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ADVANCE SHEET HEADNOTE
September 14, 2026

2026 CO 63

No. 24SC469, *People v. Sloan*—Instructional Error—Sentence-Enhancing Interrogatory—Plain Error—Vehicular Eluding—§ 18-9-116.5(2)(a), C.R.S. (2025).

The supreme court reaffirms that an instructional error concerning an issue that was uncontested at trial does not amount to plain error. In this case, a division of the court of appeals concluded that Colorado law requires a more robust analysis than simply examining whether the erroneous instruction related to an uncontested issue. The division reasoned that appellate courts must also consider whether the evidence at trial overwhelmingly supports the defendant's conviction, and that an instructional error regarding an uncontested issue may rise to plain error only if the evidence of guilt—or, in this case, the evidence establishing the sentence-enhancing interrogatory—is overwhelming. Because the division misunderstood and misapplied Colorado law, the supreme court reverses its judgment.

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

2026 CO 63

Supreme Court Case No. 24SC469
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA1987

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Jeffery Sloan.

Judgment Reversed

en banc

September 14, 2026

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ, JUSTICE BOATRIGHT, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE BERKENKOTTER,** and **JUSTICE BLANCO** joined.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 *I err; therefore, I am.* This expression, inspired by Saint Augustine—the prolific philosopher and keen observer of human nature—reminds us that we are all inherently fallible. This, of course, includes trial court judges. No matter how much they strive for perfection, they cannot attain infallibility. Thus, in a criminal jury trial, the question is not *whether* errors will occur; it's *what* errors will occur.

¶2 Because fallibility is woven into the human condition, defendants in criminal cases are not entitled to a perfect trial; they are entitled to a fair one. And when a defendant fails at trial to object to an error, an appellate court reviewing the case may only reverse if the error was plain—i.e., if (1) it was so obvious that the trial court should have been able to steer clear of it, even without the clarion call of an objection; and (2) it so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. For instructional errors, the second prong of the analysis focuses on whether a reasonable possibility exists that the flawed instruction nudged the verdict toward guilt. We have made clear, however, that an erroneous jury instruction will not ordinarily amount to plain error when the issue was uncontested at trial or when the record contains overwhelming evidence of the defendant's guilt.

¶3 In this vehicular eluding case in which two people died, the parties agree, as do we, that the trial court erred in instructing the jury. Specifically, in

presenting the sentence enhancer that elevated vehicular eluding from a class 5 to a class 3 felony, the trial court asked the jury to determine, via an interrogatory, whether the prosecution proved that “*the accident* resulted in the death of any person.” (Emphasis added.) The jury found that the prosecution so proved. The sentence enhancer in the vehicular eluding statute, however, required the prosecution to prove that the “*vehicular eluding . . . result[ed]* in death to another person.” § 18-9-116.5(2)(a), C.R.S. (2025) (emphasis added).

¶4 At trial, the defendant, Jeffrey Sloan, did not dispute that the vehicular eluding resulted in death. Rather, he asserted that he wasn’t the driver of the car that eluded two police officers and was then involved in the collision that took two lives. And Sloan did not object to the interrogatory that incorrectly asked the jury to determine whether the accident — as opposed to the vehicular eluding — resulted in death.

¶5 The question for us is whether the error was plain. We answer in the negative. Because this was an instructional error concerning an issue that was not contested at trial, it was not plain error.¹

¹ Neither party has cited any authority drawing a line between an error in an elemental instruction and one in a sentence-enhancer interrogatory for purposes of plain-error review. And our canvass of the case law has revealed none. Indeed, just a few months ago, we explained in a slightly different context that “sentence-enhancing factors generally function much like elements” because, with a few exceptions that are inapplicable here, a trial court may not impose an enhanced sentence unless the prosecution proves the sentence-enhancing factor beyond a

¶6 In arriving at a different conclusion in a published opinion, a division of the court of appeals misconstrued our case law and then improperly relied on and misapplied one of our cases. Accordingly, we reverse its judgment.

