SUMMARY
April 27, 2023

2023COA36

No. 19CA1928, *People v. Grudznske* — Crimes — Murder in the First Degree — Extreme Indifference — Vehicular Homicide (DUI) — Attempted Assault in the First Degree — Extreme Indifference — Attempted Vehicular Assault ¬(DUI); Constitutional Law — Fourteenth Amendment — Due Process — Equal Protection

While under the influence of alcohol, the defendant drove his pickup into another vehicle, fatally injuring its driver. The struck vehicle was propelled into an intersection, where it collided with other vehicles, injuring those occupants. The defendant attempted to flee the scene, showing little concern for the victims.

The Colorado General Assembly has passed laws that criminalize driving while under the influence of alcohol, including

separate crimes for vehicular homicide (DUI) and attempted vehicular assault (DUI). The General Assembly has also passed laws that allow for the prosecution of persons that cause the death or attempt to assault another through conduct manifesting an extreme indifference to the value of human life generally. In this case, a division of the court of appeals must resolve, for the first time, whether a defendant may be prosecuted for both extreme indifference first degree murder and vehicular homicide (DUI), and similarly, attempted extreme indifference first degree assault instead of attempted vehicular assault (DUI). The division concludes that prosecution and resulting convictions under the DUI laws and the general criminal statutes addressing extreme indifference crimes do not violate the defendant's right to equal protection and are consistent with the General Assembly's intent in enacting these laws.

The division also addresses a number of additional issues raised by the defendant, including the validity of the search warrant that permitted taking blood draws from him, various issues regarding the adequacy of the jury instructions provided by the trial court, and the admission of allegedly prejudicial evidence. The

division concludes the trial court did not err and therefore affirms the defendant's convictions.

COLORADO COURT OF APPEALS **2023COA36**

Court of Appeals No. 19CA1928
Jefferson County District Court No. 18CR3960
Honorable Christopher J. Munch, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Todd Kenneth Grudznske,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE SCHUTZ
Navarro and Tow, JJ., concur

Announced April 27, 2023

Philip J. Weiser, Attorney General, Brock J. Swanson, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Sean James Lacefield, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 After a jury trial, defendant, Todd Kenneth Grudznske, was convicted of extreme indifference first degree murder, vehicular homicide (DUI), three counts of attempted extreme indifference first degree assault, and three counts of careless driving (one of which was merged into the other two). The trial court sentenced Grudznske to life in prison on the extreme indifference first degree murder conviction and to lesser concurrent sentences on the remaining convictions. We affirm.

¶ 2 In resolving Grudznske's claims, we address his argument that the trial court violated his right to equal protection by allowing him to be charged with, and convicted of, extreme indifference first degree murder and attempted extreme indifference first degree assault. As a matter of first impression in Colorado, we conclude that a defendant's right to equal protection of the laws is not violated by being convicted of these offenses.

I. Background

¶ 3 The trial produced evidence from which the jury could have reasonably found the following facts.

¶ 4 On a Sunday morning in September 2018, Grudznske visited multiple bars. Grudznske arrived at the first bar at approximately

9 a.m., stayed for about an hour, and consumed three shots of liquor and one beer. Grudznske went to a second bar, where he drank another shot of liquor and another beer, and then proceeded to a third bar, where he consumed five shots of liquor and two beers.

¶ 5 Grudznske then got into his pickup truck at approximately noon. The truck was loaded with cargo in its bed. Grudznske proceeded to drive through residential and commercial areas, exceeding the speed limit by thirty to forty miles per hour. Traffic cameras detected Grudznske traveling as fast as seventy-one miles per hour, recklessly driving into bike lanes and over curbs, and nearly striking other vehicles. Grudznske was heading southbound on Kipling Street when he came to a red light at the intersection with Colfax Avenue. Grudznske plowed into a car legally stopped at the red light. The traffic light camera registered Grudznske's speed at approximately seventy miles per hour at impact. The collision propelled the stopped car into the intersection, where it was subsequently hit by multiple other cars.

¶ 6 Grudznske's collision with the stopped car caused the death of the driver. It also resulted in injuries to persons in three other

vehicles. After the collision, Grudznske attempted to flee the scene, but his truck was stuck atop a brick embankment. He also refused to unlock the doors of his truck. Once paramedics arrived, they had to help Grudznske out of his truck or he would have fallen due to his inebriated state. He was belligerent and threatening as paramedics transported him to the hospital, where his blood was drawn approximately ninety minutes after the collision. His blood alcohol content was .341. Additional blood draws were taken, two hours and three hours after the initial draw. Those draws revealed a blood alcohol content of .296 and .273.

¶ 7 Grudznske appeals based on the following contentions: (1) the trial court violated his right to equal protection by entering convictions for extreme indifference first degree murder and attempted extreme indifference first degree assault; (2) the General Assembly intended vehicular deaths or injuries caused by intoxicated drivers to be charged exclusively under Colorado's vehicular homicide and vehicular assault statutes; (3) the trial court erred by failing to suppress the results of his blood draw; (4) it erred by preventing the jury from considering the defense of self-induced (voluntary) intoxication; (5) it erred by not instructing the jury that

"knowingly" applies to all elements of the extreme indifference first degree murder and attempted extreme indifference first degree assault charges; (6) it erred by refusing to define "universal malice" for the jury and then, later, by providing an incomplete definition; and (7) it erred by allowing the jury to be exposed to extraneous prejudicial prior-crime evidence. Grudznske also claims that the cumulative impact of these alleged errors deprived him of a fair trial. We address these contentions in turn.

