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SUMMARY
July 26, 2018

2018COA102

No. 15CA0528, People v. Murray — Crimes — Trespass — Burglary

A division of the court of appeals holds that where the defendant was charged with trespass and burglary of an ex-girlfriend's residence and failed to present any evidence of a landlord-tenant agreement between them, he was not a tenant with a license to go into or remain in the ex-girlfriend's residence, even if he had stayed at the residence in the past. Thus, the ex-girlfriend could revoke any permission for the defendant to be on the premises at any time, and the defendant's failure to leave after she told him to do so could subject him to prosecution for trespass and burglary.

COLORADO COURT OF APPEALS **2018COA102**

Court of Appeals No. 15CA0528
La Plata County District Court No. 14CR124
Honorable William L. Herringer, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Michael Christane Murray,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE J. JONES
Ashby and Harris, JJ., concur

Announced July 26, 2018

Cynthia H. Coffman, Attorney General, Brenna A. Brackett, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Anne T. Amicarella, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 A jury found defendant, Michael Christane Murray, guilty of first degree burglary, trespass, third degree assault, false imprisonment, attempted sexual assault, attempted second degree burglary, and criminal mischief, all arising out of an incident occurring at the victim's home. Among the issues we address is whether any evidence was presented that defendant, the victim's former boyfriend, was a tenant of the victim's home so that his entry or remaining on the premises could've been lawful. We conclude that there wasn't. And because we reject defendant's other contentions of error, we affirm.

I. Background

¶ 2 Defendant's ex-girlfriend (the victim) asked him to come to her house to help with an errand. The couple had dated "on and off" for about two years, and defendant had stayed frequently at the house, but the two had broken up about two-and-a-half weeks earlier.

¶ 3 Defendant entered the victim's house, and the two got into an argument. The victim told defendant to leave. Defendant threatened the victim, ripped off her clothes, and tried to sexually assault her. At that moment, a friend of the victim showed up. Defendant chased him into the street. The victim locked the door

behind defendant and called 911. Defendant yelled at the victim to let him back in the house, but she refused. He then broke a window on the front door trying to get back inside the house.

II. Discussion

¶ 4 Defendant contends that the district court erred by (1) inaccurately and inadequately instructing the jury on the unlawfully entered or remained element of the burglary and trespass charges; (2) denying his motions for a judgment of acquittal based on insufficiency of the evidence; (3) ruling that if he introduced certain of his recorded statements pursuant to the doctrine of completeness, his credibility would be fair game for attack by the prosecution; and (4) ruling that the prosecution could use his Montana deferred judgment to impeach his credibility (both if he introduced the recorded statements and if he chose to testify). We address and reject these contentions in turn.[1]

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[1] Ordinarily, we would address defendant's contention regarding insufficiency of the evidence first because, if we conclude the evidence was insufficient (which we don't), then we would necessarily vacate the convictions. But because defendant's jury instruction argument presents a matter of first impression, we address it first.

A. The District Court Properly and Adequately Instructed the Jury Concerning “Entering or Remaining Unlawfully”

¶ 5 Defendant contends that the court provided an inaccurate instruction defining “enters unlawfully” and “remains unlawfully,” and that it abused its discretion by refusing his tendered instruction explaining those concepts.

1. Additional Background

¶ 6 The charges of first degree trespass and first and second degree burglary required proof that defendant “unlawfully” entered or remained on the victim’s premises. §§ 18-4-202(1), -203(1), -502, C.R.S. 2017.

¶ 7 For purposes of these offenses, “[a] person ‘enters unlawfully’ or ‘remains unlawfully’ in or upon premises when the person is not licensed, invited, or otherwise privileged to do so.” § 18-4-201(3), C.R.S. 2017. The court so instructed the jury. At the prosecutor’s request, and over defense counsel’s objection, the court also agreed to instruct the jury as follows, using language from *People v. Waddell*, 24 P.3d 3 (Colo. App. 2000):

> A previously granted invitation to enter or remain in a dwelling can be withdrawn at any time by the person with authority to grant the invitation. If a person refuses to leave the

> dwelling after the invitation to enter or remain is withdrawn by one with authority to grant the invitation, that person is thereupon remaining unlawfully after a lawful entry, so long as no other license or privilege to remain exists.

