COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; Jefferson County District Court Honorable Robert C. Lochary Case Number 2022CR2923	DATE FILED October 9, 2025 12:49 PM
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant GEMINI ELIJAH GARCIA	
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REPLY BRIEF	

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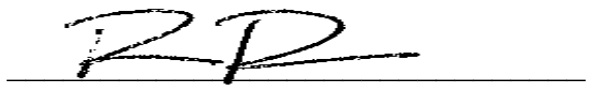

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ARGUMENT

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

The Opening Brief contended the evidence was insufficient to prove beyond a reasonable doubt Garcia's guilt for felony murder or any of the predicate offenses, either as a principal or complicitor. *See* Opening Br. 7-23. The Answer Brief disagrees, based on inferences that, for reasons explained below, are speculative and not reasonable on this record.

A. There was insufficient evidence to convict Garcia of aggravated robbery under a complicity theory.

The jury was instructed on a complicity theory for all five of the aggravated robbery counts (i.e., counts 2-6). *See* CF, pp. 300-17.[1] Without clearly differentiating between those counts, the People generally assert the prosecution's evidence was sufficient to "prove that Defendant was guilty of aggravated robbery under a theory of complicity." Answer Br. 9-11. The People's argument, however, illuminates the

[1] To the extent the People assert that a complicity theory under subsection (1)(c) means Garcia "becomes the 'confederate'" and Vargas-Vigil the "complicitor," Answer Br. 12 n.1, the plain language of the statute suggests otherwise. Under a complicity theory, Vargas-Vigil is the principal, and Garcia would be both a complicitor *and* confederate. *See* § 18-4-302(1)(c), C.R.S. 2024 ("A person who commits robbery is guilty of aggravated robbery if . . . [h]e has present a confederate, aiding or abetting the perpetration of the robbery . . . .").

lack of evidence directly implicating Garcia as opposed to Vargas-Vigil. The record bears this out.

For example, the People contend there's sufficient evidence Garcia aided and abetted Vargas-Vigil in the aggravated robbery, and intended to do so, because Garcia "accompanied Vargas-Vigil to the scene" and "brought a bag," which the jury could "reasonably conclude" Garcia would use to "take anything of value." Answer Br. 9-10. But merely accompanying Vargas-Vigil to the victim's truck, particularly when Garcia believed they were going to buy marijuana, does not establish that Garcia knew Vargas-Vigil intended to rob the victim, let alone that Garcia intended to aid, abet, advise, or encourage him to do so. *Cf. 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."). It is undisputed Vargas-Vigil alone communicated with the victim to arrange to buy one pound of marijuana, in broad daylight, in the parking lot of the apartment complex where Vargas-Vigil lived. This arrangement accounts for the "bright green bag." *E.g.* TR 6/12/23, pp. 61-64.

The People also point to evidence that Garcia "stood outside the driver's side door where [the victim] was seated." Answer Br. 9. In the People's view, this "prevent[ed] [the victim] from leaving the vehicle while Vargas-Vigil sat in the

passenger seat aiming the gun at" him. Answer Br. 9-10. *But 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.").

The record does not render this inference a reasonable one. No evidence indicated the victim tried to get out of his vehicle or that Garcia, either through words or action, affirmatively stopped him from doing so. *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"). Nor were Garcia's fingerprints found on the driver's side door handle, the presence of which might have otherwise indicated he pushed or held the door closed. TR 6/9/23, p. 120:1-20; EX 182; Supp EX 191. Instead, his finger and palm prints for both hands were found only along the top of the driver's side window, which was rolled partway down. TR 6/9/23, pp. 113-17. Finally, the logic of the People's argument would place Garcia in the line of fire—a

risk it is unreasonable to infer he would take if he knew Vargas-Vigil meant to rob the victim at gunpoint.

The People next contend sufficient evidence demonstrated Garcia was aware that Vargas-Vigil knowingly committed aggravated robbery, pointing primarily to Vargas-Vigil's brother who testified that Vargas-Vigil "was armed just before he left to go to the parking lot." Answer Br. 10. But the brother's testimony didn't end there. He described how Vargas-Vigil had a gun "on his hip" when the brother first entered the apartment. TR 6/8/23, p. 126:20-22. But Vargas-Vigil *took it off* "a couple minutes later" and "puts it in the couch." TR 6/8/23, pp. 126-29. Critically, the brother admitted he did "not see [Vargas-Vigil] put the gun back on his hip." TR 6/8/23, pp. 127-28. Nor did he describe seeing Vargas-Vigil with another gun. And he never saw Garcia with a gun. TR 6/8/23, p. 128:24-25.