I. Facts and Procedural History²

¶7 Just after midnight one June morning, Denver Police Department Officer James Adam spotted an occupied stolen Jeep parked in a Denver neighborhood. Officer Adam parked his patrol car nearby and waited for backup to respond. While he waited, the Jeep began driving down the street. Officer Adam followed the Jeep, and a backup patrol car arrived shortly thereafter. Officer Adam activated his overhead lights and attempted to initiate a traffic stop. Following his lead, the backup officer likewise turned on his overhead lights. Rather than stop, the Jeep accelerated north toward Colfax Avenue. As the two patrol cars began to pursue, the Jeep ran a stop sign and sped through the neighborhood. Then, after running a second stop sign, the Jeep turned left onto Colfax Avenue going westbound.

reasonable doubt. *People v. Ceus*, 2026 CO 59, ¶ 49 n.8, 592 P.3d 1246, 1256 n.8. We therefore place the error in the vehicular-eluding interrogatory in this case under the elemental-error umbrella and refer simply to *instructional errors* throughout this opinion.

² Our factual recitation is premised on what the jury could reasonably have found based on the evidence presented at trial.

¶8 A High Activity Location Observation camera (“HALO camera”) captured the Jeep moving at a high rate of speed at the intersection of Colfax Avenue and Jersey Street at 1:07:23 a.m. About thirty seconds later, the officers—following department protocol prioritizing public safety—called off the chase, deactivated their overhead lights, and pulled into a parking lot near the intersection.

¶9 Approximately a mile away, at the intersection of Colfax Avenue and Colorado Boulevard, the Jeep ran a red light at roughly sixty to seventy-five miles per hour and broadsided a car entering the intersection on a green light. Another HALO camera recorded the collision—it occurred at 1:08:18 a.m., fifty-five seconds after the Jeep went through the Colfax Avenue/Jersey Street intersection and about thirty seconds after the officers ended their pursuit. The Jeep did not slow down before the collision.

¶10 The officers, who had been parked for two to three minutes, received a report of an accident at Colfax Avenue and Colorado Boulevard. Upon arriving at the scene, Officer Adam and the backup officer identified the Jeep as the one they’d been following minutes earlier. The car that the Jeep collided with was driven by Y.H., an Uber driver, who was taking M.K. home following a concert. Both Y.H. and M.K. sustained fatal blunt force injuries. Y.H. died at the scene; M.K. died several weeks later.

¶11 The driver of the Jeep fled on foot before officers arrived at the scene. Inside the Jeep, officers recovered a phone, a wallet, and an identification card (“ID”) tucked inside a jacket, all of which connected Sloan to the Jeep. The following day, officers located Sloan and arrested him. They noticed that he had injuries that were consistent with airbag deployment and seatbelt use at the time of a collision.

¶12 During an interview with a detective, Sloan denied being the Jeep’s driver at the time of the chase or the collision. But the available evidence contradicted his statements. Specifically, Sloan’s DNA was recovered from the Jeep’s deployed airbag and windshield, and other evidence showed that Sloan had his phone with him in the hours leading up to the collision.

¶13 As relevant here, the prosecution charged Sloan with vehicular eluding pursuant to section 18-9-116.5 and alleged a sentence enhancer under subsection (2)(a). The enhancer asserted that the eluding resulted in someone’s death and therefore elevated the charge from a class 5 to a class 3 felony. At trial, Sloan advanced a mistaken identity defense, arguing that he wasn’t driving the Jeep during the relevant timeframe. He acknowledged that his wallet, phone, and ID were found in the Jeep and that his DNA was recovered from the Jeep’s airbag and windshield. But he contended that the prosecution still could not prove beyond a reasonable doubt that he was the driver of the Jeep when the pertinent events

occurred. According to Sloan, the items belonging to him inside the Jeep transferred his DNA to the airbag and windshield during the collision.

¶14 The jury rejected Sloan's theory of defense and found him guilty of vehicular eluding. It further concluded that the prosecution proved the related sentence enhancer. The trial court later entered a judgment of conviction for class 3 felony vehicular eluding and sentenced Sloan on that count to ten years in prison to run consecutively to the sentences imposed on other counts. All told, Sloan received a seventy-two-year prison sentence.

