

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203</p> <p>Appeal; Jefferson County District Court Honorable Robert C. Lochary Case Number 2022CR2923</p>	<p>DATE FILED February 26, 2025 12:54 PM</p>
<p>Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO</p> <p>v.</p> <p>Defendant-Appellant GEMINI ELIJAH GARCIA</p>	
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<p style="text-align: center;">OPENING BRIEF</p>	

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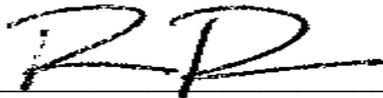


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INTRODUCTION

On October 12, 2022, Jessie Vargas-Vigil met the victim to buy marijuana. Vargas-Vigil shot and killed the victim. And Vargas-Vigil took the victim's necklace and stash of marijuana as he fled the scene. Gemini Garcia was subsequently convicted of felony murder for what Vargas-Vigil, alone, did. Garcia did not know the victim. He did not arrange to buy marijuana from him. Garcia did not have a gun that day. And he did not rob the victim. But Garcia tagged along with Vargas-Vigil. He was convicted of murder and sentenced to 44 years in prison for being in the wrong place, at the wrong time, with the wrong person.

STATEMENT OF THE ISSUES PRESENTED

- I. Whether the prosecution failed to prove robbery, aggravated robbery, and felony murder beyond a reasonable doubt.
- II. Whether the trial court erred in admitting, under CRE 404(b), highly prejudicial propensity evidence of social media posts showing Garcia around guns and of him being arrested with a gun to prove that he had a dangerous and reckless character and, acting in conformity with that character, was more likely to have been armed during the robbery.
- III. Whether the trial court abused its discretion by rejecting the tendered theory of defense instruction and instead instructing the jury in a way that

undermined Garcia's defense and implicitly conceded a disputed fact regarding his mental state.

- IV. Whether the cumulative effect of the errors in Arguments II and III deprived Garcia of a fair trial, warranting reversal.

STATEMENT OF THE CASE

Gemini Elijah Garcia was convicted after a jury trial of one count of second-degree felony murder,¹ five counts of aggravated robbery,² and two crime of violence sentence enhancers.³ CF, pp. 273-78, 349. The aggravated robbery counts merged into the felony murder count. CF, p. 349. Garcia was sentenced to 44 years in prison. *Id.*

STATEMENT OF FACTS

Vargas-Vigil arranged to meet the victim in the parking lot of an apartment complex where Vargas-Vigil lived with his sister to buy marijuana. EX 45-51; *see also* TR 6/8/23, pp. 94-97. Before the victim arrived, Vargas-Vigil, his brother, and Garcia were hanging out in the apartment. The brother had driven over because Vargas-Vigil called him asking for a ride. TR 6/8/23, pp. 96-97, 102-05. The victim

¹ § 18-3-103(1)(b), C.R.S.

² § 18-4-302(1)(a)-(c), C.R.S.

³ § 18-1.3-406(2)(a)(I)(A)-(B), C.R.S.

messed Vargas-Vigil that he was on his way but ran into some traffic. EX 48. Since the brother was getting impatient, Vargas-Vigil told him he could wait in his truck or just leave. TR 6/8/23, pp. 105-06, 131.

When the victim arrived, Vargas-Vigil and Garcia, who was carrying a bright green bag, walked out to his truck. Video EX 119 at 0:12-0:33. Although witness testimony varied somewhat, it appeared that Vargas-Vigil opened the passenger door and sat inside next to the victim while Garcia stayed outside near the driver's side window, which was partially rolled down. *Compare* TR 6/7/23, pp. 13-15, *with* TR 6/7/23, pp. 41-42, 89-92, 99-100; *see also* TR 6/9/23, pp. 118-20; EX F-H. A few minutes later, there was a gunshot and Vargas-Vigil and Garcia ran away from the truck back toward Vargas-Vigil's apartment. TR 6/8/23, pp. 256-57; Video EX 120, 129-30. Vargas-Vigil, who appeared to be holding a gun, dropped a clear bag and yelled at Garcia to pick it up. TR 6/7/23, pp. 46-47; TR 6/8/23, pp. 38, 41-42. Vargas-Vigil called his brother to come back to the apartment, which he did, and they left the apartment complex. TR 6/8/23, pp. 107-08; Video EX 124.

Several neighbors called 911. Paramedics rushed the victim to the hospital, where he was pronounced dead. TR 6/7/23, p. 172:4-23. The medical examiner determined the cause of death was a single gunshot wound to the head. TR 6/7/23, pp. 200-01.

Police searched Vargas-Vigil's apartment, where they found two firearm holsters as well as ammunition "in the base of a flower pot" and "underneath a couch cushion." TR 6/7/23, pp. 162-65, 169, 223-26; EX 15-17, 23, E. After Vargas-Vigil was arrested, police searched another apartment in Denver where he had been seen. Inside that apartment, police found a tan handgun, the victim's gold necklace, and a distinctive sweatshirt Vargas-Vigil wore on October 12. TR 6/8/23, pp. 15-17, 64, 169-70, 173; EX 24-25, 27-28, 174, 188.

The day after the murder, a neighbor found a bullet casing in the parking lot near where the victim's truck had been parked. Ballistics confirmed the tan gun found in Vargas-Vigil's Denver apartment had fired that bullet. TR 6/8/23, pp. 156-59; TR 6/9/23, pp. 37-38; EX 153, 174. DNA testing linked Vargas-Vigil to the tan gun, as well as to the victim's gold necklace. On the other hand, Garcia was excluded as a source of DNA on the necklace but "no conclusions . . . could be made" as to the tan gun, whose "mixture was too complex." TR 6/8/23, pp. 240-44; TR 6/9/23, pp. 85-86.

The trial centered on a dispute about Garcia's role and mental state. The prosecution argued Garcia knew this was a planned robbery and his actions were consistent with helping Vargas-Vigil commit it. TR 6/12/23, pp. 19-26. By contrast, the defense argued that Vargas-Vigil "acted alone when he shot and killed" the

victim “and then took the things he was intending to buy and then some.” TR 6/12/23, p. 37:5-7. Garcia “did not know” what Vargas-Vigil intended to do and, after it happened, Garcia “was stuck in a terrible position.” TR 6/12/23, p. 37:8-14.

SUMMARY OF THE ARGUMENT

- I. The prosecution presented insufficient evidence that Garcia committed robbery, aggravated robbery, and felony murder. Specifically, no evidence showed that, on October 12, Garcia was armed with a deadly weapon; that he took anything of value from the victim; or that he used threats, force, or intimidation to do so. Nor did the evidence establish Garcia aided or abetted Vargas-Vigil, or that he was aware Vargas-Vigil intended to rob the victim. Because the prosecution did not meet its burden of proof beyond a reasonable doubt, Garcia’s convictions should be vacated.

