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SUMMARY
August 20, 2026

2026 COA 65

No. 24CA1331, *People v. Schlitt* — Parks and Wildlife — Willful Destruction of Wildlife — Mens Rea — Intent to Abandon

As a matter of first impression, a division of the court of appeals considers whether a defendant may be guilty of willful destruction of wildlife under section 33-6-117, C.R.S. 2025, where a defendant hunts wildlife, takes only its trophy parts, and then later returns to harvest meat from the carcass. The division concludes that the statute requires the jury to determine whether, at the time the defendant killed wildlife and took only trophy parts, he did so with the conscious objective of leaving the carcass behind with no intent to return.

Court of Appeals No. 24CA1331
Park County District Court No. 22CR69
Honorable Amanda Hunter, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Robert C. Schlitt,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART AND VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE GROVE
Moultrie and Bernard*, JJ., concur

Announced August 20, 2026

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2025.

¶ 1 Defendant, Robert C. Schlitt, appeals the judgment of conviction entered after a jury found him guilty of willful destruction of big game wildlife (willful destruction), hunting big game without a valid and proper license (hunting without a license), illegal possession of wildlife (illegal possession), and waste of edible game wildlife (waste). Among other things, Schlitt contends that the prosecution's evidence was necessarily insufficient to support his willful destruction conviction because, after killing a black bear and collecting only its trophy parts, he returned one or two days later and harvested meat from the carcass. We reject Schlitt's contention because we conclude that the willful destruction statute required the jury to determine whether, at the time that he killed the bear and took only the trophy parts, he did so with the conscious objective of leaving the carcass behind with no intent to return, and there was sufficient evidence that he had that conscious objective.

¶ 2 As for Schlitt's remaining contentions, we vacate his waste conviction because we conclude that it must be merged with his conviction for illegal possession and remand the case to the trial court for correction of the mittimus. Otherwise, we affirm.

I. Background

¶ 3 A reasonable jury could have found the following facts based on the evidence presented at trial.

¶ 4 While bow hunting with his brother on September 11, 2022, Schlitt killed a bear. He had a valid qualifying hunting license and a bear tag valid for several nearby game management units, but he took the bear, which weighed approximately 350 pounds, outside of the designated unit. With the help of a man camping nearby, Schlitt and his brother cut off the bear's head, hide, and paws, propped the carcass on some logs, and then left it there without field dressing it or harvesting any meat. The brothers told the camper that "their impression was that . . . all they had to take in that moment . . . was either the meat or the hide," and they did not mention any plans to go back and harvest the meat later.

¶ 5 The next day, Schlitt's father called Colorado Parks and Wildlife (CPW),¹ said that his sons had killed a bear and taken the skin and the head, and asked if they had to collect the meat as well.

¹ In 2011, the Division of Wildlife (DOW) and the Division of Parks and Outdoor Recreation merged to create CPW. DOW and CPW are used interchangeably in the record, but we use CPW to reflect the current naming convention.

Schlitt and his brother were upset about their father's phone call, and after they learned that he had made it, they returned to the carcass and harvested sixty-two pounds of meat.

¶ 6 A few weeks later, based on a tip from another hunter, CPW opened an investigation. When the CPW investigator found the bear's carcass, he noted that it had not been field dressed and had no knife marks, and that there were signs of scavenging signaling that edible meat had been left on the bear. During a search of Schlitt's and his father's properties, the investigator found bear meat, the bear's trophy parts, and hunting equipment.

¶ 7 Schlitt was charged with willful destruction, hunting without a license, illegal possession, and waste.² A jury found him guilty of all counts, and the trial court sentenced him to ten years of probation, assessed various fines and costs, and determined that CPW could impose up to thirty-five hunting license suspension points.

² Schlitt was also charged with possession of a weapon by a previous offender (POWPO) and with waste related to hunting an elk. The POWPO count was severed prior to trial, and the jury found Schlitt not guilty of waste related to the elk.

¶ 8 In this direct appeal of his convictions, Schlitt contends that (1) the charges of waste and willful destruction, and the charges of hunting without a license, waste, and illegal possession should be merged; (2) his willful destruction conviction is not supported by sufficient evidence; (3) the jury instructions for willful destruction and waste caused a constructive amendment or fatal variance that deprived him of due process; (4) the prosecutor committed misconduct; (5) the court erroneously permitted improper expert witness testimony regarding the waste charge; (6) the court erroneously allowed lay witnesses to provide improper expert testimony regarding the waste charge; and (7) these errors collectively require reversal.

¶ 9 While we agree with Schlitt that the waste conviction must be merged with his conviction for illegal possession, we reject his other contentions. Accordingly, we affirm Schlitt's convictions for willful destruction, hunting without a license, and illegal possession.