¶15 On appeal, Sloan argued that the trial court (1) violated his right to a public trial and (2) incorrectly instructed the jury on the sentence-enhancing interrogatory related to the vehicular eluding charge. Because only the second issue is before us, we cabin our discussion accordingly.

¶16 At the court of appeals, Sloan maintained that the trial court erred by instructing the jury – via an interrogatory – that the vehicular-eluding sentence enhancer required proof beyond a reasonable doubt that *the accident* resulted in the death of any person. Sloan argued that, under Colorado law, the prosecution could establish the sentence enhancer only by proving beyond a reasonable doubt that the *vehicular eluding* itself resulted in the death of any person. And because the relevant verdict form – which tracked the language of the vehicular-eluding interrogatory – reflected the jury's finding that the "accident" resulted in the death

of any person, Sloan asserted that he should have been convicted of a class 5, not a class 3, felony.

¶17 Because Sloan did not object to the sentence-enhancer interrogatory, a division of the court of appeals reviewed for plain error. *People v. Sloan*, 2024 COA 52M, ¶ 27, 554 P.3d 527, 533. It first agreed with Sloan that this was not only an error but an obvious one because it contravened the clear statutory language concerning the sentence enhancer in section 18-9-116.5(2)(a). *Sloan*, ¶ 30, 554 P.3d at 533. Further siding with Sloan, the division determined that the error was substantial because it so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Id.* at ¶¶ 51-57, 554 P.3d at 536-37. On the latter point, the division acknowledged that the defense did not contest at trial whether the victims died as a result of the vehicular eluding. *Id.* at ¶ 37, 554 P.3d at 534. Nevertheless, the division concluded that our jurisprudence called for “a more robust analysis than simply examining whether the challenged instruction related to an issue contested at trial.” *Id.* at ¶ 50, 554 P.3d at 536. Instead, the division reasoned that our precedent also required consideration of “whether the evidence introduced at trial overwhelmingly supported the defendant’s conviction.” *Id.*

¶18 And because the division concluded that the evidence that the vehicular eluding resulted in death was not overwhelming, it held that the instructional

infirmity constituted plain error. *Id.* at ¶¶ 54–57, 554 P.3d at 536–37. Accordingly, the division reversed Sloan’s conviction for class 3 felony vehicular eluding.³ *Id.* at ¶ 57, 554 P.3d at 537.

¶19 Through a petition for certiorari review, the prosecution asked us to examine a single question:

Whether the court of appeals misapprehended and misapplied the test for assessing whether a jury instruction related to an undisputed factual issue at trial amounts to plain error.

We agreed to do so.

II. Analysis

¶20 Unlike most of the cases that taxi to our certiorari gate, this one doesn’t require us to decide whether the trial court erred—*it clearly did*. The dispute is whether reversal is required. And because Sloan didn’t object to the jury instruction at the heart of this case, our review is for plain error. The plain error standard is therefore our point of departure.

A. Plain Error Standard

¶21 In the criminal law sphere, “[o]ur appellate courts normally won’t correct a trial error if the defendant failed to call the court’s attention to it by uttering an

³ The division remanded the case to the trial court with instructions to correct the mittimus on an unrelated matter. *Sloan*, ¶ 58, 554 P.3d at 537. We note, however, that the remand instructions left one issue unaddressed: whether the prosecution could elect to retry Sloan for class 3 felony vehicular eluding or accept a class 5 felony conviction (that is, a conviction without the sentence enhancer).

objection.” *People v. Crabtree*, 2024 CO 40M, ¶ 41, 550 P.3d 656, 667. But this is a general rule, not an absolute one. Crim. P. 52(b) provides a narrow escape hatch—plain-error review. “Plain errors . . . affecting substantial rights may be noticed [on appeal] although they were not brought to the attention of the [trial] court.” Crim. P. 52(b). To qualify as plain error, an unobjected-to trial error must (1) be plain and (2) affect substantial rights.⁴ *Id.*

