ADVANCE SHEET HEADNOTE
June 13, 2022

2022 CO 25

No. 20SC928, *Magana v. People*—Arson—Unit of Prosecution—Sentencing.

The supreme court holds that (1) the unit of prosecution under the first-, second-, and fourth-degree arson statutes is, respectively, each building or occupied structure damaged or destroyed, each person's property (other than a building or occupied structure) damaged or destroyed, and each person endangered; and (2) the legislature didn't mean for all first degree arsons by fire to be crimes of violence, and therefore fire alone is not a deadly weapon for the purpose of prosecuting first degree arson as a crime of violence. Accordingly, the court affirms in part and reverses in part the judgment of the court of appeals.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 25

Supreme Court Case No. 20SC928
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA807

Petitioner:

Christopher Magana,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed in Part and Reversed in Part
en banc
June 13, 2022

Attorneys for Petitioner:
Megan A. Ring, Public Defender
Jason C. Middleton, Deputy Public Defender
Denver, Colorado

Attorneys for Respondent:
Philip J. Weiser, Attorney General
Carmen Moraleda, Senior Assistant Attorney General
Denver, Colorado

Alexis King, District Attorney, First Judicial District
Colleen R. Lamb, Appellate Deputy District Attorney
Golden, Colorado

JUSTICE HOOD delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ**, **JUSTICE GABRIEL**, **JUSTICE HART**, and **JUSTICE SAMOUR** joined.

CHIEF JUSTICE BOATRIGHT, joined by **JUSTICE BERKENKOTTER,** concurred in part and dissented in part.

¶1 Defendant, Christopher Magana, started a fire that engulfed two cars and a duplex. A jury found Magana guilty of eighteen counts of arson, including two counts of first degree arson, each of which the prosecution had charged as a crime of violence ("COV") based on Magana's use of "fire and accelerant" as a deadly weapon.

¶2 The jury also found that both counts of first degree arson involved the use of a deadly weapon. But at sentencing, the trial court surmised that the jury had reached its sentence-enhancement finding based on fire alone. The trial court concluded that first degree arson necessarily requires the use of fire. Without more, it refused to sentence Magana under the COV statute.

¶3 A division of the court of appeals affirmed the convictions, but it concluded that the trial court should have imposed the COV enhancer.

¶4 We address two arguments Magana makes in challenging the judgment of the court of appeals. First, he claims his eighteen convictions are multiplicitous. (In other words, he believes that the trial court improperly imposed multiple punishments for the same criminal conduct, thereby violating the constitutional prohibition against double jeopardy.) More specifically, he contends that the controlling unit of prosecution for all forms of arson is the act of starting a fire or causing an explosion—rather than the number of buildings torched, property burned, or people endangered—and, therefore, he should have been convicted on

just three counts—one count for each of the categories of harm. Second, he argues that the General Assembly didn't intend fire to serve as both a constituent element of first degree arson and a basis for COV sentence enhancement.

¶5 We hold that (1) the unit of prosecution under the first-, second-, and fourth-degree-arson statutes is, respectively, each building or occupied structure damaged or destroyed, each person's property (other than a building or occupied structure) damaged or destroyed, and each person endangered; and (2) fire alone is not a deadly weapon for the purpose of prosecuting first degree arson as a COV. We therefore affirm in part and reverse in part the division's judgment.

I. Facts and Procedural History

¶6 Late one night in April 2016, Magana set fire to his ex-girlfriend's car. The fire spread to another car and an adjacent duplex occupied by fourteen people, all of whom, fortunately, escaped uninjured. An investigation revealed three different ignition points on the ex-girlfriend's car.

¶7 The prosecution charged Magana with eighteen counts of arson: two counts of first degree arson, one for each unit of the duplex, § 18-4-102, C.R.S. (2021); two counts of second degree arson, one for each car, § 18-4-103, C.R.S. (2021); and fourteen counts of fourth degree arson, one for each person endangered, § 18-4-105, C.R.S. (2021).

¶8 Colorado divides arson into four degrees, spanning "offenses involving damage or destruction, on the one hand, and endangerment, on the other hand." *People v. Magana*, 2020 COA 148, ¶ 38, 490 P.3d 948, 957. The provisions break down as follows:

- *First degree arson*: "A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent commits first degree arson." § 18-4-102(1).
- *Second degree arson*: "A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any property of another without his consent, other than a building or occupied structure, commits second degree arson." § 18-4-103(1).
- *Third degree arson* (not at issue here, but included for completeness): "A person who, by means of fire or explosives, intentionally damages any property with intent to defraud commits third degree arson." § 18-4-104(1), C.R.S. (2021).
- *Fourth degree arson*: "A person who knowingly or recklessly starts or maintains a fire or causes an explosion, on his own property or that of another, and by doing so places another in danger of death or serious bodily

injury or places any building or occupied structure of another in danger of damage commits fourth degree arson." § 18-4-105(1). The fourth-degree-arson statute further delineates the level of the offense based on whether "a person" or "only property" was endangered. § 18-4-105(2), (3).