¶ 8 Defense counsel requested an additional instruction including the following language:

> A person is licensed, invited or otherwise privileged to enter or remain in or upon premises when he occupies that premises.
>
> Ownership of a property is irrelevant in determining whether a person had a license, invitation or privilege to enter or remain in or upon a premises.
>
> In order for a person to relinquish occupancy of a premises, such that he no longer has a license, invitation or is otherwise privileged to enter or remain in or upon those premises, both parties must have understood that the possessory interest of one party was being relinquished.

¶ 9 The basis for defense counsel's objection to the prosecutor's added instruction and for his requested instruction was his argument that defendant wasn't on the premises unlawfully because he lived there: defendant had moved all his clothing and most of his furniture into the victim's house; though defendant occasionally spent the night at his employer's house, he spent

"pretty much every night" leading up to the incident at the victim's house; defendant had a key; and defendant was "free to come and go as he pleased," even after the breakup. Essentially, counsel argued that there was evidence defendant had a possessory interest in the house that the victim wasn't free to revoke on the spot.

¶ 10 The court declined to give defense counsel's tendered instruction because there wasn't any evidence defendant had any right to stay at the house. To the contrary, the court ruled that the victim owned the house and could tell defendant to leave at any time: his presence at her invitation hadn't made him a "constructive tenan[t]."

2. Standard of Review

¶ 11 We review de novo whether a jury instruction correctly states the law. *People v. Robles-Sierra*, 2018 COA 28, ¶ 50. But we review for an abuse of discretion whether the district court erred in refusing to give a particular instruction. *Id.*

¶ 12 To the extent defendant's argument presents questions of statutory interpretation, we review such questions de novo. *Marsh v. People*, 2017 CO 10M, ¶ 19.

3. Analysis

a. The Court's Additional Instruction Accurately Stated the Law

¶ 13 Defendant doesn't direct us to any authority, nor are we aware of any, casting doubt on the correctness of the court's instruction that "a previously granted invitation to enter or remain in a dwelling can be withdrawn at any time by the person with authority to grant the invitation . . . [s]o long as no other license or privilege exists." Indeed, it seems to be an accurate statement of Colorado law. *See* § 18-4-201(3); *People v. Ager*, 928 P.2d 784, 790 (Colo. App. 1996) ("A person can be convicted of a burglary if previously granted permission to enter is withdrawn and the person enters or remains on the premises with the intent to commit a crime therein."). Instead, he argues that the language in this instruction "mirror[ed] the prosecution's argument that [someone in defendant's situation] has no possessory rights in the eyes of the law because that person's name is not on the mortgage or a written lease." But there's no such limiting language in the instruction. So this contention necessarily fails.[2]

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[2] In holding that the court's additional instruction accurately stated the law, we don't mean to hold that the court was required to give

b. The Court Didn't Abuse Its Discretion by Rejecting Defendant's Proposed Additional Instruction

¶ 14 Defendant's sole argument in this context is that because he was a tenant with a possessory interest in the premises, he was a "licensee" whose license the victim couldn't revoke without written notice. He seems to concede that if he wasn't a tenant, the victim could immediately revoke whatever license or privilege he had to be on the premises. We conclude that the linchpin of his argument — that he was a tenant — doesn't hold up. And because it fails, his claim of error in refusing the tendered instruction falls apart.

¶ 15 Defendant argues, relying primarily on various civil statutes,[3] that by moving into the victim's house for a time and helping to pay certain bills he became a tenant-at-will, and was therefore entitled to written notice before being evicted from the house (assumedly because the tenancy provided him with a license or privilege to

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it. *See People v. Pahl*, 169 P.3d 169, 183-84 (Colo. App. 2006) ("As a general rule, the use of an excerpt from an opinion in a jury instruction is an unwise practice because opinions and instructions have very different purposes."). At the same time, we recognize that the court's obligation to adequately instruct jurors on the applicable law may sometimes call for explanatory instructions tailored to particular factual and legal issues in the case.