- II. The trial court admitted social media posts depicting Garcia posing with guns and/or expressing interest in buying a gun. The court also admitted evidence that Garcia had a gun when he was arrested six days after the robbery. The prosecution argued this evidence proved that Garcia was armed on October 12. But this evidence should have been excluded under CRE 404(b). The posts were dated weeks and months before the incident. And the prosecution failed to connect any of the pictured guns to it. Nor did the evidence establish any

connection between the gun Garcia had when he was arrested and the robbery. Instead, the only relevance of this evidence was the prohibited inference that Garcia was dangerous and recklessly displayed and/or possessed guns in the past, so he was more likely to have acted reckless and dangerous here. This evidence was also highly prejudicial and inflammatory. And because this error went to a central dispute at trial, it was not harmless. Accordingly, Garcia's convictions should be reversed.

III. The defense-tendered jury instruction asserted that Garcia didn't know Vargas-Vigil intended to rob the victim. But the trial court altered the instruction in a way that effectively conceded Garcia's knowledge and denied only that he aided or abetted Vargas-Vigil, who had acted alone. Doing so was an abuse of discretion that violated Garcia's constitutional right to present a defense.

IV. The cumulative impact of the errors in Arguments II and III prevented Garcia from receiving a fair trial. Most of the evidence pointed directly at Vargas-Vigil. But the prosecution implied that because Garcia was friends with Vargas-Vigil, he knew what he was getting himself into. To that end, the prosecution introduced Facebook posts reinforcing that Garcia, like Vargas-Vigil, was a dangerous person. And the trial court altered the theory

of defense instruction in a way that failed to sufficiently convey the defense’s theory that Garcia lacked the requisite knowledge for a conviction. The combined prejudice flowing from these errors gives ample reason to doubt the reliability of the jury’s verdict.

ARGUMENT

I. The prosecution failed to prove robbery, aggravated robbery, and felony murder beyond a reasonable doubt.

A. Standard of Review and Preservation

This Court “review[s] the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the defendant’s conviction.” *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010).

Whether sufficient evidence supported a conviction “may be raised for the first time on appeal” and is “not subject to plain error review.” *McCoy v. People*, 2019 CO 44, ¶ 2.

B. Discussion

Due process “prohibit[s] the criminal conviction of any person except on proof of guilt beyond a reasonable doubt.” *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988); *see also* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *In re Winship*, 397 U.S. 358, 364 (1970).

When the sufficiency of the evidence is challenged, a reviewing court “must determine whether the evidence, when viewed as a whole and in a light most favorable to the prosecution, is both substantial and sufficient to support a conclusion by a reasonable person that the defendant is guilty of the charge beyond a reasonable doubt.” *People v. Serra*, 2015 COA 130, ¶ 18. “[A] modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt” nor may “verdicts in criminal cases . . . be based on guessing, speculation, or conjecture.” *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999).

1. The prosecution failed to prove robbery and aggravated robbery beyond a reasonable doubt.

Garcia was charged with five counts of aggravated robbery: one under section 18-4-302(1)(a) and two each under sections 18-4-302(1)(b) and (c). *See* CF, pp. 40-42. These subsections do not “define[] separate offenses . . . but, rather, alternative means of committing the same offense.” *People v. Serna-Lopez*, 2023 COA 21, ¶ 19. As relevant here, the prosecution was required to prove beyond a reasonable doubt that Garcia “was armed with a deadly weapon” and/or “knowingly took a thing of value, namely: necklace and/or marijuana” from the “person or presence of” the victim. CF, pp. 41-42, 300-17; *see also* §§ 18-4-301(1), 18-4-302(1)(a)-(c), C.R.S. The prosecution failed to satisfy this burden.

i. The prosecution failed to prove that Garcia was armed with a deadly weapon.

To convict Garcia of aggravated robbery under subsection (1)(a) or (c), the prosecution was required to prove beyond a reasonable doubt, as relevant here, that Garcia was armed with a deadly weapon. To do so, the prosecution primarily relied on three types of evidence: Facebook photos, firearms paraphernalia found in Vargas-Vigil's apartment, and Garcia's arrest. Each one falls short.

First, the prosecution introduced a series of Facebook photos and/or conversations purporting to show Garcia with a gun or expressing interest in buying one. *See* EX 5-7; TR 6/8/23, pp. 83-90. According to the prosecution, this evidence made it more likely Garcia was also armed on the date of the offense.⁴ But even if Garcia had a gun in June or bought one in September, that alone did not establish that he had one at the robbery in October. Such an inference is particularly speculative where, as here, no evidence showed Garcia still possessed any of these weapons on October 12, let alone that he brought one to Vargas-Vigil's apartment that day. *Cf. United States v. Goldesberry*, No. 23-5008, 2025 WL 543118, at *7 (10th Cir. Feb. 19, 2025) ("An inference is unreasonable if it requires the jury 'to

⁴ This evidence, as well as evidence Garcia had a loaded gun when arrested, should have been excluded under CRE 404(b), as argued in Part II.

engage in a degree of speculation and conjecture that renders its findings a guess or mere possibility.’”) (citation omitted).

Second, the firearms paraphernalia in the apartment was never linked to Garcia and, thus, does not establish he was armed on October 12. Garcia did not live at that apartment; rather, Vargas-Vigil stayed there with his sister. TR 6/8/23, pp. 94-97. Inside, investigators found “different types of ammunition” and two gun holsters, one of which was located in a dresser in what appeared to be the sister’s bedroom. *See, e.g.*, TR 6/7/23, pp. 169, 223-26. The record does not clearly show any of the ammunition belonged to Garcia or matched a gun connected to him. Other than having been in the apartment, the prosecution failed to connect this evidence to Garcia in any meaningful way.

Third, the prosecution argued that Garcia had a gun when he was arrested six days after the incident. TR 6/9/23, p. 47:5-14; EX 162. But this gun was eliminated as the one that fired the bullet casing found in the parking lot. TR 6/9/23, pp. 39, 48. And the prosecution did not present any other evidence that Garcia was in possession of that gun on October 12.

