

Court of Appeals No. 10CA2481
Arapahoe County District Court No. 08CR1289
Honorable Elizabeth A. Weishaupl, Judge
Honorable Kurt A. Horton, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Edward Kevin DeGreat,

Defendant-Appellant.

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

Division V
Opinion by JUDGE DUNN
Román and Miller, JJ., concur

Announced July 30, 2015

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¶ 1 Defendant, Edward Kevin DeGreat, appeals the judgment of conviction entered on jury verdicts finding him guilty of aggravated robbery, second degree assault — reckless, and a crime of violence count. DeGreat contends that the trial court erred in (1) rejecting his tendered jury instruction on self-defense as an affirmative defense to aggravated robbery; (2) denying his *Batson* challenge; (3) failing to sua sponte strike testimony that he rejected a plea deal; and (4) denying his motion to suppress telephone calls made from the jail. Because we conclude that DeGreat was entitled to a self-defense instruction in connection with the aggravated robbery charge, we reverse the judgment of conviction for aggravated robbery and the related crime of violence count. The judgment is otherwise affirmed.

I. Procedural Background

¶ 2 DeGreat was charged with attempted second degree murder, first degree assault, aggravated robbery, and theft. The charges arose from an altercation with a taxi cab driver over the fare, which culminated in DeGreat stabbing and wounding the driver. DeGreat did not deny stabbing the driver or failing to pay the fare, instead

defending on a theory of self-defense. The jury acquitted DeGreat of attempted second degree murder, first degree assault, and theft. But the jury found DeGreat guilty of aggravated robbery, the lesser included offense of second degree assault — reckless, and a crime of violence count.¹

II. Affirmative Defense Instructions

¶ 3 DeGreat contends that, given the unique facts presented, he was entitled to a jury instruction on self-defense as an affirmative defense to aggravated robbery. We agree.

A. The Altercation

¶ 4 At trial, it was undisputed that DeGreat and two neighbors shared a cab ride home on the night of the altercation. When they reached their destination, the two neighbors left, leaving DeGreat in the front seat. What transpired next was contested.

¶ 5 According to DeGreat, when he attempted to pay the cab fare, he discovered he was a few dollars short. DeGreat testified that he told the cab driver he would get the full amount from his apartment, and gave the driver his identification card (ID) as

¹ The trial court subsequently reduced the second degree assault conviction to third degree assault — negligence with a deadly weapon.

collateral. DeGreat testified that the driver put the ID in his pocket, made a phone call, locked DeGreat in the cab, and told DeGreat that he had called the police.

¶ 6 DeGreat testified that he jumped into the back seat to try and exit through the back doors. He further testified that the cab driver then got out of the car and, after DeGreat pleaded with him, unlocked the doors. DeGreat stated that when he got out of the cab, he ignored the driver's order to stay put and started towards his apartment to retrieve the full fare. When DeGreat turned to leave, the cab driver grabbed him and threw him onto the car. DeGreat testified that "the next thing [he knew, they were] . . . fist fighting."

¶ 7 As they fought, DeGreat testified, he felt a burning sensation on his chin, saw blood on his shirt, and asked the cab driver if he had stabbed him. DeGreat testified that the driver then "put his hand behind his leg . . . [and DeGreat] saw something gleam in the [cab driver's] hand." Believing it was a weapon, DeGreat took a knife out of his pocket. When the cab driver approached, DeGreat cut him. The cab driver then fled.

¶ 8 The cab driver, in contrast, testified that DeGreat refused to get out of the cab. When DeGreat inexplicably crawled into the back seat, the driver became afraid and exited the cab. DeGreat got out of the cab and the driver described feeling “something to [his] neck,” and afterward realized he was bleeding. The driver testified that he fled and DeGreat chased him. The driver testified that he ran to a convenience store where he located police.

