COLORADO COURT OF APPEALS **2017COA99**

Court of Appeals No. 15CA0717
Boulder County District Court No. 14CR884
Honorable Patrick D. Butler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Coleman Backstrom Stewart,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE GRAHAM
Welling, J., concurs
J. Jones, J., concurs in part and dissents in part

Announced July 27, 2017

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¶ 1 Defendant, Coleman Backstrom Stewart, appeals the judgment of conviction entered on jury verdicts finding him guilty of felony menacing and misdemeanor obstructing a peace officer. We conclude that there were a number of errors in the trial proceedings — two of them standing alone might serve as the basis for reversal, but collectively they clearly require that we reverse the conviction and remand for a new trial.

I. Background

¶ 2 When an impetuous youth runs from police, good things rarely result. This case is just such a circumstance.

¶ 3 Inebriated, defendant took a cab from a friend's house and refused to pay his $4.85 cab fare. Rather than deliver defendant to his desired destination, the cab driver, apparently suspecting that defendant would not pay his fare, stopped near a police station. Defendant jumped from the cab and ran, with the cab driver in pursuit. The cab driver alerted a nearby police officer who shouted at defendant and also gave chase. Defendant ran to his apartment and then appeared behind his window blinds with a plastic BB gun. Officers, who had entered defendant's gated patio, opened fire, and defendant suffered two gunshot wounds.

¶ 4 The evidence at trial showed that defendant's apartment was surrounded by a six-foot privacy fence that was locked. The apartment air conditioner was running at a high noise level. The fence enclosed defendant's private patio and was not accessible to other residents of the building. At least one police officer scaled the fence and then opened the gate for remaining officers to enter the patio. It was after the officers breached the fence that they saw defendant with the BB gun and, believing the gun to be real, commenced firing.

¶ 5 Prior to trial, defendant filed a motion to dismiss the charges against him on grounds that "outrageous government conduct" in violation of his Fourth and Fifth Amendment rights barred prosecution. U.S. Const. amend. IV; U.S. Const. amend. V. The motion also sought to suppress all evidence obtained by the police after their illegal entry onto his property. The trial court denied the motion without holding a hearing or issuing a detailed order.[1]

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[1] The trial court wrote a single sentence denying the motion: "None of the alleged facts rise to the level of outrageous government conduct." The parties dispute whether defendant preserved his Fourth Amendment claim on appeal. We conclude that he did. Although we believe that he did preserve this claim, in light of

¶ 6 A jury convicted defendant of felony menacing and obstructing a peace officer. The trial court sentenced defendant to probation.

II. Evidentiary Errors

¶ 7 All relevant evidence is admissible unless otherwise prohibited by law. CRE 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401.

¶ 8 When a defendant objects to the admission of evidence, we review for harmless error. *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001). If the error is not one of constitutional dimension, the defendant bears the burden of showing prejudice from the error. *People v. Vigil*, 718 P.2d 496, 500 (Colo. 1986); *People v. Casias*, 2012 COA 117, ¶ 60. We will reverse if the error "substantially

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People v. Doke, 171 P.3d 237, 240 (Colo. 2007) (illegally pointing a gun at police who impermissibly enter a dwelling is a new crime that will not be suppressed under exclusionary rule), we conclude that it is unlikely that any evidence would be suppressed and because of our disposition as to numerous other claims of error, we need not address it in this opinion. But on remand, the trial court should take a fresh look at the motion should defendant renew it.

influenced the verdict or affected the fairness of the trial proceedings." *Tevlin v. People*, 715 P.2d 338, 341-42 (Colo. 1986).

A. Refreshing Recollection Evidence

¶ 9 Whether defendant was aware that a police officer was chasing him after he jumped from the cab was hotly disputed. The prosecutor sought to establish that the officer had yelled at defendant and identified himself as a police officer. The prosecution's first witness had seen some of the chase, but she had only a vague recollection of events when she was called to the witness stand for direct examination. Rather than asking an open-ended question, the prosecutor asked: "And if you told the officer at the time that you heard 'stop police' would that be accurate?" Defense counsel objected to the leading question, but the trial court overruled the objection because it was "being used to refresh recollection." Defense counsel sought leave to approach the bench to make further argument, but the trial court denied the request. The witness then responded: "Yes, I think anything I said to him would have been accurate."

¶ 10 The prosecutor's question placed words in the witness's mouth — words that were critical in evaluating the defense that defendant

was not aware he was being chased by a police officer. CRE 611(c) prohibits leading questions on direct examination, and CRE 612 permits refreshing recollection only in limited circumstances and following a particular procedure.

¶ 11 The court's ruling was in error not only because the prosecution was leading the witness but also because it violated CRE 612. That rule deals with situations where a witness indicates a lack of recollection and has his or her recollection refreshed with a writing. No writing was introduced in this instance. Nor was this question proper impeachment because no foundation was laid. *See* CRE 613 (stating that denial or failure to remember the prior statement is a prerequisite for the introduction of extrinsic evidence to prove a prior inconsistent statement); *see also* § 16-10-201, C.R.S. 2016. Here, the prosecutor did not attempt to call the witness's attention to a prior inconsistent statement. Instead, the prosecutor simply told the witness what the prosecutor wanted to prove.

¶ 12 Under circumstances where defendant's awareness of the presence of police was both disputed and pivotal to his defense, we cannot conclude that this error was without prejudice. The

witness's answer could easily give a jury the impression that defendant was aware from the outset that he was being chased by police. Furthermore, although defense counsel was able to elicit from the witness during cross-examination that she did not in fact tell the investigator she had heard the officer yell "stop police," the prosecutor nevertheless referenced this statement as though it was a proven fact multiple times during trial.

¶ 13 And we do not agree that evidence of defendant's menacing was overwhelming. His appearance behind blinds at the window with his BB gun was fleeting, and the jury could have believed that he was not intending to menace the police but instead he was in fear of the cab driver.

¶ 14 But, on balance, although we conclude that this error was prejudicial, we cannot conclude that it, standing alone, "substantially influenced the verdict or affected the fairness of the trial proceedings." *Tevlin*, 715 P.2d at 341-42. Thus, it is harmless in the sense that this error, in isolation, does not require reversal, although it substantially contributes to the cumulative error determination discussed in Part V below.