[3] Defendant relies on the Premises Liability Act, § 13-21-115, C.R.S. 2017, and section 13-40-107, C.R.S. 2017.

remain). *See* § 13-40-107, C.R.S. 2017 (governing terminations of tenancies). It follows, he says, that he was lawfully on the premises because the victim didn't have the right to revoke his tenancy on the spot. But even assuming these civil statutes can apply in this criminal context, we conclude that defendant's argument mischaracterizes the nature of a tenancy-at-will.

¶ 16 "It is fundamental to the relationship of landlord and tenant that an estate pass to the tenant and that he achieve possession and control of such property." *Hoffman v. King Res. Co.*, 187 Colo. 300, 302, 530 P.2d 961, 962 (1975). Even a tenancy-at-will requires an agreement in which a landlord transfers possession to a tenant. *See* § 13-40-107(3) ("Any person in possession of real property with the assent of the owner is presumed to be a tenant at will until the contrary is shown."). Such a tenancy is characterized by an agreement for possession for an indefinite period of time and "the right of either party to terminate *the lease* at will." *Collins v. Shanahan*, 34 Colo. App. 82, 86-87, 523 P.2d 999, 1002 (1974) (emphasis added) (lease didn't create a tenancy-at-will when it provided that it would continue until terminated by lessees), *aff'd in*

part, rev'd in part on other grounds, 189 Colo. 169, 539 P.2d 1261 (1975).

¶ 17 There's no record evidence of a landlord-tenant agreement between the victim and defendant. Defendant had no lease or rental agreement with the victim, written or otherwise, and he didn't pay rent. *See* § 38-12-502(6), C.R.S. 2017 ("'Tenant' means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others."); *Maes v. Lakeview Assocs., Ltd.*, 892 P.2d 375, 377 (Colo. App. 1994) ("[I]n all landlord-tenant relationships, the 'landowner' is in the business of renting property. The tenant is a customer of the landlord in a continuing business relationship that is mutually beneficial."), *aff'd*, 907 P.2d 580 (Colo. 1995); Black's Law Dictionary 1694 (10th ed. 2014) (defining "tenancy" as "[t]he possession or occupancy of land under a lease; a leasehold interest in real estate"). And defendant's mere contributions to groceries and other bills didn't otherwise give him a leasehold interest. *See Maes*, 892 P.2d at 378 ("[T]he business relationship between the landlord and tenant is an adequate basis for distinguishing that relationship from that of a landowner and the landowner's social guest."); *Piotrowski v. Little*, 911 N.Y.S.2d

583, 585 (N.Y. City Ct. 2010) ("It is clear that a landlord-tenant relationship does not exist between the parties [who cohabitated for over a decade and dated for about nine years]. The respondent was not granted exclusive possession of the premises in exchange for rent, but rather received shared use and occupancy of the premises along with the petitioner.").

¶ 18 In arguing that he was indeed a tenant, defendant relies on two cases, *People v. Hollenbeck*, 944 P.2d 537 (Colo. App. 1996), and *Commonwealth v. Robbins*, 662 N.E.2d 213 (Mass. 1996), which involved spouses living in the same house. He says these cases "are meaningful here" because they "affect[] consideration" of whether he had a possessory interest in the victim's house.

¶ 19 In *Hollenbeck*, a division of this court considered whether an estranged spouse could be charged with burglary of the marital residence he'd recently occupied with his estranged wife. In answering "yes," it held that, in the absence of a restraining order or other grounds granting one spouse exclusive possession,

> the question whether one spouse has the sole possessory interest [in the marital residence] depends on whether the evidence shows that both parties had decided to live separately. Simply ordering a spouse out of the house and

> changing the locks does not establish this. Both parties must have understood that the possessory interest of one was being relinquished, even if such interest is relinquished begrudgingly or reluctantly.

Id. at 539. (Defendant derived the language of his proposed instruction from this passage.)