¶22 An error is “plain” within the meaning of the first prong of Crim. P. 52(b) when it is “obvious.” *Crabtree*, ¶ 42, 550 P.3d at 667 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)). Under the rule’s plainness requirement, the error must be “so clear-cut, so obvious” that a trial judge should be able to avoid it without the lighthouse beam of an objection. *Id.* (quoting *Romero v. People*, 2017 CO 37, ¶ 6, 393 P.3d 973, 976). To be deemed plain, therefore, “an error must contravene a clear statutory command, a well-settled legal principle, or established Colorado case law.” *Id.* In this case, Sloan asserts, the prosecution agrees, and we conclude that the instructional error was plain because it contravened a clear statutory command—the sentence enhancer defined in section 18-9-116.5(2)(a). The statutory sentence enhancer required the prosecution to prove that the

⁴ To avoid confusion between an error that is plain under the rule’s first prong and an error that constitutes plain error because it satisfies both prongs, we refrain from calling the former “plain error.”

vehicular eluding resulted in someone's death; the trial court instead informed the jury that the prosecution had to prove that *the accident* resulted in someone's death.

¶23 That is not the end of the plain-error inquiry, however. The second prong of the analysis requires us to determine whether the trial court's error affected Sloan's substantial rights. That prong is the fulcrum on which the parties' dispute turns and therefore the pivotal point of our discussion.

¶24 An error that is plain affects an accused's substantial rights when "an appellate court, after reviewing the trial record in its entirety, can say with fair assurance that the error 'so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.'" *Crabtree*, ¶ 43, 550 P.3d at 667 (quoting *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987)). This standard was crafted to allow appellate courts to correct "particularly egregious errors." *Hagos v. People*, 2012 CO 63, ¶ 14, 288 P.3d 116, 120 (quoting *Wilson*, 743 P.2d at 420). Indeed, the aim of the plain-error rule is "to temper the contemporaneous-objection requirement in the interest of permitting an appellate court to correct particularly egregious errors." *Crabtree*, ¶ 43, 550 P.3d at 667 (quoting *Wilson*, 743 P.2d at 420). Consistent with this objective, "reversals must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time." *Hagos*, ¶ 23, 288 P.3d at 122. The upshot is that plain-error review walks a careful line between "our need to encourage all trial

participants to seek a fair and accurate trial” from the start and “our insistence that obvious injustice” resulting from particularly egregious errors be addressed without undue delay. *Id.* at ¶ 23, 288 P.3d at 121 (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)).

¶25 In the specific context of an instructional error, the substantial-rights prong of Crim. P. 52(b) asks whether the error “prevented the jury from making a finding that the law requires so as to affect a substantial right of [the accused’s] and undermine the fundamental fairness of [the] trial.” *Auman v. People*, 109 P.3d 647, 665 (Colo. 2005). In other words, the inquiry is whether there is a reasonable possibility that the erroneous instruction contributed to the guilty verdict such that serious doubt is cast upon the reliability of the conviction. *Id.*

¶26 With these principles as our compass, we turn to whether the trial court’s instructional error constitutes plain error and thus requires reversal. We conclude it does not.

B. Instructional Errors Related to Uncontested Issues Do Not Satisfy the Substantial-Rights Prong of Crim. P. 52(b)

¶27 Our plain-error jurisprudence has sketched a clear tenet that is dispositive in this case: A trial court’s failure to properly instruct the jury does not amount to plain error “where the subject of the error . . . is not contested at trial, or where evidence of the defendant’s guilt is overwhelming.” *Auman*, 109 P.3d at 665 (quoting *Bogdanov v. People*, 941 P.2d 247, 255 (Colo. 1997)); see also *Miller*, 113 P.3d

at 750 (“[A]n erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant’s guilt.”). If the instructional error “concerned an uncontested issue, . . . then [the accused’s] substantial rights were not affected, and no reasonable possibility exists that the improper instruction contributed to [the] conviction.” *Auman*, 109 P.3d at 665.