No surveillance footage or witness testimony indicated Garcia was armed on October 12. Nor did the physical evidence permit such an inference. To the contrary, the evidence supported the opposite. For example, one eyewitness expressly agreed

she didn't see "any weapons" or "guns." TR 6/7/23, p. 21:9-13. And Vargas-Vigil's brother didn't see Garcia with a gun in the apartment minutes before the robbery. TR 6/8/23, p. 128:24-25. Further, as defense counsel pointed out in closing, Garcia's fingerprints were on the driver's side window of the victim's truck "as though he had grabbed the window with both hands simultaneously. You know what you can't do when you're grabbing a window with two hands simultaneously? Hold a gun." TR 6/12/23, p. 55:1-7; *cf. People v. Moore*, 841 P.2d 320, 323 (Colo. App. 1992) (holding insufficient evidence defendant was armed where he "removed weapons from the home" during a burglary but "no evidence indicat[ed] that he removed the stolen weapons from the canvas sack or otherwise armed himself").

For all these reasons, the evidence was insufficient to prove beyond a reasonable doubt that Garcia was armed with a deadly weapon on October 12.

ii. The prosecution failed to prove that Garcia "took anything of value" from the victim.

To commit aggravated robbery, a person must commit robbery. § 18-4-302(1); *People v. Mortenson*, 2023 COA 92, ¶ 7. Section 18-4-301(1) defines robbery as "knowingly tak[ing] anything of value from the person or presence of another by the use of force, threats, or intimidation."

Here, the prosecution specifically alleged, but failed to prove, that Garcia took a necklace and/or marijuana from the victim. CF, pp. 41-42.

The necklace was found in the Denver apartment linked to Vargas-Vigil. TR 6/8/23, pp. 173-74; EX 27-28. No evidence connected Garcia to that apartment or suggested he had ever been there. DNA testing on the necklace excluded Garcia. TR 6/9/23, p. 86:21-24. And none of the witness testimony or surveillance footage showed Garcia with the necklace. In short, the prosecution failed to present any evidence connecting Garcia to the necklace. Instead, swabs of the necklace indicated the presence of blood and also a potential DNA match to Vargas-Vigil, suggesting Vargas-Vigil, alone, took the necklace from the victim, “ripp[ing] it off of him after he had shot him.” TR 6/12/23, p. 57:6-16; *see also* TR 6/8/23, pp. 177-78; TR 6/9/23, pp. 85-86.

As for the marijuana, the evidence presented at trial established that, at most, Garcia was ordered by Vargas-Vigil—who was still holding the gun he’d used to shoot the victim—to pick up the dropped bag near the garages, on the opposite side of the parking lot from the victim’s truck. Video EX 120; TR 6/7/23, pp. 46-47; TR 6/8/23, pp. 38, 41-42. Doing so was neither a taking “from the person or presence of” the victim, nor using “force, threats, or intimidation.” *Cf.* TR 6/12/23, p. 27:1-16. Indeed, by that point, the robbery was complete. *Mortenson*, ¶ 8.

Alternatively, the prosecution pointed to the “footage of this defendant running away with items in his arms, items that he did not have when he originally

went to the victim's truck. And the only way he was able to do that is because there was an exertion, a use of force, upon the victim. That victim was subdued. He was no longer able to obtain his items. And this defendant took them." TR 6/12/23, p. 27:9-16; *see also* pp. 69-70. But this argument rests on speculation. While the prosecutor told the jury the green bag "going out, moves a certain way" and "coming back, moves a different way," TR 6/12/23, p. 69:8-15, no evidence was presented of what, if anything, was inside that bag. Nor did the prosecution present evidence that any other items were missing from the victim's truck.⁵ Indeed, Garcia's fingerprints were not found on the driver's side door handle nor was his DNA inside the victim's truck, making it unlikely he was ever inside it. TR 6/8/23, pp. 200-02, 205-07; TR 6/9/23, pp. 87, 113-17, 120; EX 182; Supp EX 191.

For these reasons, the evidence was insufficient to support the "taking" element of robbery and aggravated robbery. *Cf. Mortenson*, ¶¶ 12-16.

⁵ Defense counsel twice objected when the prosecutor argued in rebuttal closing that marijuana and the necklace were merely "examples" of "anything of value" taken. TR 6/12/23, pp. 69-70. Garcia maintains that such an argument by the prosecutor was improper and that the complaint only put him on notice of the necklace and marijuana. CF, pp. 40-42. To the extent the jury was encouraged to convict Garcia for taking other, unidentified items, the record does not contain any such evidence so the conviction cannot stand on that basis.

iii. The prosecution failed to prove Garcia took anything of value “by the use of force, threats, or intimidation.”

“The gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a transaction culminating in the taking of property from the victim’s person or presence.” *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983). Simply put, robbery requires that the use of force, threats, or intimidation facilitate the taking.

Here, the prosecution proved only that Garcia was present when Vargas-Vigil shot the defendant, taking his necklace and a clear bag allegedly filled with marijuana. No affirmative evidence demonstrated that Garcia used physical force against, threatened, or intimidated the victim to facilitate that taking. *Cf. United States v. Mills*, 29 F.3d 545, 549-50 (10th Cir. 1994) (“Even if the jury disbelieved the entire defense [theory], that disbelief cannot constitute evidence of the crimes charged . . .”).

Consequently, the prosecution failed to prove a connection between the use of force, threats, or intimidation by Garcia and any taking. *Bartowsheski*, 661 P.2d at 244.

iv. The prosecution failed to prove Garcia was guilty of aggravated robbery under a complicity theory.

The prosecution also alleged Garcia was guilty of aggravated robbery in Counts 2-6 under a complicity theory. *See* CF, pp. 300-17.

Complicity liability provides that “[a] person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.” § 18-1-603, C.R.S.

The Colorado Supreme Court “has interpreted the complicity statute to require that a complicitor hold a dual mental state.” *People in Interest of B.D.*, 2020 CO 87,

¶ 12. Accordingly, a complicitor must have both

(1) the intent, in the commonly understood sense of desiring or having a purpose or design, to aid, abet, advise, or encourage the principal in his criminal act or conduct, and

(2) an awareness of those circumstances attending the act or conduct he seeks to further that are necessary for commission of the offense in question.

People v. Childress, 2015 CO 65M, ¶ 29. “[C]ircumstances attending the act or conduct” means “those elements of the offense describing the prohibited act itself

and the circumstances surrounding its commission, including a required mental state, if any[.]” *Id.*

To convict Garcia of aggravated robbery under a complicity theory, the prosecution had to prove beyond a reasonable doubt that (1) Vargas-Vigil committed aggravated robbery; (2) Garcia aided, abetted, advised, or encouraged that robbery; (3) he intended to do so; and (4) Garcia was aware Vargas-Vigil knowingly committed aggravated robbery. *Id.* The prosecution did not satisfy its burden here.