Finally, the People speculate Vargas-Vigil's comment that "he and Defendant had to 'go do something'" was in reference to the robbery. Answer Br. 10. But Vargas-Vigil's brother testified that no one said anything about a robbery or used any "other kind of lingo for robbing someone." TR 6/8/23, p. 130:1-7. From the text message conversation, the record shows instead that the victim was caught in traffic but headed to meet Vargas-Vigil. *See* EX 45-51.

B. There was insufficient evidence to convict Garcia of aggravated robbery as a principal.

The prosecution also alleged that Garcia was guilty of aggravated robbery as a principal on counts 2, 3, and 6. *See* CF, pp. 301, 305, 315. This required proof beyond a reasonable doubt, as relevant here, 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. 2024. The prosecution failed to present "substantial and sufficient" proof of either. *People v. Serra*, 2015 COA 130, ¶ 18.

Regarding whether Garcia was armed, the People point to four categories of evidence for support: social media photos "showing Defendant's possession or expressions of interest in buying a gun," the "loose rifle and handgun ammunition" found in Vargas-Vigil's sister's apartment, the circumstances surrounding Garcia's arrest, and the surveillance video and still photos of Vargas-Vigil and Garcia running away after the incident. Answer Br. 12-15. Putting aside Garcia's argument that the first and third categories of evidence should have been excluded under CRE 404(b), *see* Part II *infra*, this specific evidence was insufficient for the reasons explained in the Opening Brief at pages 9-11. The Answer Brief fails to explain why or how the gaps and limitations of this evidence is not fatal, contending simply that "a

reasonable jury could have circumstantially inferred Defendant was armed on the day of the incident." Answer Br. 13.

The prosecution is not entitled to "the benefit of *every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial." *Cf. United States v. Goldesberry*, 128 F.4th 1183, 1192 (10th Cir. 2025) (citation omitted). Thus, while it is *possible*, for instance, that the "loose ammunition in the flower pot could have belonged to Defendant and been left at the home on that day," Answer Br. 14, that possibility on this record lacks "other evidence to buttress the inference." *Id.* (citing *People v. Stark*, 691 P.2d 334, 339 (Colo. 1984)). Specifically, none of that ammunition was tied to Garcia or matched a gun connected to him. Thus, the People's inference rests on speculation and is not a reasonable one. *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999).

For support, the Answer Brief cites *People v. Poe*, 2012 COA 166, *see* Answer Br. 14, but that case is factually distinguishable. In *Poe*, the defendant argued the prosecution had failed to prove beyond a reasonable doubt his "knowing possession" of drugs and drug paraphernalia found in a one-bedroom apartment "rented by defendant" where there was "no evidence of a houseguest." *Poe*, ¶¶ 17-18. Under those circumstances, a division of this Court concluded the evidence was sufficient because the items "were under defendant's dominion and control." *Id.* ¶ 18. By

contrast, the flower pot ammunition was not found in Garcia's apartment. Although he was inside the apartment before and after the incident, the record contains no evidence that he lived there or exercised "dominion and control" over any part of it. *Cf.* TR 6/8/23, pp. 94-97. Accordingly, it is speculative to assume, without more, that the items in the apartment belonged to Garcia. *Cf. Feltes v. People*, 498 P.2d 1128, 1131-32 (Colo. 1972) ("Under the facts of this case, where there was no exclusive possession of either the premises as a whole, or of any of the rooms within [it], additional links in the evidence must be provided to connect the individual defendants with the contraband discovered to prove possession and control to the exclusion of any reasonable hypothesis of innocence.").

