgment of conviction.

STATEMENT OF THE FACTS AND CASE

Schweizer was driving on Highway 119 in Gilpin County around 4:45 a.m. when a sheriff's deputy noticed his van was travelling 30 miles per hour (MPH) in a 45-MPH zone with two cars "bumper to bumper" behind it. TR 3/11/19, p 141:15-25. The deputy did not see any license plates on the van and stopped Schweizer. TR 3/11/19,

p 143:3-16. Schweizer was the only person in the van. TR 3/11/19, p 144:22-25.

The deputy noticed Schweizer's eyes were "very dilated," his speech was slurred, and "he was sweating profusely from his face and arms" — although the temperature was 45 degrees, he was wearing a T-shirt, and the heater was off. TR 3/11/19, p 147:3-17. The deputy went back to his patrol car for about four minutes, returned to find Schweizer asleep in the van, and had to knock on his door to wake him up. TR 3/11/19, pp 147:21-148:7. When the deputy asked him to step out of the vehicle, he lost his balance and fell into the side of the van. TR 3/11/19, p 148:15-18.

Suspecting Schweizer was under the influence of a drug, the deputy asked him if he had used any methamphetamine, which he denied. TR 3/11/19, p 150:16-21. Schweizer agreed to perform roadside maneuvers, which indicated that he was under the influence of a central-nervous-system stimulant like methamphetamine rather than alcohol or cannabis. TR 3/11/19, pp 150:21-163:22.

The deputy arrested Schweizer and advised him of Colorado's express-consent law. TR 3/11/19, pp 164:11-165:5. Schweizer refused to submit to a blood test, saying, "I want a lawyer. I don't know why you are doing this," and "I'm not doing anything." TR 3/11/19, p 165:5-166:7, 193:5-8.

The deputy then went to secure Schweizer's van, where he saw a black case on the driver's side floorboard. TR 3/11/19, pp 170:4-9. He opened the case and discovered a glass pipe with burnt white residue and a clear plastic baggie containing what appeared to be methamphetamine. TR 3/11/19, p 172:11-16. The deputy collected the case with its contents; a later test showed the baggie contained 0.99 grams of methamphetamine. TR 3/11/19, p 225:12-227:13.

Schweizer was charged with possession of a controlled substance, DUI, compulsory insurance, and unregistered vehicle. CF, pp 22-23. At trial, the defense argued: Schweizer wanting to talk to an attorney did not indicate guilt; the deputy was not credible; the residue in the pipe was not tested for methamphetamine; and the black case was not tested for DNA or fingerprints. TR 3/12/19, pp 42:4-49:5

The jury found Schweizer guilty as charged. CF, pp 262-65. The court sentenced him to two years of probation and 180 days in jail. CF, p 305.

SUMMARY OF THE ARGUMENT

The trial court properly denied Schweizer's motion to suppress the methamphetamine and the pipe found in his van. Under the warrant exception for a vehicle search incident to arrest, the arresting deputy had a reasonable articulable suspicion that the van would contain evidence of DUI, for which he had probable cause to arrest Schweizer. Because Schweizer did not seek suppression under the Colorado Constitution in the trial court, he cannot assert it for the first time on appeal. In any event, a violation of the Colorado Constitution did not occur, and regardless, any error was not plain.

Evidence of Schweizer's refusal to submit to a blood test did not violate the Fourth Amendment. He had no right to refuse the test or confer with counsel before deciding whether to submit or refuse. If this

Court disagrees, any constitutional error only affected the DUI conviction.

The court properly instructed the jury that it could consider Schweizer's refusal to submit to a blood test. Even if the instruction was improper, the error was harmless.

ARGUMENT

I. The record supports the trial court's denial of Schweizer's motion to suppress the drug evidence found in his van because the deputy had a reasonable belief that evidence related to the DUI arrest might be found in the van.

A. Preservation and Standard of Review

The People agree in part that this issue is preserved. OB, p 9. Schweizer preserved his argument under the Fourth Amendment by drawing the court's attention to case law interpreting the Fourth Amendment as to searches incident to arrest. *See* CF, pp 81-82; TR 2/8/19, pp 37:23-44:6. Preserved trial errors of constitutional dimension are reviewed for constitutional harmless error. *People v. McKnight*, 2019 CO 36, ¶ 60; *People v. Hagos*, 2012 CO 63, ¶ 11.

Schweizer did not, however, preserve his claim that the warrantless search violated the Colorado Constitution. OB, p 18. "[A]ppellate courts should not reach Colorado Constitutional arguments raised for the first time on appeal. . . . To preserve a Colorado Constitutional argument for appeal, then, a defendant must make an objection sufficiently specific to call the attention of the trial court to the potential Colorado Constitutional error." *Martinez v. People*, 244 P.3d 135, 139-40 (Colo. 2010).

