COLORADO COURT OF APPEALS **2015COA88**

Court of Appeals No. 12CA0015
Conejos County District Court No. 10CR72
Honorable Robert W. Ogburn, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Nathan Richard Vigil,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE NAVARRO
Berger, J., concurs
Lichtenstein, J., dissents

Announced July 2, 2015

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¶ 1 Defendant, Nathan Richard Vigil, appeals the judgment of conviction entered on jury verdicts finding him guilty of second degree burglary and second degree aggravated motor vehicle theft. In Section V of our opinion, we address an issue of first impression and hold that the trial court did not err in permitting a lay witness to testify to the substantial similarity between shoeprints found in connection with the crime and Vigil's shoes. Because we also conclude that Vigil's other contentions of error do not warrant reversal, we affirm.

I. Background

¶ 2 In November 2010, Casey Caldon discovered that his truck and other personal property were missing from his farm. The other missing property included a motorcycle, flat-screen television, DVD player, and stereo. The truck had been parked in the third bay of a "lean-to," a "shed that's up against" a shop on the farm (the south shop). The motorcycle had been inside a different shop (the north shop). The television and DVD player had been in a trailer, and the stereo was missing from a tractor. On the same day, Caldon also noticed that a truck resembling his was parked near an establishment in town, the La Jara Trading Post.

¶ 3 Caldon called the sheriff. Sergeant Crown from the Conejos County Sheriff's Department went to the La Jara Trading Post, took photographs of the truck, and confirmed that it was registered to Caldon Farms. Sergeant Crown went to the farm, where he took more photographs, including photographs of shoeprints found in the lean-to. Further investigation revealed that the shoeprints appeared to match shoes worn by Vigil when he was later arrested in connection with a different case in neighboring Alamosa County.

¶ 4 The investigation also revealed that, three days earlier, other witnesses had seen Vigil in possession of Caldon's truck. The truck had broken down, and one of these witnesses helped Vigil tow it to the La Jara Trading Post.

¶ 5 Vigil was charged with first degree aggravated motor vehicle theft, second degree burglary, theft, and attempt to commit second degree burglary. The attempted burglary count was later dismissed. A jury convicted Vigil of the lesser included offense of second degree aggravated motor vehicle theft and second degree burglary but acquitted him of theft. The jury also found that the value of the truck was in the range of $1000 to $20,000. This appeal followed.

II. Juror C.A. and Prospective Juror D.K.

¶ 6 Vigil contends that the trial court reversibly erred when it denied his challenge for cause to Juror C.A. and granted the prosecutor's challenge for cause to prospective Juror D.K. We do not agree.

A. Standard of Review

¶ 7 We review a trial court's decision to grant or deny a challenge for cause for an abuse of discretion. *People v. Schmidt*, 885 P.2d 312, 314 (Colo. App. 1994). We apply this very deferential standard of review because the trial court is in a unique position to analyze the juror's responses, demeanor, and body language. *People v. Young*, 16 P.3d 821, 824 (Colo. 2001); *Carrillo v. People*, 974 P.2d 478, 485-86 (Colo. 1999); *see also People v. Harlan*, 8 P.3d 448, 464 (Colo. 2000) ("The principle of deference applicable to our review requires us to presume that the trial court's decisions were based on nonverbal communications from jurors that do not appear in the transcript."), *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005). A trial court abuses its discretion in this context "only if there is no evidence in the record to support its decision." *People v. Wilson*, 2014 COA 114, ¶ 11. Accordingly, "we do not look

to see whether we agree with the trial court"; instead, we consider "whether the trial court's decision fell within the range of reasonable options." *Hall v. Moreno*, 2012 CO 14, ¶ 54 (internal quotation marks omitted).

B. Juror C.A.

¶ 8 During voir dire, Juror C.A. acknowledged that he had performed "quite a bit of [electrical] work" for the Caldons and had "gotten along great with them for years." Defense counsel asked Juror C.A. whether it would be difficult to render an impartial verdict, and the following exchange occurred:

> [Juror C.A.]: I can't say that. I really can't. I'd like to say no. I'd like to say no, but I don't know.
>
> [Defense Counsel]: So what are you saying? Are you saying yes, you can render an impartial [verdict] or no you can't?
>
> [Juror C.A.]: It's something that sits there. I know the people. I really do. I don't know the defendant here.
>
> [Defense Counsel]: Do you think you may be doing business with them in the future?
>
> [Juror C.A.]: Possibly with [Casey Caldon's] dad. . . . I don't know.

> [Defense Counsel]: Your honor . . . . He stated that he has a business relationship with the — Mr. Caldon and his family and may be having business in the future; and in the back of his mind, that may make him where he's not completely unbiased or prejudiced in making an ultimate determination [sic].
>
> [Court]: Sir, can you evaluate his testimony just the same as the testimony of all the other witnesses?
>
> [Juror C.A.]: His you're talking about?
>
> [Court]: [Casey] Caldon's. Can you evaluate his testimony just like all the other witnesses who will testify in this case?
>
> [Juror C.A.]: I think I could.
>
> [Court]: Challenge for cause is denied.

Ultimately, Juror C.A. served on the jury as foreperson.

¶ 9 A prospective juror must be disqualified if his or her state of mind evinces enmity or bias toward the defendant or the state, unless the trial court is satisfied that the juror "will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." § 16-10-103(1)(j), C.R.S. 2014; *see also People v. Shreck*, 107 P.3d 1048, 1057 (Colo. App. 2004). When a prospective juror makes a statement evincing bias, he or she may nonetheless serve if the juror agrees to set aside any preconceived

notions and make a decision based on the evidence and the court's instructions. *People v. Phillips*, 219 P.3d 798, 801 (Colo. App. 2009).

¶ 10 We reiterate that, under the abuse of discretion standard, the question for us is not whether the record would have supported a decision to grant the challenge for cause or whether we would have granted the challenge. *See DeBella v. People*, 233 P.3d 664, 666 (Colo. 2010) ("It is a long-standing principle of appellate review that an appellate court may not substitute its own judgment for that of the trial court where a matter is committed to the trial court's discretion."). Rather, the question presented is whether the record *compelled* the trial court to grant the challenge. *See Harlan*, 8 P.3d at 462 ("In a noncapital case, we will overturn the trial court's resolution of a challenge for cause only if the record presents no basis for supporting it.").