¶ 20 *Hollenbeck* tells us two things. First, it tells us, albeit by implication, that spouses are presumed to have equal possessory interests in a marital residence. But second, it tells us that this presumption may be overcome, and one spouse may be guilty of burglarizing a marital residence. This view is consistent with other courts' holdings. *See, e.g.*, *White v. State*, 587 So. 2d 1218, 1224-26 (Ala. Crim. App. 1990) (where spouses are living apart, and have communicated to each other an intent to do so, one spouse doesn't have a right to enter the marital residence occupied by the other without the other's consent); *People v. Gill*, 70 Cal. Rptr. 3d 850, 867-68 (Cal. Ct. App. 2008) (estranged wife exerted possessory control over family home to the exclusion of the defendant when he voluntarily left the house, returned his keys to her, and heeded her demands to stay out of the house, especially considering that the defendant had made prior threats to the safety of the victim and

there had been prior incidents of abuse); *Parham v. State*, 556 A.2d 280, 284-85 (Md. Ct. Spec. App. 1989) (conviction for burglary of marital residence upheld even though the defendant still had clothes in the dwelling); *State v. Machan*, 322 P.3d 655, 660-61 (Utah 2013) (insufficient evidence that husband had relinquished his possessory interest in the marital residence).

¶ 21 These cases, dealing as they do with spousal interests, are of no help to defendant. Nothing in the record indicates that his relationship with the victim or interest in the home was such that he presumably had an equal possessory interest. Whether defendant had any possessory interest in the house is questionable. But even if he had some such interest, it wasn't equal to the victim's and, perhaps more importantly, was subject to the victim's continuing consent. For that reason, courts in other jurisdictions refuse to recognize a sufficient possessory interest to defeat a burglary or trespass charge in circumstances like those in this case. *See, e.g.*, *Boulds v. Nielsen*, 323 P.3d 58, 64 (Alaska 2014) ("[S]imply living together is not sufficient to demonstrate intent to share property as though married."); *People v. Ulloa*, 102 Cal. Rptr. 3d 743, 749 (Cal. Ct. App. 2009) (the defendant had a legal interest in

a shared apartment under the lease but abandoned his possessory interest when he moved out after the couple's separation a few months before burglary); *Washington v. State*, 11 So. 3d 980, 981-82 (Fla. Dist. Ct. App. 2009) (formerly cohabiting unmarried woman had a superior interest in previously shared and co-leased premises to that of formerly cohabiting unmarried man when she changed the locks, requested that the landlord remove him from the lease, and the man moved his belongings out); *State v. Hagedorn*, 679 N.W.2d 666, 667 (Iowa 2004) ("[T]he mere fact that the defendant had previously resided at the residence in question with his family did not give the defendant an irrevocable 'right, license, or privilege' to enter the premises."); *State v. O'Neal*, 721 N.E.2d 73, 82 (Ohio 2000) (sufficient evidence of trespass where wife was the sole lessee under lease agreement for parties' home and the defendant had moved out of the house four days prior to the alleged crime and had begun living elsewhere); *Morgan v. State*, 501 S.W.3d 84, 89-92 (Tex. Crim. App. 2016) (evidence was sufficient to support the defendant's conviction for burglary when, although he lived with his girlfriend, she had the greater right to possession at the time of the commission of the offense and she had intentionally locked him out

of the apartment); *see generally* George L. Blum, Annotation, *Property Rights Arising From Relationship of Couple Cohabitating Without Marriage*, 69 A.L.R.5th 219 (1999) ("[A] man and a woman cohabiting [outside of marriage] do not acquire, by reason of such cohabitation alone, any rights in property accumulated in the name of the other.").

¶ 22 In reaching our conclusion, we find particularly persuasive the Iowa Supreme Court's observation that "[a]pplication of our burglary law in these circumstances will tend to discourage domestic violence and promote security in the home." *Hagedorn*, 679 N.W.2d at 669 (quoting *State v. Peck*, 539 N.W.2d 170, 173 (Iowa 1995)); *see also Gill*, 70 Cal. Rptr. 3d at 867-68.

¶ 23 The bottom line is that defendant wasn't a tenant and didn't have a possessory interest in the premises beyond that allowed by the victim. And so this isn't a case in which the court needed to provide the type of instruction defense counsel tendered.