B. CRE 404(b) Evidence

¶ 15 Defendant objected to the introduction of evidence of a 2010 incident in Kansas, where he hid from police under a parked car, as improper character evidence. The trial court initially agreed the evidence should be excluded unless defendant "were to testify that he did not know police were after him or trying to contact him."

¶ 16 Defendant did not testify at trial, but the court ruled that he had opened the door to this evidence by suggesting through argument and examination of witnesses that he did not knowingly menace police because he was unaware that police were on his patio. Thus, the court admitted the evidence for the limited purpose of rebutting "any allegation of accident or mistake" on the part of defendant. In rebuttal, the People introduced the testimony of two police officers from Kansas who found defendant hiding under a parked car after responding to a report of possible car break-ins.

¶ 17 On appeal the People contend this evidence does not implicate CRE 404(b) because it was "admitted to show that [defendant] had previous experience with law enforcement," "not . . . to show that, because [defendant] hid from an officer on a previous occasion, he

acted in conformity with that character in this case in knowingly resisting arrest." We disagree.

¶ 18 CRE 404(b) addresses evidence of "other crimes, wrongs, or acts." The Kansas incident several years prior to the charges in this case is clearly evidence of other crimes, wrongs, or acts. Indeed, during trial the prosecutor, defense counsel, and the trial court all agreed this evidence implicated CRE 404(b).

¶ 19 Evidence of prior acts is admissible if the acts (1) relate to a material fact; (2) are logically relevant; (3) have a logical relevance "independent of the intermediate inference, prohibited by CRE 404(b), that the defendant has a bad character" and committed the crime charged because he acted in conformity with that bad character; and (4) have a probative value that is not substantially outweighed by the danger of unfair prejudice. *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990).

¶ 20 We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v. Harris*, 2015 COA 53, ¶ 14. "CRE 404(b) does not always require similarity between a defendant's prior act and the charged offense." *Casias*, ¶ 46 (citing *Yusem v. People*, 210 P.3d 458, 467 (Colo. 2009)). But when

proving lack of accident or mistake, "[t]he uncharged act should closely parallel the charged act," and "[i]f the acts are similar in material respects, the similarity justifies the admission of the acts to disprove innocent intent." *Id.* (alterations in original) (quoting 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5:08, at 25 (2009)); *accord Harris*, ¶ 24.

¶ 21 Here, the evidence related to the material fact of defendant's mens rea. *See Casias*, ¶ 36 ("Other bad acts evidence is admissible to prove a defendant's knowledge . . . when . . . the other bad acts tend to prove the requisite knowledge by virtue of the doctrine of chances."). Yet the evidence had little logical relevance to the material fact at issue; that is, the fact that defendant hid from police on a prior occasion did not make it more or less likely that he knew police were chasing him on this occasion.

¶ 22 But even if we were to conclude that this evidence has slight logical relevance — "that [it] has *any* tendency to make the existence of the material fact more or less probable than without the evidence," *Yusem*, 210 P.3d at 464-65 — because defendant's prior contact with police may make it more probable he knew he was dealing with police in this instance, we are unpersuaded that

such relevance is independent of the inference prohibited by CRE 404(b).

¶ 23 Indeed, the prosecutor did not state a precise evidentiary explanation of how the 2010 incident proved defendant's mens rea in this case — apart from his propensity to hide from the police. A jury could not reasonably conclude that defendant was more likely to know he was being chased by police in this case without relying on the inference that he hid from police in the past and so he is likely to hide from them again. This is the very type of impermissible inference prohibited by CRE 404(b). *See Yusem*, 210 P.3d at 464.

¶ 24 Nor can we conclude that this error was harmless. Propensity evidence always has a potential for unfair prejudice. *Perez v. People*, 2015 CO 45, ¶ 28. The unfair prejudice to defendant was not outweighed by any probative value we are able to discern in the 2010 incident. Indeed, in our view, that evidence was irrelevant to any issue at trial other than the habit and character of defendant. Because defendant contended that he was unaware that he was disobeying officers, this prior incident certainly presented an opportunity for the jury to believe that defendant was aware of the

pursuing police here and sought to hide from them. The prosecutors' closing arguments highlighted the 2010 evidence, urging the jurors to use it to infer that defendant knew the police were outside the apartment when he appeared at the window with his BB gun. One prosecutor went so far as to say in closing that the 2010 incident proved that defendant "knew" the officers were looking for him because "he's run before." We conclude that the error prejudiced defendant and affected the fairness of the proceedings. Although this would likely be a sufficient basis for reversal, when it is considered in the context of the other errors we perceive, as we hereafter conclude, they collectively require reversal.

III. Jury Instruction Error

¶ 25 Over defendant's objection, the trial court gave the jury an instruction stating: "An officer may pursue a fleeing suspect even in to that person's home."

¶ 26 "A trial court must correctly instruct the jury on all matters of law applicable to the case." *People v. Mendenhall*, 2015 COA 107M, ¶ 14. "We review de novo whether instructions accurately informed the jury of the law." *People v. Garcia*, 2017 COA 1, ¶ 7. "[C]ontentions of instructional error are preserved when a party

objects to an instruction or requests a specific additional or alternative instruction." *Mendenhall*, ¶ 21. Preserved instructional errors that do not implicate constitutional rights are reviewed for harmless error. *People v. Castillo*, 2014 COA 140M, ¶ 24 (*cert. granted* Nov. 23, 2015). Such an error, however, does not require reversal if we can determine that there is no reasonable probability that it contributed to the jury's guilty verdict. *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009).

¶ 27 "[I]t is error for a court to instruct the jury in a manner that invites confusion." *People v. Stellabotte*, 2016 COA 106, ¶ 25 (quoting *Steward Software Co. v. Kopcho*, 275 P.3d 702, 711 (Colo. App. 2010)) (*cert. granted* Feb. 6, 2017). And "[an] instruction . . . should not assume facts not supported in some manner by the record." *People v. Tenneson*, 788 P.2d 786, 799 (Colo. 1990).

¶ 28 There are three situations in which exigent circumstances justify warrantless entry onto private property:

> (1) the police are engaged in a "hot pursuit" of a fleeing suspect; (2) there is a risk of immediate destruction of evidence; or (3) there is a colorable claim of emergency threatening the life or safety of another. The scope of the permissible intrusion is determined by the

> exigency justifying the initiation of the warrantless entry.

People v. Aarness, 150 P.3d 1271, 1277 (Colo. 2006) (citation omitted).