¶ 9 DeGreat defended on a theory of self-defense. The jury was instructed that self-defense was an affirmative defense to the attempted murder and first degree assault charges. DeGreat also requested a self-defense instruction in connection with the aggravated robbery charge. DeGreat asserted that self-defense applied to aggravated robbery because the “taking” was part of a continuous transaction in which he defended himself from the cab driver’s aggression.² The trial court denied the tendered instruction. The jury acquitted DeGreat of attempted murder, first

² The “taking” consisted of DeGreat’s failure to pay the fourteen dollars owed for the cab fare. Because the parties do not raise the issue, we assume without deciding that this failure to pay is a “taking.” See §§ 18-4-301, -302, C.R.S. 2014 (listing elements of robbery and aggravated robbery).

degree assault, and theft, but convicted him of reckless assault and aggravated robbery.

B. Preservation and Standard of Review

¶ 10 We first reject the People’s contention that DeGreat did not preserve this claim because he did not specifically object during the jury instruction conference. Tendering the desired instruction sufficiently preserved this claim. *See People v. Ridgeway*, 2013 COA 17, ¶ 10 (tendering an alternative jury instruction sufficiently preserved a contention that the given jury instructions were inadequate); *accord People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). Therefore, we review the jury instructions de novo to determine if they accurately informed the jury of the governing law. *People v. Oram*, 217 P.3d 883, 893 (Colo. App. 2009).

C. Self-Defense

¶ 11 Colorado recognizes a limited statutory right to use physical force in self-defense. § 18-1-704, C.R.S. 2014. In particular, a person may use physical force to defend himself from what “he reasonably believes to be the use or imminent use of unlawful physical force” by another person. *Id.* The affirmative defense of self-defense extends to any crime except those requiring a mental

state of recklessness, extreme indifference, or negligence. § 18-1-704(1), -704(4); *People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011) (“With respect to crimes requiring recklessness, criminal negligence, or extreme indifference, . . . self-defense is not an affirmative defense, but rather an element-negating traverse.”). Barring ambiguity, we construe the self-defense statute as written. See *State v. Nieto*, 993 P.2d 493, 506 (Colo. 2000).

¶ 12 Robbery and aggravated robbery require a defendant to act knowingly; that is, they are general intent crimes. See § 18-1-501(6), C.R.S. 2014 (crimes requiring a knowing mental state are general intent crimes). The legislature did not exclude robbery, or any general intent crime, from the crimes for which self-defense is available as an affirmative defense. See *id.* Nor did the legislature eliminate self-defense for a particular class of crimes, such as crimes against property. See § 18-1-704. Had the legislature intended to exclude robbery from those crimes for which self-defense is available as an affirmative defense, it would have plainly done so. See *Frazier v. People*, 90 P.3d 807, 811-12 (Colo. 2004); *City of Loveland Police Dep’t v. Indus. Claim Appeals Office*, 141 P.3d 943, 954-55 (Colo. App. 2006); cf. *People v. Graves*, 479 N.E.2d 10,

12 (Ill. App. Ct. 1985) (because the state statute expressly excludes aggravated robbery from those crimes for which self-defense is applicable, defendant was not entitled to a self-defense instruction).

¶ 13 The Colorado Supreme Court agrees that the affirmative defense of self-defense applies to general intent crimes. See *Pickering*, 276 P.3d at 555 (self-defense is an affirmative defense to crimes requiring “intent, knowledge, or willfulness”). And divisions of this court have applied the self-defense statute to general intent crimes — irrespective of the type of crime. See *People v. Taylor*, 230 P.3d 1227, 1230 (Colo. App. 2009) (self-defense instruction should have been given as to the charge of knowing illegal discharge of a firearm), *overruled on other grounds by Pickering*, 276 P.3d 553.

