

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
November 15, 2018

2018COA156

No. 14CA2271, *People v. Sandoval* — — Criminal Law — Parties to Offenses — Complicity; Evidence — Demonstrative Evidence — Admissibility

A division of the court of appeals considers whether the United States Supreme Court's holding in *Rosemond v. United States*, 572 U.S. 65 (2014) — which requires the jury to determine whether an alleged felony complicitor knew in advance of the occurrence of a predicate felony that another participant intends to commit — applies to complicity crimes charged under Colorado's complicity statute, § 18-1-603, C.R.S. 2018. In a felony murder trial, the district court declined to instruct the jury in accordance with the advanced knowledge component set forth in *Rosemond*. The division concludes that the instruction was appropriate in not including the proffered temporal element because the Supreme

Court's reasoning in *Rosemond* does not apply to Colorado's complicity statute.

Additionally, the division rejects the defendant's contention that the prosecution's use of a demonstrative aid to provide a partial reconstruction of the crime scene violated the defendant's right to a fair and impartial jury. In doing so, the division determines that, because the demonstrative aid was authentic, relevant, fairly representative, and not unduly prejudicial, it was appropriately admitted.

The division also dismisses the defendant's claims that the prosecution violated his constitutional right to a fair and impartial jury by misstating the concept of complicity.

Accordingly, the division affirms the judgment.

Court of Appeals No. 14CA2271
Jefferson County District Court No. 13CR2847
Honorable Stephen M. Munsinger, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Floyd Sandoval,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE TAUBMAN
Terry and Fox, JJ., concur

Announced November 15, 2018

Cynthia H. Coffman, Attorney General, Grant R. Fevurly, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Anne T. Amicarella, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Floyd Sandoval, appeals the judgment of conviction entered on jury verdicts finding him guilty of felony murder, aggravated robbery, and menacing.¹ We affirm.

¶ 2 He contends that the trial court violated his constitutional right to due process when it declined to instruct the jury in accordance with *Rosemond v. United States*, 572 U.S. 65 (2014), that an alleged felony murder complicitor must know in advance of the occurrence of the predicate felony that another participant intends to commit. We conclude that *Rosemond* does not apply to Colorado's complicity statute. Sandoval also asserts the trial court violated his constitutional rights to a fair trial and impartial jury when it allowed the prosecutor to use a partial reconstruction of the crime scene as a demonstrative aid, and the prosecutor committed misconduct by misstating the law of complicity as well as key evidence to undermine the defense.

¹ Sandoval does not challenge his convictions for two counts of accessory to crime and one count of conspiracy to distribute marijuana.

I. Background

¶ 3 On October 17, 2013, Alicia Brown had agreed to sell her friend, John Goggin, five pounds of marijuana, which he intended to sell to Sandoval. Before Sandoval's arrival, Brown delivered two boxes containing the marijuana to the small, detached garage next to New Age Medical marijuana dispensary where Goggin and his girlfriend resided. The boxes were left inside with Goggin's girlfriend while Brown and Goggin waited outside for Sandoval.

¶ 4 Sandoval arrived carrying a satchel over his shoulder, accompanied by his cousin, Jose Palacios. Sandoval asked if Palacios could join them in the garage, stating that he was also involved in the deal. Goggin did not object, so the four of them entered the garage where Goggin's girlfriend sat on the far edge of the bed.

¶ 5 What took place in the garage is disputed, but the prosecution relied on the following evidence to support its case against Sandoval. Once inside the garage, Sandoval asked Palacios to close the door to the garage. Sandoval pulled money from his satchel and Goggin responded to Sandoval by stating the price for the marijuana. Sandoval then reached inside his satchel, and pulled

out a revolver, which he pointed at Goggin and said, “Don’t say anything.” Simultaneously, Palacios pushed Brown to the ground and held her down with a gun pointed at her head. Goggin retrieved his gun from the bed, at which point Palacios and Sandoval told Goggin to surrender the marijuana. Goggin and Sandoval struggled as they each attempted to grab the other’s hand. During the chaos, four shots were fired, and Palacios released Brown as he rushed to Goggin. Palacios held Goggin down until he stopped breathing, he then grabbed the marijuana and ran to the car where Sandoval was waiting.