¶ 11 Juror C.A. did not clearly evince bias. Instead, the juror indicated that he could evaluate Caldon's testimony impartially, and the juror gave equivocal or ambiguous answers on the question whether his business relationship with the Caldons would prevent him from rendering an impartial verdict. In these circumstances,

our supreme court's decisions in *Carrillo* and its progeny are especially enlightening. Under those decisions, a trial court is not compelled to grant a challenge for cause where a juror's responses are equivocal and do not articulate a clear expression of bias, as we shall explain.

¶ 12 *Carrillo* is a seminal case in this area. The supreme court grappled with, and endeavored to clarify, the divergent Colorado case law concerning the standard of review applicable to rulings on challenges for cause. *See Carrillo*, 974 P.2d at 485. *Carrillo* emphasized that the abuse of discretion standard is a "very high standard of review" that gives great deference to the trial court's judgments and "serves to discourage an appellate court from second-guessing those judgments based on a cold record." *Id.* at 485-86. Applying these principles, *Carrillo* upheld the trial court's denial of a challenge for cause that was based on the juror's relationship with the victim's father. Because the juror's answers to questions about his relationship with the victim's father appeared ambiguous and failed to "articulate a clear expression of bias requiring his dismissal," the supreme court concluded that the trial

court had acted within its discretion when it denied the challenge for cause. *Id.* at 488.[1]

¶ 13 Similarly, in *People v. Lefebre*, the supreme court concluded that excusing the jurors for cause was inappropriate where "[t]he record does not establish *firmly and clearly* that the jurors could not set aside their preconceived beliefs and decide the case based on the evidence and the court's instructions." 5 P.3d 295, 298 (Colo. 2000) (emphasis added), *overruled on other grounds by People v. Novotny*, 2014 CO 18.

¶ 14 In *Young*, the supreme court stressed that "[r]eversals on juror challenges . . . should be rare." 16 P.3d at 825. "If the juror's recorded responses are unclear only the trial court can assess accurately the juror's intent from the juror's tone of voice, facial expressions, and general demeanor." *Id.* at 825-26. Because the record did not show that the challenged juror had "any *clear bias* against [the defendant] which would make his dismissal from the

[1] Of import, neither the parties nor the trial court in *Carrillo* asked the juror whether he would assess the credibility of the victim's father any differently than that of any other witness. *Carrillo v. People*, 974 P.2d 478, 487-88 (Colo. 1999). In contrast, Juror C.A. indicated that he would evaluate Caldon's testimony the same as any other witness's testimony.

jury compulsory," *Young* affirmed the trial court's denial of the challenge for cause. *Id.* at 826 (emphasis added); *see also Harlan*, 8 P.3d at 466 ("The equivocal nature of [the juror's] statements, however, does not allow us to displace the trial court in its role as evaluator of credibility." (internal quotation marks omitted))). According to these authorities, Juror C.A.'s equivocal responses did not require the trial court to excuse him.

¶ 15 Still, Vigil faults the trial court for not asking expressly whether Juror C.A. could render an impartial verdict. Vigil makes a valid point. We agree that it would have been preferable to have asked the juror such a specific follow-up question. We do not agree, however, that the juror's answers taken as a whole revealed any "clear bias" that "would make his dismissal from the jury compulsory." *Young*, 16 P.3d at 826; *see Carrillo*, 974 P.2d at 488 ("[A]lthough it would have been better practice for the trial judge to question [the juror] in order to fully explore his feelings, we do not find that the record of [the juror's] answers taken as a whole demonstrates that he had a state of mind evincing bias against Carrillo.").

¶ 16 Juror C.A.'s statement that he would treat Caldon's testimony the same as other witnesses' testimony meant that he would treat Caldon's testimony impartially (i.e., he would not be unduly partial toward Caldon when assessing his testimony). Juror C.A.'s statement that he would treat Caldon's testimony impartially was some evidence that he would render an impartial verdict (i.e., he would not be unduly partial toward Caldon when rendering the verdict).

¶ 17 With the benefit of hindsight and time to parse the record, we could conceive of more complete follow-up questions for Juror C.A. However, simply because we could construct additional useful questions for the juror does not necessarily give us license to overturn the trial court's decision. The restraint on our review of the trial court's ruling reflects the supreme court's considered judgment of the respective roles of the trial and appellate courts regarding challenges for cause. Thus, we must resist the temptation to second-guess the trial court's decision based on a cold record. *See Carrillo*, 974 P.2d at 486.

¶ 18 Although the trial court's questioning could have been more comprehensive, it still elicited a response significant to the

challenge for cause, as explained above. Therefore, even if imperfect, the trial court's questioning of the juror weighs in favor of affirmance. *See Wilson*, ¶ 11 (A trial court abuses its discretion "only if there is no evidence in the record to support its decision.").

¶ 19 In sum, the record reveals the juror's equivocal implication of bias and his answer to follow-up questioning that suggested that he could render an impartial verdict. Considering these facts, and presuming that the trial court's decision was based on "nonverbal communications" from the juror "that do not appear in the transcript," *Harlan*, 8 P.3d at 464, we do not discern an abuse of discretion. *See also People v. Vecchiarelli-McLaughlin*, 984 P.2d 72, 76 (Colo. 1999) ("[O]nly the trial court had the opportunity to consider this juror's demeanor, including any doubts or convictions he displayed, in making its decision to deny the challenge for cause.").

C. Prospective Juror D.K.

¶ 20 We need not decide whether the trial court erred in granting the prosecutor's challenge for cause to prospective Juror D.K. because the alleged error was harmless.

¶ 21 With respect to an erroneous ruling on a challenge for cause, we will reverse a conviction only if the error is not harmless under an "outcome-determinative test." *Novotny*, ¶ 27. Thus, reversal is not automatic when a trial court erroneously grants the prosecution's challenge for cause. *See Wilson*, ¶ 23. Instead, "[t]o show prejudice sufficient to require reversal, the defendant ordinarily must show that a biased or incompetent juror participated in deciding his guilt." *Id.* (internal quotation marks omitted). Vigil has not shown that a juror who participated in deciding his guilt was biased or incompetent to serve.