As to whether Garcia took anything of value from the person or presence of the victim, the People contend the surveillance video of Garcia running back to the apartment "with [his] arms full" and following "Vargas-Vigil's instructions to pick up something [Vargas-Vigil] had dropped" is sufficient "to show Defendant took anything of value from [the victim's] person or presence." Answer Br. 16-17. Not so. By the time Garcia picked up the plastic bag in the grass, he was across the parking lot and behind the garages near an apartment building. Video EX 120; TR 6/7/23, pp. 46-47; TR 6/8/23, pp. 38, 41-42. The robbery, at that point, was complete and Garcia was no longer in the victim's presence nor using force, threats, or

intimidation. *People v. Mortenson*, 2023 COA 92, ¶ 8 (explaining that, "[f]or property to be in a victim's 'presence,' the victim must be exercising, or have the right to exercise, control over the item taken" and the property "must also 'be within the victim's reach'") (citation omitted). Additionally, the surveillance footage does not clearly show that the green bag pressed up against Garcia's left side had anything inside it. The People do not dispute that the prosecution presented no evidence "of what, if anything, was inside that bag" or "that any other items were missing from the victim's truck." Opening Br. 13.

Finally, the Answer Brief does not appear to contend there is evidence, let alone sufficient evidence, that Garcia took the victim's necklace. The record refutes that he did. *See* Opening Br. 12. For reasons already explained, the fact that Garcia stood outside the truck on the driver's side, without more, doesn't permit a reasonable jury to find beyond a reasonable doubt that he "used force, threats, and/or intimidation to take [the victim's] necklace" either. Answer Br. 17.

C. There was insufficient evidence to convict Garcia of felony murder.

The People appear to agree that, if the prosecution failed to prove beyond a reasonable doubt at least one of the predicate offenses, Garcia's felony murder conviction must also be vacated. *See* Opening Br. 23; Answer Br. 18.

Concerning the affirmative defense to felony murder in section 18-3-103(1.5), C.R.S. 2024, the People contend Garcia "took numerous steps to aid in . . . commission" of the homicidal act, "specifically including his standing outside the driver's side door, which would prevent any attempt by [the victim] to escape." Answer Br. 19. Again, this argument is speculative and lacks record support. It is further undermined by the prosecution's recognition that the murder "wasn't planned necessarily." TR 6/12/23, p. 74:5-11.

* * * *

For the reasons here and in the Opening Brief, Garcia's convictions based on insufficient evidence should all be vacated. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Mortenson*, ¶ 32; *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.

The Opening Brief argued that gun evidence in social media posts and as part of the circumstances of Garcia's arrest constituted extrinsic evidence and should have been excluded under CRE 404(b). *See* Opening Br. 29-37. The Answer Brief

contends otherwise, arguing the challenged gun evidence was intrinsic, that it did not inherently suggest bad character, and, even if it did, its admission was harmless. *See* Answer Br. 27-35. Three points require further clarification.

First, the People's argument rests on the idea that the challenged evidence involves "legal gun ownership," which "on its own is not suggestive of bad character." Answer Br. 27, 30. Whether or not that is true, the evidence at issue isn't clearly limited to legal gun ownership. In pretrial litigation, the defense specifically argued the social media post about Garcia expressing interest in buying a gun involved "the private purchase of a firearm," which is criminalized in Colorado under section 18-12-112 "and require[s] strict compliance with specific terms and conditions." CF, pp. 174, 185. Absent "the admission of that [kind] of evidence," the proffered evidence involved "prior uncharged criminal conduct." *Id.* Similarly, the defense explained that Garcia's arrest six days after the incident involved "unlawful prior acts, namely carrying a concealed weapon" and "possession of a prohibited large capacity magazine." CF, p. 196. Defense counsel even noted Garcia "ha[d] been charged with those crimes as a result of his arrest." *Id.*

Relatedly, the record does not indicate whether Garcia owned any of the pictured guns or merely posed with them, let alone that he was in possession of any of the guns on the day of the incident. Nor is there evidence about whether Garcia

purchased the gun in the Exhibit 6 group chat. There is also no evidence establishing when Garcia obtained the gun he was arrested with. The People's assumption then that this evidence "directly proved" that Garcia had the "means to carry out the aggravated robberies" is, without more, speculative. Answer Br. 28.