¶ 14 *Taylor* is particularly instructive. There the defendant was charged with illegal discharge of a firearm. *Id.* at 1229. The trial court denied defendant’s request for a self-defense instruction, finding the defense inapplicable. *Id.* On appeal, a division of this court reversed, concluding that self-defense is available as an affirmative defense to general intent crimes. *Id.* at 1230. Relying on cases from other jurisdictions, the court concluded that it would be illogical to allow a defendant to assert self-defense to charges of

assault or murder, but disallow it for a related charge that is “intertwined with the attack necessitating self-defense.” *Id.* at 1230. Thus, notwithstanding the People’s argument that illegal discharge of a firearm is a “crime against property, not persons,” *Taylor* concluded that the defendant was entitled to a self-defense instruction. *Id.* at 1231; *see also People v. Mullins*, 209 P.3d 1147, 1151 (Colo. App. 2008) (jury should have been allowed to consider self-defense as an affirmative defense to the crime of inciting or engaging in a riot); *cf. People v. Fuller*, 781 P.2d 647, 650-51 (Colo. 1989) (self-defense may be an affirmative defense to resisting arrest).

¶ 15 The circumstances here are similar to *Taylor*. Evidence was presented that supported an affirmative self-defense instruction and DeGreat defended against the attempted murder and first degree assault charges on that basis. *See Idrogo v. People*, 818 P.2d 752, 754 (Colo. 1991) (“[W]here the record contains any evidence tending to establish the defense of self-defense, the defendant is entitled to have the jury properly instructed with respect to that defense.”). And the robbery was intertwined with the assault. That is, there was some evidence that DeGreat’s failure to pay the fare

was entangled with his belief that the use of physical force against the cab driver was necessary. Thus, from the testimony presented, the jury could have concluded that DeGreat had the right to defend himself against what he “reasonably believe[d] to be the use or imminent use of unlawful physical force.” § 18-1-704; *see Taylor*, 230 P.3d at 1230; *cf. Commonwealth v. Rogers*, 945 N.E.2d 295, 306-07 (Mass. 2011) (based on the facts presented it was not error to give a self-defense instruction for a robbery charge).

Consequently, under these facts, it is illogical to allow self-defense as an affirmative defense to some of the general intent crimes, but not all of them. *Taylor*, 230 P.3d at 1231.

¶ 16 True, several decades ago a division of this court concluded that self-defense is not an affirmative defense to aggravated robbery. *People v. Beebe*, 38 Colo. App. 80, 81, 557 P.2d 840, 841 (1976) (the elements of robbery are inseparable, and “[s]elf-defense cannot justify the taking of a thing of value from the person or presence of another”); *see also People v. Laurson*, 15 P.3d 791, 794 (Colo. App. 2010).³ But for two reasons we are not persuaded by

³ *Laurson* replicates *Beebe*’s holding in dicta without analyzing the self-defense statute and therefore does not alter our analysis.

Beebe. First, *Beebe* does not address or analyze the self-defense statute or explain why the plain language permitting self-defense for general intent crimes does not apply to robbery.⁴ 38 Colo. App. at 81, 557 P.2d at 841. Second, *Beebe* cannot be reconciled with the Colorado Supreme Court’s recognition that self-defense may be asserted in crimes such as robbery involving a mens rea of “intent, knowledge, or willfulness.” *Pickering*, 276 P.3d at 555. Accordingly, we do not find *Beebe* persuasive and we decline to follow it.⁵ See *People v. Smoots*, 2013 COA 152, ¶ 21 (divisions of the Colorado Court of Appeals are not bound by other divisions’ decisions).

¶ 17 We do not fault the trial court for relying on *Beebe*. Indeed, it had no alternative. Nevertheless, we conclude that the plain language of section 18-1-704 permits an affirmative self-defense instruction to the general intent crime of aggravated robbery where, as here, the evidence supports such a defense.

⁴ Nor could *Beebe* have addressed the statute’s express exclusion of certain crimes, as this subsection was added after *Beebe* was decided. See Ch. 83, sec. 1, § 18-1-704, 2003 Colo. Sess. Laws 795.