¶ 29 The People argue on appeal that the instruction correctly stated the law, but they cite to a Utah case to support the instruction. *See State v. Hamilton*, 710 P.2d 174, 175 (Utah 1985) (A warrantless entry was justified where an officer "was literally in 'hot pursuit' of a person who had been observed committing an offense, albeit a minor one."). During oral argument, the People argued that the instruction was correct because it contained the term "may" and therefore, according to the People, did not categorically state it was acceptable for officers to pursue a fleeing suspect into that person's home.

¶ 30 Meanwhile, relying on federal precedent, defendant argues that the instruction was error because a police officer may not pursue a fleeing suspect into a home when the suspected offense is a misdemeanor (much less a petty offense, as defendant's failure to pay the cab fare was here). *See Mascorro v. Billings*, 656 F.3d 1198, 1207 (10th Cir. 2011) ("The warrantless entry based on hot pursuit

was not justified" where "[t]he intended arrest was for a traffic misdemeanor committed by a minor."); *see also Stanton v. Sims*, 571 U.S. ___, ___, 134 S. Ct. 3, 5 (2013) ("[F]ederal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.") (collecting cases); *Mendez v. People*, 986 P.2d 275, 283 (Colo. 1999) (discussing *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and the important factor of the "gravity of the offense" in determining exigent circumstances, but not resolving whether a misdemeanor crime can justify warrantless entry into a private residence).

¶ 31 We are unable to determine the relevance of this instruction. First, nothing in the record suggests that the officers pursued defendant into his "home." And although defendant took the position that his patio (curtilage) was part of his dwelling, there was no instruction regarding that contention. Second, it appears that the instruction was not an accurate or complete statement of the law, even if it did bear some relevance to the evidence adduced at trial. In some instances police may be entitled to pursue a fleeing

suspect into his or her home; in other cases they may not. Yet the instruction, without qualification, purported to instruct the jury that in all instances the police can pursue a defendant into his or her home. Accordingly, we conclude that it was error for the trial court to give the instruction.

¶ 32 But, because the error is not of constitutional dimension, reversal is not required "if there is not a reasonable probability that the error contributed to the defendant's conviction." *Garcia*, 28 P.3d at 344 (quoting *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000)). At best, the instruction was certainly confusing. At worst, it was a misstatement of the law that created the impression that a determination had been made that the police conduct throughout the pursuit was lawful. But the prejudice from this erroneous instruction is contained by the fact that it does not directly tie to any issue that the jury was required to decide. Thus, while we conclude that it was error to give the instruction, "we can say with fair assurance that the error," standing alone, "did not substantially influence the jury verdict or impair the fairness of the trial." *People v. Gordon*, 160 P.3d 284, 288 (Colo. App. 2007) (citing *Cordova v. People*, 817 P.2d 66 (Colo. 1991)). Accordingly, this error in

isolation does not require reversal, but, as discussed in Part V below, it does contribute to the cumulative effect of the errors noticed on appeal.

IV. Denial of Continuance

¶ 33 A pivotal witness to the cab ride and the initial police chase was the cab driver. He was endorsed as a witness by both the prosecution and the defense and had agreed to meet with the prosecutor shortly before trial. Believing the cab driver to be a material and essential witness, the prosecutor attempted to subpoena him to no avail.

¶ 34 The defense filed a motion for a continuance to secure the cab driver's presence at trial. The court denied the motion, noting that defendant would not be prejudiced if the witness did not testify. Nevertheless, the day after denying the continuance, the court ruled that a defense subpoena could issue for the cab driver (in Florida, where he had been located) and justified approving the subpoena by stating that he was a "material witness" who was required to be at trial. Ultimately, defendant was not able to place the cab driver under subpoena prior to trial. Defendant renewed his motion for continuance, which the court again denied.

¶ 35 The denial of a motion for continuance is reviewed for an abuse of discretion. *People v. Bakari*, 780 P.2d 1089, 1092 (Colo. 1989). Exercising such review, we must determine whether the denial was manifestly arbitrary, unreasonable, or unfair, *People v. Roybal*, 55 P.3d 144, 150 (Colo. App. 2001), or a misapplication of the law, *People v. Lopez*, 2016 COA 179, ¶ 43.

¶ 36 "No mechanical test exists for determining whether the denial of a request for a continuance constitutes an abuse of discretion." *Roybal*, 55 P.3d at 150. The circumstances of each case and the reasons justifying a continuance must be weighed. *People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988). "[A]n unreasoning and arbitrary insistence upon a trial date in the face of a justifiable request for delay can amount to an abuse of discretion . . . ." *Id.*

¶ 37 In this case there were several justifiable reasons for the request and no perceivable prejudice to the prosecution in granting the request. The cab driver was unquestionably a material witness. Defendant sought to prove that the driver's frenzied driving and refusal to deliver him to his desired location justified his jumping from the cab and running. This would have helped to corroborate defendant's theory that he was running from the cab driver and not

from police officers. And the error in refusing the continuance prejudiced defendant by denying him a key witness, affecting the fairness of the trial proceedings. *See Hagos v. People*, 2012 CO 63, ¶ 12. As with our conclusion with respect to the CRE 404(b) evidence, this error contributes to the cumulative effect of the various errors at trial.

V. Cumulative Error

¶ 38 Considered in isolation, each of the errors we have specified might be viewed as harmless, although two of them might well require reversal on their own. However, when we consider them in the context of a single trial, we reach the conclusion that the cumulative effect of the errors committed requires reversal of defendant's conviction. As the dissent points out, a defendant is not entitled to a perfect trial. However, he is entitled to a fair one.

¶ 39 "We will reverse for cumulative error where, although numerous individual allegations of error may be deemed harmless and not require reversal, in the aggregate those errors show prejudice to the defendant's substantial rights and, thus, the absence of a fair trial." *People v. Gallegos*, 260 P.3d 15, 28-29 (Colo. App. 2010).

¶ 40 One division of our court recently adopted an approach to evaluating cumulative error that has been widely used in the federal circuits. *See People v. Howard-Walker*, 2017 COA 81, ¶ 111 (citing *United States v. Caraway*, 534 F.3d 1290, 1302 (10th Cir. 2008)). Following this sensible approach,

> [a] court evaluates whether the total effect of errors warrants reversal based on a number of non-exclusive factors, including: the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy of any remedial efforts); the strength of the government's case; and the length of the trial.

