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| COURT OF APPEALS<br>STATE OF COLORADO<br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202 | |
| District Court, Adams County<br>Honorable Chris Melonakis, Judge<br>Case No. 07CR3418 | |
| THE PEOPLE OF THE STATE OF COLORADO,<br><br>Plaintiff-Appellee<br><br>v.<br><br>VU B. LE,<br><br>Defendant-Appellant | ▲COURT USE ONLY▲<br><br>Case No. 09CA1989 |
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| **PEOPLE'S ANSWER BRIEF** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☐ It contains _____ words.

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The brief complies with C.A.R. 28(k).

For the party raising the issue:

☐ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p. ), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☒ It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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## INTRODUCTION

The defendant, Vu Le, directly appeals the judgments of conviction entered against him on one count of attempted second degree murder; four counts of attempted extreme indifference first degree murder; and one count of attempted extreme indifference first degree assault, following a jury trial.

## STATEMENT OF THE CASE AND FACTS

The defendant's family operates a lube shop and car wash. For a period of time, a man named Eric Bowers managed the lube shop, and the defendant was his boss. Tr. 6/1/09, pp.238-39. The defendant did not like Bowers, and he threatened that Bowers would "get his ass kicked" some time. *Id.*, pp.240-42. Bowers filed a workers compensation claim against the family business, and the defendant fired Bowers in early 2007, telling Bowers he would "get" him and "take care of" him. *Id.*

In September 2007, the defendant drove his white Lexus to an auto-parts store to buy brake fluid for the lube shop. Tr. 6/2/09, pp.78-80. Clayton Gilson, one of the defendant's employees, rode with the

defendant to help. At the store, they saw Eric Bowers and his little boy. *Id.* Bowers was attempting—unsuccessfully—to locate a part he needed to repair his mother's car. Tr. 6/1/09, p.246. He saw the defendant, but ignored him. *Id.*

The defendant bought the brake fluid, then followed the Bowers vehicle when it left the parking lot. *Id.*, p.81; Tr. 6/1/09, p.247. Bowers drove to several more auto-parts stores, then onto a freeway entrance ramp as the defendant followed with Gilson in his car. Tr. 6/1/09, pp.249-53; Tr. 6/2/09, pp.84-89. Gilson knew that the defendant and Bowers "didn't really like each other too much," and he assumed the defendant wanted to confront Bowers or "beat him up." *Id.*, pp.82, 86.

According to Gilson, when the Bowers vehicle turned onto the entrance ramp, the defendant took a handgun out of the center console, pointed it out the sunroof, and fired three times towards Bowers. Tr. 6/2/09, pp.91-92. The defendant then abruptly U-turned, either while shooting or just after the third shot. *Id.*, p.141. But rather than the bullets hitting Bowers, they blew out the window of a vehicle carrying a woman and three children. Tr. 6/1/09, pp.223, 253-54. The defendant

fled the scene, and Gilson helped him hide and clean the car. Gilson was on probation at the time, and "did not want to get in trouble for something [he] had no part in doing." Tr. 6/2/09, p.100.

Gilson was initially charged with being an accessory to the shooting based on his role in cleaning and hiding the car. But the charges were dropped when he agreed to testify. Tr. 6/2/09, pp.102-03. The defendant was charged with attempted murder, and his case proceeded to jury trial. The jury found him guilty as stated above.

In his Opening Brief, the defendant suggests that the evidence at trial supported the conclusion that the defendant's passenger was the shooter. OB, p.7. But the evidence was not nearly as "interesting" as he suggests. *Id.* The fact that only one particle of gunshot residue (GSR) was discovered on the driver's window—as compared with "less than 100" particles in the passenger doorjamb—meant nothing, according to the GSR expert. *See* Tr. 6/2/09, pp.251-52, 255-57. The presence of GSR only indicates that a gun was fired in the generally vicinity—it cannot be used to determine the distance between the firearm and any given point. *Id.*, pp.248, 254-56. And even if it could,

the expert went on to testify that GSR can be "easily" rubbed or washed off. *Id.*, p.248. Whatever could have been gleaned from the initial GSR in this case is unknown, because the defendant had the car cleaned just after the shooting, and even directed others to clean specific portions of the vehicle interior. *Id.*, pp.100, 163.