⁵ Nothing in this opinion should be read, however, as undermining the rule that, in the context of felony murder, “[s]elf-defense may be available as an affirmative defense to a predicate felony but not as to the resulting death.” *People v. Renaud*, 942 P.2d 1253, 1256 (Colo. App. 1996).

¶ 18 And, notwithstanding the court's other self-defense instructions, we cannot say that the error was harmless. The jury was instructed on self-defense as an affirmative defense to first degree assault and attempted murder, but it acquitted DeGreat of both charges. Instead, the jury found DeGreat guilty of reckless second degree assault, to which self-defense is not an affirmative defense. By convicting DeGreat of reckless assault, the jury did not consider or reject the affirmative defense of self-defense. Thus, we conclude that the refusal to give the self-defense instruction for the charge of aggravated robbery lowered the prosecution's burden of proof and was not harmless. *See People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005); *see also Lybarger v. People*, 807 P.2d 570, 582-83 (Colo. 1991) (an improper affirmative defense jury instruction that effectively removed the defense from the jury's consideration and thereby lowered the prosecution's burden of proof cannot be deemed harmless); *accord Taylor*, 230 P.3d at 1230.

¶ 19 DeGreat's aggravated robbery conviction is accordingly reversed and remanded for a new trial.

III. Remaining Contentions

¶ 20 To the extent DeGreat’s remaining claims affect the misdemeanor assault conviction, we address them in turn.

A. *Batson* Challenge

¶ 21 DeGreat contends that the trial court erred in denying his challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the prosecutor’s use of a peremptory challenge to remove Juror M, an African-American, from the panel. DeGreat argues that the trial court improperly denied his challenge because the prosecutor’s proffered race-neutral reason for striking the juror was pretextual and, consequently, insufficient to demonstrate that the juror’s removal was not racially motivated. We perceive no clear error.

1. The Voir Dire

¶ 22 During jury selection, defense counsel extensively questioned prospective jurors about the necessity and moral acceptability of self-defense. When asked about his beliefs on the law permitting the use of force in self-defense, Juror M responded, “I agree with the law. As an individual, myself, I would be 100 percent defending myself.” Juror M was not questioned further regarding self-defense.

¶ 23 Defense counsel later asked Juror M to respond to a hypothetical related to the credibility of police officers. Juror M asked defense counsel to clarify before answering the question.

¶ 24 After the parties began exercising peremptory challenges, Juror M interrupted the proceedings to request a bathroom break. The court allowed a five minute recess. Upon resuming the proceedings, the prosecution exercised its second peremptory strike on Juror M. Defense counsel then asserted a *Batson* challenge. As grounds for the challenge, counsel contended that Juror M was the only African-American on the panel and that he had given no responses during voir dire that “would subject him to be kicked by the state other than race.”

¶ 25 The prosecutor responded that the venire had other persons of color. And the prosecutor explained that in response to a question about self-defense, Juror M made a “very quick and assertive statement” that he would exercise his right of self-defense and that he “sat forward and answered very quickly and in a different tone.” The prosecutor also suggested that Juror M “seemed frail” and appeared “confused” when asked to respond to the hypothetical. These characteristics, combined with Juror M’s request for a

bathroom break, led the prosecutor to have “concerns about [Juror M’s] attention span.”⁶

¶ 26 Stating its belief that Juror M was capable of following the law on self-defense, the court asked for further explanation. The prosecutor elaborated that it excused Juror M because of Juror M’s “vivid reaction” and “vociferous[]” statement that, if threatened, he “personally would use force” to defend himself. The prosecutor emphasized that it was not asserting a causal challenge to Juror M based on any perceived inability to follow the law, but was instead exercising a peremptory due to Juror M’s “bellicose response to [the self-defense] issue.” Specifically, the prosecutor pointed out that someone with such a response “may not be . . . as good a juror . . . [as] somebody that is more pacifistic.”