To the extent Schweizer's reply brief suggests that his motion to suppress also rested on the Colorado Constitution, *see* CF, p 85, this Court does not address arguments raised for the first time in a reply brief. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990). And in any case, "[a] conclusory, boilerplate contention in a motion to suppress is insufficient, by itself, to preserve an issue for appeal." *People v. Samuels*, 228 P.3d 229, 238 (Colo. App. 2009); *see also Martinez v. People*, 2015 CO 16, ¶ 14 ("Parties must make objections that are specific enough to draw the trial court's attention to the asserted error."). The trial court did not separately address the

Colorado Constitution. TR 2/8/19, pp 46:16-55:19. *See People v. Gee*, 33 P.3d 1252, 1257 (Colo. App. 2001) (where trial court made no reference to the Colorado Constitution in its ruling, review is limited to federal constitutional standards, and this Court presumes the trial court relied on those standards and does not address this issue).

Now, Schweizer argues for the first time that the Colorado Constitution affords greater protection from searches incident to an arrest than the rule in *Arizona v. Gant*, 556 U.S. 332 (2009). OB, pp 18-23. But, because he "failed to preserve his Colorado Constitutional argument for appeal," *Martinez*, 244 P.3d at 140," this Court "may not consider the argument on appeal." *People v. Marciano*, 2014 COA 92M-2, ¶ 41.

The People also agree with Schweizer's proposed standard of review. OB, p 9. "A district court's ruling on a motion to suppress evidence presents a mixed question of law and fact." *People v. Kessler*, 2018 COA 60, ¶ 16. A reviewing court defers to the factual findings of the trial court where the record includes competent supporting evidence, but it reviews the court's legal conclusions de novo. *Id.*

B. Facts

At the suppression hearing, the deputy testified that after arresting Schweizer for DUI, the deputy put him in the back of his patrol car. TR 2/8/19, pp 20:1-21:3. When the prosecutor asked the deputy what he did next, he said:

> I went to secure his vehicle and also conducted a search for any evidence related to the crime of DUID, driving under the influence of a drug. I then noticed a black case on the front driver's floorboard next to where he would have been sitting. I grabbed the case, opened, noticed a clear glass pipe which I suspected to be a methamphetamine pipe and then I noticed a clear, plastic baggie with a clear crystal substance inside which I suspected to be methamphetamine.

TR 2/8/19, p 21:4-13. He added that once he had opened the driver-side door, "it was right there on the floorboard" where Schweizer had been sitting. TR 2/8/19, p 21:17-18. He also testified that based on his training and experience, "people like to hide their drugs and paraphernalia in little cases," so he suspected drugs and paraphernalia might be inside the case. TR 2/8/19, p 21:23-22:18.

After collecting the case, the deputy locked Schweizer's van, left it parked on the shoulder, and transported Schweizer to the jail. TR 2/8/19, p 22:23-25. After booking Schweizer, the deputy conducted a field test on the crystalline substance, which tested positive for methamphetamine. TR 2/8/19, p 23:16-22.

The trial court found that the deputy had probable cause to arrest Schweizer for driving under the influence of drugs, which Schweizer does not dispute on appeal. TR 2/8/19, pp 49:22-50:6. Relying on *Gant* and *People v. Chamberlain*, 229 P.3d 1054 (Colo. 2010), because the roadside maneuvers indicated Schweizer was under the influence of drugs and not alcohol, the court found the deputy had "reasonable cause to believe" the van contained evidence related to that crime. TR 2/8/19, pp 50:18-52:3. The court also noted "that the search conducted by the officer was a very limited one" — restricted to "the area of the driver's compartment and only the floor in front of the driver's seat." TR 2/8/19, pp 52:7-12.

The court denied Schweizer's motion to suppress. TR 2/8/19, pp 52:21-23.

C. Law and Analysis

1. The evidence of drugs was found during a valid search incident to arrest.

Schweizer contends that the prosecution failed to prove the deputy had a reasonable articulable suspicion that evidence of the DUI might be found in the van. OB, p 12. The record shows otherwise.

"Warrantless searches are presumptively invalid unless justified by an established exception to the warrant requirement," one being the search of a vehicle incident to a lawful arrest. *Kessler*, ¶ 17.

In *Gant*, 56 U.S. at 351, the U.S. Supreme Court held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Our supreme court has adopted this test in *People v. Crum*, 2013 CO 66, ¶ 2: "Under the evidence-gathering rationale set forth in [*Gant*], officers may search the passenger compartment of a vehicle where the particular circumstances give rise to a reasonable articulable suspicion that the vehicle might

contain evidence of the crime for which they had probable cause to arrest." (citation omitted).

Reasonable suspicion requires "considerably less than proof . . . and is less demanding even than the 'fair probability' standard for probable cause." *People v. Polander*, 41 P.3d 698, 703 (Colo. 2001) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). "'In considering whether reasonable suspicion exists, the court looks at the totality of the circumstances, the specific and articulable facts known to the officer at the time of the encounter, and the rational inferences to be drawn from those facts,' in light of the officer's special training and experience[.]" *Kessler,* ¶ 26 (quoting *People v. Garcia*, 251 P.3d 1152, 1158 (Colo. App. 2010)) (citation omitted).