No evidence established that Garcia intended to aid, abet, advise, or encourage the aggravated robbery. Vargas-Vigil alone had communicated with the victim to arrange the marijuana buy. *See* EX 45-51, 57; TR 6/8/23, p. 116:4-7. There were no communications between Vargas-Vigil and Garcia, before or after the incident, about robbing the victim. In fact, the record does not clearly establish Garcia was aware of the marijuana buy until that morning. Vargas-Vigil’s brother also testified about the conversation in the apartment just before the incident, explaining only that his brother Jessie said they had “to do something real quick.” TR 6/8/23, p. 103:18-20. There was no mention of a robbery. TR 6/8/23, p. 130:1-7. The brother further described how, when he first went into the apartment, Vargas-Vigil had a gun “on his hip”; a few minutes later he took it off and “put[] it in the couch.” TR 6/8/23, pp. 126-29. The brother did not know if Garcia saw the gun or if Vargas-Vigil

picked it back up. TR 6/8/23, pp. 127-28. And he never saw Garcia with a gun. TR 6/8/23, p. 128:24-25.

But even assuming Garcia may have known that Vargas-Vigil had a gun and prearranged to buy marijuana from the victim, neither of these things established that Garcia intended to facilitate or promote the aggravated robbery. *See People v. Duran*, 272 P.3d 1084, 1092 (Colo. App. 2011) (“Merely driving persons to the party, being present there, and being associated with [the shooter] are insufficient to support a determination of complicity.”). The fact that Garcia accompanied Vargas-Vigil to the parking lot and brought a bag didn’t establish that he intended to aid, abet, advise, or encourage Vargas-Vigil in planning or committing aggravated robbery. To the contrary, the evidence supports only that Garcia believed they were going to buy marijuana. *See Bogdanov v. People*, 941 P.2d 247, 251 (Colo. 1997) (“Complicity is not a theory of strict liability. It is not sufficient that the defendant intentionally engaged in acts which ultimately assisted or encouraged the principal. Rather, the complicitor must intend that his conduct have the effect of assisting or encouraging the principal in committing or planning the crime committed by the principal.”).

Nor did anyone testify that Garcia had a gun, let alone that he used one in any way during the aggravated robbery. *Cf. Quintana v. People*, 102 P.2d 486, 486-88

(Colo. 1940) (reversing defendant’s conviction for being an accessory to causing death while driving under the influence where, other than being intoxicated in the car, “[n]o other circumstance or statement appear[ed] in the record which would indicate that [defendant] gave any encouragement, by word or act, to the commission of the offense charged”).

Additionally, the evidence failed to establish beyond a reasonable doubt that Garcia was aware of the attending circumstances, i.e., that Vargas-Vigil knowingly committed aggravated robbery. *Childress*, ¶ 29. As defense counsel put it in closing, this was “a drug deal gone wrong,” not a planned robbery. TR 6/12/23, p. 61:10-13. There were “no communications” between Vargas-Vigil and Garcia “to set up this robbery.” Vargas-Vigil arranged to meet the victim in the middle of the day in the parking lot of the apartment complex where he lived. Both Garcia and Vargas-Vigil wore distinctive, colorful hoodies and Garcia carried a “bright green bag.” And \$11,000 cash was left in the victim’s truck. TR 6/12/23, pp. 61-64; *see also* TR 6/8/23, pp. 221-26.

For all these reasons, the prosecution failed to prove, beyond a reasonable doubt, that Garcia was complicit in the aggravated robbery.

2. The prosecution failed to prove felony murder beyond a reasonable doubt.

i. The prosecution failed to prove the predicate offense for felony murder.

The prosecution charged Garcia with felony murder with robbery serving as the predicate offense. CF, p. 41. Accordingly, the prosecution was required to prove that Garcia, “[a]cting either alone or with one or more persons, . . . commit[ted] or attempt[ed] to commit . . . robbery . . . and, in the course of or in furtherance of [doing so], or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by any participant.” § 18-3-103(1)(b). “[T]he commission or attempt to commit the predicate offense is an essential element of felony murder.” *Doubleday v. People*, 2016 CO 3, ¶ 22.

For the reasons explained in Part I.B.1, the prosecution failed to prove that Garcia committed aggravated robbery or robbery. *See People v. Borghesi*, 66 P.3d 93, 97 (Colo. 2003) (“[O]ne who commits an aggravated robbery has also committed the lesser included offense of robbery.”). Consequently, the prosecution failed to prove felony murder. *Doubleday*, ¶ 22.

The prosecution also failed to prove that Garcia attempted to commit robbery. Under section 18-2-101(1), an attempt requires a “substantial step toward the commission of the offense” that “is strongly corroborative of the firmness of the

actor’s purpose to complete the commission of the offense.” As relevant here, the prosecution had to present evidence that Garcia “was aware he was engaging in conduct strongly corroborative of the firmness of his purpose to complete the commission of” robbery. *People v. Anderson*, 2019 CO 34, ¶ 18; *see also People v. Lehnert*, 163 P.3d 1111, 1115 (Colo. 2007). It failed to do so.

Garcia did not know the victim. No evidence established that he planned to rob him. No witness testified that Garcia used force, threats, or intimidation against the victim for the purpose of robbing him. None of the victim’s possessions were found with Garcia. And nothing in the record established that Garcia made any failed attempts to take anything of value from the victim.

Because the prosecution failed to establish that Garcia took, or attempted to take, anything of value from the person or presence of the victim by the use of force, threats, or intimidation, the prosecution failed to prove the predicate for the felony murder charge. Thus, Garcia’s felony murder conviction must be vacated. *Doubleday*, ¶ 22.

ii. The prosecution failed to disprove the affirmative defense of disengagement.

Section 18-3-103(1.5) provides an affirmative defense to felony murder if four conditions are satisfied: (a) the defendant was “not the only participant in the underlying crime”; (b) the defendant “[d]id not commit the homicidal act or in any

way solicit, request, command, importune, cause, or aid the commission thereof”; (c) the defendant was “not armed with a deadly weapon”; and (d) the defendant “[d]id not engage himself . . . in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury.”

Garcia’s jury was instructed on this affirmative defense, which required the prosecution “disprove, beyond a reasonable doubt, at least one of the” conditions. CF, p. 299. The first condition is not at issue because the prosecution in closing conceded it. TR 6/12/23, p. 28:1-4. Because the other three conditions were not disproven by the prosecution beyond a reasonable doubt, Garcia’s felony murder conviction cannot stand.