¶ 22 Vigil contends that *Novotny* — which overruled *People v. Macrander*, 828 P.2d 234 (Colo. 1992), and its progeny — should not be applied to his appeal because *Novotny* was announced after his trial. It is well settled, however, that a new rule for the conduct of criminal proceedings applies "to all criminal cases pending on direct review or not yet final." *People v. McAfee*, 160 P.3d 277, 281 (Colo. App. 2007); *see also Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied . . . to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule

constitutes a 'clear break' with the past."). Consistent with this principle, the supreme court in *Novotny* itself remanded for application of its new rule to the defendant's direct appeal even though his trial had been conducted under the old *Macrander* regime. *See Novotny*, ¶ 27. Because this is Vigil's direct appeal, *Novotny* applies.

¶ 23 Additionally, divisions of this court have rejected the claim that applying *Novotny* to a defendant's direct appeal violates his right to due process. *See People v. Pernell*, 2014 COA 157, ¶ 22; *People v. Maestas*, 2014 COA 139M, ¶ 6; *People v. Wise*, 2014 COA 83, ¶ 14. We are persuaded by the analysis articulated in those cases, and we rely on it here to reject Vigil's due process argument.

¶ 24 Finally, Vigil contends that he was prejudiced by the trial court's grant of the challenge for cause to Juror D.K. because that juror might have voted to acquit him. Aside from the speculation inherent in this contention, Vigil's claim fails because a defendant is not entitled to have any particular juror serve in his or her case. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("Defendants are not entitled to a jury of any particular composition."); *United States v. Russell*, 463 F. App'x 585, 587 (7th Cir. 2012) ("A

defendant has no legally cognizable right to have any particular juror participate in his case."); *United States v. Polichemi*, 201 F.3d 858, 865 (7th Cir. 2000) (same).

Therefore, we perceive no reversible error. *See Wilson*, ¶ 23.

III. Variance

¶ 25 Vigil asserts that the prosecutor's closing argument impermissibly expanded the second degree burglary charge to include burglary of the lean-to. Although not expressly styled as a variance claim, Vigil's contention relies on concepts and case law associated with a variance between a charging document and the evidence or instructions presented at trial. Construing his contention as such, we concur that a simple variance occurred but conclude that Vigil has not shown prejudice.

A. Background

¶ 26 Before trial, Vigil requested a bill of particulars "specifying each act of theft and burglary as well as the precise date and location of each act." The trial court did not rule on the request.

¶ 27 Before jury selection, the trial court held a conference in which the parties discussed Vigil's request for a bill of particulars. Regarding the burglary charge, the prosecutor stated that the

burglarized buildings were the trailer, the tractor, and the north shop on Caldon's farm.

¶ 28 In closing argument, however, the prosecutor argued that the jury could also convict Vigil of burglary if it found that he entered the *lean-to* without permission and remained there unlawfully with intent to steal the truck. *See* § 18-4-203, C.R.S. 2014. Defense counsel did not object to the prosecutor's argument but later requested a bench conference after the prosecutor had finished. Defense counsel seemed to ask the trial court to instruct the jury that the lean-to was not a subject of the burglary charge. The court noted that "[o]bviously, someone entered the lean-to-type thing" and explained that defense counsel was free to argue that the lean-to was not a "building" within the meaning of the burglary charge. Despite the court's offer, defense counsel did not ultimately argue to the jury that the lean-to was not a building.[2]

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[2] At oral argument in this appeal, Vigil asserted that there was no opportunity before closing argument to research whether a lean-to qualified as a building under section 18-4-101(1), C.R.S. 2014. But Vigil had the opportunity — and the incentive — to research this issue before trial. The prosecutor had not suggested that the lean-to was excluded from the burglary charge until the first day of trial.

B. Applicable Law and Analysis

¶ 29 One purpose of a bill of particulars is to permit a defendant to prepare a defense when the charging instrument is sufficient to advise him or her of the charges but lacks the detail necessary to procure witnesses and prepare for trial. *Erickson v. People*, 951 P.2d 919, 921 (Colo. 1998).

¶ 30 Two types of variance from the charging instrument are possible: a constructive amendment and a simple variance. *People v. Pahl*, 169 P.3d 169, 177 (Colo. App. 2006). "A constructive amendment occurs when jury instructions change an element of the charged offense to the extent the amendment 'effectively subject[s] a defendant to the risk of conviction for an offense that was not originally charged.'" *Id.* (quoting *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996)). A simple variance occurs when the elements of the charged crime remain unchanged, "but the evidence presented at trial proves facts materially different from those alleged in the indictment." *Id.* Although a constructive amendment is per se reversible, a simple variance warrants reversal only if it prejudices a defendant's substantial rights. *Id.*

¶ 31 We identify two assumptions we adopt for the sake of our analysis. First, we assume without deciding that the jurisprudence discussed above applies to a variance between the evidence or argument presented at trial and a *bill of particulars* (as distinct from a charging instrument). Second, although an oral bill of particulars is atypical, we assume (as do the People) that it should be treated the same as a written bill of particulars.

¶ 32 Based on the oral bill of particulars, we conclude that a simple variance occurred. In that bill, the prosecutor alleged that Vigil burglarized three structures: the trailer, the north shop, and the tractor. The lean-to was not included. By declaring in closing argument that Vigil could be convicted of second degree burglary if he entered the lean-to and remained without permission and with intent to steal the truck, the prosecutor expanded the charge beyond the facts alleged in the bill of particulars. *See Pahl*, 169 P.3d at 177. But, while we understand Vigil's frustration with the prosecutor's actions, we do not discern prejudice requiring reversal.

¶ 33 Vigil maintains that he was prejudiced by this simple variance because he "had no notice that he would have to defend against evidence that he burglarized the lean-to" (e.g., the shoeprints found

in the lean-to). We disagree because the evidence that he had burglarized the lean-to was part and parcel of the evidence that he had committed motor vehicle theft. And Vigil had ample notice that he would have to defend against evidence that he had committed motor vehicle theft.

¶ 34 To prove motor vehicle theft, the prosecution had to prove that Vigil "knowingly obtain[ed] or exercise[d] control over the motor vehicle of another without authorization." § 18-4-409(2), C.R.S. 2014. No witness, however, saw Vigil take the truck from the lean-to where it had been parked. When Caldon and Sergeant Crown later found the truck at the La Jara Trading Post, no one was inside the truck. Although two witnesses testified that they had seen Vigil with the truck, they did not know how he came to be in possession of it. As a result, the shoeprints found in the lean-to were important to proving that Vigil had stolen the truck.

¶ 35 In fact, Vigil concedes that the shoeprint evidence was critical to proving the motor vehicle theft. He declares that the "shoeprints discovered under the lean-to were the prosecution's *key evidence* that Vigil had entered the lean-to and stolen the pickup."