Because Schweizer had been removed from his van before the search occurred, the only question is whether the deputy had a "reasonable articulable suspicion" that the van might contain evidence of the DUI. *See Kessler*, ¶ 19. As in *Kessler*, the answer is yes.

In *Kessler*, ¶ 2, during a traffic stop, officers observed a half-empty bottle of alcohol behind the passenger's seat of the car. "Kessler had

watery, bloodshot eyes, slurred speech, and an odor of alcohol on his breath." *Id.* at ¶ 3. When asked to step out of the car, he had to use the car door for support, but then denied that he had been drinking. *Id.* After performing unsatisfactorily on most of the roadside sobriety tests, he was arrested for DUI and placed in the back of a police car. *Id.* While conducting a search for further evidence of alcohol consumption, officers discovered a bag of suspected cocaine under the armrest on the center console. *Id.* at 4.

The *Kessler* division concluded the evidence of cocaine was admissible at trial because "the police had more than ample grounds to reasonably suspect that the vehicle would contain evidence (i.e., alcohol) related to the offense for which Kessler was arrested." *Id.* at ¶ 28. A reason for this conclusion was that "one of the two officers who searched the vehicle stated, based on his training and experience, it was 'more common than not' to find bottles of alcohol in a vehicle of someone arrested for driving under the influence." *Id.* at 27.

This case parallels *Kessler*. The deputy had probable cause to believe Schweizer was driving under the influence of drugs based on the following observations:

- At 4:47 a.m., Schweizer was driving 15 MPH below the speed limit;
- His pupils were dilated to the degree that the deputy could barely see the color of his eyes;
- He was sweating "bullets" from his face and arms, although the temperature was 45 degrees, he was only wearing a T-shirt, and the heater in the van was off;
- His speech was slurred, and he had difficulty speaking;
- He fell asleep during the four minutes when the deputy was running clearance, who then had to knock on his door to wake him up;
- When the deputy asked Schweizer to step out of the van, he lost balance on his left foot, and his left shoulder fell into the side of the van;

- During the test for horizontal gaze nystagmus (HGN), he did not show signs of alcohol intoxication;
- He performed unsatisfactorily on the walk-and-turn and one-leg-stand tests, showing a lack of balance;
- He did not show signs of cannabis intoxication during the lack-of-convergence test; and
- During the Modified Romberg test, the deputy observed every possible sign of intoxication: body and eyelid tremors, swaying, and an accelerated internal clock.

TR 2/8/19, pp 5:24-19:9.

Based on the deputy's training and experience, these observations led him to believe Schweizer was under the influence of a drug, mostly likely a central-nervous-system stimulant like methamphetamine. TR 2/8/19, pp 10:7-9, 11:4-12, 14:2-5.

Contrary to Schweizer's characterization of the deputy's suspicion as "purely a generalized, inchoate hunch," OB, p 16, the totality of the circumstances show the deputy had a "reasonable articulable suspicion" that the passenger compartment of the van might have evidence related

to the offense of arrest: drugs or drug paraphernalia. *See Crum*, ¶ 2; *Kessler*, ¶¶ 27-28. And the search was even more limited than in *Kessler* because the deputy saw the case in plain view on the floorboard, while in *Kessler*, ¶ 3, the officers found the cocaine only after "lifting the armrest over the center console." And the deputy was permitted to open the case to see if drugs or paraphernalia were inside, especially because, based on experience, he knew users tend to "hide their drugs and paraphernalia in little cases." TR 2/8/19, p 21:23-22:18. *See Gant*, 556 U.S. at 344 ("[T]he offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and *any containers therein*.") (emphasis added).

True, the deputy did not testify that "people who use [central-nervous-system] stimulants like methamphetamine often times have evidence of that drug or the paraphernalia necessary to use the drug in the car," as the trial court believed. TR 2/8/19, p 52:3-7; OB, pp 16-17. Even so, testimony concerning this reasonable inference was not required, given that "in considering whether reasonable suspicion exists, the court looks at the totality of the circumstances . . . . and the

rational inferences to be drawn from those facts." *Kessler*, ¶ 26 (quoting *Garcia*, 251 P.3d at 1158). Because the deputy had ample grounds to believe Schweizer was driving under the influence of a drug, and since Schweizer was the only person in the van, the deputy could make a rational inference that some evidence of Schweizer's current drug intoxication could be found in the van.

In sum, the search of the van incident to arrest was valid under *Gant*, *Crum*, and *Kessler*, so the court properly denied Schweizer's motion to suppress evidence of the methamphetamine and the pipe.

2. Schweizer cannot assert an alternative suppression claim under the Colorado Constitution for the first time on appeal.