¶28 This principle is no dying ember from bygone days; we have stoked it at least twice in the last decade. Indeed, we reaffirmed its vitality a mere six years ago in *Thompson v. People*, 2020 CO 72, 471 P.3d 1045, a securities fraud case. There, the defendant argued that the trial court improperly instructed the jury on the definition of “security.” *Id.* at ¶ 53, 471 P.3d at 1057. Because he didn’t object to the instruction at trial, we reviewed for plain error. *Id.* at ¶ 54, 471 P.3d at 1057. We initially noted that the instruction tracked the relevant statutory definition “almost verbatim.” *Id.* at ¶ 55, 471 P.3d at 1057. But that wasn’t the basis for our determination that there was no plain error. No, our decision was premised on the fact that the defendant “never disputed at trial that the [promissory] note at issue was a security,” arguing instead that he did not engage in fraud. *Id.* at ¶ 56, 471 P.3d at 1057. And since the defendant “never contested” that the note was a security, we could not say “that any error by the trial court in defining the term ‘security’ so undermined the fundamental fairness of the trial so as to cast serious

doubt on the reliability of the judgment of conviction.” *Id.* at ¶ 57, 471 P.3d at 1057–58. Accordingly, we held that any error in the definitional instruction failed to satisfy the substantial-rights prong of Crim. P. 52(b). *Thompson*, ¶ 57, 471 P.3d at 1057–58.

¶29 *Thompson* drew strength from *People v. Lozano-Ruiz*, 2018 CO 86, 429 P.3d 577, a sexual assault case we had decided less than two years earlier. There, the county court correctly instructed the jury on the elements of the offense charged, including that the defendant inflicted “sexual intrusion or penetration on a person.” *Id.* at ¶ 3, 429 P.3d at 578. But its instructions omitted the statutory definition of “sexual penetration.” *Id.* Because the defendant neither objected to the instructions nor requested the missing definitional instruction, we, like the district court—acting as an appellate court—reviewed for plain error. *Id.* at ¶¶ 3, 5, 429 P.3d at 578. Unlike the district court, however, we concluded that there was no plain error because the instructional defect concerned an issue that was uncontested at trial:

[B]ecause the question of whether sexual penetration occurred was not contested at trial beyond the mere fact of the defendant pleading not guilty, failure to include the definitional instruction did not rise to the level of plain error Lozano-Ruiz never contested the testimony from several witnesses that he and the victim engaged in “sex” or “sexual intercourse.” He did not cross-examine the victim as to the veracity of her statement that he put his penis inside of her. His sole defense at trial was mistake of age, a defense wholly unrelated to the statutory definition of “sexual penetration.”

Id. at ¶¶ 5–6, 429 P.3d at 578.

¶30 When the dust settles, our jurisprudence reveals that an instructional error related to an issue that was uncontested at trial does not satisfy the substantial-rights prong of the plain-error analysis. We turn next to why the division faltered in arriving at a different conclusion, focusing on two aspects of its analysis.

1. The Division Misread Our Case Law

¶31 The division concluded that, “regardless of whether the defense did or did not contest the [pertinent] issue at trial,” a court conducting plain-error review must “examine whether the instructional error . . . ‘so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.’” *Sloan*, ¶ 48, 554 P.3d at 535 (quoting *Thompson*, ¶ 54, 471 P.3d at 1057). More specifically, the division reasoned that an instructional lapse constitutes plain error unless the evidence at trial overwhelmingly supports the defendant’s conviction. *Id.* at ¶¶ 48–50, 554 P.3d at 535–36. That understanding misapprehends our jurisprudence.