As to the second condition, the prosecution erroneously argued only that Garcia “did aid in the commission of *this robbery*. . . . [He] picked up several things that Jessie dropped. This defendant took those things into Jessie’s apartment, and then he took those things away from the scene[.]” TR 6/12/23, p. 28:5-20 (emphasis added). Defense counsel twice objected to this argument as a misstatement of the law because the second condition related to the homicidal act, not the robbery. TR 6/12/23, p. 28:11-13, 21-24. In any event, the prosecution failed to disprove the second condition beyond a reasonable doubt because Garcia neither killed the victim

nor aided Vargas-Vigil in doing so. The prosecution acknowledged the murder “wasn’t planned necessarily.” TR 6/12/23, p. 74:5-11. No evidence established that Garcia knew the victim, let alone that he “in any way solicit[ed], request[ed], command[ed], [or] importune[d]” Vargas-Vigil to kill him. § 18-3-103(1.5)(b). Nor is there evidence Garcia said or did anything to “cause” or “aid” the killing. To the contrary, the physical evidence supports that Garcia was standing at the driver’s side window and in the line of fire when Vargas-Vigil, sitting in the passenger seat, shot the victim in the head. TR 6/9/23, pp. 113-17.

The prosecution also failed to disprove the third and fourth conditions. The evidence was insufficient to establish that Garcia was armed with a deadly weapon. *See* Part I.B.1.i, *supra*. As such, he did not “engage himself” in or “intend to engage in” conduct “likely to result in death or serious bodily injury.” § 18-3-103(1.5)(d). Nor did Garcia have a “reasonable ground to believe that” Vargas-Vigil “intended to engage in” such conduct. *See* Part I.B.1.iv, *supra*. Rather, the theory of defense was that Garcia believed this was a routine marijuana buy between Vargas-Vigil and the victim. The record is devoid of any indication Vargas-Vigil held any ill-will toward the victim or wanted to hurt him. And it’s unclear whether Garcia knew beforehand that Vargas-Vigil was armed. TR 6/8/23, pp. 127-29.

* * * *

The prosecution failed to prove beyond a reasonable doubt robbery, attempted robbery, and aggravated robbery, as either a complicitor or a principal—the predicate offenses for felony murder. Nor was the evidence substantial or sufficient to disprove Garcia’s affirmative defense of disengagement. *Serra*, ¶ 18.

Because these convictions based on insufficient evidence violated Garcia’s state and federal constitutional rights to due process and conviction based only on proof beyond a reasonable doubt, all should be vacated. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Mortenson*, ¶ 32 (“Generally, an appellate court vacates a conviction when there is insufficient evidence.”); *see also* *People v. Torrez*, 2013 COA 37, ¶ 23 (“Trial courts may not enter a separate conviction or sentence on a count that is only a sentence enhancer.”); *People v. Mata*, 56 P.3d 1169, 1176-77 (Colo. App. 2002).

II. The trial court abused its discretion by admitting propensity evidence that Garcia had guns before and after the robbery, so he was more likely to have had one during the robbery.

A. Standard of Review and Preservation

De novo review applies to whether the erroneous admission of evidence violated a defendant’s rights to a fair trial and an impartial jury. *Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008); *People v. Al-Yousif*, 49 P.3d 1165, 1169 (Colo.

2002). Otherwise, appellate courts review a trial court’s evidentiary rulings for an abuse of discretion. *See Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009).

This issue was preserved. CF, pp. 168-212.

B. Relevant Facts

1. Motions in Limine

In April 2023, the prosecution filed a “Notice of Intent to Introduce Relevant Evidence” pursuant to *Rojas v. People*, 2022 CO 8, and CRE 404(b). CF, pp. 140-59. As relevant here, the prosecution sought to admit “Gun Evidence – Defendant,” which included “[s]ocial media records showing the defendant’s gun possession between May-October 2022” as well as the “[c]ircumstances of [Garcia’s] arrest.” CF, pp. 142-44. Specifically, the social media records included Facebook photos and/or posts of Garcia holding a gun or offering to buy one. CF, p. 143. Regarding the arrest, the prosecution intended to introduce evidence that officers searched Garcia and “discovered a tan Glock 19X concealed inside of his shorts pocket, loaded with 17 live rounds and one in the chamber, and an additional live round in his pocket.” CF, pp. 143-44.

The prosecution argued this evidence was admissible under CRE 406 to show Garcia had a “habit of carrying a firearm,” which was “relevant to prove that his conduct on the day of the homicide was in conformity with that habit.” CF, p. 153.

Alternatively, the prosecution argued the evidence was admissible under CRE 404(b). CF, p. 154. According to the prosecution, the evidence was relevant to proving Garcia “possessed a firearm during the crime”; it was logically relevant “to whether he acted in conformity with that habit”; and there was “no inherent bad character” inference, and thus, “no prejudice,” “associated with the practice of an entirely lawful habit.” CF, p. 154; *see also* CF, p. 156 (arguing gun evidence when Garcia was arrested was either intrinsic under *Rojas* or admissible under CRE 404(b) because “evidence that the defendant possessed a firearm on October 18th 2022 can [be used to] infer the defendant also possessed a firearm on October 12th”).

In response, the defense contended the gun evidence was inadmissible under both Rules 406 and 404(b). “By incorrectly arguing this evidence is habit evidence,” the defense argued “the People have necessarily admitted that their use of the evidence is to prove that because Mr. Garcia acted in a certain manner in the past[,] he is the type of person (character evidence) to act in that same manner moving forward and did act in conformity with his character in this case.” CF, p. 173; *see also* CF, pp. 196-97. To be sure, the prosecution “failed to articulate any evidential hypothesis by which a material fact can be inferred absent the” prohibited propensity inference. CF, pp. 172-76, 181-83, 197.

2. Pretrial Motions Hearing

At the motions hearing, the trial court first rejected the prosecution's theory that the "Gun Evidence – Defendant" constituted habit evidence under CRE 406. TR 5/15/23, pp. 16-19.

The court determined the evidence was extrinsic under *Rojas*, reasoning "[t]here's no evidence the People have offered to show that the guns pictured or used or discussed in the[] 13 incidents of conduct was the murder weapon, or [that] any of them were part of the crimes charged here." TR 5/15/23, p. 20:10-15.

The trial court therefore conducted a *Spoto* analysis. See TR 5/15/23, pp. 20-42. As relevant here, the trial court permitted the following evidence:

- On September 24, 2022, a "photograph of the defendant and another guy, they're pointing handguns, it looks like they have laser sights on them." TR 5/15/23, pp. 21-23. The court reasoned this evidence was relevant to establishing that Garcia was armed on the date of offense, that it tended to prove that material fact because the photo was posted 18 days beforehand, and that the probative value outweighed any danger of unfair prejudice.
- On September 27, 2022, a photo of a handgun "and the communications related thereto" showing Garcia was interested in buying a handgun.