As explained above, because Schweizer did not raise in the trial court his claim that the admission of the drug evidence violated his rights under the Colorado Constitution, he cannot raise it for the first time on appeal. *See Martinez*, 244 P.3d at 140 (vacating the consideration of a Colorado-constitutional issue by a division of this Court where the issue had not been properly preserved in the trial

court). In any event, his claim fails because the Colorado Constitution does not afford him any greater protection from a search incident to arrest than the Fourth Amendment. *See People v. Taylor*, 2012 COA 91, ¶ 8 n.3, *abrogated on other grounds as recognized by People v. Folsom*, 2017 COA 146M ("Because Colorado has not departed in any significant way from federal analysis of searches incident to arrest, we find those cases analyzing the Fourth Amendment persuasive.").

Should this Court disagree and choose to address Schweizer's arguments based on the Colorado Constitution, the plain error doctrine limits reversal. "[P]lain error occurs when there is (1) an error, (2) that is obvious, and (3) that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Phillips v. People*, 2019 CO 72, ¶ 39. For an error to be obvious, it must contravene a clear statutory command, a well-settled legal principle, or Colorado case law. *Scott v. People*, 2017 CO 16, ¶ 16. *See also People v. Ujaama*, 2012 COA 36, ¶ 42 ("To qualify as plain error, the error must be one that 'is so clear-cut, so obvious,' a trial

judge should be able to avoid it without benefit of objection.") (quoting *People v. Taylor*, 159 P.3d 730, 738 (Colo. App. 2006)).

Schweizer fails to show the Colorado Constitution provides him any greater protection than the Fourth Amendment, as explained in *Gant*. OB, p 21. His reliance on *People v. Edwards*, 836 P.2d 468 (Colo. 1992), is misplaced. The language Schweizer that quotes from *Edwards* addresses the automobile exception, a distinct exception to the warrant requirement — which turns on probable cause rather than reasonable suspicion. *Id.* at 471-42. And since *Edwards*, *Gant* changed the landscape for vehicle searches incident to arrest.

In any event, this Court need not decide whether the trial court erred where "it is clear that the alleged error was not obvious." *People v. Vigil*, 251 P.3d 442, 447 (Colo. App. 2010). In this case, any possible error under the Colorado Constitution could not have been obvious to the trial court. Schweizer points to no statute, well-settled legal principle, or Colorado case law stating the Colorado constitution provides greater protection than the federal constitution from searches

incident to arrest. Controlling case law holds otherwise. *Taylor*, ¶ 8 n.3.

For these reasons, any error was not plain, and reversal is not warranted.

II. The trial court properly admitting Schweizer's statements surrounding his refusal to submit to a blood test.

A. Preservation and Standard of Review

The People agree that this issue is preserved. As said above, preserved errors of constitutional dimension are reviewed for constitutional harmless error. *Hagos*, ¶ 11.

The People also agree with Schweizer's proposed standard of review. A trial court's suppression order presents a mixed question of fact and law. *Kessler*, ¶ 16. This Court defers to the trial court's findings of fact when they are supported by the record but assesses the legal effect of those facts de novo. *Id.*

B. Facts

At the suppression hearing, the deputy testified that after placing Schweizer in custody, he had advised Schweizer of the express-consent

law. TR 2/8/19, p 20:4-9. Because the deputy suspected Schweizer was under the influence of a drug, the deputy offered him only a blood test. TR 2/8/19, p 20:9-11.

Schweizer responded that he wanted a lawyer. TR 2/8/19, p 20:18-19. The deputy explained to Schweizer that under the express-consent law, he was not entitled to a lawyer before responding to the request for a test. TR 2/8/19, p 20:20-23. Schweizer refused to submit to a blood test. TR 2/8/19, pp 20:24-25, 25:25-26:2. Then the deputy secured Schweizer in the back of the patrol car. TR 2/8/19, p 21:1-2.

Defense counsel argued that Schweizer had been denied due process by the deputy not allowing him to consult with counsel before deciding whether "to undergo a search of his blood when he requests counsel." TR 2/8/19, p 44:14-22. The prosecutor responded, "The defendant does not have a right to consult with an attorney prior to choosing whether to take a chemical test[.]" TR 2/8/19, p 45:6-8. The court agreed with the prosecutor, saying:

> This wasn't argued in the defendant's motion, but I'm not aware of any case law that permits a person who is pulled over for drunk and driving

> to request a lawyer before he or she submits to a chemical test of blood or breath. I think the case law is to the contrary that a person in those circumstances does not have the right to request a lawyer prior to deciding whether to consent to a test so I don't think that's a correct statement of the law. The defendant, of course, then refused to submit to a test and the officer placed the defendant in his patrol car.

TR 2/8/19, p 50:7-17.