¶9 The prosecution also charged a COV sentence enhancer for the first-degree-arson counts on the grounds that Magana used "fire and accelerant" as a deadly weapon. *See* §§ 18-1.3-406(1)(a), (2)(a)(I)(A), (2)(a)(II)(G), -401(10)(a), (b)(XII), C.R.S. (2021) (stating together, in relevant part, that using a deadly weapon during the commission of first degree arson can more than double a defendant's potential sentence).

¶10 During jury deliberations, the jury asked if "fire itself" could be considered a deadly weapon. The trial court said yes. The jury found Magana guilty of all eighteen counts of arson and found that Magana used a deadly weapon in committing first degree arson, thereby triggering the COV sentence enhancer.

¶11 Following additional briefing from the parties, however, the trial court chose to disregard the jury's deadly weapon finding. The court reasoned that allowing fire to be classified as a deadly weapon could make every first-degree-arson case a COV. It further determined that if every first-degree-arson conviction

is a COV, the provision classifying arson by explosive as a per se COV[1] would be superfluous. This result would be contrary to legislative intent. The trial court, therefore, sentenced Magana without imposing the enhancer.

¶12 On appeal, Magana argued that the unit of prosecution for arson is the number of fires set by the defendant, not the number of buildings or property burned or people endangered, as the prosecution claimed. On cross-appeal, the prosecution argued that the trial court imposed an illegal sentence when it rejected the jury's finding that the first-degree-arson counts involved the use of a deadly weapon for COV purposes.

¶13 The division agreed with the prosecution on both questions. *Magana*, ¶¶ 53, 69–70, 490 P.3d at 960, 963. In its analysis of the *first*-degree-arson statute, the division found it compelling that the General Assembly explicitly provided that "[i]f a building is divided into units for separate occupancy, any unit not occupied by the defendant is a 'building of another.'" *Id.* at ¶ 41, 490 P.3d at 958 (quoting § 18-4-101(4), C.R.S. (2019)). The division therefore held that the unit of

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[1] A per se COV is a crime that the legislature requires courts to treat as a COV even if it doesn't meet the statutory definition. *See Chavez v. People*, 2015 CO 62, ¶ 12, 359 P.3d 1040, 1042.

prosecution for first degree arson is each dwelling or structure burned. *Id.* at ¶ 47, 490 P.3d at 959.

¶14 Turning to *second* degree arson, the division concluded that while the more amorphous term "any property" could imply an aggregating effect irrespective of the separately identifiable pieces of property damaged, the phrase "of another" that follows that term demonstrates legislative intent to confine the unit of prosecution to each person whose property is damaged or destroyed. *Id.* at ¶ 50, 490 P.3d at 959; *see* § 18-4-103(1).

¶15 And, focusing on *fourth* degree arson's distinction between whether "a person" or "only property" is endangered, the division held that the legislature intended to permit separate charges for each person placed in danger. *Magana*, ¶ 52, 490 P.3d at 960; *see* § 18-4-105.

¶16 Finally, the division concluded that the same evidence proving an element of first degree arson by fire could support a sentence enhancer because, unlike first degree arson by explosives, the prosecution would still need to prove beyond a reasonable doubt that the fire could cause death or serious bodily injury. *Magana*, ¶¶ 60–69, 490 P.3d at 961–63.

¶17 We granted certiorari.[2]

II. Analysis

A. Proper Unit of Prosecution

1. Standard of Review and Rules of Statutory Interpretation

¶18 We review the relevant statutes de novo to determine the General Assembly's intended unit of prosecution. *Woellhaf v. People*, 105 P.3d 209, 215 (Colo. 2005); *McCoy v. People*, 2019 CO 44, ¶ 37, 442 P.3d 379, 389. We also review de novo whether a defendant's conviction violates the constitutional protection against double jeopardy. *People v. Arzabala*, 2012 COA 99, ¶ 19, 317 P.3d 1196, 1203.

¶19 The unit of prosecution is the way the General Assembly, in drafting a criminal statute, divides a defendant's conduct "into discrete acts for purposes of

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[2] We granted certiorari to review the following issues:

1. Whether fire is a deadly weapon that can make first degree arson a crime of violence under section 18-1.3-406, C.R.S. (2020).
2. [REFRAMED] Whether a defendant who set one fire can receive separate first-, second-, and fourth-degree arson convictions for each building or occupied structure damaged, each piece of personal property damaged, and each person endangered.

In our analysis, we've flipped the order of the issues to track the sequence of the proceedings.

prosecuting multiple offenses." *Woellhaf*, 105 P.3d at 215. "To determine the unit of prosecution, we look exclusively to the statute," and we seek to "ascertain and effectuate the legislative intent." *Id.* "[W]e read [the statutory] scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous . . . ." *McCoy*, ¶ 38, 442 P.3d at 389. If the statute is unambiguous, "we apply it as written." *People v. Jones*, 2020 CO 45, ¶ 54, 464 P.3d 735, 746. However, if "the language is ambiguous, meaning it is silent or susceptible to more than one reasonable interpretation, we may use extrinsic aids of construction." *Id.* at ¶ 55, 464 P.3d at 746.

