SUMMARY
January 13, 2022

2022COA11

No. 19CA0529, Peo v Rodriguez — Evidence — Authentication — Chain of Custody

Defendant was convicted of possession with intent to distribute a controlled substance and obstruction of a peace officer. At trial, in lieu of establishing a chain of custody, the prosecution authenticated a bag of cocaine through an officer's testimony that he recognized the bag of powder as the same substance he had recovered at the scene more than a year earlier. On appeal, defendant argued that the trial court erred by admitting the bag of cocaine because the prosecution was required to, but did not, establish a sufficient chain of custody for the evidence.

A division of the court of appeals clarifies that a proponent of fungible evidence — meaning evidence that is not readily identifiable — must authenticate it through a proper chain of

custody, by accounting for the evidence's whereabouts at all times. Because the officer in this case had no knowledge of the bag's whereabouts after he handed it to a sergeant at the scene and the sergeant did not testify, there was no factual basis for the jury to determine that the evidence admitted at trial was the same bag of powder recovered at the scene. The division therefore concludes that the court erred by admitting the evidence. And because the error was not harmless, the division reverses the drug conviction and remands for a new trial on that charge.

The division rejects defendant's challenge to his obstruction conviction, however, and therefore affirms the judgment with respect to that conviction.

COLORADO COURT OF APPEALS **2022COA11**

Court of Appeals No. 19CA0529
El Paso County District Court No. 17CR5166
Honorable David L. Shakes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Pedro Rodriguez,

Defendant-Appellant.

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

Division V
Opinion by JUDGE HARRIS
Richman and Gomez, JJ., concur

Announced January 13, 2022

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¶ 1 Defendant, Pedro Rodriguez, appeals the judgment of conviction entered after a jury found him guilty of possession with intent to distribute a controlled substance and obstruction of a peace officer.

¶ 2 With respect to his drug conviction, Rodriguez argues, primarily, that the trial court erred by admitting a bag of cocaine allegedly recovered during a traffic stop because the prosecution failed to establish a sufficient chain of custody. With respect to his obstruction conviction, Rodriguez argues that the trial court erred by instructing the jury that it had to follow the law and by permitting prosecutorial misconduct during closing argument.

¶ 3 We agree with Rodriguez's first argument but reject the others. Therefore, we reverse his drug conviction[1] and remand for a new trial on that charge, but we affirm the obstruction conviction.

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[1] Rodriguez also contends that his drug conviction must be reversed based on prosecutorial misconduct during opening statement and the admission of expert testimony in violation of the Confrontation Clause, CRE 602, and rules against hearsay. Because we conclude that the court reversibly erred by admitting Exhibit 1 — the evidence bag containing cocaine — despite the prosecution's failure to authenticate it, we decline to address Rodriguez's other contentions of error.

I. Authentication of the Evidence Supporting the Drug Conviction

¶ 4 Rodriguez contends that the trial court erred by admitting the bag of cocaine into evidence because the prosecution failed to show a chain of custody and therefore failed to authenticate it. We agree.

A. Factual Background

¶ 5 The charges against Rodriguez arose from a traffic stop. Rodriguez was a passenger in a car stopped by Officer Chase Gardner.

¶ 6 At some point during the stop, Rodriguez jumped out of the car and ran along the side of the highway. By then, two other officers had arrived to assist with the stop. Officer Gardner and another officer gave chase, and, during the pursuit, Rodriguez threw down a small plastic bag containing a white powdery substance. The officers quickly caught up to Rodriguez and, after they arrested him, Officer Gardner recovered the bag Rodriguez had discarded.

¶ 7 At trial, the prosecution sought to establish that the substance in the plastic bag recovered from the scene was the same substance that a chemist tested and determined was cocaine. Officer Gardner

testified that, after he retrieved the bag from the ground, he gave it to Sergeant David Manzanilla at the scene. Officer Gardner described the bag as a "small, clear bag that had a white, powdery substance in it." After giving the bag to Sergeant Manzanilla, Officer Gardner did not see the bag again until he purportedly identified it at trial.