Second, the challenged gun evidence went further than merely establishing "legal gun ownership" and did in fact risk a conviction on an impermissible character inference. *Kaufman v. People*, 202 P.3d 542 (Colo. 2009), supports Garcia's position on this point. There, the supreme court concluded that "some of the other act evidence, particularly Kaufman's knife collection, was improperly admitted under CRE 404(b), prejudicing the defense by painting a picture of Kaufman as an evil individual and allowing the jury to draw impermissible inferences of action in conformity with that nature." *Id.* at 546. The supreme court explained "the 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." *Id.* at 555. Thus, the evidence "merely . . . paint[ed] a picture of Kaufman as a bad person." *Id.* A knife collection, like "legal gun ownership," isn't necessarily illegal. But *Kaufman* recognizes that such evidence, depending on the facts of a particular case, can nonetheless be subject to, and deemed inadmissible under, the other act evidence framework of CRE 404(b).

Applying *Kaufman* here, the social media photographs depicted a young man of color who appeared to nonchalantly pose with and display guns, permitting the impermissible inference that Garcia is a dangerous and reckless individual who acted in conformity with his dangerous and reckless nature on the day of the incident. For similar reasons as those the supreme court recognized in *Kaufman*, the challenged gun evidence did not satisfy the requirements under *Spoto*/CRE 404(b) and should have been excluded.

Third, the People assert that the circumstances of Garcia's arrest, in particular attempting to run away and giving a false name, went to Garcia's consciousness of guilt for the aggravated robbery and murder. But again, the defense provided critical context that, on the date of Garcia's arrest, "there was a warrant for [his] arrest for" menacing allegations that pre-dated the incident here by four months. CF, p. 196. Thus, this evidence "does not show a guilty conscience *about the events of this case*"; rather, it showed Garcia "did not want to be charged" based on an outstanding warrant in another case. CF, p. 197.

* * * *

As explained in the Opening Brief, the gun evidence was irrelevant, highly prejudicial, and inflammatory. Because its erroneous admission concerned a central dispute at trial, this error cannot be deemed harmless. Opening Br. 5-6, 36-37.

Reversal of all Garcia's convictions for a new trial is warranted. *People v. Brown*, 2014 COA 130M, ¶ 30.

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

The Opening Brief argued that the trial court's revised theory of defense instruction did not accurately incorporate the substance of the defense theory because it omitted the critical and disputed element of what Garcia knew and what he intended. Opening Br. 39-41. To make matters worse, the court's instruction implied the opposite: that Garcia knew Vargas-Vigil intended to rob the victim at gunpoint but that he simply "stood by and did not help." Opening Br. 40. Because Garcia's knowledge and intent went to the core of the defense theory, this error cannot be deemed harmless, let alone harmless beyond a reasonable doubt. Opening Br. 41-42. The Answer Brief argues otherwise to no avail.

A. The trial court abused its discretion.

The Answer Brief contends there was no abuse of discretion because the court's modified instruction properly removed the argumentative and "redundant" aspects of the defense tendered instruction. Answer Br. 40-41. For support, the People rely on *People v. Martinez*, 2020 COA 141. But on closer inspection, this reliance is misplaced.

The tendered theory of defense instruction in *Martinez* included multiple sentences describing the defendant's encounter with the victim leading up to the charged sexual assault, including that they were hanging out "in a park in lower downtown"; that the victim approached Martinez and his friends; that she made the first move with defendant's friend, but shifted her attention to Martinez after learning his friend had a girlfriend. *Id.* ¶ 83. The trial court modified the instruction, explaining that the above-described sentences were "focus[ed] solely on Martinez's testimony" and "'merely reiterate[d] portions of the evidence' that were favorable to" him. *Id.* ¶ 85; *cf. People v. Omwanda*, 2014 COA 128, ¶¶ 40-41 (a theory of defense instruction may be improper to the extent it "merely highlights specific pieces of evidence"). A division of this Court concluded the redrafted instruction was proper because it "excised the problematic components . . . while providing Martinez's theory of defense that [the victim] did not appear to be incapable of appraising the nature of her conduct" and that the sex was consensual. *Martinez*, ¶ 86.

Here, by contrast, the "substance" of Garcia's theory of defense was that he "did not know" what Vargas-Vigil intended to do. CF, p. 324. And *because he "did not know*," he "could not aid, abet, advise or encourage" Vargas-Vigil in doing it. *Id.* (emphasis added); *cf. Omwanda*, ¶ 40 (a theory of defense instruction "must

explain the evidence *and its legal effect*") (emphasis added). The People do not point to another jury instruction that encompassed the lack of knowledge aspect of the defense theory. *Cf. People v. Weiss*, 717 P.2d 511, 512 (Colo. App. 1985) ("A defendant is entitled to a properly worded instruction setting forth his theory of defense so long as there is any evidence in the record to support the instruction and it is not encompassed in other instructions."). To the contrary, the court's modified instruction omitted any reference to Garcia's knowledge. Worse still, as the Opening Brief argued, it "contemplated" the opposite: "that Garcia knew but stood by and did not help Vargas-Vigil." Opening Br. 40.