2. Discussion

¶20 We start by examining the constitutional backdrop against which this issue of statutory construction emerges; namely, the Double Jeopardy Clauses of the United States and Colorado constitutions. We have long recognized the limited scope of these constitutional provisions. *Patton v. People*, 35 P.3d 124, 128–29 (Colo. 2001). The protection against double jeopardy "does not prevent the General Assembly from specifying multiple punishments based upon the same criminal

conduct."[3] *Woellhaf*, 105 P.3d at 214. Rather, "if the General Assembly has not conferred specific authorization for multiple punishments, double jeopardy principles preclude the imposition of multiple sentences." *Id.* We went on to clarify that "the Double Jeopardy Clause simply embodies the constitutional principle of separation of powers by ensuring that courts do not exceed their own authority by imposing multiple punishments not authorized by the legislature," *id.*, because "[i]t is the province of the legislature to establish and define offenses by prescribing the allowable unit of prosecution," *id.* at 215.

¶21 Magana focuses on the General Assembly's use of "any" in the arson statutes. He posits that including this non-restrictive term indicates that no matter the extent of damage done, the unit of prosecution for each arson statute is the act of starting a fire or causing an explosion.

¶22 In making this argument, Magana relies heavily on our decision in *Woellhaf*, so some unpacking of that decision is in order. A jury convicted Woellhaf of four counts each—eight total—of sexual assault on a child and sexual assault on a child by one in a position of trust. *Woellhaf*, 105 P.3d at 211–12. The statutes that define

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[3] We've held that the state provision is coextensive with its federal counterpart in determining "whether double jeopardy principles bar multiple punishments for the same criminal conduct." *People v. Leske*, 957 P.2d 1030, 1035 n.6 (Colo. 1998); *see also Woellhaf*, 105 P.3d at 214 n.6.

those two offenses provide that an actor who "knowingly subjects another not his or her spouse to any sexual contact" commits the offense. §§ 18-3-405(1), -405.3(1), C.R.S. (2021). Importantly in *Woellhaf*, the charges weren't clearly tied to distinguishable incidents, separated by time, location, or volitional departures, but rather were based on the types of statutorily defined sexual contact, § 18-3-401(4), C.R.S. (2021), Woellhaf perpetrated. *Woellhaf*, 105 P.3d at 211–13. We reversed Woellhaf's convictions and held that the unit of prosecution was "any sexual contact," which we interpreted as "an unlimited, non-restrictive phrase that generally encompasses a multitude of types of sexual contacts." *Id.* at 216. Because the record evidence didn't indicate distinct events on which to base multiple counts, Woellhaf's eight convictions violated double jeopardy principles, and we remanded for the trial court to merge the four counts of each charge into one count each—two total. *Id.* at 219–20.

¶23 *Woellhaf* is distinguishable. In *Woellhaf*, we noted that multiplicity, "the charging of multiple counts and the imposition of multiple punishments for the same criminal conduct," *id.* at 214, tends to arise in three contexts: (1) where multiple statutory provisions proscribe the same conduct; (2) where a series of repeated acts are charged as distinct offenses even though they are part of a continuous transaction; and (3) where statutes provide alternate ways to commit

the same offense, *id.* at 214–15. *Woellhaf* dealt with the third category; that analysis is inapplicable here.

¶24 In *Woellhaf*, "any" modified the criminal conduct: "sexual contact." §§ 18-3-405(1), -405.3(1). The statutory language thus encompassed multiple actions, any of which could constitute the actus reus of the charged offense. *See Woellhaf*, 105 P.3d at 216 (concluding that neither statute "authorizes multiple punishments for each discrete act of sexual contact that occurs *within a single incident of sexual assault*" (emphasis added)).

¶25 But in the arson statutes, there are just two ways to engage in the relevant criminal conduct: fire and explosives. And, perhaps more importantly, "any" modifies the phrase describing the resulting damage "to another." §§ 18-4-102, -103. In other contexts, we have concluded that offenses "defined in terms of committing an act causing harm to another person" are distinct offenses requiring consecutive sentences because they "can never be supported by proof that the defendant committed an act causing harm to a different person, whether or not the defendant's volitional act causing harm was the same." *People v. Espinoza*, 2020 CO 43, ¶ 13, 463 P.3d 855, 858.

¶26 The legislature's focus on the victimization "of another" in the arson statutes correlates the unit of prosecution to the impact of the defendant's actions, rather than the defendant's actions themselves. Because each building damaged or

person endangered will necessarily involve different factual proof than any other property or person harmed, each creates a distinct unit of prosecution.

¶27 Magana seems to at least partially accept this interpretation. After all, he concedes that a defendant who knowingly sets a single fire that happens to burn a dwelling, damage a car, and endanger another person, could be criminally liable for a class three felony and two class four felonies[4]—one count for each statutorily delineated category of harm. Yet, he fails to apply this impact-oriented approach when all the damage is confined to one category of harm. For example, from his perspective, a defendant who knowingly sets a single fire that burns three dwellings should face only a single class three felony. His interpretation strikes us as unreasonable (and thus fails to render the statutory language ambiguous). *See Jones*, ¶ 55, 464 P.3d at 746.