II. Equal Protection

¶ 8 Grudznske argues the trial court violated his right to equal protection of the laws by permitting him to be charged with and convicted of extreme indifference first degree murder in addition to vehicular homicide (DUI). *Compare* § 18-3-102(1)(d), C.R.S. 2022, *with* § 18-3-106(1)(b)(I), C.R.S. 2022. Similarly, he argues that he was deprived of equal protection by being charged with attempted extreme indifference first degree assault rather than attempted vehicular assault (DUI). *Compare* § 18-3-202(1)(c), C.R.S. 2022, *with* § 18-3-205(1)(b)(I), C.R.S. 2022.

¶ 9 The trial court treated Grudznske's equal protection argument as a challenge to the extreme indifference first degree murder

charge on its face and as applied to him. On appeal, however, Grudznske confirms he is only presenting an as-applied challenge. More specifically, Grudznske claims his equal protection rights were violated because there is not an intelligent standard to decide if his actions demonstrated knowing conduct with an extreme indifference to the value of human life as compared to reckless, drunken conduct. We disagree.

A. Standard of Review

¶ 10 We review de novo the constitutionality of statutes. *See People v. Lente*, 2017 CO 74, ¶ 10. "We presume statutes are constitutional, and a challenger has the burden to prove a statute unconstitutional." *Id.* "[T]o succeed on an as-applied challenge, a defendant must establish the unconstitutionality of a statute, as applied to him or her, beyond a reasonable doubt." *People v. Trujillo*, 2015 COA 22, ¶ 15.

B. Extreme Indifference First Degree Murder/Vehicular Homicide (DUI)

¶ 11 The Fourteenth Amendment to the United States Constitution and the due process clause of the Colorado Constitution guarantee the equal protection of laws. *See* U.S. Const. amend. XIV, § 1; Colo.

Const. art. II, § 25. Specific to Colorado, "equal protection is violated where two criminal statutes proscribe identical conduct, yet one punishes that conduct more harshly." *Dean v. People*, 2016 CO 14, ¶ 14.

¶ 12 The General Assembly retains the prerogative to establish appropriate penalties for criminal conduct, and it may choose to punish some conduct more severely than similar conduct if it believes the more harshly punished conduct has greater social impacts or graver consequences. *Id.* at ¶ 16. Equal protection is not violated in such circumstances, provided the legislative determination is reasonable. *Id.* Stated otherwise, equal protection is not violated if the differences in treatment are rationally justified. *Id.*

¶ 13 To survive an equal protection challenge, "the statutory classification must turn on 'reasonably intelligible standards of criminal culpability.'" *People v. Jefferson*, 748 P.2d 1223, 1226 (Colo. 1988) (quoting *People v. Marcy*, 628 P.2d 69, 80 (Colo. 1981)). This means that when interpreting the conduct proscribed by a statute, "a person of average intelligence [must be able to]

reasonably distinguish it from conduct proscribed by other offenses." *Id.* (quoting *Marcy*, 748 P.2d at 80-81).

¶ 14 As a starting point, this analysis requires us to focus on the elements of, and the differing consequences imposed for, the two offenses. *See People v. Stewart*, 55 P.3d 107, 115 (Colo. 2002); *see also People v. Prieto*, 124 P.3d 842, 845 (Colo. App. 2005). To establish extreme indifference first degree murder, the People must prove a defendant engaged in the following: "Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another . . . ." § 18-3-102(1)(d). Extreme indifference first degree murder is a class 1 felony. *See* § 18-3-102(3). A conviction of extreme indifference first degree murder carries a presumptive penalty of life imprisonment with no possibility of parole. *See* § 18-1.3-401(1)(a)(V)(A.1), C.R.S. 2022.

¶ 15 In contrast, the vehicular homicide (DUI) statute provides that "[i]f a person operates or drives a motor vehicle while under the influence of alcohol . . . and such conduct is the proximate cause of

the death of another, such person commits vehicular homicide," which is a class 3 felony. § 18-3-106(1)(b)(I), (c). Vehicular homicide (DUI) carries a presumptive penalty of four to twelve years' imprisonment plus a mandatory parole period of three years. *See* § 18-1.3-401(1)(a)(V)(A.1).

¶ 16 A conviction for extreme indifference first degree murder requires a showing that a defendant acted knowingly, meaning he must have been "aware that his conduct is practically certain to cause the result." § 18-1-501(6), C.R.S. 2022; *see* § 18-3-102(1)(d). In contrast, vehicular homicide (DUI) is a strict liability offense. § 18-3-106(1)(b)(I). And unlike vehicular homicide (DUI), extreme indifference murder requires proof that a defendant, under circumstances demonstrating an attitude of universal malice manifesting extreme indifference to the value of human life generally, knowingly engaged in conduct that created a grave risk of death to others. Thus, the statutes do not describe identical conduct.

¶ 17 In addition to comparing the statutory definitions, the equal protection analysis requires us to consider the conduct that Grudznske demonstrated before and after striking the victim's car.

In doing so, we must determine whether a rational standard exists by which a reasonable juror could distinguish between the two crimes based on the evidence presented. *See People v. Lovato*, 2014 COA 113, ¶ 50. We therefore turn to the operative facts of this case.

¶ 18 It is undisputed that before entering his truck, Grudznske consumed numerous hard liquor shots and beers within a three-hour window of time. Indeed, he consumed so much liquor by noon that his blood alcohol content after the accident was .341, more than four times the level at which a defendant is considered per se under the influence. *See* § 42-4-1301(2)(a), C.R.S. 2022. With that alcohol saturation, Grudznske drove sixty to seventy miles per hour through residential and heavily trafficked commercial areas. When he approached a traffic light that had been red for several seconds, he ignored it, maintaining a speed of approximately seventy miles per hour when he made impact with the stopped car. Had it not been for the collision with the victim (which pushed the victim into the intersection), Grudznske would have entered the busy intersection of Kipling and Colfax at that

excessive speed. A reasonable juror could conclude these actions reflected an extreme indifference toward the value of human life.