¶ 6 Sandoval and Palacios sped away, and shortly thereafter, Sandoval was treated at St. Anthony’s North hospital for a leg injury.

¶ 7 Goggin sustained three bullet wounds, and a forensic pathologist determined that the fatal shot to his abdomen was fired from a gun held between six and thirty-six inches away from him. Cell phone records uncovered by investigators showed multiple phone calls between Sandoval and Palacios before their arrival at Goggin’s residence.

¶ 8 Sandoval stood trial for six counts — one count of murder in the first degree, two counts of aggravated robbery, two counts of accessory to crime, and one count of felony menacing. A lesser non-included count of conspiracy to commit distribution of marijuana was added by the trial court, at Sandoval’s request. At trial, Sandoval argued that he did not intend to rob or kill Goggin; therefore, he was not guilty of first degree murder. Further, he contended that he did not know Palacios intended to rob or kill Goggin. The jury found Sandoval guilty of all charges except for one charge of aggravated robbery, and he was sentenced to life without the possibility of parole in the custody of the Department of Corrections.

II. Jury Instructions

¶ 9 Sandoval contends that the trial court violated his right to due process by failing to extend the holding in *Rosemond* — requiring an alleged complicitor to have known that the other participant intended to commit the predicate felony before its commission — to

Colorado's complicity statute.² Sandoval alleges that, because he was unaware of Palacios's intent to rob and kill Goggin before the crimes occurred, he is not guilty of robbery and felony murder.³ We disagree.

A. Relevant Facts

¶ 10 At trial, Sandoval tendered a jury instruction based on *Rosemond*, which stated as follows:

An individual cannot be found guilty to a crime based on the actions of another after the crime is committed. However, an individual who becomes aware of a crime after its commission and renders assistance may be criminally liable for the crime of Accessory as defined in Instructions __ and __.

The trial court declared that this proffered instruction was clear as to complicity, but it rejected Sandoval's proposed instruction and provided the jury with the following complicity instruction:

² Sandoval presents conflicting arguments, alleging first that the court *must* apply a temporal element but later suggesting that the trial court *should have* adopted this element. For purposes of this opinion, we assume Sandoval intended to argue that the court must apply a temporal element in instructing a jury under the Colorado complicity statute.

³ It is undisputed that Sandoval carried a gun to Goggin's garage; this was evidence which the jury could have reasonably considered to determine that he had the intent to rob and possibly kill Goggin.

Complicity is not a separate crime. Rather, it is a legal theory by which one person may be found guilty of a criminal offense that was committed in whole or in part by another person.

To be found guilty as a complicitor, the prosecution must prove each of the following circumstances beyond a reasonable doubt:

1. A robbery must have been committed.
2. Another person must have committed all or part of the robbery.
3. Floyd Sandoval must have had knowledge that the other person intended to commit all or part of the robbery.
4. Floyd Sandoval must have aided, abetted, advised, or encouraged the other person in planning or committing the robbery.

Sandoval argued that the complicity instruction provided did not accurately define the law because it did not include the temporal element required by *Rosemond*.

B. Standard of Review

¶ 11 We review a trial court's ruling on a jury instruction for abuse of discretion; however, we review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. McClelland*, 2015 COA 1, ¶ 14, 350 P.3d 976, 980.

C. Applicable Law

¶ 12 The trial court must properly instruct the jury on all matters of law to enable the jury to determine whether the prosecution met its burden to prove every element of the charged offenses beyond a reasonable doubt. *See Griego v. People*, 19 P.3d 1, 7 (Colo. 2001); *People v. Alvarado*, 284 P.3d 99, 101 (Colo. App. 2011).

¶ 13 Elemental instructions that substantially track the language of the controlling statute are generally sufficient and proper. *Alvarado*, 284 P.3d at 101. A defendant is entitled to a jury instruction on his or her theory of the case; however, a trial court does not err in refusing to give a defense theory instruction when the contents of that instruction are already encompassed in other instructions. *People v. Tippett*, 733 P.2d 1183, 1195 (Colo. 1987). We ensure the jury was aware of the defendant's theory of defense by considering all instructions together. *Id.*

¶ 14 The Supreme Court's decision in *Rosemond* concerned the interpretation of 18 U.S.C. § 924(c) (2018), a federal statute criminalizing using or carrying a firearm during any crime of violence or drug trafficking crime. 572 U.S. 65. The Court interpreted this statute to include a temporal element, concluding

that, to be found guilty of aiding and abetting under § 924(c), a defendant must have “advance knowledge that a confederate would use or carry a gun during the crime’s commission.” *Id.* at 67. The Court stated, “a person who actively participates in a criminal scheme knowing its extent and character intends that scheme’s commission.” *Id.* at 77. It derived this interpretation from the language of the federal complicity statute, which states, in relevant part, “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C. § 2(a) (2018).