(Emphasis added.)[3] Vigil also acknowledges that "since [he] was charged with the aggravated motor vehicle theft of the pickup truck, he had no basis to object to the admission of evidence related to the lean-to where the truck had been parked."

¶ 36 Accordingly, Vigil had ample notice that the prosecution would introduce evidence showing that he had entered the lean-to with the intent to steal the truck. Hence, he had notice that he would have to defend against this evidence; indeed, at trial he vigorously defended against it (in particular, the shoeprint evidence). It is of no consequence that this evidence was ultimately relevant to two charges rather than one. Because Vigil did not suffer prejudice from the simple variance, reversal is not warranted. *See People v. Rice*, 198 P.3d 1241, 1246 (Colo. App. 2008) ("A simple variance is not a ground for reversal unless it is . . . prejudicial to the defendant.").

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[3] Similarly, Vigil argues that the "footprint evidence was the State's key evidence tying Vigil to the scene of the vehicle theft and the burglary," without which "the evidence would have been insufficient to convict Vigil of the burglary and the vehicle theft charges." Although Vigil makes these points in the context of a different appellate argument, the accuracy of his representations of the record does not depend on which appellate issue they concern.

IV. Modified Unanimity Instruction

¶ 37 Vigil maintains that the trial court reversibly erred by not giving — sua sponte — a modified unanimity instruction regarding the burglary count. As a result, he argues that the verdict does not reflect unanimous agreement as to which building he burglarized. We are not persuaded.

A. Standard of Review and Preservation

¶ 38 "We review de novo whether the trial court was required to give a unanimity instruction." *People v. Torres*, 224 P.3d 268, 278 (Colo. App. 2009).

¶ 39 Because Vigil did not request a modified unanimity instruction, we will reverse only if plain error occurred. *See People v. Vigil*, 251 P.3d 442, 447 (Colo. App. 2010). Thus, even if we discern error, we will reverse only if it was obvious and "so undermined the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *Miller*, 113 P.3d at 750 (internal quotation marks omitted).

B. Law and Analysis

¶ 40 In Colorado, a defendant enjoys a right to a unanimous jury verdict. § 16-10-108, C.R.S. 2014; Crim. P. 23(a)(8); Crim. P.

31(a)(3); *People v. Linares-Guzman*, 195 P.3d 1130, 1134 (Colo. App. 2008). Unanimity in a verdict means only that each juror agrees that each element of the crime charged has been proved to that juror's satisfaction beyond a reasonable doubt. *People v. Lewis*, 710 P.2d 1110, 1116 (Colo. App. 1985). "Generally, jurors need not agree about the evidence or theory by which a particular element is established . . . ." *Vigil*, 251 P.3d at 447; *see Lewis*, 710 P.2d at 1116 ("Jurors are not, however, required to be in agreement as to what particular evidence is believable or probative on a specific issue or element of a crime, particularly where there is evidence to support alternative theories as to how an element of a crime came to occur.").

¶ 41 There is an exception, however, to the general rule that jurors need not be unanimous as to which evidence or theory establishes a particular element of the crime. When the prosecution presents evidence of multiple transactions, any one of which would constitute the offense charged, and there is a reasonable likelihood that jurors may disagree about which transaction the defendant committed, there is a risk that a conviction may result from some jurors finding the defendant guilty of one act, while others convict

based on a different act. *People v. Perez-Hernandez*, 2013 COA 160, ¶ 55. In that situation, the trial court should require the prosecution to elect the transaction on which it relies for conviction, *or* instruct the jury that to convict it must unanimously agree that the defendant committed all the alleged acts or the same act (a modified unanimity instruction). *Id.*

¶ 42 This exception does not apply, however, when a defendant is charged with a crime encompassing multiple incidents occurring in a single transaction. *Torres*, 224 P.3d at 278. Where the incidents occurred in a single transaction, the prosecutor need not elect among acts, and the trial court need not give a modified unanimity instruction. *Melina v. People*, 161 P.3d 635, 640-41 (Colo. 2007); *People v. Greer*, 262 P.3d 920, 925 (Colo. App. 2011).

¶ 43 With respect to the burglary count, a modified unanimity instruction was not required because the burglary was charged as a single transaction. The prosecution alleged that Vigil committed one burglary on or about November 27, 2010, at the Caldon Farms. Because the prosecution presented a single theory of burglary, the jury was not required to unanimously agree on *which* building was burglarized. Instead, the jury only needed to agree that Vigil

burglarized a building on the charged date at the charged place. *See Melina*, 161 P.3d at 641 ("[E]ven if [the defendant's] conversations with various people could be charged as separate crimes of solicitation, these crimes would not be severable in this case because the People charged and tried the case under the broad theory that [the defendant] engaged in a single transaction of solicitation.").

¶ 44 Finally, even if a modified unanimity instruction were required, its absence was not sufficiently prejudicial to constitute plain error. *See People v. Villarreal*, 131 P.3d 1119, 1129 (Colo. App. 2005) (concluding that the lack of a special unanimity instruction was harmless because the jury unanimously found the defendant guilty of two of the possible felonies underlying the burglary). Because the jury unanimously convicted Vigil of stealing the truck that had been parked in the lean-to, it is very likely that the jury found that he had unlawfully entered or remained in the lean-to with the intent to steal the truck. Thus, by far the most probable interpretation of the verdicts is that the jury unanimously

agreed that Vigil had burglarized the lean-to.[4] The alleged error, therefore, did not "'so undermine[] 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 (emphasis added) (quoting *Miller*, 113 P.3d at 750).

V. Shoeprint Evidence

¶ 45 Vigil raises two contentions of error related to the shoeprints found in the lean-to. First, he contends that the trial court erred by permitting Sergeant Crown to testify as a lay witness about his comparison of the shoeprints to the shoes that Vigil was wearing when he was arrested in Alamosa County. Second, Vigil maintains that the trial court reversibly erred when it denied his motion to suppress the shoeprint evidence and shoes as a sanction for the prosecution's failure to disclose before trial a Colorado Bureau of Investigation (CBI) report indicating that its analysis of the shoeprint evidence was inconclusive. We reject both contentions.

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[4] This is especially true given that the jury *acquitted* Vigil of stealing property from the other buildings subject to the burglary charge. Because the property allegedly taken from those buildings was the principal evidence that Vigil had burglarized those buildings, it is very unlikely that the jury found he had burglarized those buildings.