¶ 19 After the accident, Grudznske was combative and did not ask about the condition of the driver of the car he had hit, and he repeatedly requested that he be allowed to go home. While not determinative, a reasonable juror could conclude that Grudznske's conduct after the accident also reflected his extreme indifference to the value of human life.

¶ 20 The parties agree that this conduct meets the definition of vehicular homicide (DUI). But given the evidence of Grudznske's conduct on the day of the incident, we agree with the People that such conduct also "demonstrate[d] that his lack of care and concern for the value of human life generally [were] extreme, and that the circumstances of his actions evidence[d] that aggravated recklessness or cold-bloodedness which has come to be known as 'universal malice.'" *Jefferson*, 748 P.2d at 1232. "The intent of the legislature has always been to prohibit extremely reckless conduct, when accompanied by evidence of 'universal malice.'" *Id.* at 1231.

¶ 21 Considering these particular circumstances, a person of average intelligence could determine that Grudznske committed

vehicular homicide (DUI) and, by acting with an attitude that indicated malice, in general, toward others, he additionally committed extreme indifference first degree murder. "That is all that is necessary to distinguish the statutes in the wake of an equal protection challenge." *Id.* at 1233. We therefore reject Grudznske's contention that his conviction for extreme indifference first degree murder violated his right of equal protection of the laws.

C. Attempted Extreme Indifference First Degree Assault/Attempted Vehicular Assault (DUI)

¶ 22 Grudznske also contends that his equal protection rights were violated by allowing the prosecution to proceed with attempted extreme indifference first degree assault instead of attempted vehicular assault (DUI).

¶ 23 The analysis of the interplay between these two offenses does not materially vary from the analysis of the extreme indifference first degree murder and vehicular homicide (DUI) counts. As with the homicide charges, the material difference between the two assault statutes is that the extreme indifference count requires the prosecution to prove that under circumstances manifesting extreme indifference to the value of human life, a defendant knowingly

engaged in conduct that created a grave risk of death to another and thereby caused the other to suffer serious bodily injury. § 18-3-202(1)(c). In contrast, vehicular assault (DUI) is a strict liability offense. *See* § 18-3-205(1)(b)(I). For the reasons previously described in detail, we conclude the facts of this case provided the jury with a rational basis to apply these differing elements. We therefore perceive no error resulting from Grudznske's conviction for attempted extreme indifference first degree assault.

III. The General Assembly's Intent

¶ 24 Grudznske contends the Colorado General Assembly intended our DUI statutes to provide the exclusive means of prosecuting those who cause death or serious bodily injury to others while driving while under the influence. We disagree.

¶ 25 We apply three factors to decide whether the General Assembly intended to limit a defendant's prosecution to a specific statute:

> (1) whether the statute invokes the full extent of the state's police powers; (2) whether the specific statute is part of an act creating a comprehensive and thorough regulatory scheme to control all aspects of a substantive area; and (3) whether the act carefully defines different types of offenses in detail.

People v. Smith, 938 P.2d 111, 116 (Colo. 1997). If "a [specific] statute does not satisfy at least the first two prongs of the [*Smith*] test, it does not supplant the general statute." *People v. Blue*, 253 P.3d 1273, 1278 (Colo. App. 2011).

¶ 26 Our guiding principle in interpreting statutes is to determine and give effect to the General Assembly's intent by first looking to the plain language of the statute. *See People v. Dennel*, 2022 COA 115M, ¶ 10. We read the statute's words and phrases according to their common usage and "in a manner that is harmonious with other provisions" of the statute. *Id.* If the "language is clear and unambiguous, we won't engage in further statutory analysis. . . . [I]t is only when a statute is ambiguous that we may employ other tools . . . such as considering the consequences of a given construction, the end to be achieved by the statute, and legislative history." *Id.* at ¶ 11.

¶ 27 The essence of Grudznske's argument stems from the General Assembly's enactment of specific legislation that permits the prosecution of those who cause another person's death or bodily injury by driving while under the influence of alcohol. Because the General Assembly enacted such statutes, the argument continues,

it must have intended these specific statutes to deprive the People of the ability to pursue charges under Colorado's general criminal code, which criminalizes various types of homicidal and assaultive conduct.

¶ 28 Grudznske's argument is logically unavailing. The General Assembly has demonstrated no intention of giving those who commit crimes while intoxicated favorable treatment. Defendants are routinely charged with crimes such as homicide or assault for offenses committed while they were intoxicated. Voluntary intoxication may be considered if offered to obviate the existence of specific intent, if specific intent is an element of the crime charged. § 18-1-804(1), C.R.S. 2022. However, voluntary intoxication is not relevant to general intent crimes, such as those at issue here.

¶ 29 Given this long-established authority, it makes no logical sense to conclude that the General Assembly intended to provide some form of special dispensation for those persons who choose to become intoxicated, decide to drive, and then use a vehicle in a manner that evidences an extreme indifference to the value of human life. We are unwilling to assume that the General Assembly

intended such an unjust and absurd result. *See, e.g.*, *People v. Richards*, 23 P.3d 1223, 1225 (Colo. App. 2000).