¶32 The division distinguished our decision in *Thompson* because it read it as resting “primarily” on our observation that the definitional instruction of “security” tracked the statutory language. *Sloan*, ¶ 47, 554 P.3d at 535. But we were clear that the reason we could not “say that any error by the trial court in

defining the term ‘security’” met the substantial-rights prong of the plain-error standard was “[b]ecause Thompson never contested at trial that the note at issue was a security.” *Thompson*, ¶ 57, 471 P.3d at 1057–58. The remark regarding the similarities between the instructional and statutory definitions of “security” was a brief aside, not a building block of our rationale. *Id.*

¶33 After failing to capture the true thrust of *Thompson*, the division turned to *Thompson’s* predecessor, *Lozano-Ruiz*. It then read *Lozano-Ruiz* as limiting the effect of a defendant’s decision at trial not to contest an issue that’s later raised on appeal. *Sloan*, ¶ 41, 554 P.3d at 534–35. The division suggested that what matters isn’t whether a defendant failed to contest such an issue; it’s whether the defendant actually conceded the issue. *Id.* Respectfully, we said just the opposite in *Lozano-Ruiz*.

¶34 We acknowledged in *Lozano-Ruiz* that the defendant “did not *concede* that sexual penetration occurred, in that he maintained throughout the trial that he was not guilty of the charged offense.” ¶ 7, 429 P.3d at 578. But we hastened to add that “he also did not *contest* that sexual penetration occurred, in that he never challenged the evidence suggesting that it had.” *Id.* And, importantly, we explained that “[i]t [was] the failure to *contest* the issue that [was] *the crucial missing ingredient.*” *Id.* (second emphasis added). Stated differently, although the defendant did not concede the issue of sexual penetration, we could not conclude

that the omitted definition constituted plain error *because he did not contest that sexual penetration occurred.* *Id.* As we summarized, “[w]ithout putting the definition of ‘sexual penetration’ at issue in the trial, and without objecting to the jury instructions, Lozano-Ruiz [could not] . . . claim that the trial court plainly erred in omitting that definition from the instructions.” *Id.*

¶35 We turn next to the division’s interpretation of *Auman* — an earlier case that sits comfortably alongside *Thompson* and *Lozano-Ruiz*. The division seemed to treat *Auman* as supporting the notion that whether an instructional error amounts to plain error requires a more rigorous analysis than merely assessing “whether the challenged instruction related to an issue contested at trial” — the reviewing court must *also* consider “whether the evidence introduced at trial overwhelmingly supported the defendant’s conviction.” *Sloan*, ¶ 50, 554 P.3d at 536. But *Auman* gives that proposition no shelter. Although *Auman* discussed both an unobjected-to instructional error concerning “an uncontested issue” and an instructional error arising in a case where “the evidence of [the defendant’s] guilt is overwhelming,” we separated those scenarios with the disjunctive *or*, not the conjunctive *and*. 109 P.3d at 665. We said that “[i]f the error concerned an uncontested issue, *or* if the evidence of her guilt [was] overwhelming, then *Auman*’s substantial rights were not affected, and no reasonable possibility

exist[ed] that the improper instruction contributed to her conviction.” *Id.* (emphasis added).

¶36 What appears to have thrown the division off course in applying *Auman* is that we articulated the same proposition in inverse form in the very next sentence, which required us to replace the disjunctive *or* with the conjunctive *and*:

However, if the evidence of [the defendant’s] guilt is not overwhelming, *and* if there existed an evidentiary dispute as to [the subject of the instructional error], then it is likely that [the defendant’s] substantial rights were affected, and a reasonable possibility exists that the improper instruction contributed to [the] conviction.

Id. (emphasis added). The division misinterpreted this sentence, overlooking that it is simply the mirror image of the earlier one. The two sentences are entirely consistent. They are merely different expressions of the same idea; the first explains when plain error *does not* result—the subject of the error was an uncontested issue *or* the evidence of guilt was overwhelming—while the mirror-image counterpart explains when plain error *does* result—the subject of the error was not uncontested *and* the evidence of guilt was not overwhelming.

¶37 *Espinoza v. People*, 712 P.2d 476 (Colo. 1985), on which the division also relied, *Sloan*, ¶ 50, 554 P.3d at 536, is in lockstep with *Auman*. There, after noting that a failure to properly instruct on an undisputed element generally does not constitute plain error, we added that “[i]t is also unlikely that an erroneous instruction will be considered plain error if the evidence of the defendant’s guilt

was overwhelming.” *Espinoza*, 712 P.2d at 478. The fact that *Espinoza* addressed both points—because both happened to apply in that case—does not mean that our plain-error framework requires both conditions to be satisfied. The division erred in reaching the opposite conclusion.