¶28 We agree with the division that the nub of Colorado's arson statutes is the damage or danger caused, not the number of fires set. *See Magana*, ¶¶ 38–39, 490 P.3d at 957; *cf. Copeland v. People*, 2 P.3d 1283, 1287 (Colo. 2000) ("[The

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[4] In 2021, the General Assembly revised the second-degree-arson statute to expand its classification system. *See* Ch. 462, sec. 200, § 18-4-103, 2021 Colo. Sess. Laws 3122, 3174. This change took effect March 1, 2022. Before this revision, section 18-4-103(2) classified second degree arson as a class four felony if the damage was one hundred dollars or more.

Colorado General Assembly] has determined to focus its fourth degree arson mens rea requirement on the actor's conduct in starting or maintaining the fire, while continuing to hold the arsonist responsible for the fire's result, whether or not he or she was aware of or intended the consequences."); *see also VanMeveren v. Dist. Ct.*, 619 P.2d 494, 496 (Colo. 1980) (highlighting the use of the phrase "of another" as indication that the legislature sought to protect property rights, not just to proscribe fires).

a. First Degree Arson

¶29 The plain language of the first-degree-arson statute shows that the unit of prosecution is each dwelling or structure damaged or destroyed. The statute uses the modifier "of another" for "building or occupied structure." § 18-4-102(1). "The plain meaning of the word 'another' is singular . . . ." *People v. Manzanares*, 2020 COA 140M, ¶ 46, 490 P.3d 919, 927 (defining the word "another," in the context of the statute proscribing the solicitation of another person, as "(1) different or distinct from the one first considered; (2) some other; or (3) being one more in addition to one or more of the same kind"). To avoid rendering any words in the statute superfluous, we must give this phrase meaning. Therefore, including the phrase "of another" demonstrates legislative intent that the unit of prosecution for first degree arson is each building burned, damaged, or destroyed.

¶30 Additionally, section 18-4-101(4) defines "building of another" in a multi-unit building as "any unit not occupied by the defendant." By including this definition, as the division pointed out, the General Assembly strongly implied that the unit of prosecution for first degree arson is each building or occupied structure burned or destroyed. *See Magana*, ¶ 41, 490 P.3d at 958. Had the legislature intended for a defendant to be charged with one count of first degree arson regardless of whether he burned down one apartment unit or the whole building, this provision would be superfluous. Furthermore, this interpretation is consistent with the interpretation of similar statutes by other jurisdictions. *See, e.g.*, *People v. Barber*, 659 N.W.2d 674, 679 (Mich. Ct. App. 2003) (holding that for the proscription on burning "any dwelling house" in section 750.72 of the Michigan Compiled Laws, the proper unit of prosecution is "each separate house"); *Richmond v. State*, 604 A.2d 483, 489 (Md. 1992) (concluding that the phrasing "any dwelling house" in Maryland's then-arson statute means that the unit of prosecution is "each apartment unit burned").

b. Second Degree Arson

¶31 Similarly, the second-degree-arson statute modifies the term "property" with the phrase "of another." § 18-4-103(1). We acknowledge that the phrase "any property" in the statute and the penalty provisions referencing the magnitude of the damage, § 18-4-103(2), suggest legislative intent to aggregate certain property.

But whose property exactly? The plain language of the statute arguably suggests that it is the total personal property belonging to each separate owner. Regardless, we need not resolve all the possible permutations and limitations on the unit of prosecution for second degree arson. That broader question isn't before us. For the moment, it suffices to note that the two cars supporting Magana's two second-degree-arson convictions were the property of two different people; thus, each car was property *of another*. In accord with our reasoning as to the similarly worded first-degree-arson provision, we conclude that these facts support two convictions for second degree arson.

c. Fourth Degree Arson

¶32 Finally, while the fourth-degree-arson statute is structured differently than the first- and second-degree statutes, our construction of it doesn't yield different results. Section 18-4-105(1) creates, as Magana points out, different ways of committing fourth degree arson. This may seem reminiscent of *Woellhaf*, but it remains distinguishable. The statute prohibits placing "*another* in danger of death or serious bodily injury." § 18-4-105(1) (emphasis added). That there are multiple ways to perpetrate this offense doesn't negate the use of "another" throughout section 18-4-105 or subsection (2)'s reference to endangering "a person." The statute still acknowledges each individual victimized by a defendant's actions. *Cf. Espinoza*, ¶ 21, 463 P.3d at 860 (concluding that "because offenses defined in terms

of their victimization of another and committed against different victims" can't be proved by identical evidence, a defendant's convictions run consecutively). Therefore, the unit of prosecution for fourth degree arson is each person endangered.

B. The Legislature Did Not Make Fire Alone a Basis for Turning First Degree Arson into a Crime of Violence

1. Standard of Review

¶33 We review the legality of a sentence de novo. *People v. Wiseman*, 2017 COA 49M, ¶ 22, 413 P.3d 233, 239. A sentence is illegal if it is "inconsistent with the statutory scheme outlined by the legislature." *People v. Rockwell*, 125 P.3d 410, 414 (Colo. 2005). In reviewing the legislature's statutory scheme, we construe statutes to "avoid calling their constitutional validity into question." *People v. Lee*, 2020 CO 81, ¶ 11, 476 P.3d 351, 354.