¶ 8 Over defense counsel's "chain of custody" objection, the prosecutor showed Officer Gardner Exhibit 1, a Colorado Springs Police Department (CSPD) evidence bag, and asked Officer Gardner to identify it. Officer Gardner testified that Exhibit 1 contained "[t]he substance I observed in the bag [at the scene]."[2]

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[2] The exchange resulting in admission of Exhibit 1 was as follows:

> [PROSECUTOR]: At this time, Your Honor, I'd like to approach the witness with what has been marked as People's Exhibit No. 1.
>
> THE COURT: Any objection?
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor, I will be objecting on the basis of chain of custody at this point in time. It seems that the drugs

were given to another officer before making it here. I'd be objecting to the introduction of this evidence based upon chain of custody.

[PROSECUTOR]: Your Honor, that would go to weight, not admissibility. However, I believe, based upon what the officers [sic] testified, he should be able to identify People's Exhibit 1 and testify that it is in substantially the same or substantially same [sic] condition.

THE COURT: Objection's overruled.

. . . .

[PROSECUTOR]: Officer, please take a look at People's Exhibit No. 1. Do you recognize People's Exhibit 1?

[GARDNER]: Yes.

[PROSECUTOR]: What is People's Exhibit 1?

[GARDNER]: The substance that I observed in the bag.

[PROSECUTOR]: Is People's 1 in the same or substantially the same condition as when you collected it by the highway?

[GARDNER]: Ah, it appears so.

[PROSECUTOR]: Your Honor, I'd move to admit People's 1.

THE COURT: Any further objection?

[DEFENSE COUNSEL]: No.

¶ 9 Later, the police chemist testified that he picked up Exhibit 1 from the CSPD evidence section. Exhibit 1 was sealed when he received it. He did not know "who placed the item[] in evidence" or where the item "had been prior to" the time he picked it up for testing. The chemist weighed and tested the substance contained in the exhibit bag and determined that it was approximately twenty-eight grams of cocaine. Then he resealed the bag with blue tape, "dated it," "marked it with the case number, item number, and [his] initials," and returned it to the evidence section.

¶ 10 Sergeant Manzanilla did not testify. Rodriguez contends that, as a result, the prosecution failed to establish a sufficient chain of custody for the white powder found at the scene and, therefore, Exhibit 1 was not properly authenticated and should not have been admitted.

B. Preservation and Standard of Review

¶ 11 We review a trial court's evidentiary rulings for an abuse of discretion. *Gonzales v. People*, 2020 CO 71, ¶ 25. A court abuses

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THE COURT: Exhibit 1's admitted.

its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law. *People v. Payne*, 2019 COA 167, ¶ 5.

¶ 12 The People contend that Rodriguez failed to preserve the claim he raises on appeal, but we disagree. Rodriguez objected to Officer Gardner's authentication of Exhibit 1 on the ground that the evidence could not be admitted without establishing a chain of custody, which the prosecution could not do absent Sergeant Manzanilla's testimony. That is the same argument he makes on appeal. Therefore, the claim is preserved. *See, e.g.*, *People v. McFee*, 2016 COA 97, ¶ 31 (claim is preserved when the objection is sufficiently specific to draw the court's attention to the asserted error).

¶ 13 When a claim is preserved, and does not implicate a constitutional right, we assess whether an error requires reversal under the ordinary harmless error standard. *See Pernell v. People*, 2018 CO 13, ¶ 22. An error is harmless under this standard if there is no reasonable probability that it contributed to the defendant's conviction. *Id.*

C. Analysis

¶ 14 Authentication is a condition precedent to the admissibility of evidence. CRE 901(a). The condition is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* "The rationale is that in the absence of showing that the evidence is what its proponent alleges, the evidence is simply irrelevant." *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989); *see also United States v. Branch*, 970 F.2d 1368, 1370 (4th Cir. 1992) (Authentication "'represent[s] a special aspect of relevancy' in that evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." (quoting Fed. R. Evid. 901(a) advisory committee note)).