¶ 15 Colorado’s complicity statute holds a defendant liable for the crimes of another “if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.” § 18-1-603, C.R.S. 2018. The supreme court — in *People v. Wheeler*, *Bogdanov v. People*, and *Grissom v. People* — initially interpreted the statute to require the finding of a dual mental state in order to convict a defendant. The requisite mental state included the “culpable mental state required for the underlying crime committed by the principal,” as well as acts coupled with intent to

assist or encourage the commission of the crime. *Grissom v. People*, 115 P.3d 1280, 1284-85 (Colo. 2005) (quoting *Bogdanov v. People*, 941 P.2d 247, 250 (Colo. 1997), *disapproved of on other grounds by Griego*, 19 P.3d 1); see *People v. Wheeler*, 772 P.2d 101 (Colo. 1989); see also *Alvarado*, 284 P.3d at 101.

¶ 16 A decade after the *Grissom* decision reaffirmed the dual mental state required to convict a defendant under Colorado’s complicity statute, the supreme court clarified the twofold mental state requirement to include “an awareness of sufficient attendant circumstances.” *People v. Childress*, 2015 CO 65M, ¶ 33, 363 P.3d 155, 165. In *Childress*, the supreme court examined the history of Colorado’s complicity statutes, and based on that review, extended complicitor liability to strict liability offenses. It concluded that

section 18-1-603 therefore dictates that a person is legally accountable as a principal for the behavior of another constituting a criminal offense if he aids, abets, advises, or encourages the other person in planning or committing that offense, and he does so with: (1) the intent to aid, abet, advise, or encourage the other person in his criminal act or conduct, and (2) an awareness of circumstances attending the act or conduct he seeks to further, including a required mental

state, if any, that are necessary for commission of the offense in question.⁴

Id. at ¶ 34, 363 P.3d at 165.

D. Analysis

¶ 17 The above cases interpreting Colorado’s complicity statute have not imputed a temporal element to the dual mental state required, and we do not attribute such a standard to section 18-1-603. Sandoval urges us to apply *Rosemond* to Colorado’s complicity statute; however, due to differences between the federal and state statutes, we decline to do so. The *Rosemond* court relied on language in the federal aiding and abetting statute which is not present in Colorado’s complicity statute. Thus, we discern no reason to conclude that the holding in *Rosemond* must apply to section 18-1-603.

¶ 18 Further, a division of our court previously declined to read a temporal element into Colorado’s complicity statute, stating that even “roughly contemporaneous knowledge by the complicitor of the principal’s intent is sufficient.” *Alvarado*, 284 P.3d at 103.

⁴ Because felony murder is a strict liability crime, *Childress* applies to Sandoval’s felony murder conviction. See *People v. Fisher*, 9 P.3d 1189, 1191 (Colo. App. 2000).

¶ 19 In addition, several state courts have declined to apply *Rosemond* to state criminal laws regarding aiding and abetting. See *State v. Ward*, 473 S.W.3d 686, 693 (Mo. Ct. App. 2015) (stating that “[n]othing in *Rosemond*” suggests that its holding rests on any constitutional requirement or has any application to state criminal laws on accomplice liability; rather, the Court’s analysis was merely a question of federal interpretation of the federal aiding and abetting statute”); see also *Hicks v. State*, 759 S.E.2d 509, 514 n.3 (Ga. 2014) (asserting that *Rosemond* interpreted federal law and does not apply to Georgia state criminal law).