Accordingly, the trial court here went further than in *Martinez* and directly undermined Garcia's theory of defense in the court's effort to simplify and shorten the instruction. Because Garcia's jury received an instruction that not only failed to incorporate his defense theory but that implicitly conceded the opposite, Garcia respectfully disagrees this was simply a matter of not "employ[ing]" the defense's "precise language." *Cf.* Answer Br. 41. It was an abuse of discretion.

B. Under any standard, this error warrants reversal.

The People disagree that this error should be reviewed for constitutional harmlessness. Answer Br. 36. Even if this Court applies the ordinary harmless error standard, reversal is warranted.

It is the People's burden to show an error is harmless. *James v. People*, 2018 CO 72, ¶¶ 18-19. To do so, the People focus on the "ample opportunity" Garcia had "through opening statement, cross-examination, and closing argument" to "convey what he wished to include in the tendered theory of the case instruction." Answer Br. 41. But arguments of counsel are not evidence. *See Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978) ("The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. But arguments of counsel cannot substitute for instructions by the court."); *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1088 (Colo. 2011) (holding that courts presume a jury follows a trial court's instructions, but a jury may properly disregard statements made by counsel); *People v. Joosten*, 2018 COA 115, ¶¶ 37-38. "It is the duty of the trial court—not counsel—to 'correctly instruct the jury on all matters of law for which there is sufficient evidence to support giving instructions.'" *People v. Jones*, 2018 COA 112, ¶ 64 (citation omitted). "Consistent with its obligation," the trial court here repeatedly told the jury the law is what the court provides in the written instructions—not what the lawyers argue it is. *See* CF, p. 282; TR 6/12/23, pp. 29, 70; *cf. Jones*, ¶ 64 (rejecting People's argument that "defense counsel's closing cured the effect of an erroneous jury instruction," in part because the trial court told

the jury that "if the lawyers say the law is something and it's something different in the instructions, then you go with the instructions"). In the absence of contrary evidence, this Court presumes the jury understood and followed those instructions, *see, e.g.*, *Dunlap v. People*, 173 P.3d 1054, 1088 (Colo. 2007)—which were, at best, inconsistent with the defense theory and, at worst, undermined it.

Following the court's unfavorable ruling rejecting and modifying the tendered theory of defense instruction, defense counsel necessarily had to adapt and pivot, using closing argument to do so. *Cf. People v. Terhorst*, 2015 COA 110, ¶ 12 ("At some point after receiving an adverse ruling on an objection or argument at trial, trial counsel must accept the trial court's decision and move on. This acquiescence is not akin to a waiver, but instead permits the party adversely affected by the ruling to seek appellate relief[.]"); *DeBella v People*, 233 P.3d 664, 669 (Colo. 2010) ("Moreover, the defense attorney's decision to argue evidence admitted over his objection should not operate as a concession to its later use."); *Frasco v. People*, 165 P.3d 701, 707 (Colo. 2007) (Martinez, J., concurring) ("The defense attorney unsuccessfully objected to the admission of the videotape at trial. Faced with a situation in which the jury was going to see the evidence, he then argued to the jury that the evidence supported his client's case. His arguments should not be confused or construed as acceptance of admission of the videotape. Further, he should not

have to face the risk that his decision to argue evidence admitted over his objection will operate as a penalty to any later objections he might make to its admission or use."). Counsel's response under the circumstances here was thus neither curative of, nor insulation for, the trial court's error.

Garcia's knowledge was a central dispute at trial. *See* TR 6/12/23, pp. 19-20. The theory of defense instruction, as modified by the trial court, effectively conceded that element. Such an error cannot be deemed harmless, let alone harmless beyond a reasonable doubt. *See also* Opening Br. 41-42. Reversal is warranted.

CONCLUSION

For the reasons explained here and in the Opening Brief, Garcia respectfully requests, based on Argument I, that this Court 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 October 9, 2025, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Allison S. Block of the Attorney General's Office.