TR 5/15/23, pp. 24-27. Here again, the court reasoned the evidence was relevant to establish Garcia was armed on the date of offense, “maybe perhaps [with] this weapon,” because this occurred 15 days before the alleged offenses.

- On June 6, 2022, two photographs purporting to show Garcia with a black handgun. TR 5/15/23, pp. 29-31. Like the two above-described exhibits, the court similarly found this evidence was relevant to proving Garcia was armed on the date of offense (and to disproving the affirmative defense of disengagement). Even though the “photograph’s remote in time, it’s 128 days before the date of offense[,] . . . it does [have] some tendency to make the existence of the material fact . . . more probable than without the evidence.” TR 5/15/23, pp. 29-30. Finally, the court explained there “are alternative means” of proving Garcia was armed, “but not very many.” TR 5/15/23, p. 31:2-5.
- On October 18, 2022, six days after the robbery, Garcia is arrested, “police officers end up searching” him, “and they find a tan [G]lock in his [] shorts.” TR 5/15/23, p. 40:7-16. The court found the arrest evidence was intrinsic under *Rojas*, and that Garcia’s possession of a handgun was “direct evidence to overcome the affirmative defense” and

to support the deadly weapon element in multiple aggravated robbery counts. TR 5/15/23, pp. 40-41. The court determined the gun evidence was also admissible under CRE 404(b) for similar reasons to the social media records described above. TR 5/15/23, pp. 41-42.

3. Evidence at Trial

The prosecution admitted the three pieces of social media evidence described above through a detective with the Denver police department. *See* TR 6/8/23, pp. 82-83; EX 5-7. Evidence of the loaded gun found on Garcia when he was arrested was introduced through another officer. TR 6/9/23, pp. 47-48; EX 162. The jury was contemporaneously instructed this evidence was “being presented for the purpose of determining if the defendant was armed on the date of offense only. You may not consider these exhibits for any other purpose.” TR 6/8/23, p. 84:1-5; *see also* TR 6/9/23, p. 42:12-16.

In closing, the prosecution made a propensity argument to the jury based on this evidence: “You heard evidence that [Garcia] was armed. [He] was armed on June 6th of 2022. [He] was armed on September 24th of 2022. [He], on September 27, 2022, took part in a conversation where he’s looking to buy a gun. And you know that he was armed on October 18th of 2022 when he was arrested by police in

Thornton. It certainly suggests this defendant was armed the day he went to rob [the victim].” TR 6/12/23, p. 29:4-15.

C. Discussion

Due process guarantees every criminal defendant the right to a fair trial. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973); *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000). Admission of irrelevant and prejudicial evidence may violate this right. *Howard-Walker v. People*, 2019 CO 69, ¶ 23.

“[E]vidence of other crimes, wrongs or acts is inadmissible if the logical relevance of the proffered evidence depends upon an inference that a person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue.” *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). This is because other act evidence that is not probative of a non-propensity purpose, such as intent or identity, is irrelevant to whether the charged conduct has been proven and instead encourages a conviction based on the character of the person being accused. *See Rojas*, ¶ 52 (“If extrinsic evidence suggests bad character (and thus a propensity to commit the charged offense), it is admissible only as provided by Rule 404(b) and after a *Spoto* analysis.”); *Kaufman v. People*, 202 P.3d 542, 552 (Colo. 2009) (explaining

character evidence is inadmissible in part because “there is a concern that a jury will convict a defendant as a means of punishment for past deeds or merely because the jury views the defendant as undesirable”).

Prior to admitting uncharged misconduct evidence, the trial court must first determine, by a preponderance of the evidence, that the prior acts did occur and the defendant committed them. *People v. Garner*, 806 P.2d 366, 373-74 (Colo. 1991). If this threshold is met, courts apply the four-part *Spoto* test: (1) “whether the proffered evidence relates to a material fact”; (2) whether the evidence is “logically relevant”; (3) “whether the logical relevance is independent of the intermediate inference, prohibited by CRE 404(b)”; and (4) “whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice” under CRE 403. *See Spoto*, 795 P.2d at 1318.

1. The gun evidence was extrinsic.

In *Rojas*, ¶ 52, the supreme court held that, “in evaluating whether uncharged misconduct evidence triggers Rule 404(b), a trial court must first determine if the evidence is intrinsic or extrinsic to the charged offense.” Intrinsic evidence “directly prove[s] the charged offense” or “occurred contemporaneously with” it and

“facilitated the commission of it.” *Id.* For that reason, intrinsic evidence is “exempt from Rule 404(b).” *Id.*

Here, the trial court clearly found the social media posts were extrinsic evidence. *See* TR 5/15/23, pp. 19-21. At the same time, the record reflects the court believed evidence that Garcia had a loaded gun when he was arrested was intrinsic, reasoning that it was “direct evidence to overcome the affirmative defense” and to support elements of aggravated robbery. TR 5/15/23, pp. 40-41. This determination was erroneous for two reasons.

First, that Garcia had a loaded gun when he was arrested did not, without more, directly prove he was armed on the date of offense. *See* Part II.C.2, *infra*. No eyewitness testimony or video surveillance showed Garcia with a gun on October 12. And the prosecution ruled out this particular gun as the murder weapon. TR 6/9/23, pp. 39, 48. As such, this evidence is virtually indistinguishable from the social media evidence on this point. *Cf.* TR 5/15/23, pp. 19-20.

Second, the arrest was not contemporaneous with the robbery and murder; it was almost one week later. The prosecution also failed to establish *when* Garcia obtained the loaded gun; because it’s entirely possible he did so *afterward*, it is speculative to infer this particular weapon facilitated the commission of the robbery or murder. *See* CF, p. 196.

Because all the gun evidence was extrinsic to the charged crimes, its admissibility was governed by Rule 404(b). Here, too, the trial court erred.

2. The evidence was not logically relevant.

Evidence is logically relevant when it has “any tendency to make the existence of [a] material fact more or less probable than without the evidence.” *Yusem*, 210 P.3d at 464-65 (emphasis omitted).

Here, the prosecution argued only that the gun evidence was logically relevant because “the defendant’s habit [of carrying a firearm] is relevant as to whether he acted in conformity with that habit” on October 12. CF, p. 154. The trial court appeared to agree, reasoning that Garcia’s possession of a gun 128, 18, and 15 days before the incident, and then six days after it, made it more probable “he had a handgun on the date of offense.” TR 5/15/23, pp. 22, 25, 29-30, 41-42.