B. The Evidence Supports Defendant's Convictions

1. Standard of Review

¶ 24 We review the record de novo to determine whether the evidence presented to the jury was sufficient, both quantitatively

and qualitatively, to support defendant's convictions. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). But reviewing de novo in this context doesn't mean that we reweigh the evidence from scratch, as if we are a second jury. Rather, we employ the now familiar substantial evidence test, which requires us to consider whether any rational trier of fact could regard 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). And so we must give the prosecution the benefit of every reasonable inference that may fairly be drawn from the evidence, *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005); *People v. Helms*, 2016 COA 90, ¶ 51, and we must leave to the jurors their assessments of witness credibility and conflicting evidence, *People v. Poe*, 2012 COA 166, ¶ 14.[4]

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[4] Because we don't conclude that the court erred in denying defendant's motions for a judgment of acquittal, we don't need to address the People's argument that defendant failed to adequately preserve this argument as to the burglary charges. Nor need we address whether we review any error for plain error.

2. Analysis

a. Evidence Supports the Jury's Finding that Defendant Entered or Remained Unlawfully With the Intent to Commit Another Crime

¶ 25 First, defendant contends that the jury couldn't have concluded that he knew that remaining in the victim's house after she demanded that he leave was unlawful or that he knew that his subsequent attempt to re-enter the house was unlawful, as required for the burglary charges. He says this is so because he had a key to the house, often slept there, kept belongings there, and paid for groceries and other things.

¶ 26 Defendant relies on a purported absence of direct evidence of his knowledge. In so doing, he minimizes the circumstantial evidence against him and overlooks reasonable inferences that may fairly be drawn from the evidence. *People v. Bennett*, 183 Colo. 125, 131, 515 P.2d 466, 469 (1973) (direct and circumstantial evidence have the same status under the substantial evidence test); *see also People v. Robinson*, 226 P.3d 1145, 1154 (Colo. App. 2009) ("[A] defendant's mental state may be inferred from his or her conduct and other evidence, including the circumstances surrounding the commission of the crime.").

¶ 27 We conclude that, from the following evidence, considered as a whole, the jury reasonably could've inferred that defendant knowingly entered or remained in the victim's house unlawfully:

- The victim owned the house and the mortgage was in her name (and defendant was not on the mortgage).
- There was no rental agreement between defendant and the victim.
- Defendant didn't pay rent.
- The victim and defendant had broken up two and a half weeks before the incident.
- The victim told police the afternoon of the incident that defendant "did not live there and this was not the first time he entered [the victim's] house without permission."
- During the altercation the victim repeatedly asked defendant to "leave her house."
- Once defendant left the house, the victim locked the door and called 911.
- Defendant tried to break in through the front door window to get back inside the house.

¶ 28 Defendant's arguments on this issue ask us to weigh the evidence differently than did the jury. But that's not our role. Even if we might have reached a different conclusion than the jury (and we're not saying we would have), we can't substitute our judgment for the jury's where its conclusion is supported by competent evidence. *People v. Gennings*, 196 Colo. 208, 210, 583 P.2d 908, 909 (1978).

b. The Evidence Supports the Jury's Findings That Defendant Intended to Assault and Sexually Assault the Victim and Attempted to Sexually Assault the Victim

¶ 29 We reach the same conclusion as to defendant's arguments that (1) the evidence wasn't sufficient to show that he intended to assault or sexually assault the victim, *see* §§ 18-2-101, 18-2-204(1), 18-3-402(1)(a), 18-4-203(1), (2)(a), C.R.S. 2017; and (2) the evidence wasn't sufficient to support the jury's finding that he took a substantial step corroborative of his intent to knowingly cause sexual intrusion or penetration against the victim's will, *see* §§ 18-2-101(1), 18-3-402(1)(a).