A. Procedural History

¶ 46 As discussed, Vigil was arrested in Alamosa County on a charge unrelated to this case. The same attorney represented Vigil in both cases. Defense counsel knew that Vigil's shoes and the photographs of the shoeprints associated with this case had been sent to the CBI for analysis. Before trial, defense counsel requested that the prosecution disclose the results. No further discussion of the CBI's analysis occurred until trial.

¶ 47 During direct examination at trial, Sergeant Crown testified about his observations of the distinctive pattern of the shoeprints he found in the lean-to, including the word "Skechers" in the prints. He also explained that he had photographed the shoeprints "with and without scales," which were "ruler-looking things" used to show the relative size of the prints. Soon after taking the photographs, Sergeant Crown learned that Vigil had been arrested in Alamosa while wearing Skechers shoes. The sergeant then went to the Alamosa County Sheriff's Office and photographed Vigil's shoes "with and without a scale."

¶ 48 In response to the prosecutor's question about what Sergeant Crown had noticed about the shoes when he inspected them in

Alamosa, Sergeant Crown testified, "I noticed that the soles of the shoes visually matched the –." Defense counsel objected and argued, "That's an opinion for an expert." After the trial court overruled the objection, Sergeant Crown testified, "The print of the shoes visually matched the prints that were out on scene [in the lean-to]."

¶ 49 Next, Sergeant Crown began testifying to his retrieval of Vigil's shoes from the Alamosa County Sheriff's Office a few days before trial. As part of this effort, he had obtained a document that referenced the earlier request that the CBI test the shoeprints and shoes (but the document did not reveal any results). Defense counsel requested a bench conference, and the jury was excused. In response to the court's inquiry, Sergeant Crown revealed that he had recently learned that the CBI's analysis of the shoeprints was "inconclusive." Defense counsel asserted that he had not received a copy of the CBI's report. As a result, defense counsel asked the court to suppress the evidence of the shoes and shoeprints as a sanction for the discovery violation. The prosecutor explained that he had not known of the CBI's report until Sergeant Crown mentioned it in response to the court's question.

¶ 50 The trial court indicated that it would not exclude this evidence. Instead, the court suggested that the parties deal with the issue through: (1) a stipulation that the CBI's investigation was inconclusive; (2) presentation of the CBI analyst's testimony by telephone; or (3) presentation of in-person testimony of the CBI analyst after a recess to allow her to travel to Conejos County.

¶ 51 After the parties recessed to discuss these options, the prosecutor informed the court that he had just spoken with an Alamosa prosecutor and had learned that the CBI report was previously disclosed to the same defense counsel in connection with Vigil's Alamosa case.[5] Defense counsel did not deny that he might have received the CBI report in Vigil's Alamosa case. But counsel explained that he had not yet reviewed the discovery in that case.

¶ 52 Ultimately, the court denied the motion to suppress the shoeprint and shoe evidence. After noting that the CBI report was

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[5] Although both Alamosa County and Conejos County are within the Twelfth Judicial District (and thus under the authority of the same district attorney), different prosecutors handled the Alamosa case and this case. As for the contents of the report, the prosecutor here explained that the CBI's investigation was inconclusive due to the absence of a cast of the footprints as well as the CBI's view that the photographs of the footprints were of insufficient quality.

exculpatory, the court advised the parties that they could address the report "however you want to explore it, through [Sergeant Crown] or by stipulation or however you want to do it." The prosecutor responded that the report could be explored through Sergeant Crown's testimony without a stipulation, and the prosecutor requested time to confer with defense counsel. After that conference, the prosecutor, without further comment from defense counsel, questioned Sergeant Crown about the CBI report in front of the jury. The sergeant testified that the results of the CBI's analysis of the shoeprints "came back inconclusive."

¶ 53 Using photographs of the shoeprints, Vigil's actual shoes, and the "scales" (all of which were admitted into evidence), Sergeant Crown further explained to the jury the basis for his comparison of the shoeprints and the shoes. He identified the "similar size" and "similar characteristics" of the shoeprints and the shoes, including various distinctive marks such as the "Skechers" emblem in both. He concluded, "[I]t appears to visually be a match."

¶ 54 On cross-examination, Sergeant Crown testified that, when he collects evidence that he wishes to be examined "scientifically," he sends it to the CBI because the CBI has specialized technicians and

specialized equipment. He agreed that the CBI has "more means than the Conejos County sheriff's office or the Alamosa County sheriff's office to examine and match fingerprints, DNA, [and] shoe prints." Sergeant Crown also agreed that, according to the CBI report, the shoeprints and Vigil's shoes "could not be scientifically matched beyond a reasonable doubt."

B. Sergeant Crown's Shoeprint Testimony: Lay or Expert Opinion?

¶ 55 To reiterate, Vigil contends that Sergeant Crown's testimony about his shoeprint comparison was improperly admitted because it was expert testimony masquerading as lay opinion. We disagree that Sergeant Crown's testimony was expert testimony.

1. Standard of Review and Preservation

¶ 56 We review a trial court's evidentiary rulings for an abuse of discretion. *People v. Hard*, 2014 COA 132, ¶ 22. A court abuses its discretion if its decision is manifestly unreasonable, arbitrary, or unfair. *Id.*

¶ 57 Vigil argues that, if we discern error, we should review it under the constitutional harmless error standard. The People contend that, because Vigil did not argue in the trial court that the

admission of this evidence violated his constitutional rights, we should review for ordinary harmless error. Because we discern no error, we need not resolve this dispute.

2. Analysis

¶ 58 CRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

¶ 59 A law enforcement officer's testimony is not admissible under CRE 701 if it is based on specialized training and education in addition to his or her own perceptions, observations, and experiences. *See People v. Mollaun*, 194 P.3d 411, 419 (Colo. App. 2008). If, however, the officer's opinion "could be reached by an ordinary person based on a process of reasoning familiar in everyday life, it is admissible as lay opinion evidence" under CRE 701. *Id.*

¶ 60 Sergeant Crown was not qualified as an expert before testifying that, in his view, the shoeprints in the lean-to appeared to "visually match" Vigil's shoes in light of their similar size and distinctive characteristics. This case thus presents a novel question in Colorado: may a lay witness testify as to the substantial similarity between shoeprints found in connection with a crime and the defendant's shoes? We answer that question "yes" so long as the testimony falls within the limits discussed below.