Id. at ¶ 114 (citing *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005)).

¶ 41 Here, the trial errors were preserved, so the trial court had an opportunity to address them. In one instance, the trial court did not recognize the proper use of CRE 612. In another, the trial court misapplied the *Spoto* analysis. In still another, the trial court instructed the jury with a misstatement of the law. And, regarding the continuance, the trial court recognized the importance of an absent witness to the defense but declined to give even a short continuance to afford an opportunity to secure his presence. These

errors were interrelated because they all impacted the theory of defense — namely, that defendant thought he was being pursued by the cab driver and not police officers.

¶ 42 While some might view the prosecution's case as strong, it rested on the questionable footing of the propriety of giving chase to a person who had committed a petty offense. Finally, the trial in this case was relatively short, adding emphasis to the errors.

¶ 43 Because of the numerous preserved errors committed during trial and giving consideration to the factors discussed in *Howard-Walker*, we are convinced defendant's substantial rights were prejudiced and that he did not receive a fair trial. Therefore, reversal of his conviction is required.

VI. Conclusion

¶ 44 The judgment is reversed, and the case is remanded for a new trial.

JUDGE WELLING concurs.

JUDGE J. JONES concurs in part and dissents in part.

JUDGE J. JONES, concurring in part and dissenting in part.

¶ 45 I concur in the majority's conclusions that the court erred in allowing evidence of the 2010 Kansas incident under CRE 404(b) and that any errors in allowing the prosecutor to refresh a witness's recollection without using a writing and in instructing the jurors that "[a]n officer may pursue a fleeing suspect even in to that person's home" don't require reversal under the applicable standards of review. I respectfully dissent, however, from the rest of the majority's conclusions.

- I disagree with the majority's decision to allow defendant to further pursue his motion to suppress on remand. He failed to preserve for our review the only issue he raises relating to that motion, and that should be the end of the matter.
- I also disagree with the majority's conclusion that the court's error in allowing evidence of the 2010 Kansas incident under CRE 404(b) likely requires reversal. In my view, that error was harmless because the evidence that defendant menaced the police officers was overwhelming.

- I disagree with the majority's conclusion that the district court reversibly erred in denying defendant's motion for a continuance to locate a witness. Given defendant's lack of diligence, the lateness of the motion, and defendant's failure to show that he could find the witness within a reasonable time, the district court acted well within its discretion.
- Lastly, I disagree with the majority's conclusion that reversal is required for cumulative error. The three errors (or potential errors) the district court may have made didn't deprive defendant of a fair trial.

¶ 46 I also address two claims of evidentiary error that the majority doesn't address. I do so because the issues are likely to arise on remand. Neither claim is persuasive.

¶ 47 I would affirm the judgment.

I. The Motion to Suppress

¶ 48 On appeal, defendant argues that the district court should have suppressed evidence obtained by the police officers after they entered the "curtilage" of his residence because they needed a warrant to enter that area and didn't have one. The majority

concludes in a footnote that defendant preserved that argument, but because the district court didn't rule on it, defendant should be allowed to pursue it on remand. The majority errs, for two reasons.

¶ 49 First, defendant manifestly did not preserve the argument. His motion to suppress raised only one issue: should the evidence obtained by the police be suppressed because their conduct was outrageous? That theory is different from the theory that evidence obtained by reason of a warrantless search must be suppressed. The outrageous government conduct theory is based on the Due Process Clause of the Fifth Amendment, *see United States v. Russell*, 411 U.S. 423, 431-32 (1973) (cited in defendant's motion); *People in Interest of M.N.*, 761 P.2d 1124, 1127 (Colo. 1988), while the stand-alone warrantless search theory is based on the Fourth Amendment, *see People v. Brunsting*, 2013 CO 55, ¶¶ 16-21.

¶ 50 That defendant didn't raise a stand-alone Fourth Amendment argument, but instead relied solely on a Fifth Amendment due process argument, is borne out by the following aspects of the motion:

- The motion is captioned "MOTION TO DISMISS OR IN THE ALTERNATIVE TO SUPPRESS EVIDENCE

OBTAINED BY OUTRAGEOUS GOVERNMENT CONDUCT."

- The motion alleged facts related to officer conduct that would've been irrelevant to a warrantless entry argument; these facts were obviously included to show that the officers overreacted and used excessive force.
- Though the motion asserted in conclusory fashion that the officers "disregarded the protections of the Fourth Amendment," it said the officers disregarded those protections "when [they] committed outrageous conduct by illegally trespassing."
- The legal analysis portion of the motion focused on the Due Process Clause. And the motion expressly urged the court to address the issue as one of outrageous government conduct. ("For purposes of evaluating a claim of outrageous government conduct . . . .")
- The motion argued that "the government's actions were fundamentally unfair and a shock to the universal sense of justice." That is an outrageous government conduct argument, not a Fourth Amendment argument. *See*

Russell, 411 U.S. at 431-32; *People in Interest of M.N.*, 761 P.2d at 1127.

- The motion argued that "[i]t is implicit in this Court's authority to determine whether violations of the Due Process Clause of the Fifth Amendment warrant dismissal of criminal charges."
- The motion argued that the officers' entry on defendant's patio (the "curtilage" of his residence) was "an act of criminal trespass," and that "the trespass . . . was wholly unreasonable."
- The motion argued that "[h]ad [the police] not trespassed, there would have been no escalation, no armored vehicle [would have] crashed through the property, and a twenty-three year-old young man would not have been shot. Instead, the officers invaded [defendant's] home, guns drawn, with absolutely no legal justification whatsoever."
- And lastly, the motion concluded as follows: "Because the officers committed outrageous conduct by illegally entering [defendant's] property in violation of his due process rights under the Fifth Amendment and the

requirements of the Fourth Amendment," the charges should be dismissed or the evidence should be excluded.