¶ 30 The jury could have relied on the following testimony and physical evidence in finding that defendant intended to assault and

sexually assault the victim and attempted to sexually assault the victim:

- As defendant ripped the victim's clothes off (the jury saw her torn shirt and underwear), she kept telling him to leave.
- Defendant told the victim, "You always accuse me of domestic violence, I'm going to show you what it really is."
- Defendant grabbed the victim by the arms, head-butted her, and slapped her legs with a chain.
- When the victim tried to leave the house, defendant struggled with her and kept blocking the door.
- Defendant told the victim, "I'm going to fuck you before I go."
- The victim struggled with defendant and tried to keep him off of her.
- When the victim got away from defendant, she moved to the couch and tried to cover herself up. When defendant came towards her, she kicked him in the groin, but he came towards her again.
- The victim was still pushing defendant away when her friend arrived at the house.

- The police officer who responded to the incident testified that he saw injuries on the victim and a ripped pair of women's underwear on the floor where the victim said the altercation had occurred.

¶ 31 Defendant emphasizes that the victim later retracted her initial account of the events and said that any sexual activity was consensual. But the jury also heard the evidence noted above and found the victim's initial version of the incident more credible. *See People v. Padilla*, 113 P.3d 1260, 1261 (Colo. App. 2005) ("It is the fact finder's function to consider and determine the weight to be given to all parts of the evidence and to resolve conflicts, inconsistencies, and disputes in the evidence."). As we've said, it's not our place to reweigh the evidence. *See, e.g.*, *People v. Taylor*, 159 P.3d 730, 734 (Colo. App. 2006) ("As an appellate court, it is not our role to reweigh the evidence or judge the credibility of witnesses.").

C. Defendant's Recorded Statements Weren't Admissible Under the Doctrine of Completeness

1. Additional Background

¶ 32 During a recorded visit with defendant while he was in jail, the victim said that she had told his lawyers "everything that they wanted to hear and that you wanted them to hear." According to the prosecution, this statement indicated that defendant had told the victim to recant her allegations and that she had told his lawyers that she would. Correctly anticipating that the victim would testify that she didn't recall the conversation, the prosecution alerted the court and defense counsel, before her testimony, that it intended to introduce the recording of that statement as a prior inconsistent statement. The court ruled that it would be admissible for that purpose. Defense counsel responded that he wished to provide additional context pursuant to the doctrine of completeness by playing the recording of defendant's response to the victim: "How do you know what I wanted them to hear? This is the first time you've come to see me. I've tried calling you a couple of times, but you won't answer." The court indicated initially that introducing that statement would put defendant's credibility at issue, and so

the prosecution would be able to introduce defendant's prior Montana felony conviction. But after further discussion, the court said,

> I'm not even sure [defendant's] response would be admissible to the statement, but if it's — I'm going to hold off. If you want to offer it, you can offer it and make your arguments, if the prosecution objects, I'll make a ruling then; if it comes in, then we're going to have to figure out whether or not that means his credibility can be impeached.

¶ 33 Defense counsel never sought to introduce defendant's statements. However, in the course of advising defendant of his right not to testify, *see People v. Curtis*, 681 P.2d 504 (Colo. 1984), the court seems to have ruled definitively that introducing the statements would put defendant's credibility at issue.

> [O]ne of the things that strikes me from the video conference is that [defendant] seems to have some knowledge that [the victim] has spoken with his lawyers.
>
> He says, "That depends upon what you told my lawyers," which suggests to the Court that there's at least some evidence that he, you know, had some sort of previous conversation or at least had knowledge that she was going to be speaking to his lawyers.
>
> So for — you know, if then he wants to introduce testimony, basically, of his denial of

> having had any communications with her or saying "I don't know what you're talking about, this is the first time we've met," the Court does think that that [sic] — whether or not that is accurate is a question — introduces questions of credibility. And once his credibility is at issue, the Court does believe that the [CRE] 608 evidence, including the felony conviction, can be properly brought before the jury. So I understand that you disagree with the Court's ruling, but the ruling is going to stand as it is.