¶ 15 Thus, to prove that Rodriguez possessed cocaine, the prosecution had to introduce evidence sufficient for the jury to find that the substance in the evidence bag marked as Exhibit 1 was the same substance contained in the plastic bag recovered from the scene. *See Gonzales*, ¶ 27 (proponent of evidence must lay a sufficient foundation from which the jury could "reasonably find that the evidence is authentic") (quoting *People v. Glover*, 2015 COA 16, ¶ 13). Otherwise, the fact that the chemist tested the substance

in Exhibit 1 and determined that it was cocaine would be irrelevant. *See People v. Valencia*, 257 P.3d 1203, 1206 (Colo. App. 2011) ("[B]efore expert testimony as to the results of the testing of an object may be received, some proof must be presented of a connection between the object tested and the defendant . . . . Otherwise, the testimony would have no relevancy.").

¶ 16 The People say that Officer Gardner properly authenticated Exhibit 1 by identifying it as the substance that was in the plastic bag that Rodriguez threw on the ground. True, some evidence may be authenticated by testimony that the object is what its proponent claims. When the proffered evidence is "unique, readily identifiable and relatively resistant to change," a witness can authenticate it by identifying the evidence as the item in question. *Cardenas*, 864 F.2d at 1531; *see also* Edward J. Imwinkelried, *Evidentiary Foundations* § 4.08 (11th ed. 2020) ("If the [evidence] has a unique, one-of-a-kind characteristic or combination of characteristics," the witness can authenticate the evidence by testifying that he "previously observed the characteristic and presently recalls the characteristic.").

¶ 17 In *People v. Beltran*, 634 P.2d 1003, 1004 (Colo. App. 1981), for example, the division concluded that an officer properly authenticated a gun by testifying that the gun was the one he had taken from the defendant at the scene of a shooting. But in that case, the officer also testified that the gun was "the only gun of that type he had seen during his career as a police officer and that he recognized it by the distinctive manufacturer's insignia it bore." *Id.*; *see also Claxton v. People*, 164 Colo. 283, 290-91, 434 P.2d 407, 410-11 (1967) (witness could authenticate certain clothing by identifying the clothing as the items she wore on the night of the crime); *People v. Crespi*, 155 P.3d 570, 574 (Colo. App. 2006) (handwritten letter could be authenticated through witness's testimony).

¶ 18 White powder is not unique, readily identifiable, or resistant to change. Thus, even acknowledging Rule 901's "flexible standard," *Gonzales*, ¶ 44, Officer Gardner's testimony was not sufficient to support a finding that Exhibit 1 was what the prosecution claimed — the bag of white powder recovered during the traffic stop.

¶ 19 The People say, however, that even if Officer Gardner could not identify the white powder in Exhibit 1 as the same white powder he

recovered from the scene, he could nonetheless authenticate Exhibit 1 by relying on the writing or notations on the CSPD evidence bag. But Officer Gardner did not have any personal knowledge of how the substance from the plastic bag recovered at the scene supposedly ended up in Exhibit 1, much less the writing on the evidence bag. So if Officer Gardner had relied on the writing or notations on Exhibit 1 to determine the evidence bag's contents, his testimony would have run afoul of the prohibition against hearsay. *See Payne v. Janasz*, 711 F.2d 1305, 1313-14 (6th Cir. 1983) (deputy's testimony that the evidence was in a bag marked "10001 Cedar Avenue" was hearsay as it was admitted to show that the evidence came from a raid at 10001 Cedar Avenue); *Commonwealth v. Jones*, 37 N.E.3d 589, 596 (Mass. 2015) (DNA analyst's testimony about origin of rape kit swabs was hearsay as it was based on an inventory list prepared by a nurse); *Brown v. State*, 240 S.W.2d 310, 311 (Tex. Crim. App. 1951) (blood sample was inadmissible, where its connection to the defendant was based only on the sample's label bearing the defendant's name, because the label was hearsay).

¶ 20 In sum, we conclude that Exhibit 1 could not be authenticated by Officer Gardner's testimony at trial.