Additionally, circumstantial evidence supported Gilson's eyewitness testimony that it was the defendant who fired the gun. Tr. 6/2/09, p.89. An ex-employee of the defendant (who was otherwise uninvolved in the shooting) testified that he knew the defendant to carry a "nickel-plated .45 caliber semi-automatic" in his car. *Id.*, p.161. And both the defendant and Gilson are right-handed, making it more logical that the defendant was the one to fire out of the sunroof. *Id.*, p.147; Tr. 6/3/08, p.192.

At sentencing, the trial court imposed the statutorily mandated sentence, but noted its intention to decrease the sentence pursuant to section 18-1.3-406(1)(a). This will presumably occur once the instant direct appeal is complete. Tr. 8/13/09, p.3.

## SUMMARY OF THE ARGUMENTS

The verdicts are not inconsistent, and the prosecutor's discussion of complicity in jury selection did not deny the defendant a fair trial.

The case should be remanded for correction of the mittimus, which does not accurately reflect the trial court's order of merger or the sentence it imposed.

## ARGUMENT

### I. The verdicts are not inconsistent and do not constitute grounds for reversal.

The defendant first claims that the prosecutor's discussion of complicitor liability during jury selection amounted to misconduct and denied him a fair trial.

#### A. Standard of Review and Preservation

The People cannot agree or disagree with the defendant concerning standard of review or preservation, because he does not address them. *See* C.A.R. 28(k).

The scope of an attorney's questioning in jury selection is a matter within the sound discretion of the trial court. *See People v. Cevallos-*

*Acosta*, 140 P.3d 116, 122 (Colo. App. 2005) (allegation of prosecutorial misconduct in jury selection); *Kendrick v. Pippin*, 222 P.3d 380, 389 (Colo. App. 2009), *cert. granted on other grounds*, 09SC781, 2010 WL 60114 (Colo. Jan. 11, 2010). A court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair. *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009).

The defendant did not contemporaneously object to the discussion of complicity during jury selection. Consequently, even assuming error occurred, reversal is warranted only if the error was plain.[1] Crim. P. 52(b); *People v. Cevallos-Acosta*, 140 P.3d at 122.

### B. Proceedings Below

During jury selection, the prosecutor inquired whether the jurors could agree with the principle of complicitor liability, and most

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[1] The defendant did raise his argument in a motion for new trial after he was convicted. But a motion for new trial does not constitute a "contemporaneous" objection that preserves an issue for harmless error review. *United States v. Hill*, 60 F.3d 672, 675 (10th Cir. 1995); *People v. McNeely*, 222 P.3d 370, 374-75 (Colo. App. 2009). And the defendant cannot argue that he was unable to recognize the alleged error until hearing the verdict, because he claims that "[t]here was never any doubt that this was *not* a complicity case." OB, p.10 (emphasis added).

answered that they could. Tr. 6/1/09, pp.62-63, 111, 126. But when the prosecution requested a complicity instruction at the instruction conference, the court denied the request, finding that there was insufficient evidence to support the theory. Tr. 6/3/09, p.129.

In the end, the jury found the defendant guilty of four counts of attempted extreme indifference murder; one count of attempted second degree murder; and five counts of attempted extreme indifference assault. R.1, pp.113-28; Tr. 6/4/08, pp.3-8.

In special interrogatories, the jury also found that the defendant "used, possessed, or threatened the use of a deadly weapon" in the commission of or flight from the offense. *Id.* The trial court found the evidence sufficient to support these verdicts, and the defendant does not dispute that finding on appeal. Tr. 6/3/09, pp.123-25.

The defendant was acquitted on one count: illegal discharge of a firearm.[2] R.1, p.129; Tr. 6/4/08, p.8. In a motion for new trial, he

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[2] § 18-12-107.5, C.R.S. (2010). As relevant here, the offense is committed when a person "knowingly or recklessly discharges a firearm into . . . any motor vehicle occupied by any person." *See also* R.1, p.111 (jury instruction).

argued that this acquittal was logically inconsistent with the ten guilty verdicts. The trial court rejected that claim. R.1, p.147. It found that, based on the evidence at trial,

> these verdicts are consistent with [a] finding of universal malice with respect to [the mother and her children,] while simultaneously acquitting the Defendant of knowingly or recklessly discharging a weapon into their vehicle.

R.1, p.147.