At trial, the deputy testified that after advising Schweizer of the express-consent law and offering him a blood test, Schweizer said "[h]e didn't want to do anything" and "he wanted a lawyer." TR 3/11/19, p 164:15-165:13. The deputy then testified as follows:

> Q [PROSECUTOR]. Okay, are you allowed in the course of Express Consent to speak with a lawyer before you decide if you want to take the test?
>
> A [DEPUTY]. No; per the Colorado Express Consent law, you are not entitled to a lawyer prior to responding to an officer or my request to submit to a chemical test.
>
> Q. And did you explain that to him.
>
> A. I did.
>
> Q. And what was his response when you explained that he couldn't speak with an attorney?
>
> A. He still refused. . . .

[H]e stated, "I'm not doing anything."

TR 3/11/19, pp 164:14-165:7.

In closing argument, defense counsel conceded that the deputy's statement that Schweizer was not entitled to an attorney was "not an inaccurate reflection of the law." TR 3/12/19, p 42:4-6.

C. Law and Analysis

Schweizer contends that the trial court erred in admitting evidence of his refusal to submit to a blood test made after he said he wanted a lawyer. OB, p 24. His contention fails.

1. The admission of Schweizer's refusal to submit to a blood test did not violate the Fourth Amendment.

"Driving in Colorado is a statutory privilege, not a right." *Fitzgerald v. People*, 2017 CO 26, ¶ 10. Colorado's express-consent law provides:

> Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state *shall be required* to submit to and to complete, and to cooperate in the completing of, a test or tests of such person's blood, saliva, and urine for the purpose of determining the drug content within the person's

> system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI or DWAI and when it is reasonable to require such testing of blood, saliva, and urine to determine whether such person was *under the influence of, or impaired by, one or more drugs*, or one or more controlled substances, or a combination of both alcohol and one or more drugs, or a combination of both alcohol and one or more controlled substances.

§ 42-4-1301.1(2)(b)(I), C.R.S. (2020) (emphasis added).

"By driving in the state, a motorist consents to testing in accordance with this provision." *Fitzgerald*, ¶ 10; *see* § 42-4-1301.1(1) ("Any person who drives any motor vehicle . . . throughout this state shall be deemed to have expressed such person's consent to the provisions of this section."). The statute also provides, "The refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial." § 42-4-1301(6)(d), C.R.S. (2020).

Recently, our supreme court considered whether the express-consent law is unconstitutional in *Fitzgerald, People v. Hyde*, 2017 CO

24, and *People v. Simpson*, 2017 CO 25. It held that Colorado's statutory regime of deemed consent does not violate the Fourth Amendment. Specifically, the *Fitzgerald* court explained the statute does not violate the Fourth Amendment because it "does not criminalize a driver's refusal to consent to a search," but "merely allows a driver's refusal to submit to testing to be entered into evidence if the driver is prosecuted for DUI or DWAI." *Id.* at ¶ 25.

Additionally, after analyzing the United States Supreme Court's decisions in *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), our supreme court concluded, "The prosecution's use of a defendant's refusal to consent to a blood or breath test as evidence of guilt, in accordance with the terms of Colorado's Expressed Consent Statute, does not violate the Fourth Amendment." *Fitzgerald*, ¶ 27; *see also Birchfield*, 136 S. Ct. at 2185 ("Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the

constitutionality of those laws, and nothing we say here should be read to cast doubt on them.") (citations omitted).

Where Schweizer drove in Colorado and the deputy had probable cause to believe he was driving under the influence of a drug, Schweizer is deemed to have expressed his consent to a blood test. § 42-4-1301.1(1), (2)(b)(I); *see Hyde*, ¶ 32 ("Hyde's statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement."); *Simpson*, ¶ 25 ("By driving in Colorado, Simpson consented to the terms of the Expressed Consent Statute, including its requirement that he submit to a blood draw under the circumstances present here."). And since Schweizer refused to submit to a blood test, the trial court properly admitted evidence of his refusal at trial in compliance with § 42-4-1301(6)(d) and consistent with the Fourth Amendment. *Fitzgerald*, ¶¶ 26-27.

Schweizer asks this Court to depart from our supreme court's decisions in *Fitzgerald*, *Hyde*, and *Simpson* in light of *McNeely* and *Birchfield*. OB, pp 25-26. But this Court is bound by our supreme court's decisions — which were announced after *McNeely* and *Birchfield*

had been decided — and thus should decline Schweizer's invitation to commit error. *See In re Estate of Ramstetter*, 2016 COA 81, ¶ 40 (this Court is bound by the holdings of our supreme court and must follow those holdings unless and until they are overruled by that court).

Finally, Schweizer's reliance on *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), is misplaced. OB, pp 26-27. The *Mitchell* court addressed the specific question whether police officers may administer a blood test without a warrant when a driver is unconscious and cannot be given a breath test. 139 S. Ct. at 2530. By contrast, Schweizer was conscious and refused to submit to a blood test. The statute did not permit a breath test because the deputy had probable cause to believe Schweizer was under the influence of a drug. § 42-4-1301.1(2)(b)(I). And in any event, a blood test was not administered.

In sum, admitting evidence of Schweizer's refusal to submit to a blood test did not violate the Fourth Amendment.