II. Merger

¶ 10 Schlitt argues that his convictions for hunting without a license and waste should be merged into his conviction for illegal possession. Separately, he contends that his conviction for waste

must be merged into his conviction for willful destruction. We agree in part and conclude that the waste conviction must be merged into the conviction for illegal possession.³

A. Standard of Review and Applicable Law

¶ 11 We review de novo whether a defendant’s conviction violates his constitutional protection against double jeopardy. *People v. Arzabala*, 2012 COA 99, ¶ 19; see also *People v. Denhartog*, 2019 COA 23, ¶ 73 (“Whether convictions for different offenses merge is a question of law that we review de novo.”). Regardless of whether the claim is preserved, “when a defendant’s double jeopardy rights are violated for failure to merge a lesser included offense into a greater offense, such a violation requires a remedy.” *Friend v. People*, 2018 CO 90, ¶ 45 (quoting *Reyna-Abarca v. People*, 2017 CO 15, ¶ 81).

³ Because we vacate Schlitt’s waste conviction, we do not address his appellate arguments that exclusively relate to it. Specifically, we do not consider whether (1) Schlitt’s waste conviction should be merged into his conviction for willful destruction; (2) the court allowed a fatal variance or constructive amendment as to the waste charge; (3) the prosecutor committed misconduct by making misstatements about the waste statute; or (4) the court improperly allowed lay and expert witnesses to testify as to their understanding of the waste statute.

¶ 12 The Double Jeopardy Clauses of the United States and Colorado Constitutions protect defendants from being charged with multiple counts and being subject to multiple punishments for the same criminal conduct. *Arzabala*, ¶ 20. However, “where a conviction is predicated on more than one offense, only one of those offenses need be merged, as only one predicate offense is essential to support the greater offense.” *People v. Dutton*, 2014 COA 51, ¶ 33. And we must uphold “as many sentences as are legally possible to fully effectuate the jury’s verdict.” *People v. Glover*, 893 P.2d 1311, 1315 (Colo. 1995).

B. Additional Facts

¶ 13 The jury was instructed on the following elements for illegal possession:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. committed one of the following offenses (the jury must unanimously agree that all of the elements of at least one of the violations described below, have been proven by the prosecution):
 - a. Hunting Without a Proper and Valid License (Count 2)

b. Waste of Edible Game Wildlife (counts 4 and/or 8)

4. knowingly did hunt, take, or have in his possession,

5. any wildlife that is property of the state.

¶ 14 As relevant to the merger analysis, the jury found Schlitt guilty of hunting without a license, waste, and illegal possession. For hunting without a license, the court imposed a \$500 fine. For waste, the court imposed a \$200 fine. And for illegal possession, the court fined Schlitt \$1,000.⁴

⁴ Because hunting without a license is an unclassified misdemeanor, we compare the penalties the court actually imposed to determine which predicate offense should merge with illegal possession. *See People v. Fisher*, 926 P.2d 170 (Colo. App. 1996) (treating one class three felony as the lesser included offense of another class three felony because it carried a lesser penalty). This raises the question of whether we must consider both the fines and costs imposed as part of the penalty or just the fines. And there is some ambiguity as to whether costs are part of a criminal penalty. *Compare People v. Stead*, 845 P.2d 1156, 1160 (Colo. 1993) (holding that a drug offender surcharge “is properly characterized as a punishment”) *with Waddell v. People*, 2020 CO 39, ¶ 2 (in the context of an illegal sentence challenge, declining to resolve whether various surcharges, like a surcharge for the victim compensation fund, “constitute a form of punishment”). We need resolve that question here, however, because Schlitt’s penalty for hunting without a license was more severe than the penalty for waste regardless of whether we consider the fines alone or the fines and costs together.

C. Analysis

¶ 15 Schlitt contends that his convictions for hunting without a license and waste must merge into his conviction for illegal possession because both offenses “are a subset of the elements of illegal possession and at least one way of committing illegal possession will necessarily establish those predicates.” The People agree in part, conceding that merger is required for either hunting without a license or waste because the jury was instructed that both of these offenses were predicates to illegal possession. The People do not agree, however, that both predicate offenses should merge. Instead, they maintain that to maximize the jury’s verdict, the waste conviction should merge into illegal possession and Schlitt’s conviction for hunting without a license should remain undisturbed.

¶ 16 We agree with the People. The jury instructions provided that the jury could find Schlitt guilty of illegal possession only if it first found that he was guilty of either hunting without a license or waste (or both offenses). In other words, under the instructions in this case, hunting without a license and waste were lesser included offenses of illegal possession, and a merger is therefore required.

See Whiteaker v. People, 2024 CO 25, ¶ 18. However, because Schlitt’s illegal possession conviction was predicated on both waste and hunting without a license, and because the jury found Schlitt guilty of all three offenses, “only one of those offenses need be merged, as only one predicate offense is essential to support the greater offense.” *Dutton*, ¶ 33.

¶ 17 The court imposed a larger fine for hunting without a license than it did for waste. Thus, merging waste with illegal possession best effectuates the jury’s verdict, *see id.* at ¶ 34; *Glover*, 893 P.2d at 1315, and we conclude that Schlitt’s conviction for waste must be vacated accordingly.