### C. Law and Analysis

#### 1. Inconsistent Verdicts

Defendants are protected from juror irrationality by sufficiency-of-the-evidence review. *United States v. Powell*, 469 U.S. 57, 67 (1984); *People v. Frye*, 898 P.2d 559, 570 (1995). Such review ensures that guilty verdicts are supported by evidence sufficient to sustain the jury's conclusion(s) of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320 (1979); *People v. Lehnert,* 163 P.3d 1111, 1115 (Colo. 2007).

Therefore, when a jury reaches verdicts of guilt on some counts and acquittal on others, and the conclusions appear logically

inconsistent, the verdicts stand.[3] *Powell*, 469 U.S. at 66[4]; *Frye*, 898 P.2d at 569; *People v. Sanchez*, No. 07CA2412, 2010 WL 2521736, at *3 (Colo. App. June 24, 2010). Inconsistent verdicts of guilt and acquittal are, in fact, just as consistent with a misapplication of law in the defendant's *favor* as one to his detriment. *See Frye*, 898 P.2d at 568-69. Such verdicts may reflect jury compromise, "lenity" towards the defendant, or a rejection of what the jurors perceive as over-charging by the prosecution.[5] *Id.* But courts will not engage in baseless speculation as to the jurors' thought processes, nor call upon jurors to explain themselves. *Frye*, 898 P.2d at 569.

The People agree with the trial court that the verdicts are not inconsistent for the reasons expressed in the trial court's order. R.1,

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[3] The sole exception to this rule does not apply. *See People v. Hoefer*, 961 P.2d 563, 567 (Colo. App. 1998); *see* § 18-2-206(2), C.R.S. (2010); *Frye*, 898 P.2d at 570.

[4] Although the issue is not a federal constitutional question, *Powell*, 469 U.S. at 65, our state supreme court has adopted the Supreme Court's reasoning. *Frye*, 898 P.2d at 568-69.

[5] In this case, defense counsel even suggested in front of the jury that the state had filed "too many" charges against the defendant. Tr. 6/1/09, p.243.

pp.146-47. But even if they were, the verdicts are not to be disturbed. *Frye*, 898 P.2d at 569. The fact that the evidence was sufficient to support the guilty verdicts has sufficiently protected the defendant from juror irrationality. *Powell*, 469 U.S. at 67; *Frye*, 898 P.2d at 570.

### 2. Nature of the Defendant's Claim

The defendant recognizes that inconsistent verdicts are not grounds for reversal, but contends that the verdicts in this case are "conclusive evidence" that the jury disregarded the instructions of law and irrationally convicted him on a complicity theory for which there was no evidence. OB, pp.12-13. In support of this assertion he offers only the verdicts and the fact that the prosecutor discussed complicity in jury selection. The acquittal on illegal discharge of a firearm, he suggests, is *evidence* that the jury believed it was the defendant's passenger who fired the gun.

The defendant's claim is ultimately a prosecutorial misconduct claim. And he cites *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005), a recent case addressing prosecutorial misconduct, to support his argument. OB, p.13. He contends that in the instant case the

prosecutor's discussion of complicity was improper and misled the jury to irrationally convict the defendant on a complicity theory for which there was no evidence. And the prosecutor *knew* that the complicity discussion was improper, he contends, because there was "never any doubt that this was *not* a complicity case." OB, p.10 (emphasis added). "The prosecutors must have reasoned that by advancing complicity, they would get a conviction on Mr. Le even if the jury thought . . . that [*his passenger*] was the shooter." *Id.*

### 3. Controlling Law and Analysis

A prosecutorial misconduct claim cannot succeed unless (1) misconduct occurred, and (2) it prejudiced the defendant. *See Domingo-Gomez v. People*, 125 P.3d at 1053. As for misconduct, it is improper for a prosecutor to misinterpret the law, misstate the evidence, or urge the jury to decide the case on an improper basis. *People v. Gladney*, No. 08CA0396, 2010 WL 1915048, at *5 (Colo. App. May 13, 2010); *Cevallos-Acosta*, 140 P.3d at 122.

As for prejudice, this case is subject to review only for plain error. For prosecutorial misconduct to rise to that level, "it must be flagrantly

or glaringly or tremendously improper and so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *Cevallos-Acosta*, 140 P.3d at 122. In making that determination, an appellate court must consider "the severity and frequency of misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to defendant's conviction." *People v. Gladney*, No. 08CA0396, 2010 WL 1915048, at *6 (Colo. App. May 13, 2010).