¶ 27 Defense counsel did not dispute the prosecutor’s characterization of Juror M’s tone or demeanor. Indeed, defense

⁶ After the prosecutor set forth a basis for the peremptory challenge, a second prosecutor also commented that Juror M indicated in his questionnaire that he had a friend who was convicted of drug possession. However, the prosecutor admitted that other jurors gave similar answers. Beyond this comment, the record reflects no further argument or discussion concerning the questionnaire. And though the trial court noted the reference to the questionnaire, it did not rely on it as a basis for denying the *Batson* challenge.

counsel acknowledged that Juror M “was rather strong in his assertion that he would defend himself.” But he argued that Juror M’s own vulnerability — exhibited by his use of a cane and that he “appears to have some disability” — “may account” for Juror M’s response. Defense counsel did not suggest that other jurors exhibited a similar tone or were similarly assertive when questioned about self-defense and did not ask the trial court to conduct a comparative juror analysis.

¶ 28 The court allowed the peremptory challenge, finding that the prosecutor had articulated a “good faith . . . nonracial reason for striking [Juror M].” Namely, “[i]n response to voir dire questions [regarding] self-defense, [Juror M] was very assertive of his right to use self-defense.” Accordingly, the court denied the *Batson* challenge.

2. Governing Law

¶ 29 Racial discrimination in jury selection violates the Equal Protection Clause, harming not only the defendant but also the excused jurors and the community at large. *Batson*, 476 U.S. at 86-87. Purposeful discrimination in exercising peremptory challenges is therefore impermissible. *Id.* at 89; *Valdez v. People*,

966 P.2d 587, 589 (Colo. 1998). The ultimate burden of persuasion regarding racial motivation always rests with the party opposing the peremptory challenge. *Purkett v. Elem*, 514 U.S. 765, 768 (1995); accord *People v. Wilson*, 2015 CO 54M, ¶ 14.

¶ 30 In *Batson*, the Supreme Court outlined a three-step analysis that a trial court must follow when a defendant claims that a prosecutor’s peremptory challenge is racially motivated. 476 U.S. at 86-87; *Valdez*, 966 P.2d at 589; *People v. Phillips*, 2012 COA 176, ¶ 159. The defendant must first make a prima facie showing that the prosecutor excluded a potential juror based on race by demonstrating that the prosecutor struck a juror who is part of a “cognizable racial group” and that the totality of the circumstances give rise to an inference of discrimination. See *Valdez*, 966 P.2d at 589-90 (“The prima facie standard is not a high one; the defendant is not required to prove by a preponderance of the evidence that discrimination occurred.”).

¶ 31 If the defendant successfully presents a prima facie case for discrimination, the prosecutor must provide a race-neutral explanation for removing the juror. *Id.* at 590. The race-neutral explanation need not be persuasive or even plausible. *People v.*

Robinson, 187 P.3d 1166, 1172 (Colo. App. 2008). Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason is deemed race-neutral. *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

¶ 32 In the third and final step, after considering the race-neutral explanation and the response, the trial court must decide whether the defendant has proved purposeful racial discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Valdez*, 966 P.2d at 590-91; *People v. O’Shaughnessy*, 275 P.3d 687, 690 (Colo. App. 2010), *aff’d*, *O’Shaughnessy v. People*, 269 P.3d 1233 (Colo. 2012). In doing so, the court must consider all relevant evidence as well as the credibility and demeanor of the attorney exercising the peremptory strike. *See Miller-El v. Dretke*, 545 U.S. 231, 239 (2005); *People v. Collins*, 187 P.3d 1178, 1182-83 (Colo. App. 2008); *Robinson*, 187 P.3d at 1173. Because the evaluation of credibility and demeanor “lie[s] peculiarly within a trial judge’s province,” we review a trial court’s decision on step three only for clear error. *Snyder*, 552 U.S. at 477 (internal quotation marks omitted); *Wilson*, ¶ 13. And we defer to the trial court’s finding absent exceptional circumstances. *Snyder*, 552 U.S. at 477.