III. Sufficiency of the Evidence

¶ 18 At the close of the prosecution’s case-in-chief, Schlitt moved for a judgment of acquittal on the willful destruction charge, arguing that because he and his brother harvested meat from the bear a day or two after killing it, he “did not commit the gravamen of the offense.” The court denied the motion, concluding that the key question under the statute was “whether there was an intent to abandon the carcass or body” and that the prosecution had

presented evidence to support a jury finding that Schlitt had that intent.

¶ 19 Schlitt contends that he was entitled to a judgment of acquittal because, in denying his motion, the trial court misinterpreted the willful destruction statute. We disagree.

A. Standard of Review and Applicable Law

¶ 20 “[S]ufficiency of the evidence claims may be raised for the first time on appeal and are not subject to plain error review.” *McCoy v. People*, 2019 CO 44, ¶ 27. We review sufficiency claims involving statutory interpretation de novo. *Id.* We consider the evidence in the light most favorable to the People, giving “the prosecution the benefit of every reasonable inference which may be fairly drawn from the evidence.” *Clark v. People*, 232 P.3d 1287, 1292 (Colo. 2010). In doing so, we ask whether the evidence, “viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.” *People v. Harrison*, 2020 CO 57, ¶ 32 (quoting *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973)).

¶ 21 When interpreting a statute, we adhere to the legislative intent by ascribing the plain and ordinary meaning to the statutory language. *McCoy*, ¶ 37. “We read statutory words and phrases in context, and we construe them according to the rules of grammar and common usage.” *Id.* If the plain language is unambiguous, then no further analysis is necessary, and we apply the statute as written. *People v. Durapau*, 280 P.3d 42, 45 (Colo. App. 2011). “Only when the statutory language is ambiguous — that is, subject to more than one reasonable interpretation — do we turn to other interpretative aids” *Babcock v. People*, 2025 CO 26, ¶ 14.

B. Statutory Interpretation of Willful Destruction

¶ 22 The willful destruction statute provides that it is unlawful for a person “[t]o hunt or take . . . wildlife and detach or remove, with the intent to abandon the carcass or body, only the head, hide, claws, teeth, antlers, horns, internal organs, or feathers or any or all of such parts.” § 33-6-117(1)(a)(I), C.R.S. 2025.

¶ 23 The court instructed the jury that a person acts “with intent” when he has a “conscious objective . . . to cause the specific result proscribed by the statute defining the offense.” § 18-1-501(5),

C.R.S. 2025. The same instruction provided that “[i]t is immaterial . . . whether or not the result actually occurred.” *Id.*

¶ 24 “[T]o subject a person to criminal liability, there must be concurrence of the actus reus, an unlawful act, and the mens rea, a culpable mental state.” *Gorman v. People*, 19 P.3d 662, 665 (Colo. 2000). The act prohibited by the willful destruction statute is “hunt[ing] or tak[ing] . . . wildlife and detach[ing] or remov[ing]” only trophy parts. § 33-6-117(1)(a)(I). That act is criminal if it is done “with the intent to abandon the carcass or body” — that is, the non-trophy parts of the animal. *Id.* Thus, a hunter violates the willful destruction statute by killing an animal and taking only its trophy parts if, at the time that the hunter takes the trophy parts, he has the conscious objective of abandoning the carcass. This remains true without regard to whether the hunter returns later to harvest the carcass or ultimately abandons it. *See People v. Gordon*, 160 P.3d 284, 289 (Colo. App. 2007) (analyzing a previous version of the willful destruction statute and holding that “the General Assembly has made it an offense to hunt or kill an animal with the intent to keep only certain parts and to abandon the rest of the carcass”); *cf. People in Interest of M.C.*, 2012 COA 64, ¶¶ 18, 25 (applying the

statute after 2008 amendments and noting the statute “contains the requirement that the violator act intentionally”).

¶ 25 Having determined that the statute prohibits a hunter from taking only trophy parts “with the intent to abandon the carcass,” we turn next to the meaning of “abandon.” § 33-6-117(1)(a)(I). The Colorado wildlife statutes do not define the term, *see M.C.*, ¶ 32, so we may look to “dictionary definitions to determine [its] plain and ordinary meaning[.],” *People v. Daniels*, 240 P.3d 409, 411 (Colo. App. 2009).

¶ 26 In *People v. Dobson*, 847 P.2d 176, 179 (Colo. App. 1992), the division determined that “abandon,” as that term is used in the willful destruction statute, has no special legal definition and instead should be construed according to its common, normal, and everyday meaning. The *Dobson* division considered several different dictionaries, noting that “the same concepts [were] present in both legal and lay definitions” of “abandon.” *Id.* That remains true today. If anything, the legal and lay definitions of the term have converged in the last three decades. *See Merriam-Webster Dictionary*, <https://perma.cc/XL4X-5WXU> (concerning property, defining “abandon” to mean “to give up with the intent of never

again claiming a right or interest in”); American Heritage Dictionary of the English Language, <https://perma.cc/WZ3M-N7TG> (“[t]o surrender one’s claim to, right to, or interest in; give up entirely”); Black’s Law Dictionary 1 (12th ed. 2024) (“[t]o relinquish or give up (something) with the intention of never again reclaiming one’s rights or interest in”).