¶ 30 Indeed, it is more logical to conclude that the vehicular homicide and assault statutes were not intended to place an intoxicated driver on a more lenient path when he chooses to engage in conduct manifesting an extreme indifference to the value of human life and knowingly creates a grave risk of death to persons other than himself. It is more likely that the General Assembly intended for the vehicular homicide and assault charges to be available as a form of lesser accountability when death or serious bodily injury results from an intoxicated driver's actions, but the driver's actions do not manifest an extreme indifference to life or knowing conduct. In such circumstances, the vehicular homicide and assault statutes permit the People to hold a defendant accountable for criminal conduct without the burden of proving extreme indifference, albeit with a lesser punishment to reflect the lesser degree of moral culpability. What the statutes do not reflect, however, is an intent to provide a defendant a lesser penalty simply because he was intoxicated and, while in such state,

chose to drive his vehicle in a manner that established extreme indifference first degree murder or assault.

¶ 31 Finally, we note that other divisions of this court have reached similar conclusions by rejecting arguments that vehicular homicide (DUI) was intended to supplant other homicide charges. *See, e.g.*, *People v. Tarr*, 2022 COA 23, ¶ 63 (conviction for second degree murder not precluded by vehicular homicide (DUI)) (*cert. granted* Mar. 27, 2023); *Prieto*, 124 P.3d at 848 (conviction for first degree felony murder based upon then existing statute that treated homicide caused by a person in the immediate flight from committing certain felonies as first degree murder was not precluded, even though an applicable statute enhanced the penalty for vehicular homicide (DUI) when the offense was committed in immediate flight from commissions of another felony). We note *Prieto* was decided in 2005, and the General Assembly certainly could have passed legislation to reject the rationale underlying that decision. The fact that the General Assembly has not passed legislation rejecting that interpretation is a further indication that we should not infer an intent by the General Assembly to preempt the general homicide and assault statutes. *See People v. Washburn*,

197 Colo. 419, 423, 593 P.2d 962, 964 (1979) (observing that "where an offense has been construed in the past to require criminal intent, legislative silence indicates approval of that prior judicial interpretation" (citing *Morissette v. United States*, 342 U.S. 246 (1952))).

¶ 32 For these reasons, we conclude that the vehicular homicide and assault statutes do not evidence the General Assembly's intent to invoke the full extent of the state's police powers to the exclusion of the general homicide and assault statutes. We also conclude that the vehicular homicide and assault statutes do not reflect a comprehensive and thorough regulatory scheme to control all aspects of homicides or assaults resulting from an intoxicated driver's use of a vehicle to cause the death or bodily injury of another person. *See Prieto*, 124 P.3d at 848. Because these two elements of the *Smith* test are not satisfied, we conclude the vehicular homicide and assault statutes do not supplant the general homicide and assault statutes. *Smith*, 938 P.2d at 116; *Blue*, 253 P.3d at 1278.

IV. Blood Draw

¶ 33 Grudznske argues that the trial court erred by failing to suppress the results of his blood draws. We disagree.

A. Standard of Review

¶ 34 Suppression orders present a mixed question of law and fact. We review de novo questions of law and defer to the trial court's factual findings when supported by competent evidence. *People v. Schaufele*, 2014 CO 43, ¶ 15. We may affirm the denial of a suppression order on any grounds supported by the record, even if those grounds were not relied upon by the trial court. *See Moody v. People*, 159 P.3d 611, 615 (Colo. 2007).

B. Additional Facts

¶ 35 The vehicle collision occurred on Sunday, September 30, 2018. Based upon the information obtained on scene, the investigating officers suspected that Grudznske had consumed alcohol prior to the collision. Officer Louis Strube was directed to return from the scene to the police department, where he prepared a probable cause affidavit and a corresponding proposed search warrant to draw three blood samples from Grudznske. In relevant part, the affidavit read:

Your Affiant, Lakewood Police Department, Police Agent Strube, a peace officer, being duly sworn upon oath, says that the facts stated herein are true. Your Affiant has personal knowledge of the facts contained within this affidavit through personal involvement, interviews with witnesses and other police officers, and through reviewing official police reports. Based upon the following facts your Affiant requests the search and seizure of three separate blood kit samples, to be collected at approximately one half hour increments, to determine the level of alcohol and/or drugs which may be present for the following person:

Todd Grudznske . . . .

Three blood draws are necessary to determine the level of intoxication and extrapolate if the levels are decreasing or increasing and to provide a sufficient sample for testing. I believe it is necessary to obtain this evidence immediately as the evidence requested is of a perishable nature and a time delay would render it useless.

On, at [sic] Sunday, September 9, 2018 at 12:45PM the above named person was identified to have operated the following vehicle . . . .

This person was identified as having operated this vehicle [and] was observed by Agent Strube to be in the driver's seat, and as a result of this person's operation of the above listed vehicle, serious bodily injury or death was caused to another person . . . .

(Emphasis added.) The affidavit went on to describe the eyewitness testimony of those who were present at the scene of the accident and the factual basis for why officers suspected Grudznske was under the influence of alcohol.

¶ 36 The warrant was not effective until duly authorized by a judicial officer. So Strube sent the affidavit and proposed warrant electronically to Judge McNulty, who was the on-call judge that Sunday afternoon. Judge McNulty placed Strube under oath by telephone, and then notarized Strube's signature.

¶ 37 During the phone call, Strube advised Judge McNulty of the circumstances surrounding the crime scene and officers' interactions with Grudznske. At a subsequent hearing on the motion to suppress the evidence of the blood draws, Strube testified as follows:

> Q. . . . . And that particular conversation regarding the warrant, did he ask you questions? Do you know how that conversation went, if you recall?
>
> A. I remember it being conversational and polite. Nothing really stood out as the general — he swore me in over the phone. And just [in] general, I explained kind of what — why I'm contacting him and what happened *that day*.

(Emphasis added.) Later, during cross-examination by defense counsel, Strube confirmed, "I explained the accident, and I explained what was happening that day on the 30th."