3. Analysis

¶ 33 DeGreat contends that the prosecutor’s stated basis for the strike — Juror M’s reaction to self-defense questioning — was pretextual because several other jurors gave similar responses when questioned about self-defense. We perceive no clear error.

¶ 34 The prosecutor’s explanation regarding Juror M’s response to self-defense was not based upon the content of Juror M’s response — that he would “100 percent” use force to defend himself — but rather on the tone and demeanor in which Juror M responded. And defense counsel, when given the opportunity to respond, did not dispute the prosecutor’s characterization of Juror M’s tone or demeanor. *See O’Shaughnessy*, 275 P.3d at 695 (the trial court may consider a defendant’s failure to rebut a prosecutor’s explanation as acquiescing to its validity). Rather, counsel acknowledged Juror M’s “strong” response.

¶ 35 In light of the prosecutor’s demeanor-based explanation, we cannot say that the trial court clearly erred in finding the prosecution offered a good faith, race-neutral basis for its peremptory challenge. *See Snyder*, 552 U.S. at 479 (deference is especially warranted where an attorney’s reasons for exercising a

peremptory strike were demeanor-based); *see also O'Shaughnessy*, 275 P.3d at 691-92 (there is “no question” that a trial court’s reliance on a demeanor-based explanation for a strike is entitled to great deference). And given the trial court’s acceptance of the prosecutor’s good faith explanation, it matters not that the trial court did not “utter[]the magic words ‘no purposeful discrimination.’” *Wilson*, ¶ 19.

¶ 36 Deference is due even where the trial court’s credibility or demeanor determination is implicit, cannot be objectively verified, or was not directly observed by the trial court. *See Thaler v. Haynes*, 559 U.S. 43, 48-49 (2010) (there is no rule barring a court from crediting a prosecutor’s demeanor-based reason for a peremptory strike because the court did not personally observe or recall the prospective juror’s demeanor); *O'Shaughnessy*, 275 P.3d at 691 (court’s credibility finding need not be express); *Robinson*, 187 P.3d at 1174 (a reviewing court need not be able to independently confirm the prosecutor’s stated reason for exercising a peremptory challenge nor must it question a trial court’s ruling merely because it is not accompanied by an express credibility finding).

¶ 37 To be sure, it is preferable for a trial court to make specific findings when possible — in particular, on the issues of credibility and demeanor — regarding its reasons for denying a *Batson* challenge. Such findings improve the appellate record and permit more meaningful review. But because nothing in the record here either clearly refutes or contradicts the prosecutor’s demeanor-based explanation, we will not question the prosecutor’s credibility or second-guess the trial court’s finding that the prosecutor offered a good faith explanation.

¶ 38 DeGreat rightly states that an otherwise race-neutral explanation may be called into question when jurors with similar views, but not of a cognizable racial group, are not excused. *See Snyder*, 552 U.S. at 480. He contends that because other jurors expressed views on self-defense similar to Juror M’s, the prosecutor’s reason was pretextual. He thus asks this court to engage in a comparative juror analysis to affirm his contention. DeGreat did not make this request at trial, and we decline to undertake such an analysis now. *See Wilson*, ¶ 22 (declining to examine, on appellate review, whether similarly situated venire members were treated differently).

¶ 39 We are particularly not inclined to engage in a comparative juror analysis where, as here, the prosecutor’s explanation was not based on the content of Juror M’s response but rather on his tone and demeanor. *Cf. id.* at ¶ 18 (“Only the trial court can assess non-verbal cues, such as hesitation, voice inflection, and facial expressions, that are not recorded on a transcript.”). The unremarkable fact that other jurors agreed that self-defense might be appropriate in some circumstances does not contradict the prosecutor’s demeanor-based explanation for striking Juror M. Divorced from the nuances of tone and demeanor, other jurors’ similar responses add little to the question of whether Juror M’s strike was pretextual.