¶ 27 Applying these definitions of “abandon” to the willful destruction statute, we conclude that the statute prohibits an individual from hunting wildlife with the conscious objective of collecting only the trophy parts and leaving the carcass behind with no intent to return. Under this definition, while a trophy-collecting hunter’s subsequent return to harvest meat from the carcass could be indicative of his intent at the time of the kill, it is not dispositive. To the contrary, that question — whether the hunter originally intended to take only the trophy parts and then later changed his mind — is a question of fact that only a jury may decide.

¶ 28 Because we find the plain meaning of the statute unambiguous, we look no further.⁵ See *Cowen v. People*, 2018 CO 96, ¶ 12. We note, however, that the plain meaning of the governing statutory language is consistent with its overarching legislative purpose — “to protect the wildlife of this state from wanton, ruthless, or wasteful destruction or mutilation for their heads, hides, claws, teeth, antlers, horns, internal organs, or feathers, from being taken and abandoned, or any or all of the foregoing.” § 33-6-117(2). In short, the willful destruction statute is intended to discourage the wanton collection of trophy parts, and the plain language of section 33-6-117(1)(a)(I) is entirely consistent with that intent.

⁵ Because the statute is unambiguous, we reject Schlitt’s assertion that he should benefit from the rule of lenity. See *People v. Summers*, 208 P.3d, 251, 258 (Colo. 2009) (the rule of lenity is “a rule of last resort invoked only ‘if after utilizing the various aids of statutory construction, the General Assembly’s intent remains obscured’” (quoting *People v. Thoro Prods. Co.*, 70 P.3d 1188, 1198 (Colo.2003))); see also *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (“The rule of lenity applies only if, ‘after seizing everything from which aid can be derived,’ . . . we can make ‘no more than a guess as to what Congress intended.’” (citation omitted)); *United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993) (“The rule of lenity is a rule of last resort, to be invoked only after traditional means of interpreting the statute have been exhausted.”).

¶ 29 We are not persuaded otherwise by Schlitt’s argument that our reading of the statute renders meaningless the word “only” within the phrase “only the head, hide, claws.” As Schlitt sees it, because he returned and harvested some of the bear’s meat a day or two after taking the trophy parts, he did not take *only* trophy parts, and therefore he could not have committed willful destruction. But this interpretation divorces the mens rea of “intent to abandon” from the actus reus of hunting or taking and detaching the animal’s trophy parts. We decline to adopt such a reading of the statute.

¶ 30 Instead, as we understand the willful destruction statute, it accounts for both the hunter’s treatment of the animal after the kill and his intent at the time of the taking. On one hand, a hunter who takes only the trophy parts and leaves the rest of the carcass to decompose would almost certainly violate the statute. On the other hand, a hunter who field dresses the animal and immediately packs out its edible portions likely would not. This case falls in the middle of those two extremes. But as we explain further below, the evidence at trial reasonably supported a conclusion that Schlitt had the intent to abandon the carcass when he killed the bear because he initially took only the bear’s trophy parts, failed to field dress the

bear, left the carcass on some logs, and returned to harvest some meat only after learning that the authorities had been notified.

¶ 31 We are likewise unpersuaded by Schlitt’s argument that our interpretation blurs the lines between the felony charge of willful destruction and the misdemeanor offense of waste, thereby raising constitutional vagueness and equal protection concerns. While there is some overlap between the two statutes, there is a material difference between willful destruction and waste. As relevant here, the waste statute makes it “unlawful for a person to fail to reasonably attempt to dress or care for and provide for human consumption the edible portions of game wildlife.” § 33-6-119(2), C.R.S. 2025. Thus, while the waste statute requires hunters to reasonably attempt to dress and care for edible portions of game wildlife, the willful destruction statute prohibits hunters from killing game wildlife with the intent to collect only the trophy parts. Although failing to field dress an animal could be a relevant consideration for both offenses, hunting with the intent to collect only an animal’s trophy parts is easily distinguishable from a failure to reasonably attempt to harvest meat from a kill. For instance, a hunter may have no intent to abandon a carcass but could still fail

to make a reasonable attempt to harvest its meat, therefore committing waste but not willful destruction. Given this distinction, our interpretation of the willful destruction statute raises neither constitutional vagueness nor equal protection concerns. *Cf. M.C.*, ¶ 23 (rejecting a vagueness challenge to a different subsection of the willful destruction statute).

¶ 32 For the reasons above, we conclude the trial court did not misinterpret the statute when denying Schlitt’s motion for a judgment of acquittal.⁶

C. Application

¶ 33 Turning to the evidence presented at trial, we conclude that the prosecution presented evidence sufficient to support Schlitt’s conviction for willful destruction. Reviewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found the following facts to be true.

⁶ To the extent that Schlitt asserts that the court improperly imposed a “reasonableness standard” when interpreting the willful destruction statute, we decline to consider the argument because it is not adequately developed. *See People v. Liggett*, 2021 COA 51, ¶ 53 (acknowledging that appellate courts do not address undeveloped arguments), *aff’d*, 2023 CO 22.