Turning to this case, the prosecutor's discussion of complicity was not improper. The prosecution intended to argue complicitor liability from the beginning, and it was therefore appropriate to ensure the jurors could follow that principle of law if they were so instructed. The prosecutors' intent is clear because they discussed complicity with the jurors during voir dire, then requested a complicity instruction at the close of the evidence. Tr. 6/1/09, pp.62-64; Tr. 6/3/09, pp.126-27. This made sense, because the identity of the shooter (whether it was the defendant or his passenger) was in dispute. The fact that the trial court

ultimately declined to give a complicity instruction did not somehow retroactively render the discussion of complicity improper.

The defendant fails to cite any record support for his claim that "[t]here was never any doubt that this was not a complicity case." OB, p.10. He also states that "[t]he prosecutors must have reasoned that by advancing complicity, they would get a conviction on Mr. Le even if the jury thought . . . that [*the passenger*] was the shooter." OB, p.10. But that, of course, is how complicity works. Even assuming it is true, it did not constitute misconduct.

Next, even if the complicity discussion *had* constituted misconduct, plain error did not occur. First, discussing complicity during voir dire was certainly not "flagrantly or glaringly or tremendously improper," as required to constitute plain error. *Cevallos-Acosta*, 140 P.3d at 122. The prosecutor correctly summarized the concept of complicity; ensured that the jurors could apply it if instructed; and had a good faith basis to believe a complicity instruction would be given. Tr. 6/1/09, pp.62-63.

Second, even if the complicity discussion was improper, it did not infect the overall fairness of the trial. Complicity was mentioned only in jury selection. It was never discussed again during the three-day trial. In fact, the identity of the shooter was the primary issue that the parties debated in closing argument—making it crystal clear for the jurors that the question they had to resolve was whether it was the defendant *himself* who fired the gun. Considering the closing arguments, the defendant's contention on appeal that the jurors relied on complicitor liability is entirely unpersuasive. Tr. 6/3/09, pp.181-210.

Third, the trial court took the curative measure of never instructing the jury on complicity, and used instructional language that specifically referred to the defendant. The jurors were instructed, with respect to all offenses, that "[a] crime is committed when *the defendant* has committed a voluntary act . . . ." R.1, p.89 (emphasis added). That language was echoed in each elemental instruction, all of which stated that the elements of the offense were "1. that *the defendant*, 2. in the State of Colorado . . . ." R.1, pp.90, 91, 94, 96, 97, 98, 102, 103, 103, 107, 109, 110, 111 (emphasis added). In the same manner, the jurors were

instructed in special interrogatories that, if they found the defendant guilty of attempted murder, they must answer the question, "Did *the defendant* use, or possess and threaten to use a deadly weapon during the commission of [the crime] or in the immediate flight therefrom?" R.1, p.101 (emphasis added). They found he did.

Last, the jury is presumed to have followed the court's instructions of law absent evidence to the contrary. *People v. Gomez-Garcia*, 224 P.3d 1019, 1024 (Colo. App. 2009). In fact, even when the trial court *itself* incorrectly states the law during jury selection, accurate final jury instructions cure the error. *See Dunlap v. People*, 173 P.3d 1054, 1083 n.31 (Colo. 2007).

The defendant essentially argues that the allegedly inconsistent verdicts rebut that presumption in this case. His argument does not succeed for several reasons.

First and foremost, the verdicts are not inconsistent to begin with, as discussed above.

Second, and more fundamentally, the defendant's assertions about how the jury reached its verdicts are based on nothing more than the

type of speculation that courts refuse to engage in when addressing inconsistent verdicts. *Frye*, 898 P.2d at 569. This Court should decline his invitation to speculate.

Third, even if one were inclined to speculate, the defendant's argument fails on its own terms. He argues that the jury applied a complicity theory to all of the crimes *except* illegal discharge of a firearm. But he presents no basis for this distinction. It was undisputed that the defendant was driving and positioning the vehicle near the intended victim's vehicle when the shots were fired. Tr. 6/1/09, pp.223, 230, 253; Tr. 6/2/09, pp.91, 141; Tr. 6/3/09, pp.192, 197-98. Therefore, even assuming that (1) the verdicts are inconsistent; (2) the jury believed the defendant's passenger fired the gun; and (3) the jury convicted the defendant of attempted murder only pursuant to a complicity theory; then the jury would also have found that the defendant was complicit in knowingly or recklessly firing the gun into a vehicle, and would have convicted him accordingly. *See* R.1, p.111; § 18-12-107.5, C.R.S. (2010). But it did not.