2. Discussion

¶34 Again, a person commits first degree arson if he "knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys . . . any building or occupied structure of another without his consent." § 18-4-102(1).

¶35 Section 18-1.3-406(2)(a)(I) gives prosecutors the power to charge someone with a COV if a listed offense, including first degree arson, was

> committed, conspired to be committed, or attempted to be committed by a person during which, or in the immediate flight therefrom, the person: (A) Used, or possessed and threatened the use of, a deadly

> weapon; or (B) Caused serious bodily injury or death to any other person except another participant.[5]

¶36 As pertinent here, the statutory definition of a deadly weapon is "[a] knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury." § 18-1-901(3)(e)(II), C.R.S. (2021).

¶37 Magana argues that allowing fire alone to be treated as a deadly weapon would turn *all* first-degree-arson charges into COVs, an outcome he asserts the legislature did not intend.[6] The prosecution counters, and the division agreed, that

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[5] If the prosecutor charges an offense as a COV and the jury makes the required finding, the court must sentence the defendant to prison in the aggravated range. §§ 18-1.3-406(1)(a), -401(1)(a)(V)(A). For a class three felony like first degree arson, the sentencing range jumps from four to twelve years to ten to thirty-two years in prison. §§ 18-1.3-406(1)(a), -401(1)(a)(V)(A), (10). A court must also impose consecutive sentences if a defendant is convicted of "two or more separate crimes of violence arising out of the same incident." § 18-1.3-406(1)(a).

[6] Magana also contends that fire doesn't meet the foregoing definition of a deadly weapon because it isn't an object; it's the chemical process of combustion. Fair enough, but we agree with the prosecution that fire is also tangible inasmuch as it manifests itself as light, flame, and heat. *See, e.g.*, *Mims v. State*, 335 S.W.3d 247, 249–50 (Tex. Ct. App. 2010) (reasoning that while fire isn't tangible like a gun, it isn't intangible either, as it manifests as light, flame, and heat); *cf. People v. Shawn*, 107 P.3d 1033, 1035–36 (Colo. App. 2004) (referring repeatedly to a deadly weapon being *either* an object *or* a substance in concluding that HIV-infected blood could be a deadly weapon).

a small, ineffective fire that fails to cause damage can still support a first-degree-arson charge without necessarily constituting a COV. Therefore, the prosecution urges us to adopt a framework in which courts and juries determine on an ad hoc basis whether a first-degree-arson fire reaches the deadly weapon threshold.[7]

¶38 Of course, implicit in the prosecution's argument is the concession that the legislature didn't mean for all first degree arsons by fire to be COVs. Instead, the prosecution acknowledges that we must look to the elements of the statutory definition of what constitutes a deadly weapon. The key difference of opinion between the parties is whether a first-degree-arson fire *always* meets this statutory definition. Magana says yes. The prosecution says no.

¶39 As the language of the deadly weapon statute suggests, we conduct a two-step inquiry to determine if an instrument is a deadly weapon: (1) "the [instrument] must be used or intended to be used as a weapon," and (2) it "must be capable of causing serious bodily injury." *People v. Stewart*, 55 P.3d 107, 117 (Colo. 2002). We address each in turn.

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[7] While the prosecution charged the defendant with the use of fire *and* accelerant, the jury, the trial court, and the parties have focused on the use of fire alone. And, of course, that comports with the scope of the certiorari question which asks whether fire is a deadly weapon.

¶40 First: "use." A "defendant need not *intend* to cause serious bodily injury; he must merely *use* as a weapon an . . . instrument that is capable of causing such injury." *Id.* (emphases added). In other words, a defendant can satisfy this aspect of the definition by deliberately wielding his instrument of choice to injure people, but he can also do so by merely using an instrument to "start an unbroken, foreseeable chain of events capable of producing serious bodily injury or death." *People v. Saleh*, 45 P.3d 1272, 1276 (Colo. 2002).

¶41 Needless to say, not all fires are used as weapons. Fire has many benign uses: for example, cooking food or heating a home. But for a defendant to be guilty of first degree arson, he must employ fire in a destructive manner, targeting places where people are commonly found or where they will likely come to the rescue. To support a first-degree-arson conviction, a jury must find that a defendant *knowingly* used fire in this inherently destructive manner. *See* § 18-4-102(1). In this sense, fire is always weaponized in committing first degree arson, even if a defendant doesn't specifically intend to harm anyone.

¶42 The second step of the "deadly weapon" inquiry involves an assessment of risk. Critically, the statutory definition of deadly weapon focuses on what a thing is capable of doing—the potential result, not just the actual result. *See Saleh*, 45 P.3d at 1275 (noting that the deadly weapon statutory definition "does not require that the object actually cause serious bodily injury; rather, it must be

'capable of producing' such injury" (quoting § 18-1-901(3)(e)(II))). As applied, the question comes to this: Is a first-degree-arson fire of the more innocuous variety imagined by the prosecution (combustible enough to damage a structure without necessarily endangering people) always at least capable of causing serious bodily injury? We say yes.