2. Schweizer was not entitled to confer with counsel before choosing whether to submit to a blood test.

Schweizer contends that he was entitled to consult with an attorney before choosing whether to submit to a blood test. OB, p 28. Controlling case law holds otherwise.

"[T]he Sixth Amendment right to counsel attaches only once charges are filed." *People v. Vickery*, 229 P.3d 278, 280 (Colo. 2010). "Once charged, a criminal defendant has the right to have counsel present at all critical stages of the prosecution." *Id.*

When the deputy advised Schweizer of the express-consent law on the side of the highway, no charges had been filed. *See* TR 2/8/19, p 20:1-25; CF, pp 22-23. So, the express-consent advisement was not a critical stage of the prosecution, and Schweizer had no right to speak to counsel before deciding whether to refuse a blood test.

Our supreme court and divisions of this Court have held "a constitutional right to talk with an attorney before choosing whether to submit to the test . . . does not exist" as a matter of law. *Calvert v.*

State, Dep't of Revenue, Motor Vehicle Div., 519 P.2d 341, 343 (Colo. 1974). *See also Haney v. Colorado Dep't of Revenue, Div. of Motor Vehicles*, 2015 COA 125, ¶ 18 ("A driver has no right under the express consent statute to confer with an attorney before deciding whether to consent to testing."); *Dikeman v. Charnes*, 739 P.2d 870, 872 (Colo. App. 1987) (concluding that a request to speak to an attorney before taking a chemical test "must be deemed a refusal as a matter of law"). *Cf. Schmerber v. California*, 384 U.S. 757, 766 (1966) (because defendant was not entitled to assert privilege against self-incrimination with respect to introduction of blood-test evidence, compelling him to submit to test in face of fact that his objection to test was made on counsel's erroneous advice did not violate defendant's Sixth Amendment right to counsel); *see also South Dakota v. Neville*, 459 U.S. 553, 559 n.8 (1983) ("*Schmerber* also rejected arguments that the coerced blood test violated the right to due process, the right to counsel, and the prohibition against unreasonable searches and seizures.").

One narrow exception to the general rule is if police advise the driver under *Miranda* and cause the driver to misunderstand the state

of the law, the driver "cannot be held strictly accountable for his refusal" of testing. *Calvert*, 519 P.2d at 343. This exception does not apply here because the deputy did not provide a *Miranda* advisement.

Turning to Schweizer's due-process argument, OB, p 31, he fails to identify any binding authority holding a person has a due-process right to consult with counsel before deciding whether to submit to chemical testing. And "*Schmerber* . . . rejected arguments that the coerced blood test violated the right to due process." *Neville*, 459 U.S. at 559 n.8.

For these reasons, the trial court properly admitted evidence of his refusal.

3. Any error only affected the DUI conviction.

But even if this Court holds otherwise, reversal of Schweizer's convictions for possession of a controlled substance, failure to display proof of insurance, and operating an unregistered vehicle would be unwarranted because the alleged error could not have contributed to his conviction for those charges. *Hagos*, ¶ 11. His refusal to submit to testing was relevant only to the DUI charge.

The prosecutor did not argue Schweizer's request for counsel as somehow bearing on the drug possession charge. TR 3/12/19, pp 34:13-36:9. To the extent the jury might still have considered whether it did, the evidence proving his possession of the methamphetamine inside the vehicle was overwhelming — the deputy found it on the floorboard where Schweizer was sitting, and he was the sole occupant. Of course, the evidence proving the insurance and registration charges was also overwhelming and wholly independent of his request for counsel, and defense counsel did not contest these charges in closing argument. *See People v. Davis*, 2018 COA 113, ¶ 29 ("[A]ny error was harmless beyond a reasonable doubt in light of the relative insignificance of the statements to the People's case and the substantial evidence of guilt.").

For these reasons, even if this Court finds constitutional error in admitting the refusal evidence, only reversal of the DUI conviction is warranted.

III. The trial court properly instructed the jury on Schweizer's refusal.

A. Preservation and Standard of Review

The People agree that this issue is preserved. OB, pp 34. But contrary to Schweizer's view, OB, p 42, because Schweizer does not contend the court omitted or misdescribed the elements of the offense, the alleged error is not of constitutional magnitude, and the standard of reversal is nonconstitutional harmless error. *People v. Riley*, 2015 COA 152, ¶ 25. Under this standard, reversal is required only if the error substantially influenced the verdict or affected the fairness of the proceedings. *Id.*

The People also agree in part with Schweizer's proposed standard of review. This Court reviews de novo whether the jury instructions adequately informed the jury of the governing law. *Id.* at ¶ 22.

But a trial court's decision to provide a particular instruction is reviewed for abuse of discretion. *Chapman v. Harner*, 2014 CO 78, ¶ 4; *People in Interest of J.G.*, 2016 CO 39, ¶ 33 (stating trial courts "have broad discretion over the style and form of the instructions.").