¶ 38 All parties agree that the probable cause affidavit contains typographical errors. It states that Grudznske drove the vehicle on September 9, 2018, rather than on September 30, 2018. The parties also agree that this was an innocent mistake, made while Strube was completing his first request for a search warrant.

¶ 39 The People conceded at the suppression hearing that, because of the erroneous date, the probable cause affidavit was defective. Similarly, the trial court concluded that due to the error, the "four corners" of the affidavit did not establish probable cause. Nevertheless, the court concluded the affidavit was made in good faith and that (1) the typographical error for the date was inadvertent; (2) the reviewing judicial officer acted in good faith when approving the warrant but simply did not notice the error in the date; and (3) law enforcement acted in good faith reliance on the resulting warrant to obtain the blood draws from Grudznske. The court also concluded, based upon the telephone call with Strube, that Judge McNulty was informed of and understood that the

collision actually occurred on September 30, 2018, the day he issued the warrant. Based on these facts, the trial court concluded the warrant was valid because it was sought and issued in good faith, and law enforcement acted in good faith reliance upon the warrant when obtaining the blood draws. *See United States v. Leon*, 468 U.S. 897, 907-08 (1984).

C. Analysis

¶ 40 Because of the typographical error referring to September 9 rather than September 30, Grudznske argues that the facts alleged within the four corners of the affidavit did not establish probable cause to support the issuance of the warrant, and the fruits of the resulting search must be suppressed. Grudznske also points to authority from the Colorado Supreme Court supporting the proposition that verbal statements made to the issuing judicial officer may not be relied on to correct or supplement an incomplete or deficient affidavit. *See, e.g.*, *People v. Padilla*, 182 Colo. 101, 105-06, 511 P.2d 480, 482 (1973) (affidavit failed to identify the party whose automobile was to be searched or any case that was pending against that person and contained no reference to the date of the alleged drug purchase that purportedly justified the search).

¶ 41 We agree with the proposition that, generally, a judicial officer may not rely on verbal communications with law enforcement to supply essential elements that are missing from an affidavit. But we reject the broad application of that principle to the specific facts of this case. And unlike the trial court, we disagree with the conclusion that the four corners of the affidavit do not support the issuance of the warrant.

¶ 42 As Grudznske argues, if Judge McNulty actually believed or understood that the crime in question occurred on September 9, there would be no legal or factual basis to support the issuance of a warrant to collect Grudznske's blood on September 30. But this conclusion captures too much — it requires us to assume that Judge McNulty issued a warrant three weeks after the accident to take three blood samples as a means of assessing Grudznske's blood alcohol content on September 9. We are not able to entertain such a logically strained analysis.

¶ 43 The reasonable conclusion is that Judge McNulty understood, based upon the information provided within the four corners of the affidavit, and without the supplemental conversation with Strube, that the subject accident had occurred within the previous hours,

and time was of the essence to issue the warrant to determine Grudznske's blood alcohol content. This conclusion is supported by Strube's statements in the affidavit:

> Three blood draws are necessary to determine the level of intoxication and extrapolate if the levels are decreasing or increasing and to provide a sufficient sample for testing. I believe it is necessary to obtain this evidence immediately as the evidence requested is of a perishable nature and a time delay would render it useless.

¶ 44 In light of this allegation, a reasonable jurist would assume or understand, as Judge McNulty did, that this collision occurred shortly before he was asked to issue the warrant. While the subsequent testimony from Strube was not necessary to reach this conclusion, it nevertheless was admissible for the proper purpose of explaining what appears from the four corners of the document to be a typographical error referring to the incorrect date of the collision.

¶ 45 For these reasons, we conclude that the reasonable interpretation of the warrant reveals an obvious typographical error: Sunday, September 30 rather than Sunday, September 9. To the extent that such an inference is inconsistent with the affidavit, we

conclude the testimony of Strube was admissible to provide context to correctly interpret the obvious typographical error. *See, e.g.*, *People v. Lubben*, 739 P.2d 833, 836 (Colo. 1987) (although probable cause affidavit referenced an event that occurred "within (72) hours of [a date four days in the future]," a commonsense reading was that the officer's intent was to refer to events within 72 hours prior to the date of the affidavit); *see also State v. Rosario*, 680 A.2d 237, 240-41 (Conn. 1996) (citing secondary authority and cases from various jurisdictions holding that an affidavit containing the wrong date may be attributed to a scrivener's error when the facts recited in the affidavit support a conclusion that the stated date was erroneous, thereby supporting a finding of probable cause to issue the warrant). Accordingly, we conclude the trial court did not err by declining to suppress Grudznske's blood alcohol content derived from the blood draws authorized by the warrant.[1]

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[1] Having reached this conclusion, we do not address the People's contention that Grudznske consented to the search under Colorado's express consent statute, *see* § 42-4-1301.1, C.R.S. 2022, or that the admission of the blood alcohol evidence was harmless beyond a reasonable doubt.

¶ 46 But even if we were to assume, for the sake of argument, that the trial court correctly concluded that the affidavit did not support the issuance of the warrant, we also agree that the trial court correctly ruled that evidence of the blood draws was admissible under the good faith exception to the exclusionary rule. The trial court found, with record support, that (1) Strube's error was typographical in nature rather than reflective of recklessness or bad faith; (2) Judge McNulty did not abandon his judicial role; (3) the warrant did not lack the necessary specificity to facilitate its enforcement; and (4) this was not a bare bones affidavit. Because they have record support, we will not disturb these findings. Thus, this case met the requirements of the good faith exception, and that exception was not rendered inapplicable because of improper conduct by law enforcement or the reviewing judicial officer. *See Leon*, 468 U.S. at 907-08 (articulating the parameters of the good faith exception to the exclusionary rule); *see also People v. Gutierrez*, 222 P.3d 926, 941 (Colo. 2009) (articulating factors that may preclude application of the good faith exception).