¶ 51 Based on the content of the motion, the district court, understandably and correctly, viewed it as one based on outrageous government conduct. To be sure, the motion contains a couple of references to the Fourth Amendment and the lack of a warrant. But read in context, those references were made in service of the outrageous government conduct argument.[1]

¶ 52 Defense counsel's silence following the court's ruling also speaks volumes. After the court ruled that "[n]one of the alleged facts rise to the level of outrageous government conduct," they said nothing more about the motion. In fact, at a pretrial conference, the court, after noting that it had a month earlier denied the motion asserting outrageous government conduct, asked defense counsel whether it had missed "any motions or outstanding issues." One of defendant's attorneys responded, "I don't believe so, Your Honor." Had defense counsel believed that the court had overlooked an argument, they surely would've brought that to the court's

[1] Defendant's motion is attached hereto as Appendix 1.

attention, especially since the court expressly invited them to do so. Indeed, counsel's statement that the court hadn't overlooked any issues arguably constituted a waiver of the issue defendant now raises on appeal.[2]

¶ 53 It's obvious to me why defendant's highly experienced trial attorneys[3] didn't raise a stand-alone Fourth Amendment argument in the motion. Any such argument would've run headlong into *People v. Doke*, 171 P.3d 237 (Colo. 2007). In *Doke*, which involved facts remarkably similar to those in this case, the supreme court held that "where a defendant responds to an alleged Fourth Amendment violation with a physical attack or threat of attack upon the officer making the illegal arrest or search, . . . evidence of this new crime is admissible." *Id.* at 239; *see id.* at 240 (the

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[2] The record also shows that defense counsel filed an extensive Fourth Amendment motion to suppress evidence obtained from defendant's home, but limited the argument to the validity of search warrants the police obtained after the incident. The motion didn't assert that evidence obtained at the time of the incident should be suppressed.

[3] Defendant's attorneys at trial, both of whom put their names on the motion, were Pamela Mackey and David Kaplan, a former State Public Defender. A different attorney represents defendant on appeal.

defendant's menacing of the officer with a gun "dissipated the taint of the prior illegality"); *see also People v. Brown*, 217 P.3d 1252, 1257 (Colo. 2009) ("A defendant may not respond to an unreasonable search or seizure by a threat of violence against the officer and then rely on the exclusionary rule to suppress evidence pertaining to that criminal act." (citing *Doke*, 171 P.3d at 239)).

¶ 54 Because defendant didn't raise his stand-alone Fourth Amendment argument in his motion, he waived it. *People v. Samuels*, 228 P.3d 229, 238 (Colo. App. 2009); *People v. Salyer*, 80 P.3d 831, 835 (Colo. App. 2003); *see People v. Gouker*, 665 P.2d 113, 117-18 (Colo. 1983) (a defendant may not raise new suppression theories on appeal after those he raised in the district court proved unsuccessful).

¶ 55 Second, to the extent a stand-alone Fourth Amendment argument is buried in the motion, defendant abandoned it. When a party raises an issue in the district court, but the court doesn't rule on it, the defendant must ask the district court to rule on it to preserve it for appeal. If the defendant doesn't do that, we deem the issue abandoned and won't address it. *E.g.*, *Vanderpool v. Loftness*, 2012 COA 115, ¶¶ 26-28 (citing numerous cases); *People v.*

Tallwhiteman, 124 P.3d 827, 834 (Colo. App. 2005); *People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994).

¶ 56 The majority believes defendant raised the argument but that the district court didn't rule on it. If that is so, we should, consistent with the long-standing rule noted above, deem the argument abandoned, not remand for a ruling. The majority doesn't explain why it declines to apply this fundamental rule of issue preservation.

¶ 57 For these reasons, I would refuse to address defendant's argument and wouldn't remand for additional consideration by the district court.

II. Evidentiary Issues

A. Refreshing Recollection

¶ 58 Defendant argues that the prosecutor's question to a bystander witness, "And if you told the officer at that time that you heard 'stop police,' would that be accurate," was leading and an improper attempt to refresh recollection. The majority agrees with defendant on both scores.

¶ 59 I do not agree with the majority that the question was leading. A leading question is one that suggests its own answer. *See* 3

Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:65, at 427 (4th ed. 2013). This question didn't do that. It was conditional — that is, the answer turned on "if" the witness had said something to the officer, a fact the witness was free to deny if inconsistent with her recollection.

¶ 60 I do agree with the majority that the question was likely an improper attempt to refresh recollection because the prosecutor didn't try to comply with the requirements of CRE 612. I note, however, that defense counsel didn't raise this objection at trial.

¶ 61 In any event, the majority correctly concludes that any error was harmless. In my view, the error was completely harmless because defense counsel was able to establish on cross-examination that the officer's report of his conversation with the witness said the witness told him she had heard an officer yell "stop"; he didn't report that she had told him she heard the officer yell "stop, police."

B. The 2010 Kansas Incident

¶ 62 I fully agree with the majority's determination that the district court erred by allowing evidence about the 2010 Kansas incident

under CRE 404(b).[4] But I disagree with the majority that the error requires reversal. The key issue at trial was whether defendant knew he was being pursued by police officers. Having reviewed the trial transcript, I conclude that the properly admitted evidence overwhelmingly showed he knew that he was being pursued by police officers and that they were just outside his residence when he menaced them with a gun. Therefore, the error was ultimately harmless. *See Russell v. People*, 2017 CO 3, ¶¶ 5-7; *People v. Workman*, 885 P.2d 298, 300-01 (Colo. App. 1994); *People v. Groves*, 854 P.2d 1310, 1315 (Colo. App. 1992).

C. The Re-Creation of the Police Knock

¶ 63 Defendant also contends that the district court erred in allowing an investigator to testify about his "experiment" to determine whether defendant would've heard an officer knock on his door. (Two of the officers had testified that they knocked on the door several times and identified themselves as police; a neighbor had testified she didn't hear any knocking.) According to defendant, that testimony was expert testimony that the court

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[4] The People's argument that the evidence was not subject to CRE 404(b) is specious.

shouldn't have allowed because the prosecution didn't try to establish that the investigator was an expert. *See* CRE 703. And, defendant adds, the investigator's testimony wasn't reliable because the conditions at the time of the experiment were different from those at the time of the incident.

¶ 64 The majority doesn't address defendant's arguments regarding this evidence even though it is highly likely that the prosecution will again try to introduce the evidence on retrial. But our common practice is to address contentions that pertain to issues likely to arise on remand. *E.g.*, *Venalonzo v. People*, 2017 CO 9, ¶ 2 n.2; *People v. Serra*, 2015 COA 130, ¶ 59 (evidentiary issues); *People v. Marciano*, 2014 COA 92M-2, ¶ 19 (evidentiary issues); *People v. Jefferson*, 2014 COA 77M, ¶ 39 (expert testimony), *aff'd*, 2017 CO 35. I think the interest in judicial efficiency demands that we do so.