¶ 34 On September 11, 2022, Schlitt killed the bear and then, with the assistance of his brother and a nearby camper, removed its head, hide, and paws without harvesting any meat. Even though this was the first bear that Schlitt had taken, the jury could have inferred that he knew how to harvest meat given his experience as an elk hunter and his attendance at a mandatory CPW officer-led hunting class with a section devoted to field dressing. Thus, although he had both the knowledge and equipment to field dress or otherwise preserve the bear's meat, he left the carcass propped on logs, close to the ground, and in a condition inconsistent with an intent to harvest the edible portions of the bear.

¶ 35 Schlitt also made statements from which a jury could infer he had the intent to abandon the carcass. For instance, he told the camper who helped him take trophy parts that he did not have to harvest any meat and he did not say anything about returning later to do so.

¶ 36 Further, the jury could have inferred that Schlitt decided to return and harvest some of the bear's meat only after learning that his father had called CPW, and that Schlitt returned because he feared the call could prompt an investigation of the site. This

inference finds support in trial testimony that the bear that Schlitt killed likely had 120 pounds of harvestable meat. The fact that Schlitt took barely half of that — combined with the lack of knife marks, visible leg meat, evidence of scavenging, and sloughed-off hindquarters on the bear — suggested that his return to the carcass in the wake of his father’s phone call to CPW was not a genuine attempt to harvest the edible portions of the animal.

¶ 37 Considering the evidence as a whole and in the light most favorable to the prosecution, we conclude that it was substantial and sufficient to support a conclusion by a reasonable mind that Schlitt committed willful destruction. *See Gorostieta v. People*, 2022 CO 41, ¶ 16. Accordingly, the court did not err by denying Schlitt’s motion for a judgment of acquittal on the willful destruction count.

IV. Constructive Amendment and Fatal Variance

¶ 38 Schlitt contends the court plainly erred by allowing a constructive amendment or a fatal variance in the jury instructions for the willful destruction charge. We disagree.

A. Applicable Law and Standard of Review

¶ 39 Colorado recognizes two types of variances — a simple variance and a constructive amendment. *Campbell v. People*, 2020

CO 49, ¶ 45. A simple variance occurs when “the charged elements are unchanged, but the evidence presented at trial proves facts materially different from those alleged in the indictment.” *People v. Deutsch*, 2020 COA 114, ¶ 25 (citation omitted).

¶ 40 A constructive amendment occurs when a jury instruction “changes an essential element of the charged offense and thereby alters the substance of the charging instrument.” *Bock v. People*, 2024 CO 61, ¶ 14 (quoting *People v. Rediger*, 2018 CO 32, ¶ 48). A constructive amendment violates the defendant’s constitutional right to due process because it “subjects the defendant to the risk of conviction for an offense that was not originally charged.” *People v. Hoggard*, 2017 COA 88, ¶ 27, *aff’d on other grounds*, 2020 CO 54.

¶ 41 We review de novo whether a constructive amendment or variance occurred. *See People v. Martinez*, 2024 COA 34, ¶ 24. In the absence of an objection, we will reverse only if any error is plain. *See People v. Smith*, 2018 CO 33, ¶ 25 (“An error in jury instructions, such as a simple variance, generally does not rise to the level of plain error unless a review of the entire record establishes a reasonable possibility that the improper instruction contributed to the defendant’s conviction.”). A simple variance does

not require reversal “as long as the proof upon which the conviction is based corresponds to an offense that was clearly set out in the charging instrument.” *Campbell*, ¶ 45. However, a variance is fatal if the defendant can show that the change impaired his defense to the charge at trial. *People v. Young*, 923 P.2d 145, 148 (Colo. App. 1995).

B. Analysis

¶ 42 The charging document alleged that Schlitt committed willful destruction “[b]etween and including September 11, 2022, and September 13, 2022.” The jury instructions, however, stated that Schlitt was charged with willful destruction for killing one bear “on September 11, 2022,” and the elemental instruction specified that Schlitt was alleged to have committed the offense “at or about the date and place charged.”

1. Constructive Amendment

¶ 43 The difference in the timeframe between the charging document and the jury instructions did not amount to a constructive amendment. While the timing of Schlitt’s actions may have influenced the jury’s assessment of his intent, the instructions did not “change[] an essential element of the charged offense.”

Bock, ¶ 14 (citation omitted). Thus, there is no risk that Schlitt was convicted of an offense that was not originally charged. See *Deutsch*, ¶ 25.

2. Variance

¶ 44 Nor are we persuaded that Schlitt was prejudiced by any difference in the dates listed on the charging document and in the jury instructions. Schlitt asserts that the complaint provided notice that he should “prepare for the charges of taking only trophy parts . . . between and including September 11 and September 13.” In reliance on the timeframe alleged in the charging document, Schlitt claims that he made the strategic decision to concede at trial that he took only the bear’s trophy parts on September 11 and that he returned to harvest the meat on September 12 or 13. But by limiting the date of the offense to only September 11, Schlitt argues, the jury instructions undermined his ability to advance his theory of defense that “[l]eaving something for a relatively short period of time is not abandonment.”