V. Alleged Instructional Errors

¶ 47 Grudznske alleges numerous instructional errors by the trial court. We address each in turn.

A. Standard of Review

¶ 48 We review jury instructions de novo, as a whole, to determine whether they accurately informed the jury of the governing law. *People v. Trujillo*, 2018 COA 12, ¶ 11. Trial courts enjoy "broad discretion to determine the form and style of jury instructions." *Id.* (quoting *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011)). "A jury instruction should substantially track the language of the statute describing the crime; a material deviation from the statute can result in reversible plain error, depending on the facts of the case." *People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005).

¶ 49 "Where a defendant properly preserves an objection to an elemental jury instruction, the instruction is subject to constitutional harmless error analysis. If no objection is made, we review for plain error." *People v. Ridgeway*, 2013 COA 17, ¶ 9 (citation omitted). Under constitutional harmless error analysis, "we reverse if 'there is a reasonable *possibility* that the [error] might have contributed to the conviction.'" *Hagos v. People*, 2012 CO 63,

¶ 11 (citation omitted). And under plain error review, reversal is necessary when the error is obvious and substantial, and it so undermines the fundamental fairness of the trial as to cast doubt on the reliability of the judgment of conviction. *Id.* at ¶ 14.

B. Voluntary Intoxication

¶ 50 Grudznske preserved his argument that the trial court erred by declining to provide the jury with an instruction that Grudznske could rely on his voluntary intoxication to defeat the circumstances element of extreme indifference first degree murder. The trial court acknowledged both parties' contentions regarding voluntary intoxication. The prosecutor argued it could not serve as a defense because extreme indifference first degree murder is a general intent crime. Defense counsel countered that the requested instruction was relevant to the jury's determination, based on the totality of the circumstances surrounding the incident, whether Grudznske's attitude was one that evidenced universal malice.

¶ 51 After considering both parties' arguments, the court indicated it was inappropriate to give the voluntary intoxication instruction requested by the defense. The court also indicated that it would consider such an instruction if the defense wished to tender one. In

the meantime, however, the court explained that it would provide a limiting instruction telling the jury that it could consider voluntary intoxication for the purpose of evaluating the particular circumstances of the crime but not "as a defense to any of the charges in this case." The limiting instruction read as follows:

¶ 52 You may not consider evidence of self-induced intoxication as a defense to any of the charges in this case. But in helping you to evaluate the circumstances under which the alleged crimes occurred, the lawyers may draw your attention to all of the evidence, including evidence of self-induced intoxication.

¶ 53 Defense counsel ultimately elected not to tender an alternative instruction, and the court gave the jury the above instruction. We do not detect any error in this decision.

¶ 54 Grudznske concedes voluntary intoxication is not a defense to extreme indifference first degree murder. But he argues the court should have instructed the jury that voluntary intoxication may be used to traverse the circumstances element ("evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally"). § 18-3-102(1)(d).

¶ 55 *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011), teaches that a traverse is one type of defense to a criminal charge by which the defendant "effectively refute[s] the possibility that [he] committed the charged act by negating an element of the act." "If . . . the presented evidence raises the issue of an elemental traverse, the jury may consider the evidence in determining whether the prosecution has proven the element implicated by the traverse beyond a reasonable doubt . . . ." *Id.*

¶ 56 A defendant may offer relevant evidence to negate "the existence of specific intent if such intent is an element of the crime charged." § 18-1-804(1). But extreme indifference murder is not a specific intent crime. Instead, it is a general intent crime, where a defendant's knowing and "actual killing act had to be one objectively demonstrating a willingness to take life *indiscriminately*." *Candelaria v. People*, 148 P.3d 178, 182 (Colo. 2006) (emphasis added). Thus, we agree with the conclusions reached by other divisions of this court: voluntary intoxication is not a defense to the circumstances element of extreme indifference first degree murder. *See, e.g.*, *People v. Draper*, 2021 COA 120, ¶¶ 22-24; *People v. Zekany*, 833 P.2d 774, 778 (Colo. App. 1991). Accordingly, the trial

court did not err by declining to give a broader voluntary intoxication instruction.

C. The "Knowingly" Component of Extreme Indifference First Degree Murder

¶ 57 Grudznske next argues that the trial court erred by giving a jury instruction in which "knowingly" did not modify each element of the extreme indifference first degree murder and attempted extreme indifference first degree assault charges. Grudznske asserts that the court erroneously relied on *Montoya v. People*, 2017 CO 40, in which our supreme court held that "knowingly" applies to the conduct and the result of that conduct prescribed by the statute.

1. Additional Facts

¶ 58 At the jury instruction conference, defense counsel, the prosecutor, and the court engaged in a lengthy discussion of the elements of extreme indifference first degree murder and attempted extreme indifference first degree assault. The prosecutor objected to the trial court's suggested instruction because it included footnotes that repeated portions of the knowingly definition that was fully defined in separate instructions. Defense counsel

indicated he did not wish to be heard on the extreme indifference first degree murder instruction.

¶ 59 The trial court rejected the prosecutor's objection, explaining,

> I don't think I have ever before, that I can remember, put a footnote into an elemental instruction telling the jury which part of the knowingly instruction this relates to.
>
> The COLJI instruction, I think we all agree, is wrong for one reason, and that is because the COLJI instruction, it appears to me, has not yet been — has not yet been corrected to reflect the *Montoya* case.
>
> And the result is, under the COLJI instruction, it seems like knowingly modifies under circumstances evidencing an attitude of universal malice manifesting extreme indifference. We all know that's not right after reading *Montoya*.
>
> But the COLJI instruction also has as one sentence or one element: Engaged in conduct which created a grave risk of death to a person or persons other than himself. The difficulty with that is the first part of that invokes one meaning of knowingly, and the second part invokes a second meaning of knowingly. And that, in my view, is not — well, it hasn't been clear to lawyers and judges in the past, as the chief justice pointed out in *Montoya*, and it seems to me would be very difficult for a juror to understand how knowingly relates to this.