¶ 65 I see no abuse of discretion. *See People v. Ramos*, 2017 CO 6, ¶ 5 (we review a district court's ruling on whether testimony constitutes expert testimony for an abuse of discretion). Expert testimony is that which couldn't be offered without specialized experiences, knowledge, or training: testimony that is based on an

ordinary person's experiences and knowledge is not expert testimony. *Venalonzo*, ¶¶ 2, 16.

¶ 66 The investigator's testimony wasn't based on specialized experiences, knowledge, or training. Only an ordinary person's sense of hearing was necessary to determine whether a knock on defendant's door could be heard from inside defendant's residence.[5]

¶ 67 Though defendant argues that the conditions at the time of the experiment were different from those at the time of the incident, the differences on which he relies go to the weight of the testimony, not its admissibility.

D. Police Actions After the Incident

¶ 68 Defendant also contends the district court erred in disallowing evidence of police conduct after the incident, photographs showing damage to defendant's residence, and a photograph showing where certain shell casings were found. The majority doesn't address this issue though it is likely to arise on remand.

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[5] Defendant's contention that the investigator's statement that the person whom he had knock on the door made a "cop knock" rendered the investigator's testimony expert testimony is meritless. The investigator explained that the person doing the knocking knocked with varying degrees of loudness and that a "cop knock" was a term he used to refer to a medium knock.

¶ 69 Again, I see no abuse of discretion. Though defendant argues that the evidence was admissible as res gestae and to impeach unspecified testimony, I see no relevance in the evidence. The evidence is not necessary to give the jury an accurate and complete picture of the incident — the purpose of res gestae evidence, *see People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009) — nor does it tend to undermine any of the officers' testimony. It appears instead that defendant wanted to use much of the evidence to show that the officers overreacted after the incident; that is, he wanted to cast the officers in a bad light. That had nothing to do with any fact of consequence in the case. And any marginal relevance was substantially outweighed by the danger of creating a time-wasting sideshow. *See* CRE 403.

III. The Erroneous Jury Instruction

¶ 70 Though I agree with the majority's disposition of this issue, I think defendant's contention warrants a bit more discussion.

¶ 71 Instructing the jurors that "[a]n officer may pursue a fleeing suspect even to that person's home" was error. But it was not, contrary to defendant's argument, constitutional error. "Only those errors 'that specifically and directly offend a defendant's

constitutional rights are "constitutional" in nature.'" *People v. Flockhart*, 2013 CO 42, ¶ 20 (quoting *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010)). The error in giving the instruction didn't do that. So we review this garden-variety instructional error for harmless error. *See, e.g.*, *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001); *People v. Chirico*, 2012 COA 16, ¶ 7.

¶ 72 Under the harmless error test, we will disregard any error that doesn't affect a defendant's substantial rights. Crim. P. 52(a). The defendant has the burden of showing that the asserted error wasn't harmless. *People v. Vigil*, 718 P.2d 496, 500 (Colo. 1986); *People v. Casias*, 2012 COA 117, ¶ 60.

¶ 73 Defendant's entire argument on the jury instruction comprises nine lines of his opening brief, and it doesn't include any assertion, much less explanation, of prejudice.[6] Thus, he has failed to carry his burden.

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[6] At oral argument, defense counsel said the prejudice was that the instruction "placed a thumb on the scale." Not only was this explanation too late, it was too vague.

IV. Denial of a Continuance

¶ 74 One week before trial, defendant moved for a continuance to subpoena the cab driver. By way of background, the motion said the defense had begun attempting to locate and subpoena the cab driver less than two months before trial, and that their efforts had been unsuccessful. The motion also noted that neither the defense nor the prosecution had a current address for the cab driver (the last known address was in Florida), and that the prosecution had not served the cab driver with a subpoena. The motion did not request any particular length of a continuance. The court denied it.

¶ 75 Defense counsel renewed the motion the first day of trial, but they presented no new information on the cab driver's whereabouts. The prosecutor objected, noting that "it wasn't just last week that counsel became aware that [the cab driver] was no longer in the state," and that he had given a Florida address to defense counsel in mid-January after defense counsel had contacted him to see if the prosecution knew where the cab driver was. The prosecutor also said that the prosecution had tried unsuccessfully to subpoena the cab driver. The court again denied the motion, primarily because the cab driver's testimony would be of marginal relevance.

But the court also observed that the defense had known of the cab driver's identity for a long time and could've subpoenaed him any time after the trial date had been set. When defense counsel renewed the motion the next day, the court denied it "based on the court's prior rulings."

¶ 76 Under the circumstances presented, the district court didn't abuse its discretion. *See People in Interest of D.J.P.*, 785 P.2d 129, 131 (Colo. 1990) ("A continuance is a matter within the discretion of the trial court . . . .").

¶ 77 Defense counsel knew of the cab driver's role in the incident from the get-go but, by their own admission, made no effort to find him until less than two months before trial. *Id.* at 131-32 ("Where a request for a continuance is grounded on the absence of a witness, it is not an abuse of discretion to deny the continuance if the party seeking the continuance failed to use due diligence to procure the presence of that witness. The burden is on the party requesting the continuance to show that due diligence was used.") (citations omitted). And, though both the defense and the prosecution had tried to locate and serve the cab driver, those efforts had been fruitless. *See People v. Bustos*, 725 P.2d 1174, 1178 (Colo. App.

1986) (where "extensive but fruitless efforts" had been made to find a witness, the court did not abuse its discretion in denying a defense motion to continue on the first day of trial). Indeed, no one knew where the cab driver was, so it was utterly speculative that the defense would be able to locate and serve him within a reasonable time. *See People v. Marsh*, ___ P.3d ___, ___ (Colo. App. No. 08CA1884, Dec. 22, 2011) (affirming denial of defense request for a continuance in part because the defendant didn't show a reasonable probability that the witness would ever be available to testify), *aff'd on other grounds*, 2017 CO 10M; *People v. Staten*, 746 P.2d 1362, 1364 (Colo. App. 1987) (affirming denial of defense request for a continuance in part because defense efforts to locate the witness had not been fruitful).

¶ 78 In light of these facts, the district court's decision was neither arbitrary nor unreasonable nor unfair.