2. Defendant's Contentions

¶ 34 Defendant contends that the court erroneously ruled that (1) if he sought to introduce his recorded statements, doing so would implicate his credibility;[5] and (2) his Montana judgment constituted a felony conviction that could be admissible for impeachment. He also argues that, as a result of these two rulings, the court impermissibly infringed his right to a fair trial and to confront witnesses, because he was dissuaded from introducing his statements and cross-examining the prosecution's investigator (through whom the recording was introduced).

¶ 35 Because we conclude that defendant's statements were inadmissible, we needn't determine (in conjunction with this issue)

[5] Defendant doesn't challenge the court's ruling permitting the prosecution to introduce the victim's prior inconsistent statement, only its ruling regarding defendant's responsive statements.

whether his statements would have implicated his credibility, whether his Montana judgment constituted a felony conviction, or whether the court's asserted errors violated his constitutional rights. *See People v. Phillips*, 2012 COA 176, ¶ 63 ("We may uphold the trial court's evidentiary decision on any ground supported by the record, even if that ground was not articulated or considered by the trial court.").

3. Preservation and Standard of Review

¶ 36 Though the issue isn't free from doubt, we'll assume defendant preserved this contention. We review a district court's evidentiary rulings for an abuse of discretion. *People v. Heredia-Cobos*, 2017 COA 130, ¶ 6.

4. Analysis

¶ 37 Under the doctrine of completeness, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." CRE 106; *see People v. Medina*, 72 P.3d 405, 410 (Colo. App. 2003). Rule 106's purpose is to "avoid creating a misleading impression by

taking evidence out of context or otherwise creating a distorted picture by the selective introduction of evidence." *Medina*, 72 P.3d at 410.

¶ 38 We aren't persuaded that defendant's statements fall within the rule. Though defendant may have preferred that the jurors hear his response, that's not the standard for admission. *See Diggs v. United States*, 28 A.3d 585, 597 (D.C. 2011) ("The rule of completeness does not provide that when part of an out-of-court statement is introduced against its maker, the declarant has an automatic right to insist that other parts be admitted too, simply because they are favorable to his position.").[6] Instead, we ask whether excluding his response would have misled the jurors as to the victim's belief that she had told defendant's attorneys what they wanted to hear and what he wanted them to hear. *See People v. Manyik*, 2016 COA 42, ¶ 86 (rule of completeness inapplicable because admitting the defendant's statements "was not necessary to give the jury a complete and accurate picture" of the admitted

[6] Because CRE 106 is identical to Fed. R. Evid. 106, we consider federal cases and authorities concerning the federal rule highly persuasive in interpreting and applying our own. *Faris v. Rothenberg*, 648 P.2d 1089, 1091 n.1 (Colo. 1982); *People v. Short*, 2018 COA 47, ¶ 41.

portion of the interview, and wouldn't cause the admitted portion to be "confusing or misleading"). We conclude that it wouldn't have been confusing — the victim's statement was understandable, and not misleading, standing alone.

¶ 39 Defendant's statements were also otherwise inadmissible. Self-serving hearsay declarations made by a defendant are generally excluded because there's nothing to guarantee their trustworthiness. *People v. Avery*, 736 P.2d 1233, 1237 (Colo. App. 1986); *see also People v. Abeyta*, 728 P.2d 327, 331 (Colo. App. 1986) ("Hearsay declarations made by a defendant in his own favor are generally not admissible for the defense. A self-serving declaration is excluded because there is nothing to guarantee its testimonial truthworthiness.").[7]

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[7] For this reason, several divisions of this court have gone as far as to hold that these types of statements are excludable even when they would otherwise be admissible under Rule 106. *See People v. Davis*, 218 P.3d 718, 731 (Colo. App. 2008); *People v. Wilson*, 841 P.2d 337, 340 (Colo. App. 1992) ("To the extent the 'rule of completeness' would allow admission of exculpatory statements, we conclude that it has no applicability here."); *accord People v. Zubiate*, 2013 COA 69, ¶ 33 (stating, in dicta, that "[s]elf-serving hearsay declarations made by a defendant may be excluded under the rule of completeness because there is nothing to guarantee their trustworthiness"), *aff'd on other grounds*, 2017 CO 17. But another division of this court recently declined to adopt this approach.