¶ 61 The great weight of authority from other jurisdictions holds that a lay witness may testify as to the similarity between shoeprints found in connection with a crime and the shoes of the defendant or other witness. *See, e.g.*, *Moore v. State*, 915 S.W.2d 284, 295 (Ark. 1996); *People v. Maglaya*, 6 Cal. Rptr. 3d 155, 158 (Cal. Ct. App. 2003); *White v. State*, 375 So. 2d 622, 623 (Fla. Dist. Ct. App. 1979); *D'Antignac v. State*, 233 S.E.2d 206, 207 (Ga. 1977); *People v. Lomas*, 416 N.E.2d 408, 410 (Ill. App. Ct. 1981); *State v. Norris*, 768 P.2d 296, 305-06 (Kan. 1989); *Richards v. Commonwealth*, No. 2006-SC-000733-MR, 2007 WL 4462348, at *1-2 (Ky. 2007) (unpublished opinion); *State v. Haarala*, 398 So. 2d 1093, 1098-99 (La. 1981); *State v. McInnis*, 988 A.2d 994, 995-96

(Me. 2010); *Hutt v. State*, 523 A.2d 643, 645-47 (Md. Ct. Spec. App. 1987); *State v. Walker*, 319 N.W.2d 414, 417-18 (Minn. 1982); *State v. Johnson*, 576 A.2d 834, 851 (N.J. 1990); *State v. Rondeau*, 553 P.2d 688, 697-99 (N.M. 1976); *State v. Pratt*, 295 S.E.2d 462, 465-66 (N.C. 1982); *State v. Jells*, 559 N.E.2d 464, 470-72 (Ohio 1990); *Frederick v. State*, 37 P.3d 908, 937-38 (Okla. Crim. App. 2001); *Alcala v. State*, ___ S.W.3d ___, ___, 2013 WL 6053837, at *21 (Tex. App. 2013). Vigil points to no contrary authority, and we have found none.

¶ 62 The rationale underlying these decisions is that "shoeprint patterns are often 'readily recognizable and well within the capabilities of a lay witness to observe.'" *Johnson*, 576 A.2d at 851 (internal quotation marks omitted). This rationale is consistent with the test for admitting lay opinion testimony in Colorado. *See* CRE 701; *Mollaun*, 194 P.3d at 419. Therefore, in accord with the decisions in other jurisdictions, we hold that a lay witness may express his or her opinion as to the similarities of shoeprints and shoes "if it can be shown that his or her conclusions are based on measurements or peculiarities in the prints that are readily recognizable and within the capabilities of a lay witness to observe."

Jells, 559 N.E.2d at 471. "This means that the print pattern is sufficiently large and distinct so that no detailed measurements, subtle analysis or scientific determination is needed." *Id.*; *see Hutt*, 523 A.2d at 645-46; *Johnson*, 576 A.2d at 851; *see also State v. Winters*, ___ P.3d ___, ___, 2015 WL 2358570, at *3 (N.M. Ct. App. 2015).

¶ 63 In this case, Sergeant Crown's testimony was based on general measurements and peculiarities common to the shoeprints and Vigil's shoes that were readily recognizable to a lay witness. The "scales" showed that the shoeprint and the shoes were generally the same size, and Sergeant Crown described the large and distinctive characteristics shared by the shoeprints and the shoes (e.g., the Skechers emblem). Although he testified that he had been in law enforcement for eleven years and had received training in evidence collection, he did not testify that he had received specialized training in shoeprint identification. Thus, his opinions were not based on specialized training, subtle analysis, or a scientific determination. The sergeant's opinions were merely based on his perceptions and "could be reached by an ordinary person based on a process of reasoning familiar in everyday life." *Mollaun*, 194 P.3d

at 419; *cf. People v. Garcia*, 784 P.2d 823, 825-26 (Colo. App. 1989) (permitting a police officer with fourteen years of law enforcement experience and previous work investigating specific types of burglaries to testify as a lay witness after establishing the opinions were based on his own perceptions).

¶ 64 Indeed, Vigil agrees that "an ordinary person could look at the shoes and the photographs of the footprints found at the scene to see if they looked generally similar." Vigil maintains, however, that Sergeant Crown's conclusion that they appeared to "visually match" was expert testimony. We disagree. We have found no authority holding that the use of the term "match" or similar description transforms lay testimony about shoeprint comparison into expert opinion. To the contrary, there is much authority upholding the admission of such lay testimony. *See Moore*, 915 S.W.2d at 295 (lay testimony that "the sole of the appellant's athletic shoe matched the shoe print found on the center of the victim's bedroom floor"); *People v. Lucero*, 75 Cal. Rptr. 2d 806, 809 (Cal. Ct. App. 1998) (lay testimony that shoeprints "appeared to be the same" as the defendant's shoes); *Richards*, 2007 WL 4462348, at *1-2 (lay testimony that the shoeprints were made by the defendant's boots);

McInnis, 988 A.2d at 995-96 (lay testimony that "McInnis's shoes potentially matched shoeprints observed at the crime scene"); *Hutt*, 523 A.2d at 645-47 (lay testimony that, "from a visual inspection," two shoeprints were "identical" to each other); *Walker*, 319 N.W.2d at 417-18 (lay testimony that "the boots of defendant and his brother made the footprints which [the witness] observed and photographed at the scene of the theft"); *Pratt*, 295 S.E.2d at 465-66 (lay testimony that the defendant's shoes were the same shoes that made the prints at the crime scene); *Jells*, 559 N.E.2d at 470-72 (lay testimony that a shoeprint was made by the defendant's shoe and another shoeprint was made by the victim's shoe); *Frederick*, 37 P.3d at 937-38 (lay testimony that footprints and the defendant's shoes "appeared to me to be a match"); *Alcala*, ___ S.W.3d at ___, 2013 WL 6053837, at *21 (lay testimony "that the bloody shoeprint on the passenger-side doorstep of Alcala's father's white Dodge truck matched the shoes found in Alcala's bedroom").[6]

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[6] *Golob v. People*, 180 P.3d 1006 (Colo. 2008), cited by Vigil, is inapposite. There, the supreme court questioned whether a witness proffered as an expert in "sole impressions" was sufficiently qualified to give expert testimony on the issue. *Id.* at 1012. Here, however, Sergeant Crown was not offered as an expert in shoeprint

¶ 65 Accordingly, the trial court's finding that Sergeant Crown's testimony did not constitute expert opinion was not manifestly unreasonable, arbitrary, or unfair.