The court continued its explanation by stating that it had created a jury instruction based on *Montoya* that clarified knowingly and its application to (a) the defendant's conduct and (b) that conduct's result. Defense counsel then stated that he did not have an objection to the instruction, except that the footnote font was smaller than the rest of the instruction's content.

¶ 60 The court's extreme indifference first degree murder instruction provided as follows:

> The elements of the crime of *Murder in the First Degree (Extreme Indifference)* are:
>
> 1. That the defendant, Todd Grudznske,
> 2. in the State of Colorado, at or about the date and place charged,
> 3. under the circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally,
> 4. knowingly,
>   a. engaged in conduct[1]
>   b. which created a grave risk of death to a person, or persons, other than himself[2], and
> 5. thereby caused the death of [the victim]
>
> [1] A person acts "knowingly" with respect to conduct when he is aware that his conduct is of such nature.
>
> [2] A person acts "knowingly" with respect to a result of his conduct when he is aware that his

> conduct is practically certain to cause the result.

The court's instruction on the elements of attempted extreme indifference assault was similarly structured.

2. Analysis

¶ 61 The People contend that Grudznske either invited or waived any error associated with this instruction. But even if we assume, without deciding, that Grudznske merely forfeited rather than waived or invited this issue, we discern no error.

¶ 62 The supreme court's analysis in *Montoya* focused on the defendant's conduct of firing a gun at random into a crowd, which resulted in the death of a bystander. *Montoya*'s holding specifically wrangled with the perceived ambiguity related to the statute's treatment of the defendant's conduct and the result of that conduct. In determining and clarifying that the mens rea, knowingly, was applicable to both elements, the supreme court concluded that "knowingly engaging in the . . . conduct and thereby causing the death of a person or persons is the equivalent of knowingly causing the death of another." *Montoya*, ¶ 16.

¶ 63 Because the supreme court did not address whether knowingly applied to the circumstances elements of the crime, Grudznske argues that the court implicitly concluded that knowingly also applies to the introductory phrase: "[u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally." § 18-3-102(1)(d).

¶ 64 We reject this analysis, in part, because the trial court's interpretation of *Montoya*'s silence as an implicit suggestion that knowingly does not apply to the circumstances element is reasonable.

¶ 65 But more importantly, we conclude that the clear structure of the extreme indifference statutes demonstrate that knowingly applies only to the action and outcome elements of the statutes, not the circumstances element. The circumstances element is described in the independent introductory clause, and only after that clause is completed does the word knowingly make its appearance, where it then modifies the action and outcome elements. Thus, under the plain language of the statute, the General Assembly has indicated its intention that knowingly

modifies the action and outcome elements but not the circumstances element. The trial court's instructions correctly reflected this interpretation and therefore were not erroneous. *See, e.g.*, *People v. Cross*, 127 P.3d 71, 73-74 (Colo. 2006) (knowingly ordinarily applies to all elements of an offense but the General Assembly may structure a statute so that knowingly applies to conduct, circumstances, results, or any combination thereof, but not necessarily all three).

¶ 66 Nor do we reach a contrary conclusion based on the fact that the model jury instruction used knowingly to apply to the circumstances element of the extreme indifference offenses. *See* COLJI-Crim. 3-1:04, 3-2:03 (2022). A trial court is not required to follow the precise formatting or wording of the model instructions. *See Krueger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009); COLJI-Crim. Preface. Instead, the court should "give weight" to the model instruction but must ultimately ensure that an instruction tracks the language of the statute. *See People v. Dunlap*, 124 P.3d 780, 812 (Colo. App. 2004). Here, the trial court's instructions correctly state the proper application of the knowingly mens rea to the

extreme indifference offenses. Thus, the trial court did not err by giving the extreme indifference instructions.

D. Universal Malice Definition

¶ 67 Grudznske also argues that the trial court erred by failing to initially provide the jury with a definition of "universal malice." He additionally asserts the trial court compounded its error by giving the jury an incomplete universal malice instruction in response to the jury's request for one.

1. Additional Facts

¶ 68 Consistent with the trial court's approach regarding the extreme indifference statutes and corresponding jury instructions, the court invited counsel to tender a proposed instruction defining universal malice. Defense counsel tendered such a definition but acknowledged that it was based on case law interpreting a prior version of the statute. The court expressed reluctance to give the instruction, noting that there was no statutory definition and the current case law does not mandate giving a definitional instruction. Consistent with this forecast, the court did not initially provide the jury with a definition of universal malice.

¶ 69 Once the jury began its deliberations, it requested a definition. The trial court drafted a proposed definition that included four quotes from Colorado Supreme Court decisions applying the concept of universal malice:

> While there is no legal definition of the words "universal malice," appellate courts have used the following language in describing the term:
>
> *"Universal malice" describes conduct that, by its very nature and the circumstances of its commission, evidences a willingness to take human life indiscriminately, without knowing or caring who the victim may be or without having an understandable motive or provocation."*
>
> *"The element of universal malice required for extreme indifference murder has been defined as aggravated or extremely reckless conduct."*
>
> *"[A]cts putting at risk a single victim, without knowing or caring who that may be, as well as those acts "put[ting] at grave risk a number of individuals not targeted by the defendant"*
>
> *"Cold blooded disregard for the value of human life generally also means aggravated or extreme recklessness."*
>
> In deciding the meaning of these words, you are not bound by these various appellate court statements. They are supplied for your consideration only to the degree that you may find them useful.