¶ 40 This is not to say that an appellate court must never conduct a comparative juror analysis. For example, where nondemeanor-based factors form the basis of a peremptory challenge, a comparative juror analysis may be appropriate. Indeed, *Snyder* presents such a circumstance. There, the prosecutor offered one demeanor-based and one nondemeanor-based explanation for a

peremptory challenge.⁷ *Snyder*, 552 U.S. at 478. The trial court denied the *Batson* challenge without any explanation. *Id.* at 478-79. On appeal, the Supreme Court engaged in a comparative juror analysis of the nondemeanor-based explanation and concluded the explanation was clearly refuted by the record. *Id.* at 479-82; see also *Thaler*, 559 U.S. at 48-49 (in *Snyder*, the Court concluded that, after a comparative analysis of similarly situated jurors, the record refuted the prosecutor’s nondemeanor-based explanation); accord *People v. Beauvais*, 2014 COA 143, ¶ 16 (the *Snyder* record refuted the prosecutor’s explanation that was not based on demeanor).

¶ 41 With respect to the demeanor-based challenge, the Supreme Court did not conduct a comparative juror analysis. Rather, the Court noted that nothing in the record suggested that the trial court placed any weight on the demeanor-based explanation in denying the *Batson* challenge. 552 U.S. at 485. Importantly, the Court recognized that there was no “realistic probability” that this potential reason could be explored more than a decade after trial.

⁷ The demeanor-based explanation was the juror’s apparent nervousness and the nondemeanor-based explanation was that the juror’s busy schedule might cause him to acquit to avoid a penalty phase.

Id. at 486. Thus, the Court reversed and remanded for a new trial.

*Id.*⁸

¶ 42 In sum, we cannot conclude that the trial court clearly erred in finding that the prosecutor offered a good faith, race-neutral explanation for striking Juror M.

B. Plea Bargain Testimony

¶ 43 DeGreat next contends that the trial court plainly erred in failing to sua sponte strike testimony that DeGreat had been offered a plea bargain. We disagree.

¶ 44 During direct examination, the victim was asked about DeGreat's alleged attempts to bribe him not to appear for trial. In response to a question about phone calls he had received from DeGreat's contacts, the victim made the following statement: "I was scared in a way. I asked him . . . I was aware that Mr. DeGreat was offered a plea bargain . . . I asked him . . . Is \$7,000 worth a man's life?" DeGreat's counsel did not object. The prosecutor never

⁸ Unlike *Snyder*, this is not a case where the prosecutor relied on both nondemeanor and demeanor-based reasons to support the peremptory challenge. *Cf. People v. Collins*, 187 P.3d 1178, 1183-84 (Colo. App. 2008) (reversing where nondemeanor-based reasons were refuted by the record and the trial court did not credit the demeanor-based reasons).

referenced the remark or the plea offer during the remainder of trial.

¶ 45 Because no contemporaneous objection was raised, we review for plain error. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005). Plain error is obvious and substantial, so “undermin[ing] the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction.” *Hagos v. People*, 2012 CO 63, ¶ 14 (internal quotation marks omitted); see *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003). When the law surrounding the challenged issue is not established, error, if any, cannot be plain or obvious. *People v. Petschow*, 119 P.3d 495, 504-05 (Colo. App. 2004).

¶ 46 DeGreat identifies no Colorado authority concluding that it is error to admit evidence of a plea offer. Rather, DeGreat relies almost exclusively on a Mississippi Supreme Court case. Because no binding precedent clearly precludes evidence regarding plea offers, the trial court could not have been expected to sua sponte strike such unsolicited testimony. See *id.* (plain error assumes that the trial court should have intervened without counsel’s notice because the error was so obvious based on the current law).