¶ 66 In the alternative, Vigil contends that, even if Sergeant Crown's testimony constituted lay opinion, it was still inadmissible because it was not helpful to the jury under CRE 701. Vigil argues that the sergeant was in no better position than the jurors to compare the shoeprints to the shoes. Because Vigil did not raise this objection in the trial court, we will reverse only if we discern error so egregious that it constitutes plain error. *See People v. Munoz-Casteneda*, 2012 COA 109, ¶ 39; *People v. Ujaama*, 2012 COA 36, ¶¶ 37-43.

¶ 67 We disagree that Sergeant Crown was in the very same position as the jurors. Unlike them, he personally observed the

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comparison and did not purport to be such an expert. Because his testimony was within the bounds of lay opinion, his qualifications as an expert were irrelevant. Similarly, although the supreme court in *Golob* mentioned the CBI's protocol for identifying when a shoeprint match is "highly probable or positive," the court did not hold that all testimony about a shoeprint match constitutes expert opinion. *See id.* at 1010.

shoeprints at the scene (in the lean-to).[7] *See Robinson v. People*, 927 P.2d 381, 384 (Colo. 1996) ("[W]e . . . hold that a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is *some basis* for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.") (emphasis added). In addition, Sergeant Crown's explanation of the basis for his opinion was helpful to the jury even if the jury could have undertaken the same analysis. *See Maglaya*, 6 Cal. Rptr. 3d at 158 (officer's lay testimony comparing shoes and prints was helpful to the jury, "since the jury would otherwise have to make its own tedious comparison of shoes and prints"); *Frederick*, 37 P.3d at 937 (lay testimony that shoeprints and shoes appeared to match was helpful to a determination of a fact in issue); *see also People v. Brown*, 731 P.2d 763, 765 (Colo. App. 1986) (lay testimony that paper and tape tears "matched" was helpful to the jury even though photographs of the tears were also given to the jury). Hence, we perceive no error,

[7] For example, Sergeant Crown testified that, when he first saw Vigil's shoes at the Alamosa County jail, he noticed that "[t]he print of the shoes visually matched the prints that were out on scene."

much less plain error, in the trial court's admitting Sergeant Crown's testimony under CRE 701.

C. Sanction for Failure to Disclose CBI Report

¶ 68 Vigil maintains that the trial court reversibly erred when it declined to suppress the shoes and shoeprint evidence as a sanction for the prosecution's failure to disclose before trial the CBI report indicating that its analysis of this evidence was inconclusive.

1. Standard of Review

¶ 69 "We review for an abuse of discretion a trial court's resolution of discovery issues and its decision whether to impose sanctions for discovery violations." *People v. Acosta*, 2014 COA 82, ¶ 10. "Absent a showing of prejudice resulting from the discovery violation, there is no reversible error." *Id.* at ¶ 16.

2. Applicable Law and Analysis

¶ 70 The prosecution shall make available to the defense "[a]ny reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons." Crim. P. 16(I)(a)(1)(III). A prosecutor's obligation to disclose extends to "material and information in the possession or control of . . . any

[person] who ha[s] participated in the investigation." Crim. P. 16(I)(a)(3).

¶ 71 Assuming a discovery violation occurred here, we do not detect an abuse of discretion or prejudice requiring reversal. As discussed, the jury learned of the CBI report through Sergeant Crown's testimony. On cross-examination, for instance, Sergeant Crown testified that the shoes and the shoeprints "could not be scientifically matched beyond a reasonable doubt" by the CBI. And defense counsel reiterated the CBI's conclusion in his closing statement when he told the jury that the shoeprints "were not positively identified by" the agency.

¶ 72 Nonetheless, Vigil maintains that he suffered prejudice because, "[i]f defense counsel had been aware of this report prior to trial, he could have called the CBI agent as an expert witness or found another expert to testify in support of the CBI's conclusion." Vigil claims that "the in-person testimony of an expert would have been much stronger than [Sergeant] Crown's testimony on the matter." At trial, however, defense counsel did not pursue calling the CBI analyst as a witness, even though the trial court identified that option and allowed the parties to address the report "however

[they] want to do it." Instead, defense counsel apparently acquiesced in the prosecutor's suggestion to address the CBI report through Sergeant Crown's testimony.

¶ 73 We are mindful of our supreme court's declaration that "[i]f at all possible, a trial court should avoid excluding evidence as a means of remedying a discovery violation because the attendant windfall to the party against whom such evidence would have been offered defeats, rather than furthers, the objectives of discovery." *People v. Lee*, 18 P.3d 192, 197 (Colo. 2001). Because the jury heard the CBI's determination, because the defense did not request a continuance or other such relief, and because there was no finding that any discovery violation was willful, the trial court did not abuse its discretion in declining to suppress the evidence. *See id.* ("[A]ny prejudice resulting from a violation should be cured by a less severe sanction, such as a continuance, whenever possible."); *Rondeau*, 553 P.2d at 697-98 (discerning no reversible error where the defendant first learned at trial of an FBI report indicating that it could not positively identify footprints as those of the defendant).

¶ 74 Furthermore, we are not convinced that any incremental difference between the jury's hearing the same information from an

expert rather than from Sergeant Crown was so great as to require reversal. *Cf. People v. Grant*, 174 P.3d 798, 812 (Colo. App. 2007) ("The jury has the authority to accept or reject expert opinions and determine the facts from the evidence."). Accordingly, the discovery violation did not result in reversible error. *See Acosta*, ¶ 16.

VI. Cumulative Error

¶ 75 We reject Vigil's contention that his convictions should be reversed because the cumulative effect of the trial court's alleged errors deprived him of a fair trial.

¶ 76 "The doctrine of cumulative error requires that numerous errors be committed, not merely alleged." *People v. Rivers*, 727 P.2d 394, 401 (Colo. App. 1986). We have rejected most of Vigil's allegations of error. And the few errors we have either found or assumed — even if considered cumulatively — did not deprive him of a fair trial.

VII. Value of the Stolen Truck

¶ 77 Finally, Vigil argues that the evidence did not support the jury's finding that the stolen truck was worth at least $1000. We do not agree.