To the contrary, these instances of Garcia posing with a gun or expressing interest in buying one did not make it more likely he was armed on the date of offense. The Facebook posts pre-dated the robbery by as much as four months with no indication what happened to those weapons in the interim. No evidence showed the guns belonged to Garcia, that he ever purchased the gun mentioned in the Exhibit 6 group chat, or that he was in possession of any of the guns on October 12. Nor did the prosecution introduce evidence linking any of the guns in Exhibits 5-7 to the one

Garcia had when he was arrested. Most importantly, the prosecution failed to connect any of the guns to the robbery. *Cf. Kaufman*, 202 P.3d at 555 (“Kaufman carried none of these other weapons on his person at the time of the accident. None of them is significantly similar to the knife actually used in the altercation.”).

The fact that Garcia posed for photographs with a gun and had a gun when he was arrested after a traffic stop is not logically relevant to show Garcia was armed during the robbery. *Cf. Yusem*, 210 P.3d at 467 (“[T]he lack of similarity between [the defendant’s] prior act and the charged offense further supports [the] conclusion that the prior act evidence is not relevant independent of the inference [of the defendant’s character as] a bully.”).

3. Any logical relevance was not independent of the prohibited propensity inference.

Other acts evidence is inadmissible “if the logical relevance of the proffered evidence depends upon an inference that a person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue.” *Spoto*, 795 P.2d at 1318.

Here, any logical relevance of the gun evidence depended on the prohibited propensity inference. The prosecution admitted as much, asserting that Garcia’s “habit is relevant as to whether he acted in conformity with that habit,” but that doing so doesn’t make him “a bad person.” *CF*, p. 154. This is not “a precise evidential

hypothesis” for permissibly inferring that Garcia had a gun at the robbery independent of a character inference. *Yusem*, 210 P.3d at 463-64. To the contrary, it implicitly acknowledges the gun evidence is relevant *because* of the character inference, not in spite of it.

Said another way, that Garcia “possessed a gun on two occasions four months and two weeks prior” to the incident, and also when he was arrested almost a week after the robbery, TR 6/12/23, p. 60:13-16, does not tend to make it more probable he was armed on the date of the offense *unless* one relies on the improper inference that Garcia is a reckless and dangerous person and, acting in conformity with that character, he was more likely to be reckless and dangerous on October 12 by bringing a gun with him to the marijuana deal. *Cf. Kaufman*, 202 P.3d at 555 (“[T]he fact that a person collects knives or other weapons does not tend to make it more probable that the person is experienced with the use of knives and intends to use a knife to cause serious injury to others. . . . Possession and use are not equivalent.”); *Yusem*, 210 P.3d at 466.

4. Any probative value was strongly outweighed by the risk of unfair prejudice.

Prior acts evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Yusem*, 210 P.3d at 467. “Evidence is unfairly prejudicial if it is unduly inflammatory or likely to prevent the jury from

making a rational decision.” *People v. Brown*, 2014 COA 130M, ¶ 11 (citation omitted). Evidence should also be excluded if it has “an ‘undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror.’” *Id.* (citation omitted).

Here, the risk of unfair prejudice was high. The gun evidence portrayed Garcia as a young man of color who was arrested with a gun, cavalierly posed with guns, and shared the photos with others on social media. Guns and gun violence, especially with young people, is a particularly emotional subject. Such evidence was thus likely to encourage the jury to render a decision on an improper basis, such as hatred, contempt, retribution, or horror at Garcia’s apparently nonchalant attitude toward guns, rather than proof beyond a reasonable doubt of his conduct involving a gun, if any, on the date of offense. *Cf. Brown*, ¶¶ 21-24 (concluding trial court abused its discretion by admitting prior act evidence that was “qualitatively different, more severe, and more inflammatory than the evidence concerning the charged offenses”).

On the other hand, this evidence had little probative value. *See* Part II.C.2-3, *supra*. While the trial court believed any such value was necessarily increased because “not very m[uch]” of the prosecution’s evidence “show[ed] the defendant was armed,” TR 5/15/23, pp. 23, 26-27, 30-31, this reasoning is limited where, as here, the prosecution’s evidence “really point[ed] to the codefendant having a gun,

not the defendant,” TR 5/15/23, p. 27:1-3. Under these circumstances, the prosecution’s inability to prove Garcia was armed (because he was not), should not render otherwise inadmissible character evidence admissible—especially when the danger of unfair prejudice is so great.

5. Reversal is required.

The error in admitting the challenged gun evidence was not harmless. *Yusem*, 210 P.3d at 469.

The evidence of guilt was not overwhelming. *See* Part I. But also, the dispute at trial, as the prosecution described it, centered on “what [Garcia] knew and what [his] desire, purpose, and design was, what he knew about this deal, what he knew about Jessie Vargas-Vigil, what he knew about weapons being brought to this deal.” TR 6/12/23, pp. 19-20. To that end, the prosecutor told the jury this was a planned robbery; Vargas-Vigil was armed, Garcia knew it, and they intended to go together to confront the victim. TR 6/12/23, pp. 20-22. The defense countered that Garcia had no reason to believe this was anything other than a marijuana deal; that the victim and Vargas-Vigil had likely done these deals before without incident; and that no evidence showed Garcia was also armed that day. TR 6/12/23, pp. 40-41, 60-64.

The prosecution relied heavily on the gun evidence to establish Garcia was armed and intended to aid or encourage Vargas-Vigil in robbing the victim. TR

6/12/23, p. 29:4-17. And the trial court instructed the jury that it could consider the gun evidence on this issue. CF, p. 291.

For these reasons, “there is a reasonable probability that the error contributed to [Garcia’s] convictions by substantially influencing the verdict or impairing the trial’s fairness because the error concerned the core dispute at trial.” *Brown*, ¶ 30. Because the trial court admitted the prior act evidence as to all charges, this error warrants reversal of all Garcia’s convictions. *Id.*

III. The trial court abused its discretion and violated Garcia’s constitutional right to present a defense when it rejected his theory of defense instruction.

A. Standard of Review and Preservation

“The trial court has a duty to instruct the jury on all matters of law applicable to the case.” *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). This Court reviews de novo whether “all of the instructions given by the trial court together” accurately informed the jury of the governing law. *Id.* at 1092-93. Otherwise, this Court reviews for an abuse of discretion “a trial court’s decision to give—or not give—a particular instruction.” *People v. Omwanda*, 2014 COA 128, ¶ 39.