¶43 To be sure, not all first degree arsons involve raging infernos. On the contrary, in *People v. LeFebre*, 546 P.2d 952, 955–56 (Colo. 1976), this court reasoned that it's unnecessary for an entire building or structure to be destroyed. Instead, first degree arson simply requires "ignition of or an alteration or destruction of the fiber or texture of the materials composing the 'building' or 'structure.'" *Id.* at 955.

¶44 But the nature of any such fire is to spread. Especially when fed by the structure of a building, fire can quickly fan out and threaten anyone nearby, including those called to extinguish the flames—namely, first responders. Thus, fire poses an inherent risk that is not present with other instruments that we classify as deadly weapons only on an ad hoc basis, such as motor vehicles. *See, e.g.*, *Stewart*, 55 P.3d at 117; *Pruett v. State*, 510 S.W.3d 925, 929 (Tex. Crim. App. 2017) ("Fire is inherently dangerous in a way that cars are not[,] and it is capable of inflicting serious bodily harm, especially when it is intentionally started in a residential neighborhood.").

¶45 The risks posed by fire lead us to conclude that first-degree-arson fires always involve weaponizing fire in a manner that is at least *capable* of producing death or serious bodily injury. Thus, such fires would always trigger the COV sentence enhancer. Yet, we see nothing to suggest that the legislature intended to make all first-degree-arson fires COVs.

¶46 On the contrary, the General Assembly expressly made *only* first degree arson by *explosive* a per se COV. § 18-4-102(3). Furthermore, we'd render this subsection about explosives superfluous if we found that fire alone could support a COV sentence enhancement, for there would be no need to identify explosions causing fire as per se COVs. Because we must strive to give effect to every part of a statute, this result would run against our rules of statutory interpretation. *McCoy*, ¶ 38, 442 P.3d at 389. Had the General Assembly intended that all first-degree-arson offenses be COVs, it would have indicated as much. *Cf.* § 18-3-103(4), C.R.S. (2021) (providing that all forms of second degree murder are to be sentenced as COV offenses). It did not.

¶47 We hold that the legislature didn't mean for all first degree arsons by fire to be COVs, and therefore fire alone is not a deadly weapon for the purposes of the COV sentence enhancer for first degree arson.[8]

III. Conclusion

¶48 We affirm in part and reverse in part the division's judgment.

CHIEF JUSTICE BOATRIGHT, joined by **JUSTICE BERKENKOTTER**, concurred in part and dissented in part.

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[8] Because we conclude that the first-degree-arson statute unambiguously precludes fire alone being treated as a deadly weapon under the COV statute, we find it unnecessary to wade into the legislative history of the provision. Likewise, we need not address Magana's equal protection argument. While our interpretation stems from the plain and ordinary meaning of the statute's text, *see McCoy*, ¶ 37, 442 P.3d at 389, to the extent there is any ambiguity, we note that our reading avoids calling the statute's constitutional validity into question. *See Lee*, ¶ 11, 476 P.3d at 354.

CHIEF JUSTICE BOATRIGHT, joined by JUSTICE BERKENKOTTER, concurring in part and dissenting in part.

¶49 I agree with the majority as to the units of prosecution for first, second, and fourth degree arson. But I disagree with the majority's conclusion that fire cannot be a deadly weapon that enhances first degree arson as a crime of violence ("COV") because fires destructive enough to sustain a first-degree-arson charge would *always* meet the definition of a deadly weapon under section 18-1-901(3)(e), C.R.S. (2021). In my view, fire cannot qualify as a deadly weapon unless both inquiries from *People v. Stewart*, 55 P.3d 107, 117 (Colo. 2002) (the "*Stewart* inquiries"), are met—that is, unless the fire is (1) used or intended to be used as a weapon and (2) capable of causing serious bodily injury. Recognizing that these two inquiries are variable and fact-intensive, the General Assembly left them as questions for the jury. *See* § 18-1.3-406(2)(a)(II)(G), C.R.S. (2021) (specifically enumerating first degree arson as a crime that may be, but is not required to be, enhanced as a deadly weapon COV). I therefore cannot join the majority's decision regarding the deadly weapon issue, and I respectfully dissent.

¶50 According to the majority, fire alone cannot enhance a first-degree-arson charge as a COV because fires that meet the definition of first degree arson are (1) necessarily employed in a destructive capacity and (2) always, at the very least, *remotely* capable of spreading and causing serious bodily injury. *See* Maj. op. ¶¶ 40–45. Therefore, in the majority's view, first-degree-arson fire always meets

the definition of a deadly weapon, such that allowing fire alone to be treated as a deadly weapon would turn *all* first-degree-arson charges into COVs. *Id.* at ¶ 45. For this reason, the majority concludes that recognizing fire as a deadly weapon would render section 18-4-102(3), C.R.S. (2021)—which specifies that first degree arson by explosives is a per se COV—superfluous. Maj. op. ¶ 46. Remarkably, the majority reaches that conclusion with next to no explanation in a pair of conclusory sentences.[1] *See id.* And so, counterintuitive as it may seem, the majority concludes that because fire meets the statutory definition of a deadly weapon *too* perfectly, the General Assembly could not have intended for fire to ever qualify as a deadly weapon for purposes of first degree arson. *See id.* at ¶ 47.