¶ 70 The prosecutor objected to the term "cold blooded" in the fourth quote. In turn, defense counsel objected to the third quote and requested time to create a more complete instruction. The court provided a recess. During this time, neither party tendered an additional or alternative instruction. The jury, however, sent a follow-up inquiry as to the time it was taking to receive a response to its request. The trial court then acknowledged and overruled the prosecutor's objection to the fourth quote and defense counsel's objection to the third, and it delivered the supplemental instruction to the jury.

2. Analysis

¶ 71 Divisions of this court have recently published conflicting holdings whether the trial court must provide a jury with the definition of universal malice. In *People v. Garcia*, 2021 COA 80, ¶ 18 (*cert. granted* Mar. 28, 2022), the division concluded that universal malice has a common meaning that can be discerned by a reasonable juror. But another division in *People v. Draper*, 2021 COA 120, ¶ 34, disagreed with the *Garcia* holding, reasoning that if the court needed a dictionary to understand the common meaning, so would a typical juror. We decline to weigh in on this issue

because we conclude that any potential error that may be attributable to the initial decision not to define universal malice was obviated by the trial court's subsequent instruction.

¶ 72 Through its supplemental instruction, the trial court provided the jury with four paragraphs of quotes illustrating how the Colorado Supreme Court has construed the term universal malice. Additionally, the trial court informed the jury that it was not bound by the four exemplary quotes but that it could consider them to the degree it found them useful. The court also separately informed the jury that the instructions must be considered together as a whole. Applying reason and common sense, these instructions taken as a whole appropriately guided the jury in its consideration of whether the People had met their burden to prove that Grudznske's conduct was indicative of universal malice manifesting extreme indifference to human life generally.

¶ 73 Moreover, "[t]he omission of an element (and by extension the lesser error of failing to [fully] define an element) of an offense in the jury instructions can be harmless beyond a reasonable doubt if the evidence relating to that element is overwhelming." *Draper*, ¶ 40. Grudznske's undisputed conduct demonstrated universal malice.

See Jefferson, 748 P.2d at 1227 (listing examples of conduct that supported universal malice, including "the discharge of a firearm into a crowd of people, operating a vehicle at high speed, placing obstructions on a railroad track, throwing a heavy piece of timber from a roof onto a crowded street," and the like).

¶ 74 Thus, even if we assume, without deciding, that the trial court's initial decision to not define universal malice was error, any such error was harmless beyond a reasonable doubt in light of the supplemental instruction and the overwhelming evidence supporting the existence of universal malice.

VI. Alleged Evidentiary Error

¶ 75 Grudznske contends that the trial court erred by admitting a CD into evidence. The CD was a composite exhibit that included certain documents derived from Grudznske's cell phone records. Among the records included on the CD was the probable cause affidavit that was used to obtain a warrant for the blood draws from Grudznske. The CD also apparently contained information about Grudznske's past alcohol-related offenses. Grudznske's counsel did not object to the exhibit, and it was admitted and included with the other evidence given to the jury for consideration during its

deliberations. Grudznske argues that because the CD contained prejudicial information, reversal is required. We disagree.

A. Preservation and Standard of Review

¶ 76 Grudznske argues that this issue was preserved, yet his counsel did not object to the court admitting the CD. Grudznske claims, however, that when asked what was on the CD, the prosecution's forensic expert unintentionally misled his counsel, and therefore, although counsel did not object, the issue should still be considered preserved. The People, conversely, argue that the issue was not preserved because when provided two different opportunities to object to the CD, defense counsel failed to do so.

¶ 77 We conclude the forensic expert's statement did not mislead or relieve counsel of the obligation to either object to the exhibit in real time or ask for an extension of time to do so. We therefore review for plain error. *See Hagos*, ¶ 14.

B. Analysis

¶ 78 The record fails to indicate that the jury was provided with the hardware necessary to view the CD. Because there is no record support for the conclusion that the jury did, or was even able to, access the CD, Grudznske has failed to demonstrate that the

admission of the CD casts serious doubt on the reliability of the conviction. *Id.*; *cf. Ray v. People*, 2019 CO 21.

¶ 79 In *Ray*, our supreme court examined whether the trial court erred by providing the deliberating jury with access to hardware by which the jury could replay videotape evidence of a police interview with an eyewitness to the subject homicides. *Id.* at ¶ 15. Although the supreme court concluded that the trial court erred by allowing such unfettered access to the videotape, the supreme court concluded any error was harmless considering the substantial independent evidence of the defendant's guilt. In this case, the record is devoid of any indication that the jury was provided access to the hardware necessary to view the CD. Moreover, here as in *Ray*, there is overwhelming independent evidence of Grudznske's guilt. Thus, we conclude that the admission of the CD caused no harm to Grudznske.

VII. Cumulative Error

¶ 80 The doctrine of cumulative error is based on the concept that multiple errors, in isolation, may be viewed as harmless, but the synergistic effect of the multiple errors may be greater than the sum of the individual errors and thereby so prejudicial that they deprive

a defendant of a fair trial. *See People v. Vialpando*, 2022 CO 28, ¶ 33.

¶ 81 Here, Grudznske alleged numerous errors, but we have not found any errors committed by the trial court. Moreover, there was only one instance when we declined to address whether an error was committed. Thus, Grudznske has failed to demonstrate the existence of multiple errors, and the doctrine of cumulative error is therefore not applicable.

VIII. Disposition

¶ 82 The judgment of conviction is affirmed.

JUDGE NAVARRO and JUDGE TOW concur.