¶ 40 Defendant's statements are such self-serving statements — those made by a defendant who likely knows he's being recorded — and, given the inapplicability of CRE 106, were therefore inadmissible.

D. Defendant Waived His Contention that His Testimony Couldn't be Impeached by the Montana Judgment, and, in Any Event, Any Error Wasn't Plain

¶ 41 Before defendant's trial, he'd received a deferred judgment for felony theft in Montana, with the sentence deferred for three years pending completion of probation.

¶ 42 Defendant contends that the district court burdened his right to present a complete defense; he says he chose not to testify because the court erroneously advised him that he could be impeached with the Montana judgment if he did.

1. Defendant Waived This Contention

¶ 43 First, we agree with the People that defendant waived this contention. During the *Curtis* advisement, the following exchange occurred:

Short, ¶ 46 (the defendant's otherwise inadmissible self-serving hearsay statement was admissible under the rule of completeness). We don't need to try to reconcile or choose among these decisions because we conclude the statements weren't admissible under Rule 106.

> Court: So, [defense counsel], do you wish to make any argument regarding whether or not the Court should view this as a conviction such that it can be used for impeachment purposes?
>
> [Defense counsel]: Based upon our research, I think it can.
>
> Court: You think it can?
>
> [Defense counsel]: I mean, unless the Court has found something —
>
> Court: I — well, I'm just — yeah. And I agree with you [defense counsel].

¶ 44 Defense counsel therefore clearly affirmatively acquiesced in the admissibility of the Montana judgment. *See People v. Rediger*, 2018 CO 32, ¶ 39 (waiver is the intentional relinquishment of a known right or privilege); *see also United States v. Smith*, 502 F.3d 680, 688-89 (7th Cir. 2007) (by telling the court he didn't think any privilege attached to a letter the prosecution sought to introduce, defense counsel waived for appellate review any argument the letter was a privileged communication). Defendant's claim that the error impacted his constitutional rights doesn't matter because a defendant may waive constitutional rights. *People v. Merritt*, 2014 COA 124, ¶ 57; *see also People v. Butler*, 224 P.3d 380, 386 (Colo. App. 2009) (the defendant waived his claim that a witness's

testimony deprived him of fair trial where the district court approved the parties' stipulation concerning the defendant's motion in limine allowing, in part, for the admission of such evidence).

2. In the Alternative, There Was No Plain Error

¶ 45 Even if defendant didn't waive this issue, because we agree with the district court (and trial defense counsel, for that matter) that the Montana judgment constituted an admissible felony conviction, any error wasn't plain. *See Hagos v. People*, 2012 CO 63, ¶ 14 (plain error review applies even to errors of constitutional dimension if defense counsel fails to make a clear, timely objection).

¶ 46 In Colorado, a felony conviction is admissible to impeach a witness, including a testifying defendant. § 13-90-101, C.R.S. 2017.

¶ 47 Defendant contends that the Montana deferred judgment doesn't qualify as a felony conviction because, in Montana, the classification of a conviction is determined by the sentence imposed, and no sentence has yet been imposed in the Montana felony theft case. *See* Mont. Code. Ann. § 45-2-101(23) (2017) ("'Felony' means an offense in which the sentence imposed upon

conviction is death or imprisonment in a state prison for a term exceeding 1 year.”).

¶ 48 But this contention disregards clear Colorado law. A crime in another state qualifies as a felony admissible for impeachment in Colorado if it “carries with it *as a possible penalty, incarceration* in the state penitentiary.” *Lacey v. People*, 166 Colo. 152, 160, 442 P.2d 402, 406 (1968) (emphasis added). Because defendant faces a potential sentence of incarceration in Montana, his deferred judgment for felony theft would’ve been admissible to impeach his testimony in his Colorado trial.[8]

III. Conclusion

¶ 49 The judgment is affirmed.

JUDGE ASHBY and JUDGE HARRIS concur.

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[8] Further, any error by the court in so concluding couldn’t have been plain given the lack of any prior authority addressing the issue. *See Hagos v. People*, 2012 CO 63, ¶ 14 (plain error must be obvious).