¶ 21 Instead, when the evidence, as here, is not readily identifiable and is susceptible to alteration by tampering or contamination, the proponent of the evidence must authenticate it by establishing a chain of custody for the item. *See Cardenas*, 864 F.2d at 1531 ("The cocaine, not uniquely identifiable, requires a sufficient chain of custody to support its admission."); *State v. Bellikka*, 490 N.W.2d 660, 663 (Minn. Ct. App. 1992) (Authentication through chain of custody is "essential when common items such as drugs, blood and urine are involved."); *People v. Pleasant*, 51 N.Y.S.3d 693, 695 (App. Div. 2017) (When evidence is unique and readily identifiable, "a simple identification is sufficient to warrant admission," but for "fungible items such as currency or drugs," the prosecution must establish a "strict chain of custody" to authenticate the evidence.) (citation omitted); *cf. United States v. Humphrey*, 208 F.3d 1190, 1204 (10th Cir. 2000) (Unlike readily identifiable items, when it comes to "fungible evidence, such as drugs or cash," "absent a reliable chain of custody there would be a relatively high risk that

the original item had been contaminated or tampered with."), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009).

¶ 22 Colorado case law is consistent with this rule. Where the prosecution has sought to authenticate drug evidence, the supreme court and divisions of this court have required a showing of a sufficient chain of custody. *See, e.g.*, *People v. Atencio*, 187 Colo. 226, 229, 529 P.2d 636, 638 (1974) (explaining that "[t]he general rule is that the prosecution must establish a chain of custody" to authenticate evidence and concluding that chain of custody was sufficient to authenticate heroin);[3] *People v. Herrera*, 1 P.3d 234, 240 (Colo. App. 1999) (marijuana and cocaine authenticated through chain of custody); *People v. Moltrer*, 893 P.2d 1331, 1335 (Colo. App. 1994) (cocaine authenticated through chain of custody).

¶ 23 The chain of custody method for authentication "requires that the proponent of real evidence establish that the evidence was

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[3] Although some Colorado cases that discuss the requirement of a chain of custody as a way to authenticate evidence predate the adoption of the Colorado Rules of Evidence, we do not view CRE 901 as inconsistent with these cases. Rather, the cases stand for the proposition that without a sufficient chain of custody, the proponent cannot show that the "matter in question is what its proponent claims." CRE 901(a).

involved in the incident and that the condition of the evidence at trial is substantially unchanged." *People v. Mascarenas*, 666 P.2d 101, 112 (Colo. 1983); *see also United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982) ("The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence."). To do so, the proponent must introduce evidence showing where the item has been from its initial seizure until it is offered at trial. 5 Jack B. Weinstein, *Weinstein's Federal Evidence* § 901.03[3] (2d ed. 2011); *see also Valencia*, 257 P.3d at 1206 (to establish the necessary connection between the evidence and the defendant, the prosecution must ordinarily "present evidence showing a complete chain of custody of the item").

¶ 24 Still, the burden on the prosecution is not particularly high. "[S]o long as the evidence was accounted for at all times, the evidence is admissible." *People v. Atencio*, 193 Colo. 184, 187, 565 P.2d 921, 923 (1977). At that point, any deficiencies in the chain of custody go to the weight of the evidence, not its admissibility. *See Valencia*, 257 P.3d at 1206. Thus, once a sufficient chain is established, absent any evidence of tampering, the proponent is not

required to call each witness who may have handled the evidence. *People v. Sutherland*, 683 P.2d 1192, 1197 (Colo. 1984).