¶ 45 Much of Schlitt’s argument relies on an interpretation of the willful destruction statute that places undue emphasis on the fact that Schlitt eventually took more than the bear’s trophy parts and

overlooks his intent at the time that he killed the bear. As explained above, however, application of the willful destruction statute turns on the hunter's intent at the time that he takes an animal's trophy parts. What a hunter does before or after taking those trophy parts — including leaving the carcass “for a relatively short period of time” — can be evidence of that intent even if it is not dispositive. Here, when attempting to discern whether Schlitt intended to abandon all but the bear's trophy parts, the jury almost certainly considered Schlitt's actions and statements before and after the hunt.

¶ 46 In any event, even if the differences in the timeframe could have been material, nothing in the record suggests that Schlitt could have presented a different timeline to the jury. Indeed, an assertion that Schlitt harvested anything other than the bear's trophy parts on the night of the kill would have been contrary to all the undisputed evidence at trial. Schlitt's claim that the timeline in the charging document forced him to focus his defense on the “relatively short” period between the removal of the trophy parts and his return a day or two later to harvest the meat thus rings hollow. As a result, any variance is not fatal because it could not

have “impaired . . . [Schlitt’s] defense to the charge at trial.” *Young*, 923 P.2d at 148.

V. Prosecutorial Misconduct

¶ 47 Schlitt contends that the trial court plainly erred by allowing the prosecutor to commit misconduct. We disagree.

A. Standard of Review and Applicable Law

¶ 48 We review whether there was prosecutorial misconduct violating a defendant’s constitutional rights de novo. *People v. Castro*, 2022 COA 101, ¶ 21. We analyze claims of prosecutorial misconduct by determining whether the conduct was improper based on the totality of the circumstances and, if so, whether the conduct warrants reversal under the applicable standard of review. *People v. Nardine*, 2016 COA 85, ¶ 36. Where, as here, the defense does not object to the alleged error at trial, we review for plain error. *People v. Weinreich*, 98 P.3d 920, 924 (Colo. App. 2004), *aff’d*, 119 P.3d 1073 (Colo. 2005). “To constitute plain error, misconduct must be flagrant or glaring or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction.”

People v. Rhea, 2014 COA 60, ¶ 43 (quoting *Weinreich*, 98 P.3d at 924).

B. Analysis

¶ 49 Schlitt argues that the prosecutor committed misconduct during voir dire and closing arguments by indoctrinating, inflaming, and misleading the jury, as well as by offering a personal opinion on his guilt. We discern no reversible error.

1. Voir Dire

¶ 50 Schlitt first challenges the prosecutor's conduct during voir dire, asserting that the prosecutor made several improper statements. Our review of the prosecutor's statements and questions during voir dire reveals otherwise.

¶ 51 “The purpose of voir dire examination is to enable counsel to determine whether any prospective jurors are possessed of beliefs which would cause them to be biased in such a manner as to prevent the counsel's client from obtaining a fair and impartial trial.” *People v. Collins*, 730 P.2d 293, 300 (Colo. 1986). Trial courts generally afford counsel wide latitude in conducting voir dire. *See Smartt v. Lamar Oil Co.*, 623 P.2d 73, 76 (Colo. App. 1980) (“[C]ounsel must be given considerable latitude to make [voir dire]

examination in good faith”). A prosecutor engages in misconduct during voir dire when she intentionally misstates the law or uses voir dire to present factual matter that she knows will not be admissible at trial. *People v. Krueger*, 2012 COA 80, ¶ 50.

¶ 52 Schlitt identifies four separate instances of alleged prosecutorial misconduct during voir dire.

¶ 53 First, he claims that the prosecutor improperly sought out prospective jurors with hunting experience — allegedly with the “express purpose” of having them teach their peers about hunting norms and laws during the trial or deliberations — and then relied on these topics to argue that Schlitt improperly field dressed the bear. Schlitt is correct that a prosecutor “should not intentionally use . . . voir dire to . . . argue the prosecution’s case to the jury.” *People v. Adams*, 708 P.2d 813, 815 (Colo. App. 1985) (emphasis omitted) (quoting ABA Standards for Criminal Justice § 3-5.3(c) (2d ed. 1980)). But that is not what happened here.

¶ 54 To the contrary, the prosecutor asked general questions about prospective jurors’ knowledge and feelings pertaining to hunting laws and their personal experiences with hunting and fishing. For instance, the prosecutor asked jurors if and what they hunt, why

they hunt, how they process and dress wildlife, if they have experience with CPW processes and regulations, and if they agree with those processes and regulations. In response, some jurors described their hunting experience and explained why they felt that wildlife laws and regulations were important. This line of questioning was entirely proper. It was intended to evaluate whether prospective jurors possessed beliefs — such as a disdain for hunting laws and regulations or negative experiences with wildlife officers — that might cause them to be biased. See *Crim. P.* 24(a); *Collins*, 730 P.2d at 300.