Given the trial court's "substantial discretion in formulating the jury instructions," reviewing courts will not disturb the court's ruling "so long as [the instructions] are correct statements of the law and fairly and adequately cover the issues presented." *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006).

B. Facts

At the beginning of trial, the court asked the prosecutor how he planned to address the issue of Schweizer's refusal in the deputy's testimony. TR 3/11/19, pp 16:21-17:2. The prosecutor responded that under *Haney*, "you do not have the right to an attorney before you decide whether to do express consent," unless the person receives a *Miranda* warning first — which did not occur in this case. TR 3/11/19, pp 17:3-11. The prosecutor seemed to say the deputy could testify that Schweizer said he wanted an attorney and that he was "not doing anything." TR 3/11/19, pp 17:12-25. Defense counsel objected to allowing testimony about Schweizer requesting counsel, but asked, if the court permitted it, to allow the jury "to hear the context of that statement in that he invoked counsel and then was informed by the

police officer that he is not allowed to speak to a lawyer before taking a test and then his response." TR 3/11/19, pp 18:14-19:7.

The court said it would instruct the jury on the subject if either side requested it and asked the prosecutor whether there was "an instruction in the book on the jury's considerations of a defendant's refusal to submit to a test." TR 3/11/19, p 20:1-7. The prosecutor said there was, and although it fell out of favor with some county-court judges, he would work on an instruction. TR 3/11/19, p 20:8-21.

Before closing arguments, the prosecutor proposed a "refusal instruction." TR 3/12/19, p 4:11-5:10. The proposed instruction stated:

> You are instructed that any person who drives a motor vehicle in the State of Colorado may be required to submit to a chemical test for the purpose of determining whether the person is driving the vehicle under the influence of drugs or alcohol. If a person refuses to submit to such chemical test, then the jury may consider such refusal along with all other competent evidence in determining the defendant's guilt or innocence.
>
> A driver who is required to submit to a blood or breath test does not have the right to consult with an attorney prior to deciding whether to submit to the test.

> If you find that the defendant refused to take a chemical test of the defendant's blood or breath, you may consider this refusal along with other evidence in determining whether the defendant is guilty of the offense of Driving Under the Influence of Drugs or Driving While Ability Impaired.

CF, p 277 (Instruction No. 11).

Defense counsel objected to providing the instruction, arguing it was not an approved instruction, was not a completely accurate statement of the law, and unduly highlighted a particular piece of evidence. TR 3/12/19, p 6:16-25. As to inaccuracy, he added, "To say that a person is required to submit to a chemical test is inaccurate; a person is deemed to have given their express consent to the test and it is only under those circumstances where there is probable cause to arrest." TR 3/12/19, pp 10:22-11:1. The prosecutor responded that the court should give the instruction, arguing "the jurors are almost absolutely going to have a question about it and this instruction guides them in whether or not you can consult with an attorney before deciding to take a blood test[.]" TR 3/12/19, pp 11:8-14.

The court made the following findings:

[T]he admissibility of a refusal in circumstances such as this is a well-settled issue of law and I think this instruction adequately explains to the jury what the law is on that. . . .

[F]or the purpose of expressing the law to the jury, this instruction tells them what they need to know and I don't think that this instruction highlights this particular piece of evidence. It says at one point quote, "The jury may consider such refusal along with all other competent evidence in determining the defendant's guilt or innocence." So, I don't think this instruction unduly highlights one piece of evidence.

I have added that second paragraph here which says that a driver who is required to submit to a blood or breath test does not have the right to consult with an attorney and I did that because that has been the evidence in this case. . . .

The case law on this is pretty clear and [*Haney*] says very clearly that a driver has no right under the express consent statute to confer before deciding whether to consent to testing. And the case then goes on to say, "If a driver does not submit to testing because he wants to talk his [sic] attorney before deciding whether to take the test, it is deemed a refusal as a matter of law."

And my concern here is that of course the jury doesn't know any of this and their knowledge of the right to an attorney is probably based upon their experience of watching TV or watching police dramas where a defendant is given his or her Miranda rights and the rights say that you have the right to a lawyer. So, my concern here is

> that the jury may improperly draw an inference that this officer was overreaching when in fact he was accurately explaining the law to the defendant.
>
> I don't think it would be fair to allow the jury to (inaudible) that because that would not be a correct statement of the law and I don't think there should be any question here that the officer correctly advised the defendant of the law on this particular point. So, for those reasons, the Court will give instruction number 11 over the objection of the defendant.

TR 3/12/19, pp 11:22-14:3.

The court provided the instruction to the jury. TR 3/12/19, pp 26:13-27:6; CF, p 277.

C. Law and Analysis

1. The jury was appropriately instructed it could consider evidence of Schweizer's refusal.

Schweizer asserts that the trial court erred in giving the jury an instruction which highlighted one piece of evidence the jury could use in determining "guilt or innocence." OB, p 36. His assertion goes against settled Colorado case law permitting trial courts to give a refusal instruction with the challenged language.