¶ 25 In *Sutherland*, for example, the defendant was suspected of driving under the influence of alcohol, so a trooper directed a medical technician to obtain a blood sample. *Id.* After the technician drew blood from the defendant, she placed the sample in a vial and gave it to the trooper, who sealed it. The trooper put the sealed vial in a mailing carton and gave the carton to a sergeant who sealed the carton and mailed it to a laboratory. An analyst received the carton, removed the vial, unsealed it, and performed a chemical analysis. *Id.* At trial, the trooper, the medical technician, and the analyst testified about the chain of custody for the blood sample, including the sergeant's role. The defendant argued, however, that the sample was inadmissible because, without the sergeant's testimony, the chain of custody was incomplete. *Id.* The supreme court disagreed because the blood sample "was accounted for at all times" and the defendant had offered no evidence of tampering. *Id.*; *see also Cardenas*, 864 F.2d at 1532 (chain of custody was sufficient even though one officer who had handled the evidence did not testify, because "the whereabouts of the cocaine

was accounted for from its original seizure from [the defendant's] truck until it was offered as evidence at trial"); *Atencio*, 193 Colo. at 186-87, 565 P.2d at 923 (any ambiguity about which of two officers handed the evidence to a third officer did not break the chain of custody because the prosecution established "[c]ontinuous control or possession of the evidence" by police "from the time [the defendant] threw the powder into the air until [the coroner] tested it"); *People v. Cornelius*, 41 Colo. App. 182, 187, 585 P.2d 295, 298-99 (1978) (chain of custody was sufficient even though agent who had the evidence for five months did not testify, because the prosecution produced the officers who had sealed and marked the balloons of suspected heroin at the scene, and the balloons were still sealed when the agent returned the marked evidence to the police custodian); *People v. Johnson*, 539 P.2d 1286, 1287-88 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (notwithstanding the fact that an exterior evidence bag was not offered into evidence, a sufficient chain of custody was established for marijuana where the detective testified that suspected marijuana was placed in a sealed envelope in his presence and put

in the property room, and the analyst testified that she received the envelope with the seal intact).

¶ 26 But here, the evidence was not accounted for at all times; in fact, after the initial seizure, the evidence was not accounted for at all. The only evidence concerning chain of custody was the following:

- On September 5, 2017, Officer Gardner picked up a bag of white powder from the side of the highway. He handed it to Sergeant Manzanilla and, according to his testimony, he "never saw it from there."
- Sometime later, in response to a request for analysis from the district attorney's office, the police chemist picked up a CSPD evidence bag marked Exhibit 1 from the evidence room, tested the substance contained inside it, and determined that the substance was cocaine. Exhibit 1 was sealed when the chemist received it, but he had no knowledge of the circumstances under which Exhibit 1 was created, including who had previously handled the substance in Exhibit 1 or who had prepared and sealed the exhibit bag.

¶ 27 The break in the chain of custody in this case is at least as significant as the break found to be fatal in *People v. Garcia*, 627 P.2d 255 (Colo. App. 1980). The defendant in that case was charged with shooting three people. At trial, the prosecution sought to establish that a bullet removed from one of the victims during surgery had been fired from a gun found in the defendant's house. The bullet was admitted into evidence. *Id.* at 258. The surgeon testified that he removed the bullet and gave it to "operating room personnel." *Id.* A nurse who came on duty after the surgery testified that she had taken a bullet marked with the victim's name from a locked narcotics cabinet, marked it, and forwarded it to the coroner. *Id.* The problem, the division said, was that "no evidence was offered to account for possession of the bullet from the time the physician released it until the time the nurse located it" in a locked cabinet. *Id.* Thus, there was a break in the chain of custody "and defendant's objection to [the bullet's] admission should have been sustained." *Id.* (The error in admitting the bullet was harmless, however, because it was cumulative of the victim's testimony that the defendant had shot her. *Id.*)

¶ 28 Here, there was no evidence offered to account for possession of the bag of white powder after Officer Gardner handed it to Sergeant Manzanilla. Because Officer Gardner could not authenticate the white powder in Exhibit 1 by identifying it as the white powder from the scene, the jury had no basis to determine, and so could only have speculated, that the powder in Exhibit 1, whose origin was unknown, was the same powder that Rodriguez had possessed before discarding it during the traffic stop. *Cf. White v. People*, 175 Colo. 119, 122, 486 P.2d 4, 5-6 (1971) (prosecution established a sufficient chain of custody because it demonstrated that "the same item that fell from the defendant's hand when he was stopped by the police, was the item which was analyzed" by the police analyst).