¶38 But atop its misreading of our body of law, the division stacked a misplaced reliance on, and misapplication of, *People v. Cowden*, 735 P.2d 199 (Colo. 1987). *Sloan*, ¶¶ 43–45, 554 P.3d at 535. As we explain next, *Cowden* offers no lifeline to the division’s analysis.

2. The Division Wrongly Relied on and Misapplied *Cowden*

¶39 In *Cowden*, the elemental instruction for one of the six felony theft counts charged failed to inform the jury that the prosecution had the burden of proving that the value of the stolen property was \$200 or more but less than \$10,000. 735 P.2d at 202. Because the defendant did not object to this instruction or otherwise alert the trial court to the omission of the value element, we reviewed for plain error. *Id.* In describing the plain-error standard, we did not compose a new melody; we replayed the same settled refrain: “Failure to instruct properly on an element of a crime does not constitute plain error where the element is not contested at trial, or where evidence of the defendant’s guilt is overwhelming.” *Id.* Indeed, we cited *Espinoza* in support of this proposition.

¶40 It is true that, as the division noted, we reversed the theft conviction at issue in *Cowden*, even though the defendant did not contest the value element at trial. *Sloan*, ¶ 45, 554 P.3d at 535; *see also Cowden*, 735 P.2d at 201 (indicating that the defendant’s argument at trial was that the theft statute denied him equal protection of the law because it allowed the prosecution to obtain a conviction by proving that he acted either intentionally or knowingly). But we did so because the absence of evidence that the value of the stolen property was at least \$200 stuck out like a sore thumb. *Cowden*, 735 P.2d at 202. In fact, the victim testified to the contrary. *Id.* She said that the property’s value was *not* \$200 or more; it was \$195. *Id.* Further, neither the prosecution nor the defense presented other evidence of the property’s value. *Id.* Differently put, the evidence at trial indisputably showed that the stolen property was *not* \$200 or more. In the face of this record, we were hard-pressed to conclude that it was not reasonably possible that the defendant would have been acquitted on this count of theft if the jury had been properly instructed. *Id.* Accordingly, we remanded the case with directions to resentence the defendant for the lesser included offense of misdemeanor theft—an offense requiring proof that the value of the stolen property exceeded \$50 but was less than \$200. *Id.*

¶41 Here, unlike the situation in *Cowden*, the record is not barren of evidence that the vehicular eluding resulted in someone’s death. Nor did the evidence

introduced at trial establish the opposite. Because the record in this case is not devoid of evidence that the vehicular eluding resulted in someone's death — and it certainly doesn't indisputably establish the opposite — *Cowden* is off point. This is not an outlier case like *Cowden*, which compels us to act sua sponte in light of a glaring absence of evidence on an element or interrogatory, or in light of indisputable evidence disproving the element or interrogatory.⁵

¶42 The division not only failed to recognize *Cowden* as a case that sits outside the usual contours of the doctrinal mainstream, it also proceeded to misapply it. Taking its bearings from that decision, the division concluded that “the prosecution's own evidence” contradicted the argument that the eluding resulted in death.⁶ *Sloan*, ¶ 52, 554 P.3d at 536. It reasoned “that the officers abandoned their pursuit of the Jeep shortly before, and about a mile from the location of, the collision.” *Id.* at ¶ 53, 554 P.3d at 536. In the division's view, once the officers called off the chase, Sloan could no longer commit the crime of vehicular eluding. This application of *Cowden* was flawed.

⁵ Sloan has not brought a claim challenging the sufficiency of the evidence related to the sentence enhancer. He could have done so; he chose not to. We therefore decline his invitation to evaluate the sufficiency of the evidence supporting the sentence enhancer.