More than three decades ago, in *Cox v. People*, 735 P.2d 153, 154-55 (Colo. 1987), our supreme court granted certiorari to decide whether the trial court had erred in instructing the jury as follows:

> If a person refuses to submit to such chemical test, then the jury may consider such refusal along with all other competent evidence in determining the Defendant's guilt or innocence.

The *Cox* court held that a trial court does not err by giving such an instruction, explaining that "[t]he weight to be given the evidence of refusal is for the jury to determine," and such "evidence was relevant and not unduly prejudicial." *Id.* at 159. *See also People v. Mersman*, 148 P.3d 199, 201 (Colo. App. 2006) ("[I]t is proper to instruct a jury that it can consider a driver's refusal to take a blood or breath test, along with other evidence, in determining his or her guilt of driving under the influence.").

Despite this long-standing rule, Schweizer urges this Court to adopt the rationale of *Bartlett v. State*, 270 S.W.3d 147 (Tex. Crim. App. 2008), holding that a refusal instruction was an impermissible comment on the weight of the evidence. *Bartlett* is not binding on this Court and

contradicts Colorado case law. Unless and until our supreme court overrules *Cox*, Schweizer's arguments again invite this Court to err. *See Ramstetter*, ¶ 40.

Apart from advancing *Bartlett*, Schweizer objects to the phrase "in determining the defendant's guilt or innocence." OB, p 36, 40. But the *Cox* court approved of this exact language in its holding. *See Cox*, 735 P.2d at 159 ("[T]he trial court did not err in denying Quiming's objection to the jury instruction that allowed his refusal to take the test to be considered along with other evidence *in determining his guilt or innocence*.") (emphasis added). Contrary to Schweizer's characterization, OB, pp 40-41, "[a] holding and its necessary rationale, however, are not dicta." *Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009).

This Court should also reject his assertion that the instruction was misleading and inaccurate. OB, p 42. The first part of the instruction mirrored the language of the express-consent statute. *Compare* CF, p 277 *with* § 42-4-1301.1(2)(b)(I). And of course, "[a]n

instruction that tracks the language of the statute, as this one did, is generally sufficient." *People v. Archuleta*, 2017 COA 9, ¶ 52.

To the extent Schweizer argues in the reply brief that the instruction omitted the probable-cause requirement, this Court need not consider arguments first raised in a reply brief. *Czemerynski*, 786 P.2d at 1107. But regardless, as the trial court found, "this instruction [told the jury] what they need to know." TR 3/12/19, p 12:6-8. The jury was asked to decide whether Schweizer was guilty of DUI beyond a reasonable doubt, not whether the deputy had probable cause. CF, pp 270, 277.

And the third part of the instruction was similar to the instruction approved in *Cox*, but even more deferential to the jury's role as fact-finder. *Compare Cox*, 735 P.2d at 155 ("If a person refuses to submit to such chemical test, then the jury may consider such refusal along with all other competent evidence in determining the defendant's guilt or innocence.") *with* CF, p 277 ("*If you find* that the defendant refused to take a chemical test of the defendant's blood or breath, you may consider this refusal along with other evidence . . .") (emphasis added).

Nothing in this language "bolstered one part of the [prosecution's] case and misled the jury about the significance of that evidence," OB, p 28, especially where it employed the optional language "may" and led the jury to consider other evidence as well.

In the end, the refusal instruction correctly informed the jury of the express-consent law, and in providing the instruction, the court did not abuse its discretion.

2. Any error was harmless.

But even if the instruction were erroneous, any error was harmless. Apart from the refusal, the prosecutor presented overwhelming evidence proving that Schweizer was guilty of DUI (drug). As set out in more detail above, the deputy testified that Schweizer was driving 15 MPH below the speed limit; his eyes were dilated; he was sweating profusely; his speech was slurred; he fell asleep during the stop; he lost his balance getting out of the van; the HGN test did not show signs of alcohol intoxication; he performed unsatisfactorily on the balance tests; on the Modified Romberg test, he showed body and eyelid tremors, swaying, and an accelerated internal

clock; and methamphetamine and a glass pipe were found on the floor in front of the driver's seat. TR 3/11/19, pp 141:17-170:24.

And Investigator Lussier, a drug recognition expert, provided blind-expert testimony about signs of methamphetamine intoxication, including: sweating, eye dilation, poor concentration, rigid muscle tone affecting balance, and altered perception of time and distance. TR 3/11/19, pp 243:16-250:11. He also testified that "when the drug finishes metabolizing, now you get sleepy; you get the opposite effect." TR 3/11/19, pp 250:20-22.

In all, any error in the refusal instruction did not substantially influence the DUI verdict and was thus harmless. And Schweizer concedes that this alleged instructional error does not warrant reversal on his convictions of the other charges. OB, p 43.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request that this Court affirm Schweizer's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **EMILY HESSLER** and all parties herein via Colorado Courts E-filing System (CCES) on March 18, 2021.

/s/ Tiffiny Kallina