¶ 29 To establish a sufficient chain of custody in this case, the prosecution had to account for the plastic bag of white powder to the extent that the jury could reasonably have found that it was the same substance contained in Exhibit 1. So, for example, had Officer Gardner testified that he observed Sergeant Manzanilla place the bag of white powder into an evidence bag, seal the evidence bag, and make some identifying mark on it, and had the police chemist

then testified that when he received it, the bag was sealed in the same manner and with the same identifying marks described by Officer Gardner, the chain of custody would have been sufficient, despite Sergeant Manzanilla's absence.[4] But here, there is no "chain" of custody; there are, at most, two links — Officer Gardner's recovery of the bag from the ground and Sergeant Manzanilla's receipt of it — with no additional admissible evidence to connect those initial links to Exhibit 1. Thus, in this particular case, Sergeant Manzanilla's absence turned out to be fatal to the prosecution's ability to establish a sufficient chain of custody.

¶ 30 A similar problem arose in *Valencia*. In that case, the defendant was arrested after the victim reported that he had slashed her with a knife and sexually assaulted her. 257 P.3d at 1205. The police swabbed a speck of blood from the defendant's ear

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[4] In *People v. Grace*, 55 P.3d 165, 172 (Colo. App. 2001), *overruled on other grounds by Gibbons v. People*, 2014 CO 67, a division of this court concluded that the prosecution had established a sufficient chain of custody where one officer testified that he gave crack cocaine to a second officer (who did not testify), described the police procedures for handling evidence, and said that the second officer had likely followed those procedures. We need not decide whether we agree with the division's conclusion in that case, but we note that the prosecution did not meet even that low standard here.

and collected DNA samples from the defendant and the victim. At trial, the prosecution presented evidence that all the swabs were "suitably packaged" and delivered to a DNA analyst. *Id.* But the analyst did not identify the origin of the swabs and the prosecution did not introduce the swabs into evidence. Instead, the analyst testified, without describing her source of knowledge, that a swab taken from the defendant's ear had the victim's blood on it and that a swab taken from the victim's vagina had the defendant's DNA on it. *Id.* The division explained that because the analyst's testimony did not tie back to the actual swabs collected and packaged for analysis, the testimony did not establish a "connection between the objects tested and the defendant, the victim, or the crime," rendering the analyst's testimony irrelevant. *Id.* at 1206.

¶ 31 Accordingly, we conclude that the prosecution failed to lay a foundation sufficient to support a finding by the jury that Exhibit 1 contained what its proponent claimed — the bag of white powder that Officer Gardner retrieved from the scene after Rodriguez discarded it. The trial court therefore erred by admitting the evidence.

¶ 32 And the error was not harmless. Admission of Exhibit 1 was the basis for the chemist's testimony that the substance recovered from Rodriguez was twenty-eight grams of cocaine. Thus, there is some reasonable probability that the error contributed to Rodriguez's conviction. *See Pernell*, ¶ 22.

¶ 33 However, we disagree with Rodriguez that the remedy is to vacate the conviction. Ordinarily, when the court erroneously admits evidence and the error is not harmless, the reviewing court reverses the conviction and remands for a new trial. *See People v. Marciano*, 2014 COA 92M-2, ¶ 46 (upon reversal of a conviction where trial court has improperly admitted evidence, the appropriate remedy is to remand for a new trial) (citing *People v. Sisneros*, 44 Colo. App. 65, 68, 606 P.2d 1317, 1319 (1980)); *see also Burks v. United States*, 437 U.S. 1, 14-15 (1978); *Valencia*, 257 P.3d at 1207 (remanding for a new trial where evidence was admitted without proper foundation).