¶ 47 Accordingly, the trial court did not plainly err.

C. Jail Telephone Calls

¶ 48 Lastly, DeGreat contends that the trial court erred in admitting recorded phone calls he placed from jail. We disagree.

¶ 49 Prior to trial, DeGreat moved to suppress introduction of taped phone calls, placed from the jail, in which he attempted to solicit the victim not to appear for trial. Each taped call begins with a warning: “This call may be monitored or recorded.”

¶ 50 After an evidentiary hearing, the trial court denied DeGreat’s motion to suppress the taped calls. The court concluded that the phone calls constituted permissible CRE 404(b) evidence. By attempting to coerce the victim not to testify, the court concluded, DeGreat sought to conceal his role in the crime and, accordingly, the calls “infer a consciousness of guilt.” *See People v. Kyle*, 111 P.3d 491, 499-500 (Colo. App. 2004) (evidence showing a defendant’s consciousness of guilt and “continual efforts to control the victim” admissible under CRE 404(b)). The court also found that DeGreat had no reasonable expectation to privacy in his jailhouse calls and that recording the calls did not violate the

Fourth Amendment or Colorado's wiretapping and eavesdropping statute.

¶ 51 DeGreat contends that the trial court erred in denying his motion to suppress. In his view, recording his jailhouse calls constituted an illegal search and seizure in violation of the Fourth Amendment. And he argues that recording the calls violated the wiretapping statute, section 18-9-303(1), C.R.S. 2014. DeGreat's arguments present a mixed question of fact and law, which we review by deferring to the trial court's factual findings while reviewing its conclusions of law de novo. *People v. Mares*, 263 P.3d 699, 702 (Colo. App. 2011).

¶ 52 The Fourth Amendment guarantees protection only from unreasonable searches and seizures. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558, 569 U.S. ___, ___ (2013). Generally, warrantless searches are presumptively unreasonable. *People v. Lee*, 93 P.3d 544, 547 (Colo. App. 2003). But a warrant is not required where an individual has no reasonable expectation of privacy. *Id.* Specifically, recording a phone conversation does not constitute a Fourth Amendment violation unless an individual has a justifiable

expectation of privacy regarding the conversation. *People v. Blehm*, 44 Colo. App. 472, 475, 623 P.2d 411, 414 (1980).

¶ 53 Prisoners have little, if any, reasonable expectation of privacy while incarcerated. *People v. Salaz*, 953 P.2d 1275, 1277 (Colo. 1998); *Blehm*, 44 Colo. App. at 476, 623 P.2d at 415. And there is no reasonable expectation of privacy in phone calls placed from jail. *Mares*, 263 P.3d at 706. This is particularly true where, as here, an inmate is not misled into believing that his statements were not being recorded, but instead expressly informed that calls were being monitored. *People v. Zamora*, 220 P.3d 996, 1000 (Colo. App. 2009).

¶ 54 The trial court therefore did not abuse its discretion in finding that DeGreat had no reasonable expectation of privacy when he made the jailhouse calls. Accordingly, DeGreat's Fourth Amendment rights were not violated when his jailhouse calls were recorded. *See Mares*, 263 P.3d at 706.

¶ 55 Nor do we agree with DeGreat's argument that his phone calls were recorded in violation of the wiretapping statute. Although section 18-9-303(1) generally bars individuals from knowingly recording a phone call without the consent of either party to the

call, it does not apply to inmate phone calls placed from jail. *Id.*; *Blehm*, 44 Colo. App. at 477-78, 623 P.2d at 416.

¶ 56 Thus, the trial court did not err in admitting the jailhouse phone calls.

IV. Conclusion

¶ 57 The judgment of conviction for aggravated robbery and the related crime of violence count are reversed and the case is remanded for a new trial on those counts. The judgment is otherwise affirmed.

JUDGE ROMÁN and JUDGE MILLER concur.