¶51 I disagree. In my view, fire cannot qualify as a deadly weapon that enhances first degree arson as a COV unless the *Stewart* inquiries are satisfied. Although the majority purports to follow *Stewart*, in my view, it alters *Stewart*'s analysis and therefore fails to meaningfully engage with either step of *Stewart*'s two-part inquiry. Additionally, I fear that the majority's decision to engraft outdated

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[1] Frankly, the majority assigns far more significance to the fact that explosives are a per se COV than I find is warranted. By the majority's own definition, a per se COV is a "crime that the legislature requires courts to treat as a COV even if it doesn't meet the statutory definition." Maj. op. ¶ 11 n.1. The fact that explosive arson is listed as a per se COV has no bearing on the question at issue here: whether *fire* can qualify as a deadly weapon COV.

language from *People v. Saleh*, 45 P.3d 1272, 1276 (Colo. 2002), onto the first *Stewart* inquiry potentially broadens the definition of "deadly weapon." Thus, I would simply conduct the *Stewart* analysis as it is written.

¶52 Under *Stewart*, the first inquiry of the deadly weapon analysis is straightforward: Did the defendant use or intend to use the instrument as a weapon? 55 P.3d at 117. Relying on *Saleh*, a case that preceded *Stewart*, the majority asserts that a defendant can satisfy the first *Stewart* inquiry by "using an instrument to 'start an unbroken, foreseeable chain of events capable of producing serious bodily injury or death.'" Maj. op. ¶ 40 (quoting *Saleh*, 45 P.3d at 1276). This language from *Saleh* is unnecessarily confusing. In *Stewart*, we clarified and expounded upon *Saleh*. *See Stewart*, 55 P.3d at 117. Now the majority needlessly resurrects *Saleh*'s vague *Palsgraf*-esque test here. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (reasoning that an actor who engages in negligent conduct that results in injury will incur liability only if it was "apparent to the eye of ordinary vigilance" that the conduct would injure the victim). Again, in this context, the question that *Stewart* presents is simple: Did the defendant use or intend to use fire *as a weapon*? Or, more directly, did the defendant weaponize fire against another person? *See People v. Lee*, 2020 CO 81, ¶ 25, 476 P.3d 351, 356 (concluding that the defendant's hand was used as a weapon, and therefore satisfied the first *Stewart* inquiry, because "the perpetrator [used] the instrument

to injure the victim"); *see also People v. Esparza-Treto*, 282 P.3d 471, 476 (Colo. App. 2011) ("[T]o be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended opponent or adversary.").

¶53 The second *Stewart* inquiry is also relatively straightforward; it asks courts to consider whether the instrument is "capable of causing serious bodily injury." 55 P.3d at 117. By concluding that all first-degree-arson fires must necessarily be capable of producing serious bodily injury, *see* Maj. op. ¶¶ 42–45, the majority ultimately declines to engage with the relevant inquiry: whether the fire *in question* is capable of causing serious bodily injury.[2] The majority says that what matters is the ultimate risk that the fire creates, *see* Maj. op. ¶ 42, but it fails to acknowledge that some fires pose a greater risk than others. Not all fires are equal. And importantly, not all fires that constitute first degree arson are equal. Some fires, like the one that Magana set, spread wildly due to accelerants, such as gasoline or lighter fluid. Others never become large enough to spread uncontrollably, or they

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[2] The majority rightly points out that, in *Saleh*, we noted that the deadly weapon statutory definition "does not require that the object actually cause serious bodily injury; rather, it must be 'capable of producing' such injury." Maj. op. ¶ 42 (quoting *Saleh*, 45 P.3d at 1275). But this language does not mean that the reviewing court is proscribed from evaluating the capabilities of the *specific* fire in each case. Rather, the *Saleh* court was cautioning that an instrument can still qualify as a deadly weapon even if everyone escapes unscathed from its onslaught.

quickly run out of flammable material. Even though there is always a possibility that the latter type of fire may spiral out of control, it does not mean that every fire is "capable" of causing serious bodily injury at the time it is burning, especially if no one is alerted to the scene.

¶54 Ultimately, the majority's redefinition of the first *Stewart* inquiry effectively collapses the two *Stewart* inquiries into each other, focusing only on whether the fire was eventually capable of causing serious bodily injury. Indeed, this collapse contradicts *Stewart* itself. *See* 55 P.3d at 117 ("That [an instrument] was capable of producing serious bodily injury would be irrelevant for purposes of section 18-1-901(3)(e) had the [instrument] not been deployed as a weapon."). Ironically, although the majority's opinion today has the effect of limiting the number of first-degree-arson sentences that may be enhanced as deadly weapon COVs, I suspect that its foreseeability analysis will result in far more deadly weapon COV sentence enhancements down the line.