¶ 34 Unlike the evidence in *Casillas v. People*, 2018 CO 78M, ¶ 37, the case on which Rodriguez relies, the evidence here was not obtained in violation of Rodriguez's constitutional rights and required to be suppressed. Rather, on remand, the prosecution can

attempt to lay a sufficient foundation for the admission of Exhibit 1. And to the extent Rodriguez contends that the evidence was insufficient because Exhibit 1 was erroneously admitted, we reject that contention. "In reviewing a sufficiency of evidence contention, an appellate court must consider evidence that should have been excluded at trial." *People v. Alemayehu*, 2021 COA 69, ¶ 15 n.2; *accord Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988).

¶ 35 We therefore reverse Rodriguez's conviction for possession with intent to distribute a controlled substance and remand for a new trial on that charge.

II. Contentions Related to the Obstruction Conviction

¶ 36 Rodriguez also contends that the trial court committed two errors that require reversal of his conviction for obstructing a peace officer. We conclude that neither contention has merit.

A. Court's Voir Dire Instruction

¶ 37 During voir dire, the trial court instructed the venire that jurors have a duty to follow the law:

> So a few basic rules: First is you have to be able to follow the law. Jurors are required to follow the law, and you'll take an oath that you'll follow the law. Now, that might sound sort of obvious, but sometimes we get jurors

> who think they can make up their own law, disregard the law that's been passed by the legislature, those kinds of things. So let me give you an example; this is sort of a trivial example, but an example of what we're talking about here.
>
> Let's say this were a speeding case and the Defendant is charged with speeding on I-25 from Pueblo to Walsenburg. Who's driven I-25 Pueblo to Walsenburg? Just about everybody. Let's say the prosecution proves their case: They prove that the Defendant was the driver; they prove that the speed limit is 75; and they prove that the driver was driving 85. You would not be honest to your oath if you were to find the Defendant not guilty because you've driven it and you say it's wide open and 85 is okay. You can't do that. You have to follow the law.

Rodriguez says the instruction misstated the law and violated his constitutional right to a trial by jury.

1. Standard of Review

¶ 38 A trial court judge has wide discretion in conducting a trial, *People v. Estes*, 2012 COA 41, ¶ 10, but must correctly instruct the jury on the applicable law, *Townsend v. People*, 252 P.3d 1108, 1111 (Colo. 2011). We review de novo whether the trial court properly instructed the jury on the applicable law. *People v. Robles*, 302 P.3d 269, 280 (Colo. App. 2011), *aff'd*, 2013 CO 24.

2. Analysis

¶ 39 Jury nullification is a jury's "knowing and deliberate rejection of the evidence or refusal to apply the law because the result dictated by law is contrary to [each] juror's sense of justice, morality, or fairness." *People v. Waller*, 2016 COA 115, ¶ 57 (quoting *State v. Nicholas*, 341 P.3d 1013, 1015 (Wash. 2014)). Jury nullification occurs when a jury acquits a defendant even though the members of the jury believe the defendant is guilty. *Id.*

¶ 40 A criminal defendant does not have a right to jury nullification. *Id.* at ¶ 59. Nor does a juror have the right to nullify: a trial court must grant a challenge for cause if a prospective juror is unable or unwilling to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions. *People v. Lefebre*, 5 P.3d 295, 299 (Colo. 2000), *overruled on other grounds by People v. Novotny*, 2014 CO 18. Instead, what every juror has, notwithstanding his, her, or their sworn duty to follow the law,[5] is

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[5] At the conclusion of jury selection, jurors must take an oath to "well and truly try the matter before the court, and render a true

the de facto power to nullify — a power made possible only by the rule that jury deliberations are secret. *See People v. Scott*, 2021 COA 71, ¶ 17.

¶ 41 The jury's power to nullify is directly at odds with the fundamental principle that "the facts [are] for the jury and the law for the court." *Dill v. People*, 94 Colo. 230, 235, 29 P.2d 1035, 1037 (1933). Consequently, courts have consistently disapproved of instructions that would inform the jury of its power to nullify. *Scott*, ¶ 16 (collecting cases); *see also Waller*, ¶ 76 (holding that "courts need not promote nullification"); *People v. Wilson*, 972 P.2d 701, 706 (Colo. App. 1998) (explaining that "most courts have held that trial courts should not instruct the jury that it may nullify a verdict of guilt" and concluding that the "trial court can, in its discretion, preclude counsel from arguing jury nullification").