A. Standard of Review

¶ 78 We review de novo whether the evidence was sufficient to sustain a conviction. *People v. Brown*, 2014 COA 130M, ¶ 38. In this review, we must determine whether any rational trier of fact could accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of the defendant's guilt beyond a reasonable doubt. *People v. Sprouse*, 983 P.2d 771, 777 (Colo. 1999). Accordingly, the prosecution is given the benefit of every reasonable inference fairly drawn from the evidence. *People v. Vecellio*, 2012 COA 40, ¶ 12.

B. Applicable Law and Analysis

¶ 79 Aggravated motor vehicle theft is a class six felony "if the value of the motor vehicle . . . involved is one thousand dollars or more but less than twenty thousand dollars." § 18-4-409(4)(b).

¶ 80 When the value of the item stolen determines the grade of the offense, the prosecution must present competent evidence of the reasonable market value of the item at the time of the offense. *People v. Jensen*, 172 P.3d 946, 949 (Colo. App. 2007). Market value is the price that "would be agreed on by a willing seller and a willing buyer under no compulsion to sell or buy." *People v.*

Henson, 2013 COA 36, ¶ 31. An owner is always competent to testify as to the value of his property. *People v. Moore*, 226 P.3d 1076, 1084 (Colo. App. 2009).

¶ 81 Caldon testified that, if he were "going to buy or purchase [the truck, he] would give a thousand dollars for it." On redirect, the prosecution asked:

> [Prosecution]: And it's my understanding that the 1993 Toyota pickup truck that we've had so much discussion about, that you made a valuation here today of $1000. Is that fair? Maybe it is more than that?
>
> [Caldon]: It could be less though.
>
> [Prosecution]: Certainly. So if we indicate about a thousand dollars, is that stretching the truth in one way or another?
>
> [Caldon]: I don't feel like it's stretching the truth, no.

¶ 82 Giving the prosecution the benefit of every reasonable inference to be drawn from this testimony, this evidence was sufficient to permit the jury to find that the truck was worth $1000. In Caldon's testimony, he placed himself in the shoes of a willing buyer and explained he would pay $1000 for his truck, which was competent evidence of market value. *See Henson*, ¶ 31.

¶ 83 This case is distinguishable from *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968), on which Vigil relies. In that case, the evidence showed only that the money taken was "in the vicinity of $50." *Id.* at 431, 444 P.2d at 277. No evidence showed that the value taken was *more than* $50, a requirement for grand larceny at the time.[8] In contrast, Caldon testified that he would pay $1000 for the truck and that such a price was not "stretching the truth." Therefore, although it is a close question, we conclude that the jury was presented with sufficient evidence to find that the value of the truck was at least $1000. *See People v. Robinson*, 226 P.3d 1145, 1154 (Colo. App. 2009) ("[W]here reasonable minds could differ, the evidence is sufficient to sustain a conviction.").

VIII. Conclusion

¶ 84 The judgment is affirmed.

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[8] We also observe that *Henson v. People*, 166 Colo. 428, 444 P.2d 275 (1968), was decided before our supreme court adopted the "substantial evidence" test for assessing sufficiency claims in *People v. Bennett*, 183 Colo. 125, 131, 515 P.2d 466, 469 (1973). *Bennett* abandoned a stricter test under which the court would analyze whether the evidence permitted the jury to find beyond a reasonable doubt "that the circumstances are such as to exclude every reasonable hypothesis of innocence." *People v. Gonzales*, 666 P.2d 123, 127 (Colo. 1983).

JUDGE BERGER concurs.

JUDGE LICHTENSTEIN dissents.

JUDGE LICHTENSTEIN dissenting.

¶ 85 I respectfully dissent from Part II.B. of the majority opinion which affirms the trial court's denial of the challenge for cause to Juror C.A., who served on the jury as its foreperson.

¶ 86 This case is among the first generation of post-*Novotny* cases addressing actual Sixth Amendment violations of the right to a fair and impartial jury which, as recognized by our supreme court, "rise to the level of structural error." *People v. Novotny*, 2014 CO 18, ¶ 23.

¶ 87 I depart from the majority's affirmance because Juror C.A. never expressed a belief that he could — or a commitment that he would try to — render a fair and impartial verdict. Indeed, when directly asked whether he could render an impartial verdict, Juror C.A. said, "I don't know."

¶ 88 Juror C.A. stated that he has done "quite a bit of work for the [victim's family], for [the victim] and [his father]" and has "gotten along great with them for years and years; and actually, I did — they would go out there and we would meet. It's all in the line of business, but it was personal. I mean, it is business." He acknowledged that he may be doing future business with "the dad"

and that "I do stop and visit with [the victim's father] every once in a while." Based on this relationship with the victim's family, Juror C.A. was unable to assure the court and the parties that he could be fair and impartial to both sides. He stated, "I don't know" when directly asked whether he could "render an impartial verdict," despite his stated desire to be able to do so. He added that "I know the people. I really do. I don't know the defendant here."

¶ 89 Juror C.A. made these statements evincing his actual bias *after* the trial court and the lawyers had already discussed the concepts of the presumption of innocence, a defendant's right not to testify, and the prosecution's burden to prove guilt beyond a reasonable doubt. *Cf. People v. Lefebre,* 5 P.3d 295, 301 (Colo. 2000) ("[A] potential juror can sometimes set aside her actual bias because of what the juror learns during the voir dire process about such concepts as burden of proof or presumption of innocence."), *overruled on other grounds by Novotny*.

¶ 90 Defense counsel challenged Juror C.A. for cause because these statements evidenced that "he's not completely unbiased or prejudiced in making an ultimate determination."

¶ 91 In an attempt toward rehabilitative questioning, the court asked Juror C.A. whether he could "evaluate [the victim's] testimony "just the same as the testimony of all the other witnesses." When Juror C.A. answered, "I think I could," the court immediately denied the challenge for cause.

¶ 92 But this incomplete inquiry did not resolve the fundamental question whether Juror C.A. ultimately could set aside his declared doubt as to *his ability to impartially render a verdict*, especially given his potential for conducting future business with the victim's family members. Juror C.A. never expressed a commitment to try to follow the instructions of law, hold the prosecution to its burden of proof, and be fair and impartial to both sides in rendering his ultimate verdict. On this essential issue, the record reflects only that Juror C.A. doubted his ability to do so.

¶ 93 Because Juror C.A. was ultimately seated on the jury, Vigil's right to a fair trial was violated. *See Morrison v. People,* 19 P.3d 668, 671 (Colo. 2000); *see also Novotny,* ¶ 23 n.1. I would accordingly reverse Vigil's conviction and remand the case to the trial court for a new trial.