¶ 55 Second, and similarly, Schlitt maintains that the prosecutor inserted inflammatory commentary about community welfare, wildlife populations, and the rights of other hunters by discussing how locals see wildlife all the time and what could happen if wildlife laws are not followed. We disagree with Schlitt’s interpretation of the record. Rather than being inflammatory, the prosecutor’s questions were part of a general discussion about wildlife and CPW rules and regulations and were obviously designed to give the prosecutor insight into the best use of her challenges for cause and peremptory challenges. See *Collins*, 730 P.2d at 300.

¶ 56 Third, Schlitt contends the prosecutor suggested that the jury should return a guilty verdict as a means of protecting voiceless animals and encouraged the jurors to give greater credence to wildlife officers by describing them as “advocate[s] for . . . animal[s]” that “can’t advocate for themselves.” A review of this statement in context, however, reveals that the prosecutor was summarizing a prospective juror’s opinion about the role of CPW officers, not making her own independent assertion about their job duties. Indeed, the prosecutor started the statement by telling the jury to “correct me if I’m wrong,” and the prospective juror confirmed the prosecutor’s summary of her opinion was correct. We perceive no error, much less plain error.

¶ 57 Fourth, and finally, Schlitt argues the prosecutor misled the jury by stating that she did not “have to prove details” and that “detail is something that is unnecessary.” The prosecutor made these statements while discussing her duty to prove to the jury beyond a reasonable doubt that Schlitt had committed each element of every crime charged. She described a hypothetical offense of throwing a chair in the courtroom to demonstrate that two eyewitnesses to an event may give varying details and that

some of the details — such as the chair’s color — might be “unnecessary” to the determination of guilt. Although some of these statements were perhaps inartful, the prosecutor did not misstate her burden or tell the jury to disregard any specific details related to the case. Further, nothing in the record suggests that the comments confused prospective jurors — who were, in any event, later properly instructed on the law.

2. Closing Argument

¶ 58 Schlitt argues that the prosecutor committed misconduct in closing argument by telling the jurors that they could not consider his lack of bear hunting experience and by expressing a personal opinion on his guilt. While we disapprove of one of the prosecutor’s statements, we conclude that reversal is not required.

¶ 59 During closing arguments, prosecutors may argue facts in evidence, draw reasonable inferences from those facts, and discuss the law on which the jury has been instructed. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). A prosecutor has wide latitude in the language and style of closing argument. *Rhea*, ¶ 46. Still, a prosecutor’s arguments must stay within ethical boundaries to ensure that closing arguments do not mislead or unduly

influence the jury. *Domingo-Gomez*, 125 P.3d at 1049. In determining whether a closing argument was improper, we consider the language used, the context of the statements, the strength of the evidence, and whether the prosecutor repeated the misconduct. *People v. Lovato*, 2014 COA 113, ¶ 64. “Prosecutorial misconduct in closing argument rarely constitutes plain error.” *People v. Smalley*, 2015 COA 140, ¶ 37.

a. Commentary on Inexperience

¶ 60 Schlitt contends that the prosecutor improperly told jurors they could not consider his lack of bear hunting experience when evaluating the evidence. In support of this argument, Schlitt points to the following statements by the prosecutor during closing argument:

- a reminder that jurors should not be influenced by sympathy, bias, or prejudice, which means “there are no exceptions for good guys,” “no exceptions if you’re a new hunter,” and “no exceptions if you did everything else right, but you still broke some of the laws”;

- an assertion that Schlitt’s internet research on what to do with the bear carcass did not excuse him from complying with the law; and
- an argument that Schlitt’s other “excuses” for failing to adequately harvest meat from the bear’s carcass, such as having to go to work, being too tired or sore, and his father messing it up, “do not justify the actions.”

¶ 61 Schlitt also points out how the prosecutor reiterated these themes during rebuttal:

Most of what you have just heard from defense counsel is tugging at your heartstrings for sympathy and prejudice. You are specifically directed that you can[not]^[7] allow that to factor into your deliberations. There is no exception for trying. There is no exception for bear — bears are different than elk, so maybe they don’t know what they’re doing. There is no exception for breaking the law and then going back and trying to cover it up under the guise of, they were just trying to do the right thing. No exceptions for being tired. Those are sympathy and prejudice. Those are excuses. You cannot consider them. Having jobs, that’s not an exception either.

⁷ Given the context of the prosecutor’s statements, the omission of the bracketed “[not]” in the transcript appears to be either a stenographic error or a slip of the tongue by the prosecutor.

¶ 62 These statements were not improper. The prosecutor did not tell the jurors, as Schlitt contends, that they could not consider Schlitt's inexperience at all. Rather, the prosecutor was highlighting that, under the sympathy and bias jury instruction, the jurors should only consider the law and relevant facts before them and should not be swayed by emotion or irrelevant facts.

b. Opining on Guilt

¶ 63 Schlitt also argues that, during rebuttal, the prosecutor improperly opined on his guilt and suggested that his case had undergone a "screening process." While we agree with Schlitt that the prosecutor's comments were improper, we conclude that reversal is not required.