¶ 42 Here, the court did not tell the jurors that they did not have the power to nullify; the court told the jurors that they had a duty to follow the law. We discern no error in the court's instruction.

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verdict, according to the evidence and the law as [the court] instruct[s]" them. COLJI-Crim. B:01 (2020).

See COLJI-Crim. E:01 (2020) (The pattern instruction entitled "Duties of Judge and Jury" provides, "It is my job to decide what rules of law apply to the case. . . . [Y]ou must follow the instructions I give you. Even if you disagree with or do not understand the reasons for some of the rules of law, you must follow them.").

B. Prosecutorial Misconduct

¶ 43 In closing argument, the prosecutor attempted to explain the mental state of "knowingly," which applied to both charges:

> Element number 3. Knowingly. This is a mental state, that has a precise legal definition that the Judge read to you.
>
> . . . .
>
> A person is acting knowingly when they are aware of what they are doing, as opposed to say, sleep walking. When you are sleep walking you are not aware of what you are doing, because you are asleep.
>
> But in this case the defendant was aware of what he was doing. He was awake, and he knew what he was doing. And a lot of the evidence in this case goes to show it.
>
> He pulled over. The officer asked him for his ID, he hands him his ID. He asks him for registration, and he is looking for the registration. He was awake, he was aware, he

> knew what was going on. That element number 3 has been proven beyond a reasonable doubt.

Rodriguez argues that the prosecutor's comments misstated the law by equating a knowing mens rea with mere voluntary conduct.

1. Standard of Review

¶ 44 In reviewing a claim of prosecutorial misconduct, we determine, first, whether the conduct was improper based on the totality of the circumstances and, second, whether any improper conduct warrants reversal under the proper standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

¶ 45 Because defense counsel did not object to the prosecutor's comments, we review the comments for plain error. *See People v. Denhartog*, 2019 COA 23, ¶ 50. Prosecutorial misconduct constitutes plain error only when there is a substantial likelihood that the misconduct affected the verdict or that it deprived the defendant of a fair and impartial trial. *Id.*

2. Analysis

¶ 46 During closing argument, a prosecutor may "employ rhetorical devices and engage in oratorical embellishments and metaphorical nuance." *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010)

(quoting *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003)). Still, a prosecutor must stay within the limits of appropriate prosecutorial advocacy and therefore may not misstate the law. *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999).

¶ 47 To prove the charge of obstructing a peace officer, the prosecutor had to show that Rodriguez knowingly obstructed, impaired, or hindered a peace officer's enforcement of the law. *See* § 18-8-104(1)(a), C.R.S. 2021. A person acts knowingly with respect to conduct when he is "aware that his conduct is of such nature or that such circumstance exists." § 18-1-501(6), C.R.S. 2021. In other words, the person need only "know[] what he is doing." *People v. Holmes*, 959 P.2d 406, 414 (Colo. 1998).

¶ 48 In our view, the prosecutor's references to sleepwalking and being awake were merely dramatic ways of emphasizing that, to act knowingly, Rodriguez only needed to know what he was doing. While perhaps a bit hyperbolic, the comments were not so far from the true definition of knowingly as to constitute obvious misconduct. *See People v. Fortson*, 2018 COA 46M, ¶ 77. As well, the prosecutor did not rely on Rodriguez's state of wakefulness as proof that he had acted knowingly. Instead, the prosecutor argued

that Rodriguez's actions in initially responding to the officer's instructions and then attempting to evade the officer showed that he was aware of his circumstances. Regardless, the comments were not so flagrant or glaring or tremendously improper as to constitute plain error. *See People v. Rhea*, 2014 COA 60, ¶ 43.

III. Conclusion

¶ 49 The conviction for possession with intent to distribute a controlled substance is reversed, and the case is remanded for a new trial on that charge. The conviction for obstruction of a peace officer is affirmed.

JUDGE RICHMAN and JUDGE GOMEZ concur.