This issue is preserved. TR 6/12/2023, pp. 4-14.

B. Relevant Facts

The defense tendered the following theory of defense instruction:

Mr. Gemini Garcia asserts he believed he was going to [the victim's] truck with Jesse Vargas-Vigil to buy marijuana. Mr. Garcia asserts that, once at the truck, [Vargas-Vigil] acted alone and impetuously to rob and kill [the victim]. Mr. Garcia did not know that Mr. Vargas-Vigil intended to rob [the victim]. Because Mr. Garcia did not know that Mr. Vargas-Vigil would rob [the victim], he could not aid, abet, advise or encourage Mr. Jesse Vargas-Vigil in the planning or commission of the aggravated robbery. Further, Mr. Vargas-Vigil acted alone when he took items from [the victim] and his truck.

CF, p. 324.

The trial court rejected that instruction and drafted a shortened version, which was given to the jury:

Mr. Gemini Garcia asserts he did not aid, abet, advise or encourage Mr. Jesse Vargas-Vigil in the planning or commission of the crimes charged. Further, Mr. Vargas-Vigil acted alone when he robbed and kill [the victim].

CF, p. 295; *see also* TR 6/12/23, pp. 6-14.

Defense counsel objected to the revisions, specifically the omission of the first sentence in the tendered instruction, which went to Garcia's knowledge about "what was happening as they were going to the truck." TR 6/12/23, p. 11:14-19. The defense explained this language was necessary because the prosecution was "proceeding on multiple theories that require multiple types of defenses related to both principal and complicitor" liability. TR 6/12/23, pp. 12-13.

C. Discussion

“A defendant is entitled to an instruction on his theory of defense.” *Riley*, 266 P.3d at 1092; *see also People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992). The instruction “must be general and brief and must explain the evidence and its legal effect.” *Omwanda*, ¶ 40. Where a theory of defense instruction is improper, because it is “argumentative or merely highlights specific pieces of evidence,” the trial court “must cooperate with counsel to . . . draft an instruction that incorporates the substance of a defendant’s theory.” *Id.* ¶¶ 40-41. A trial court may reject a theory of defense instruction if it is encompassed in other instructions. *People v. Weiss*, 717 P.2d 511, 512 (Colo. App. 1985).

1. The trial court erred by omitting a portion of Garcia’s tendered theory of defense instruction.

Here, the court’s instruction did not accurately incorporate the substance of Garcia’s theory of defense. Specifically, Garcia contended that he did not know that Vargas-Vigil intended to rob and kill the victim. This defense was critical to refuting the prosecution’s allegation that Garcia was complicit in the charged crimes. And it was supported by the lack of evidence in the record. For instance, there were no discussions about robbing the victim beforehand; Vargas-Vigil frequently used, and may have also sold, marijuana, so it was unsurprising he would arrange to buy a

large quantity from the victim, TR 6/8/23, p. 130:8-18; TR 6/12/23, pp. 42, 57; and there was no evidence Vargas-Vigil harbored any ill-will toward the victim.

The first sentence of the tendered instruction, in particular, went to Garcia's knowledge and, relatedly, his intent in accompanying Vargas-Vigil to the parking lot. The trial court refused to include that first sentence, however, erroneously believing that the "planning or commission" language "takes into account what happened before." TR 6/12/23, p. 11:20-23. To the contrary, the amended instruction *assumed* Garcia had knowledge of what Vargas-Vigil meant to do, but that Garcia simply did not aid or encourage Vargas-Vigil in doing it. CF, p. 295. That is, no part of the court's instruction denied Garcia knew Vargas-Vigil intended to rob the victim. To the contrary, the court's instruction contemplated that Garcia knew but stood by and did not help Vargas-Vigil. *Cf. Nunez*, 841 P.2d at 266 ("Jury instructions that merely set forth the elements of the offense and the burden of proof, without more, do not encompass a theory of defense.").

By omitting the aspects of Garcia's theory of defense instruction regarding his knowledge, the court implicitly conceded that Garcia had such knowledge—a material fact that was hotly disputed at trial. Doing so was an abuse of discretion and violated Garcia's constitutional right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants a

meaningful opportunity to present a complete defense.”) (citation omitted); U.S. Const. amends. VI, XIV; Colo. Const. art II, § 16.

2. This error was not harmless.

In *Nunez*, the supreme court reversed the defendant’s conviction because of the trial court’s “error in refusing to give a theory of the case instruction based on [the defendant’s] claim of alibi.” 841 P.2d at 267. The supreme court reasoned that the defendant had “specifically requested an alibi instruction”; the prosecution was required to prove the defendant’s presence to establish the aggravated robbery charge; and there was evidence to support the alibi defense. *Id.* Accordingly, the question should have been left with the jury to “evaluat[e] the credibility of witnesses, the weight of testimony, and the adequacy of the defendant’s theory of defense.” *Id.*

So too here. Central to the prosecution’s case was proving that Garcia not only knew Vargas-Vigil intended to rob the victim, but that Garcia, with the desire, purpose, or design to help plan or commit the aggravated robbery, did so. But Garcia denied such knowledge. Because the court’s instruction omitted a critical aspect of the defense theory on a disputed issue, this Court cannot be confident the error did not “substantially influence[] the verdict or affect[] the fairness of the trial

proceedings.” *Hagos v. People*, 2012 CO 63, ¶ 12 (citation omitted). Reversal is thus appropriate.

IV. The cumulative effect of the errors identified in Arguments II and III deprived Garcia of a fair trial.

This Court reviews de novo whether the cumulative effect of errors deprived a defendant of a fair trial. *See Howard-Walker*, ¶¶ 24-48. Reversal is appropriate where, as here, “multiple” errors—assuming they are deemed individually harmless (which they should not be)—together show the absence of a fair trial. *Id.* ¶¶ 23-26. “Stated simply, cumulative error involves cumulative prejudice.” *Id.* ¶ 25.

What Garcia knew, what he intended, and whether he was armed on October 12 were the central disputes at trial. But the prosecution unfairly injected for the jury’s consideration *who* Garcia was, not what he did (or didn’t do). Compounding this error, the trial court’s instructions reinforced that Garcia was a bad person who knew what Vargas-Vigil intended and simply stood back and watched it happen. Because these errors “collectively prejudice[d]” Garcia’s “substantial rights,” reversal is appropriate. *Id.*

CONCLUSION

Based on Argument I, Garcia respectfully asks this Court to vacate his convictions. Alternatively, based on Arguments II-IV, Garcia requests this Court reverse his convictions and remand for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on February 26, 2025, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's Office through their AG Criminal Appeals account.