V. Cumulative Error

¶ 79 The question in deciding whether multiple errors, none of which individually requires reversal, nonetheless dictate that the defendant receive a new trial is whether the cumulative effect of the errors shows that the defendant didn't receive a fair trial. *See*

People v. Roy, 723 P.2d 1345, 1349 (Colo. 1986); *Oaks v. People*, 150 Colo. 64, 66-67, 371 P.2d 443, 446 (1962); *People v. Munsey*, 232 P.3d 113, 124 (Colo. App. 2009). We must keep in mind that a defendant, though entitled to a fair trial, is not entitled to a perfect trial. *Roy*, 723 P.2d at 1349; *see Bruton v. United States*, 391 U.S. 123, 135 (1968); *Flockhart*, ¶ 36.

¶ 80 A number of factors are relevant to deciding whether a new trial is warranted for cumulative error. These include "the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy of any remedial efforts); the strength of the government's case; and the length of the trial." *People v. Howard-Walker*, 2017 COA 81, ¶ 114.

¶ 81 I see only three errors — the improper attempt to refresh a witness's recollection, the admission of evidence about the 2010 Kansas incident, and the instruction on the police's right to enter a person's property. For the reasons discussed above, I believe only the second of these errors (evidence of the 2010 Kansas incident) was potentially prejudicial; the other two had no prejudicial effect at all. Given that I also view the evidence of defendant's guilt as

overwhelming, I conclude that the cumulative effect of these errors didn't deprive defendant of a fair trial.

VI. Conclusion

¶ 82 In sum, though I agree with the majority on a few points, I disagree on several others. Most importantly, I see no basis for reversing the convictions and therefore would affirm the judgment.

APPENDIX 1

DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6th Street Boulder, CO 80302	
PLAINTIFF: THE PEOPLE OF THE STATE OF COLORADO **DEFENDANT:** COLEMAN STEWART	
Pamela Robillard Mackey, #15136 David S. Kaplan, #12344 HADDON, MORGAN AND FOREMAN, P.C. 150 East 10th Avenue Denver, CO 80203 Phone: 303.831.7364 Fax: 303.832.2628 E-mail: pmackey@hmflaw.com; dkaplan@hmflaw.com *Attorneys for Defendant*	**▲COURT USE ONLY▲** Case No. 14 CR 884

MOTION TO DISMISS OR IN THE ALTERNATIVE SUPPRESS EVIDENCE OBTAINED BY OUTRAGEOUS GOVERNMENT CONDUCT

Coleman Stewart, through his undersigned counsel, hereby moves for dismissal of the charges against him, or in the alternative for an order suppressing all evidence obtained pursuant to the government's illegal entry into his property in violation of his rights under the Fourth and Fifth Amendments. As grounds therefor, Mr. Stewart states as follows:

I. RELEVANT FACTS

The police reports and other discovery provided to the defense by the prosecution support the following recitation of facts:

In the early morning hours of May 30, 2014, Coleman Stewart was in a cab after an evening of socializing with friends. The cab was taking Mr. Stewart from Conor O'Neills located at 1922 13th St. in Boulder, to his home at 1090 11th Street in Boulder, approximately one mile away. As the cab approached the intersection near his home, a dispute arose regarding payment of the $4.85 fare and the cab driver increased his speed to prevent Mr. Stewart from exiting the cab. Mr. Stewart then fled the cab and began running toward his home. The cab driver alerted a nearby Boulder Police officer and both men began to chase Mr. Stewart to his home. The men were prevented from proceeding further, as the residence is enclosed by a privacy fence with a locked gate.

12/18/14

None of the alleged facts rise to the level of outrageous government conduct.
DENIED. P. Butler 12/18/14

Additional Boulder Police officers arrived to provide assistance. At least one officer attempted to climb the fence and in the process opened the locked gate. Four officers proceeded into the enclosed patio area of Mr. Stewart's residence, took position around the door and windows of the apartment and shortly thereafter fired a total of ten rounds into Mr. Stewart's apartment, believing they had seen a firearm through the blinds. Mr. Stewart sustained two gunshot wounds and retreated into his apartment, where he remained for nearly two hours. Mr. Stewart was ultimately removed from his home by the Boulder SWAT team, which drove an armored vehicle through the fence and kicked in his front door.

The law enforcement response included no fewer than eight law enforcement agencies and units, and approximately eighty individual investigators. Mr. Stewart is charged with four counts of felony menacing, one count of resisting arrest, one count of obstructing a peace officer, and one petty offense count of theft.

II. ARGUMENT

Law enforcement violated Mr. Stewart's due process rights under the Fifth Amendment and disregarded the protections of the Fourth Amendment when it committed outrageous conduct by illegally trespassing into Mr. Stewart's home. As a result, the charges against him should be dismissed, or in the alternative, any evidence flowing from their illegal actions should be suppressed.

The Fifth Amendment protects individuals from deprivation of "life, liberty, or property, without due process of law. U.S. Const. amend. V. The Fourth Amendment was intended to protect people against unreasonable intrusions by the government by permitting particularized searches only upon a showing of probable cause. U.S. Const. amend. IV. The Supreme Court has recognized that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Kentucky v. King*, 131 S. Ct. 1849, 1856, 179 L. Ed. 2d 865 (2011) (quoting *Payton, supra*, at 590) (internal quotation marks omitted).

It is implicit in this Court's authority to determine whether violations of the Due Process Clause of the Fifth Amendment warrant dismissal of criminal charges. Further, violations of the Fourth Amendment should result in exclusion of any evidence flowing therefrom. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963). For purposes of evaluating a claim of outrageous government conduct, a defendant must show a violation of his constitutional due process rights by the actions of government officials to such a degree as to defy fundamental fairness and shock the universal sense of justice. *United States v. Russell*, 411 U.S. 426 (1973) (internal quotations omitted). The body of law regarding outrageous government conduct

is neither illustrative nor helpful in this instance, as the factual basis of this case is greatly distinguishable.

Here, Boulder Police officers committed an illegal trespass when they climbed a privacy fence for purposes of circumventing a locked gate and entered an area of the curtilage of Mr. Stewart's home. They made this illegal entry based solely upon the suspicion that Mr. Stewart had failed to pay a $4.85 cab fare. Upon entry into his property, officers shot and seriously injured Mr. Stewart inside his home based upon the mistaken belief that he possessed a deadly weapon. This intrusion was not justified by exigent circumstances, nor did the officers seek a warrant as required by the Fourth Amendment. As such, the actions of the government violated Mr. Stewart's right to have a search of his home evaluated by a neutral judicial officer prior to entry by law enforcement, as required by the Fourth and Fifth Amendments.