¶ 20 Although Sandoval acknowledges that several states have not applied the temporal element announced in *Rosemond* to state statutes, he contends that “nothing *bars* state courts from relying upon the analysis applied to federal statutes when interpreting the language of its own statutes.” Nevertheless, Sandoval does not cite any state cases which have applied the logic of *Rosemond* to state criminal laws. Instead, Sandoval relies on three federal cases adopting *Rosemond*. These three federal cases, *United States v. Nosal*, 844 F.3d 1024 (9th Cir. 2016), *United States v. Encarnacion-Ruiz*, 787 F.3d 581 (1st Cir. 2015), and *United States v. Goldtooth*,

754 F.3d 763 (9th Cir. 2014), are distinguishable because they apply the same federal complicity statute interpreted in *Rosemond* — 18 U.S.C. § 2 — to other federal statutes.

¶ 21 Thus, we are not convinced by Sandoval’s reasoning and note that, when state and federal statutes addressing the same subject are distinguishable, we are not bound to follow federal case law interpreting the federal statute. *See N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 906 (Colo. 1996). In fact, even if they were similar, “[n]either [the Supreme] Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.” *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

III. Partial Reconstruction of the Crime Scene

¶ 22 Sandoval contends that his right to a fair and impartial jury was violated when, over his objections, the trial court allowed the prosecutor to use a partial reconstruction of the crime scene as a demonstrative aid to assist witnesses in explaining their testimony. We disagree because we are persuaded by the reasoning in *People v.*

Palacios, 2018 COA 6M, ¶ 19, 419 P.3d 1014, 1018, which rejected a nearly identical argument.⁵

A. Relevant Facts

¶ 23 At trial, the prosecutor introduced a partial reconstruction of Goggin’s garage as a demonstrative aid to assist witness testimony. Defense counsel viewed the reconstruction before trial, and Sandoval raised multiple objections to its usage in the courtroom, contending that it was not a complete, fair, or accurate representation of the scene and — even if the prosecutor explained its inadequacies to the jury — the demonstrative aid would have undue influence on the jury. The prosecutor employed a criminalist to create the partial reconstruction, and the criminalist testified about his process in examining the crime scene, taking photographs and measurements of the garage, and using those references to create the demonstrative aid. The criminalist explained the reconstruction to the jury, using admitted photographs to compare the actual crime scene to the

⁵ The defendant in that case was Sandoval’s cousin, Jose Palacios, who was tried separately.

reconstruction. In doing so, he highlighted the variances in the reconstruction.

¶ 24 Sandoval objected to the use of the partial reconstruction, and the court overruled the objection, stating that Sandoval would have a “chance to cross-examine and challenge the crime scene investigator as to [the] correctness . . . of his measurements” before other witnesses testified. Despite this advisement by the court, Sandoval did not cross-examine the prosecution’s criminalist. Instead, Sandoval’s counsel used the partial reconstruction to show the jury the locations of handguns that had been recovered from the scene.

¶ 25 The prosecutor also utilized the partial reconstruction to facilitate Brown’s testimony as to where the five individuals were located within the garage on the day of the shooting. Defense counsel objected to members of the prosecution walking through the demonstrative aid to represent the five individuals, but the objection was overruled. However, defense counsel did not ask Brown about any inaccuracies of the partial reconstruction.

B. Standard of Review

¶ 26 The use of a demonstrative aid at trial is within the district court's discretion; thus, we review for an abuse of discretion and uphold the trial court's ruling unless it is manifestly arbitrary, unreasonable, or unfair, or when it is based on an erroneous understanding or application of the law. *See People v. Richardson*, 58 P.3d 1039, 1045 (Colo. App. 2002); *see also People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002).

C. Applicable Law

¶ 27 In *Palacios*, the division addressed a demonstrative aid that appears to have been substantially similar to this one and concluded that it could be used by the prosecution. The division acknowledged that admissible demonstrative aids can take a multitude of forms and may be used to illustrate a witness's testimony. *Palacios*, ¶ 19, 419 P.3d at 1018.

¶ 28 To determine admissibility, the court adopted a four-part test. *Id.* at ¶ 20, 419 P.3d at 1018. A demonstrative aid must (1) be authentic, meaning the proponent must demonstrate that the evidence is what it is purported to be; (2) "be relevant, meaning that it will assist the trier of fact in understanding other testimonial and

documentary evidence”; (3) be a “fair and accurate representation of the evidence to which it relates”; and (4) “not be unduly prejudicial, meaning its probative value must not be substantially outweighed by its danger for unfair prejudice.” *Id.* (citations omitted).