Fourth, the verdict forms and special interrogatories refute the defendant's speculation about the nature of the inconsistency he asserts. The jurors found the defendant guilty of ten substantive offenses. They also found—on each interrogatory they answered—that the defendant had *used or possessed a deadly weapon* in commission or flight from the offense. R.1, pp.114, 116, 117, 119, 122. This belies the defendant's simple interpretation of the verdicts.

Finally, it must be considered that jurors are generally not lawyers. The jury is unlikely to have applied the prosecutor's complicity discussion when deliberating three days later. The discussion in jury selection related only to "guilt" and degrees of "culpability" in a general, moral sense. *See* Tr. 6/1/09, pp.62-63. The prosecutor did not imply that the jurors should later read the court's instructions concerning what "the defendant" had done, and substitute "his passenger" in its place if they simply believed that the defendant's acts were worthy of equivalent moral condemnation. Such reasoning quickly makes sense to lawyers, who are well-versed in principles of accomplice liability. But ordinary persons—even after agreeing that a bank-robbery wheel-man

is "guilty the same" as his gun-toting confederates, Tr. 6/1/09, p.111—would not read their moral judgments into jury instructions that plainly refer only to acts of "the defendant."

In conclusion, the complicity discussion was not improper. Moreover, it was discussed only during jury selection; it was acknowledged as an *invalid* ground for conviction by the parties during closing argument; it was contrary to the plain language of the jury instructions and interrogatories; and the jury must be presumed to have followed the court's instructions. It is therefore unlikely that the discussion of complicity during jury selection caused the jury to rely on such a theory when deliberating three days later. Accordingly, the alleged inconsistency in the verdicts is not grounds for reversal—whether treated as an inconsistent verdicts claim or a prosecutorial misconduct claim.

## II. The mittimus should be corrected to reflect the sentences imposed.

The defendant next argues that the trial court erroneously sentenced him to consecutive sentences on four counts of attempted first

degree assault after merging those convictions into his four attempted first degree murder convictions. However, the error he complains of appears to have been simply a clerical error in the preparation of the mittimus. The trial court did not actually impose multiple convictions or sentences on the four counts of attempted first degree assault.

### A. Proceedings Below

There were five victims in this case: Eric Bowers was the intended target of the defendant's highway gunfire. But a bullet or bullet fragment shattered the rear passenger window of a car carrying Monica Elsen and three children.

On this evidence, the jury found the defendant guilty of one count of attempted second degree murder; four counts of attempted first degree extreme indifference murder; and five counts of attempted first degree extreme indifference assault.

In a post-trial order, the trial court merged four of the attempted extreme indifference assault counts into the four attempted extreme indifference murder counts. R.1, pp.135-36. Accordingly, at sentencing the court sentenced the defendant to a consecutive five-year sentence on

only *one* count of attempted extreme indifference assault. Tr. 8/13/09, p.7. For reasons not apparent in the record however, the mittimus does not reflect the merger. R.1, pp.153-55. Additionally, it lists the consecutive five-year sentence as having been imposed on all five of the attempted assault counts. *Id.*

### B. Standard of Review and Preservation

The question whether a mittimus correctly reflects the trial court's order should be reviewed de novo on appeal. The issue was not raised below.

### C. Law and Analysis

Under Crim. P. 36, clerical mistakes in orders may be corrected by trial courts at any time. Specifically, when a mittimus does not reflect the oral pronouncement of the sentencing court, the transcript controls and the mittimus should be corrected to accurately reflect the proceedings. *People v. Turner*, 730 P.2d 333, 337 (Colo. App. 1986); *People v. Mason*, 188 Colo. 410, 535 P.2d 506, 412 (Colo. App. 1975).

Here, because the mittimus does not reflect the trial court's written order concerning merger or the sentence it imposed, it should be corrected by the court pursuant to Crim. P. 36.

## CONCLUSION

Based on the foregoing reasons and authorities, the People respectfully request that the judgments of conviction and sentences be affirmed. However, the mittimus should be corrected to accurately reflect the sentences imposed.

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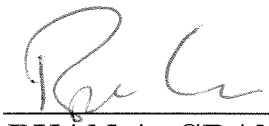

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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ENTRY OF APPEARANCE AND MOTION FOR EXTENSION OF TIME** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 8th day of November addressed as follows:

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