In the totality of the circumstances, and considering the violent outcome of this intrusion, the government's actions were fundamentally unfair and a shock to the universal sense of justice. As such, the charges against Mr. Stewart should be dismissed, or in the alternative, any evidence obtained pursuant to the officers' illegal trespass, including their observations, must be suppressed.

A. Mr. Stewart's patio is a protected extension of his dwelling.

Law enforcement trespassed into the curtilage of Mr. Stewart's home. It is well-established that the curtilage surrounding a dwelling is protected as an extension of that dwelling under certain circumstances. Four factors have been identified by the Supreme Court for consideration in defining the extent of a home's curtilage: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Hoffman v. People*, 780 P.2d 471, 475 (Colo. 1989) (quoting *United States v. Dunn,* 480 U.S. 294, 301, (1987)).

Mr. Stewart's patio falls squarely within all categories and, as such, is an extension of his dwelling. The patio immediately surrounds the front door and windows of Mr. Stewart's home. The patio is also enclosed by a tall privacy fence with a locking gate. It is private to Mr. Stewart's residence and is not accessible by other residents of Mr. Stewart's building. While Mr. Stewart resided there, the patio was used as a place of relaxation and recreation within an area private to the general public. It was also an area where he stored personal items, such as a patio table and chairs and a dirt bike, and thus he had taken measures to protect his belongings and privacy by employing a locking gate.

Having established that the patio constitutes the curtilage of Mr. Stewart's home, and thus a constitutionally protected area, we look to the officers' entry into that area and find that the officers committed an act of criminal trespass.

B. Law enforcement committed an illegal trespass.

It is undisputed that Officer Frankenreiter, the officer who first followed Mr. Stewart to his home, encountered Mr. Stewart's locked gate and stopped, presumably because he knew it would be illegal to proceed further. Unlike Officer Frankenreiter, Officers Perea and Stark—based solely upon the suspicion that Mr. Stewart had failed to pay a $4.85 cab fare—proceeded to climb the fence and open the locked gate, thus allowing the remaining officers to enter the premises.

Colorado law provides that second degree criminal trespass occurs when a person "[u]nlawfully enters or remains in or upon the premises of another which are enclosed in a manner designed to exclude intruders or are fenced[.]" C.R.S. § 18-4-503(1)(a). Importantly, law enforcement officers are not excluded from charges of criminal trespass, even when carrying out an arrest. In *People v. Lutz,* the Court of Appeals held that a statute abrogating the right to resist an unlawful arrest did not apply where the forcible resistance to law enforcement officers, which formed the basis of charged conduct, was to prevent an unlawful entry by trespassers who happened to be police officers. 762 P.2d 715 (Colo. App. 1988). The court went on to acknowledge the applicability of Colorado's defense of premises statute to "unlawful entries where the trespassers happen to be police officers," even where the officers may have probable cause, but not a warrant, for an arrest. 762 P.2d at 717, 716 (citing *Payton v. New York,* 445 U.S. 573, (1980) (Fourth Amendment prohibits police, even with probable cause for arrest, to make warrantless entry into home for that purpose)).

At a minimum, Mr. Stewart's patio was a fenced premises designed to exclude intruders and an area subject to second degree trespass. Absent exigent circumstances, which will be discussed below, the officers had no legal basis for climbing the fence or jostling open a gate they knew was locked so that they could gain access to Mr. Stewart's property. Further, these officers surely knew that their entry was unlawful. Indeed, to carry out their duties, society entrusts that officers are well-informed and trained regarding the laws they are charged with enforcing. Thus, these officers committed a knowingly unlawful trespass absent a good faith basis for entry.

C. There were no exigent circumstances to justify warrantless entry.

No exigent circumstances existed sufficient to provide law enforcement with a reasonable basis for entering the property without a warrant. The law prescribes certain

circumstances that justify law enforcement intrusions unsanctioned by a warrant. These exigent circumstances include the need to prevent destruction of evidence, pursuit of a fleeing suspect, and to render emergency aid. "[T]he fundamental measure of the existence of exigent circumstances is an assessment of reasonableness based on the totality of the circumstances." *People v. Brunsting*, 307 P.3d 1073, 1080 (Colo. 2013).

Additionally, the gravity of the offense is important to consider when determining whether exigent circumstances exist sufficient to justify warrantless entry into one's home. In *Welsh v. Wisconsin,* the Court held that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed." 466 U.S. 740, 753 (1984). The Court found it "difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." *Id.*

In the totality of the circumstances, the trespass by police into Mr. Stewart's home was wholly unreasonable. It is critical to bear in mind that at the time the police reached Mr. Stewart's fence, the only suspicion of criminal activity they had was that he had failed to pay a $4.85 cab fare. Officer Frankenreiter heard screeching tires and saw Mr. Stewart jumping out of a cab. He asked the cab driver whether Mr. Stewart had paid and when the cab driver said no, he chased Mr. Stewart into his home. He had absolutely no reason to believe that Mr. Stewart presented any danger whatsoever. He had no reason to believe that evidence of unpaid cab fare was at risk of being destroyed. He had no reason to believe that emergency aid was necessary. Under *Welsh*, suspicion of a petty offense does not support a finding of exigent circumstances sufficient to justify warrantless intrusion into Mr. Stewart's home.

All of the dramatic events that transpired resulted from the officers' unlawful entry into Mr. Stewart's home. Had they not trespassed, there would have been no escalation, no armored vehicle crashed through the property, and a twenty-three year-old young man would not have been shot. Instead, the officers invaded Mr. Stewart's home, guns drawn, with absolutely no legal justification whatsoever.

V. CONCLUSION

Because the officers committed outrageous conduct by illegally entering Mr. Stewart's property in violation of his due process rights under the Fifth Amendment and the requirements of the Fourth Amendment, the charges against him should be dismissed. In the alternative, all evidence obtained subsequent to government's illegal entry, including the officers' observations, should be excluded.

Dated: December 17, 2014.

Respectfully submitted,

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Certificate of Service

I certify that on December 17, 2014, a copy of the foregoing MOTION TO DISMISS OR IN THE ALTERNATIVE SUPPRESS EVIDENCE OBTAINED BY OUTRAGEOUS GOVERNMENT CONDUCT was served *via* email upon the following:

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