D. Analysis

¶ 29 We agree with the *Palacios* division’s decision and apply its four-part test. We first conclude that the partial reconstruction was authenticated by the prosecution’s criminalist, who measured and took photos of the crime scene to create the reconstruction. Second, the trial court properly concluded the demonstrative aid was relevant because it assisted the jury in understanding Brown’s testimony. Third, though the prosecution concedes that there were discrepancies in the partial reconstruction, those discrepancies were disclosed to the jury and Sandoval had an opportunity to cross-examine the prosecution’s criminalist about them. Thus, we conclude that the trial court did not abuse its discretion in determining that the reconstruction was a fair and accurate representation of the crime scene. Finally, we are not persuaded that the trial court improperly determined that the probative value

provided by the partial reconstruction was not substantially outweighed by its danger of unfair prejudice.

¶ 30 Accordingly, we conclude that the trial court did not abuse its discretion in allowing the use of the partial reconstruction to aid witness testimony.

IV. Prosecutorial Misconduct

¶ 31 Sandoval contends the prosecutor's closing argument misstated the concept of complicity. He also argues the prosecutor misstated evidence he presented. In doing so, Sandoval asserts that the prosecutor infringed on his constitutional right to a fair and impartial jury. We disagree.

A. Standard of Review

¶ 32 Because Sandoval did not object to the alleged prosecutorial misconduct, we review for plain error. *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005).

B. Applicable Law

¶ 33 When evaluating a claim of prosecutorial misconduct, we engage in a two-step analysis: "First, [we] must determine whether the prosecutor's questionable conduct was improper based on the totality of the circumstances and, second, whether such actions

warrant reversal according to the proper standard of review.” *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

¶ 34 “In determining whether prosecutorial misconduct mandates a new trial, an appellate court must evaluate the severity and frequency of misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to the defendant’s conviction.” *People v. Hogan*, 114 P.3d 42, 55 (Colo. App. 2004).

¶ 35 The prosecutor has wide latitude in closing arguments and may refer to any aspect of the admitted evidence and draw reasonable inferences thereon. *See People v. Rhea*, 2014 COA 60, ¶ 46, 349 P.3d 280, 291. However, the prosecutor may not use closing arguments to mislead or unduly influence the jury. *Domingo-Gomez*, 125 P.3d at 1049; *see also People v. Mason*, 643 P.2d 745, 752 (Colo. 1982) (stating that a prosecutor must avoid “arguments calculated to appeal to prejudices or to mislead the jury”).

¶ 36 If we do find misconduct, under the plain error standard, we inquire into whether the misconduct was obvious and undermined the fairness or integrity of the trial. *Domingo-Gomez*, 125 P.3d at

1053. “Only prosecutorial misconduct which is ‘flagrantly, glaringly, or tremendously improper’ warrants reversal.” *Id.* (quoting *People v. Avila*, 944 P.2d 673, 676 (Colo. App. 1997)).

C. Analysis

¶ 37 Sandoval argues that the prosecutor misrepresented the law of complicity during closing arguments by classifying Palacios and Sandoval as “teammates,” thus oversimplifying the complicity statute. We conclude that the use of the term “teammates” was an appropriate shorthand because it was not misleading and because the jury was provided an instruction explaining the statute more thoroughly.

¶ 38 Sandoval further contends that the prosecutor misstated evidence supporting his theory of the case. He argues that the prosecutor unfairly dismissed the possibility that Goggin was paranoid. He also argues that the prosecutor’s statement that “there is no evidence that the defendant knew that there was surveillance on that building” was inaccurate and, thus, undermined the defense’s theory that, because Sandoval knew of the video surveillance, it would have been foolish to plan to rob Goggin.

¶ 39 Given the wide latitude granted to the prosecutor in closing arguments, the trial court is best positioned to determine whether the prosecutor's conduct was improper considering contemporaneous circumstances. We conclude that the prosecutor's statements were fairly based on the evidence presented, and the inferences drawn were not inappropriate. We do not discern any flagrant, glaring, or tremendously improper conduct that would warrant reversal. *Domingo-Gomez*, 125 P.3d at 1053.

V. Conclusion

¶ 40 Accordingly, the judgment is affirmed.

JUDGE TERRY and JUDGE FOX concur.