¶ 64 The challenged statements by the prosecutor included the following:

We get here because [the CPW investigator] does an investigation and he brings that investigation to the district attorney's office. And the district attorney's office can turn him and his case away. The decision is not just on him. It's him, it's his supervisors, it's the judges that sign the search warrants and the arrest warrants. And then it's also on me.

These statements were improper, and obviously so. “[A] prosecutor’s reference to a ‘screening process’ is improper because it both hints that additional evidence supporting guilt exists and reveals the personal opinion of the prosecutor.” *Domingo-Gomez*, 125 P.3d at 1052. Comments like the prosecutor’s can inflame the passions of the jury, “can tip the scales towards an unjust conviction[,] and must be avoided.” *Id.* at 1052-53.

¶ 65 Notwithstanding the obviousness of the prosecutor’s improper statements, we conclude that reversal is not required under the

plain error standard for two reasons.⁸ First, the evidence of Schlitt’s guilt was not just sufficient, it was overwhelming. See *People v. Fichtner*, 869 P.2d 539, 543 (Colo. 1994) (“[I]f there is overwhelming evidence to support the conviction, we will not reverse it under a plain error standard.”). As explained above, the prosecution presented evidence that, on September 11, Schlitt was hunting outside his permitted unit, killed and skinned a bear, took its trophy parts and no meat — despite having the knowledge and

⁸ Counsel for Schlitt’s codefendant objected to the prosecutor’s statement on the ground that “there [was] no evidence” for the prosecutor’s suggestion that the case had been screened by her office and “judges that sign the search warrants and arrest warrants.” The court sustained the objection but, contradictorily, told the prosecutor that it did not think her argument was improper. The People contend that the codefendant’s objection was not sufficient to preserve this issue for appellate review. Schlitt does not address that argument but instead concedes that the issue was not preserved for appeal. We acknowledge that whether a codefendant’s preservation of an issue operates to preserve an issue for the other defendant is an unresolved question in Colorado, see *People v. Turner*, 2022 CO 50, ¶ 15 n.2, but conclude that we need not wade into that debate given that (1) Schlitt concedes that his appellate argument is unpreserved; and (2) the codefendant’s objection (that “there [was] no evidence” to support the prosecutor’s claim) is different than the screening process argument Schlitt raises on appeal. See *People v. Ujaama*, 2012 COA 36, ¶ 37 (“An issue is unpreserved for review when . . . an objection or request was made in the trial court, but on grounds different from those raised on appeal . . .”).

equipment to do so — and then left the carcass in a condition unfit for harvest. Schlitt told the camper who was assisting him that he did not intend to harvest any meat. And Schlitt was upset about his father's phone call to CPW and only returned to the bear after learning of the call. This is overwhelming evidence that Schlitt committed willful destruction, illegal possession, and hunting without a license.

¶ 66 Second, while the prosecutor's reference to a screening process was improper, the context in which the statements were made reduces their prejudicial impact. The prosecutor suggested that the case against Schlitt had undergone a screening process in direct response to defense counsel's closing argument, in which he had asserted that the CPW investigator did not properly investigate the case and that there was "no line where they would not prosecute." Just before suggesting that the case had undergone a screening process, the prosecutor characterized defense counsel's argument as "portray[ing] this investigation as a big mob of people with pitchforks going out to get [Schlitt] at all costs, regardless of what they knew," and she referenced how defense counsel had "said that we're here today because [the CPW investigator] cannot admit

he's wrong." Against this backdrop, it appears that the prosecutor's statements were an inartful attempt to respond to defense counsel's suggestion that Schlitt was only being prosecuted because the CPW officer who investigated the case held a grudge against him. In other words, the prosecutor's statement was "delivered in a context that alleviated its prejudicial impact." *Domingo-Gomez*, 125 P.3d at 1054.

¶ 67 Because the prosecutor's improper reference to a screening process did not undermine the fundamental fairness of Schlitt's trial and does not cast serious doubt on the reliability of the judgment of conviction, it does not warrant reversal under plain error review.

VI. Cumulative Error

¶ 68 Schlitt argues that the alleged errors collectively warrant reversal. "The doctrine of cumulative error requires that numerous errors be committed, not merely alleged." *People v. Conyac*, 2014 COA 8M, ¶ 152. And we reverse only "when numerous errors in the aggregate show the absence of a fair trial, even if individually the errors were harmless or did not affect the defendant's substantial rights." *Howard-Walker v. People*, 2019 CO 69, ¶ 26.

¶ 69 Although we have concluded that the prosecutor committed one instance of misconduct in closing argument, we have rejected Schlitt's remaining claims of trial error. Because we have identified only one trial error, the doctrine of cumulative error does not apply. *See Conyac*, ¶ 152.

VII. Disposition

¶ 70 Schlitt's conviction for waste is vacated, and the case is remanded to the trial court to amend the mittimus accordingly. In all other respects, the judgment of conviction is affirmed.

JUDGE MOULTRIE and JUDGE BERNARD concur.