¶55 Moreover, the caselaw that the majority cites to support its conclusion that fire is always capable of causing serious bodily injury is unpersuasive. The majority quotes *Pruett v. State*, 510 S.W.3d 925, 929 (Tex. Crim. App. 2017), for the proposition that "[f]ire is inherently dangerous in a way that cars are not[,] and it is capable of inflicting serious bodily harm, especially when it is intentionally started in a residential neighborhood." Maj. op. ¶ 44 (second alteration in

original). But *Pruett* simply does not stand for the idea that *all* fires, no matter their size or placement, are capable of causing serious bodily injury. In *Pruett*, the court considered a first-degree-arson case where the defendant not only intentionally set a fire in a residential neighborhood but also used accelerant to ensure its spread. 510 S.W.3d at 926, 929. Of course fire is a deadly weapon when used in that manner. Not surprisingly, the fire in *Pruett* satisfies both *Stewart* inquiries. *See Pruett*, 510 S.W.3d at 926, 929; *Stewart*, 55 P.3d at 117. The defendant used fire as a weapon by setting it in a residential neighborhood. *See Pruett*, 510 S.W.3d at 926, 929. And because the defendant aggravated it with accelerant, the resulting fire was certainly capable of causing serious bodily injury to the residents of the surrounding homes as well as the first responders who came to the scene. *See id.* at 929. Just because the defendant set a deadly fire in *Pruett*, however, does not mean that *all* fires are deadly weapons.

¶56 True, an arsonist certainly may set a fire that meets both the definition of first degree arson (because of the resulting damage to a building or occupied structure, *see People v. LeFebre*, 546 P.2d 952, 955 (Colo. 1976)) and the definition of a deadly weapon COV (because the arsonist used or intended to use the fire as a weapon, and the resulting fire was capable of causing serious bodily injury, *see Stewart*, 55 P.3d at 117). However, there are also instances where a

first-degree-arson charge does not warrant a deadly weapon COV sentence enhancer because one or both of the *Stewart* inquiries is not satisfied.

¶57 To demonstrate my point, consider the following illustration. An arsonist goes to her ex-boyfriend's remotely located hunting cabin to set a fire. She chooses the cabin to set alight because, although she wishes to punish her ex-boyfriend, she knows the cabin is currently unoccupied, and she does not wish to harm anyone. Using her pocket lighter, she sets fire to the side of the cabin and subsequently drives away. Before the fire can spread any further than the siding, however, it exhausts itself and dies out. The arsonist's behavior meets the definition of first degree arson, but it does not meet the definition of a deadly weapon COV. Why? Because while there was an "ignition" that resulted in "destruction of the fiber or texture of the materials composing the . . . structure," *LeFebre*, 546 P.2d at 955, neither *Stewart* inquiry was met: The arsonist did not use nor intend to use the fire as a weapon against anyone, and the fire was not capable of causing serious bodily injury.

¶58 If the majority is correct that first degree arson by fire would always be a COV, then it must *always* be a COV—no exceptions. As this illustration reveals, however, fire (even in the realm of first degree arson) is not always a deadly weapon. The majority mistakenly asserts that first-degree-arson fires are always used as deadly weapons because they necessarily "target[] places where people

are commonly found or where they will likely come to the rescue." Maj. op. ¶ 41. Yet the arsonist's fire demonstrates otherwise. In reality, just as in this hypothetical, Colorado's definition of first degree arson encompasses fires that qualify as deadly weapons as well as fires that do not. The difference between the two is just a factual question that should be decided by a jury.

¶59 Nevertheless, the majority seems to disparage the idea of asking juries to answer these factual questions by referring to them as "ad hoc" determinations. *See* Maj. op. ¶ 37. I don't understand the majority's hesitation. Evaluating facts as they are presented, case-by-case, is what juries do every day. Recall that the General Assembly enumerated first degree arson as a crime that may be, but is not required to be, enhanced as a deadly weapon COV. *See* § 18-1.3-406(2)(a)(II)(G). In so doing, the General Assembly left the question of whether the fire at issue qualifies as a deadly weapon to the jury, and so, despite the majority's concluding otherwise, I believe this determination *must* be made on an "ad hoc" basis. But, in my view, that's not a bad thing; rather, it's a necessary check on sentencing enhancements. Simply put, this question is a factual one for the jury, not one that the majority can decide in one fell swoop.

¶60 In this case, the jury considered the facts and concluded that the fire Magana set qualified as a deadly weapon. Because both *Stewart* inquiries were met, the jury reached the correct conclusion. As to the first inquiry, Magana's actions reveal

that he used the fire as a weapon against his ex-girlfriend. In the middle of the night, he lit his ex-girlfriend's car—which was parked a mere two-and-a-half feet from her family home—on fire. He lit the fire in three places, presumably to best ensure that the entire car went up in flames. Additionally, he set fire to an object that contains gasoline, a known accelerant. The fire in this case was used as a weapon. As to the second inquiry, the resulting fire was certainly capable of producing serious bodily injury: The fire engulfed almost the entire neighboring duplex, which, at the time, housed two sleeping families. Because the fire in this case meets the statutory definition of a deadly weapon COV, I believe the jury's determination should be honored.

¶61 In sum, I cannot agree with the majority that allowing fire itself to enhance a sentence for first degree arson contradicts the statutory scheme. I would hold that fire, depending on whether it is used or intended to be used as a weapon and is also capable of producing serious bodily injury, can result in a deadly weapon COV sentence enhancer for first degree arson. That determination is a factual question for the jury. Accordingly, I would affirm the division on this issue as well as on the units of prosecution for first, second, and fourth degree arson.