⁶ Following the division's lead, Sloan asserts that the prosecution's own evidence disproved the sentence enhancer.

¶43 The fact that the chase had ended doesn't mean that the eluding had, too. There was no evidence that Sloan knew the officers had called off their pursuit. To the contrary, the evidence indisputably showed that he was continuing to travel at a high rate of speed when he ran the red light and collided with the Uber car at the intersection of Colfax Avenue and Colorado Boulevard.

¶44 The record shows an unbroken chain of events set in motion by Sloan's decision to flee: Officer Adam and the backup officer attempted to stop Sloan; rather than stop, Sloan sped away from them recklessly; the officers eventually called off the chase and stopped pursuing; a mere thirty seconds later, while continuing to drive recklessly, Sloan collided with a car that had the right of way, killing both of its occupants; and Sloan then fled on foot. This uninterrupted sequence demonstrates that, although Sloan "kn[ew] or reasonably should [have] know[n]" that the officers were attempting to stop him, he "elude[d] or attempt[ed] to elude" them. § 18-9-116.5(1). More importantly, it establishes that, at the time of the collision that resulted in two deaths, Sloan was still "elud[ing] or attempt[ing] to elude" the officers, regardless of what they were doing. *Id.* The division misapplied *Cowden* by conflating the officers' pursuit with Sloan's eluding. In the end, although the jury found that the "accident" resulted in death, the "accident" was inextricably intertwined with the *eluding* and directly resulted from it.

¶45 Moreover, the division’s approach could yield absurd results. Under that rationale, a collision that occurs even two seconds after officers call off a chase—due to dangerous circumstances created by the defendant—would fall outside the vehicular eluding statute. Nothing in the text or structure of section 18-9-116.5 suggests that the legislature intended such an arbitrary limitation.

¶46 In short, *Cowden* is not germane, and the division erred in leaning on it—and then compounded that error by misapplying it.

¶47 Having explained where the division went astray, we now circle back to this case. We must determine whether the trial court’s instructional misstep constitutes plain error and thus requires reversal of Sloan’s conviction.

C. There Was No Plain Error Here Requiring Reversal

¶48 As the division acknowledged, at trial, Sloan did not contest that the eluding resulted in death. *Sloan*, ¶ 37, 554 P.3d at 534. At no time—“whether during voir dire of the potential jurors, opening statements, or closing statements—did the defense claim” that the eluding did not result in death. *People v. Fichtner*, 869 P.2d 539, 544 (Colo. 1994) (concluding that the omission of the definition of “serious bodily injury” from a menacing jury instruction did not constitute plain error because whether the victim feared serious bodily injury was not contested at trial and the evidence on that issue was overwhelming). Nor did Sloan argue at any point that the prosecution failed to present sufficient evidence that the eluding

resulted in death. Rather, Sloan rode the mistaken-identity horse from the starting gate all the way to the finish line. His position was that someone else was driving the Jeep leading up to and during the collision.

¶49 We are not persuaded otherwise by defense counsel's cross-examination, confirming that the officers turned off their overhead lights and pulled into a parking lot shortly before the collision. The focus of these questions was to establish the safety-related reasons the officers ended their pursuit, not to challenge the prosecution's evidence that the eluding resulted in death. Counsel's cursory references to the decision to call off the chase fall well short of showing that Sloan genuinely contested the vehicular-eluding interrogatory at trial. *See Cowden*, 735 P.2d at 202-03 (concluding that defense counsel's "cursory references to the claimed value of the missing items" with respect to five of the six counts of felony theft were not enough to consider the value element contested at trial).

¶50 Because Sloan did not contest that the eluding resulted in death, he cannot carry his burden of establishing that a reasonable possibility exists that the instructional error contributed to the vehicular-eluding verdict such that serious doubt is cast upon the reliability of the conviction for that crime. Accordingly, he cannot demonstrate there was plain error.

III. Conclusion

¶51 We reverse the division's judgment. We further remand to the division with instructions to return the case to the district court so that it may correct the mittimus on the unrelated matter noted in the division's opinion.