SUMMARY
March 2, 2023

2023COA20

No. 20CA1375, *People v. Cuellar* — Criminal Law — Trials — Closing Arguments — Prosecutorial Misconduct — Misstatement or Misinterpretation of the Law

A division of the court of appeals considers whether a prosecutor commits misconduct in closing by arguing that the jury may acquit the defendant only if it believes that a prosecution witness lied throughout her testimony. The division holds that such an argument is improper because it misstates the law and has the potential to lower the prosecution's burden of proof. However, the division concludes that, under the circumstances of this case, the prosecutorial misconduct was harmless.

COLORADO COURT OF APPEALS **2023COA20**

Court of Appeals No. 20CA1375
Gilpin County District Court No. 18CR179
Honorable Todd L. Vriesman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Joshua James Cuellar,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE LIPINSKY
Fox and Schock, JJ., concur

Announced March 2, 2023

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¶ 1 Justice Sutherland's decades-old pronouncement that, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones," *Berger v. United States*, 295 U.S. 78, 88 (1935), is a well-entrenched principle of Colorado jurisprudence. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005); *People v. Walker*, 180 Colo. 184, 190, 504 P.2d 1098, 1101 (1972). "While a prosecutor can use every legitimate means to bring about a just conviction, she has a duty to avoid using improper methods designed to obtain an unjust result. Overzealous advocacy that undermines the quest for impartial justice by defying ethical standards cannot be permitted." *Domingo-Gomez*, 125 P.3d at 1048 (citations omitted).

¶ 2 Trial judges are like referees in a boxing ring who must decide, on the spot, whether a contestant has struck a foul blow. If so, the judge must take immediate corrective action — cautioning the prosecutor who made the improper statement, striking the statement, and, if necessary, instructing the jury to disregard it. *See id.* at 1049-50.

¶ 3 The Colorado courts have addressed numerous examples of prosecutors' improper statements in closing argument. *See Wend v.*

People, 235 P.3d 1089, 1096 (Colo. 2010) (holding that the prosecutor acted improperly by using the words "lies," "lied," and "liar" in characterizing the defendant's testimony); *Domingo-Gomez*, 125 P.3d at 1050-53 (holding that the prosecutor committed misconduct by saying that defense witnesses "lied," that the defendant and his friends made up a story about what had occurred, and that the case went through a "screening process" before the prosecution brought charges against the defendant); *People v. Conyac*, 2014 COA 8M, ¶¶ 140-150, 361 P.3d 1005, 1029-30 (holding that the prosecutor improperly argued that the defendant had lost the presumption of innocence and that the jury should "find justice" for the alleged victim). But until today, no reported Colorado case has addressed whether it is proper argument for a prosecutor to advise the jury that it may acquit the defendant only if it disbelieves everything one of the prosecution's witnesses said while testifying. As we explain below, we hold that this type of argument is improper because it misstates the prosecution's burden of proof. However, in this case, the trial court's error in allowing the argument was harmless.

¶ 4 Joshua James Cuellar appeals the judgment of conviction entered on a jury verdict finding him guilty of sexual assault. We affirm.

I. Background Facts and Procedural History

¶ 5 Evidence introduced at Cuellar's trial established the following facts.

¶ 6 Cuellar invited his friend B.W. to meet him at a casino in Black Hawk. B.W. testified at trial that she decided to join Cuellar at the casino because she was going through a "messy break-up" and did not want to be alone. She packed an overnight bag and paid for a ride to the casino. She arrived at the casino at approximately 1:30 in the morning.

¶ 7 After Cuellar and B.W. drank together at bars in the casino, they decided to rent a room at the casino because B.W. said she was tired. B.W. later testified that, shortly after she entered the room, Cuellar "violently and aggressively" sexually assaulted her. B.W. reported the alleged sexual assault after Cuellar left the room to gamble at the casino. During a sexual assault examination shortly after the incident, a nurse discovered that B.W. had

significant bruising on her shoulder, arm, leg, and foot, as well as vaginal abrasions.

¶ 8 Shortly after his arrest, Cuellar told law enforcement officers he wanted to speak to an attorney. But after an officer gave Cuellar a *Miranda* advisement, Cuellar said he had changed his mind and denied ever having sex with B.W.

¶ 9 Cuellar was charged with sexual assault. During the two years leading up to his trial, Cuellar made inconsistent statements regarding what had occurred in the room at the casino.

¶ 10 Before trial, Cuellar sought leave to introduce evidence under section 18-3-407, C.R.S. 2022 (the rape shield statute), that B.W. had previously been sexually assaulted. The trial court ruled that such evidence was inadmissible.

¶ 11 At trial, defense counsel argued that B.W. had consented to engage in sex with Cuellar in the room at the casino, but that she turned on him when he had difficulty maintaining an erection. In her opening statement, one of the two prosecutors mentioned that Cuellar had initially invoked his right to remain silent. An officer and a detective whom the prosecutor called to testify also referenced Cuellar's invocation of such right.

¶ 12 During rebuttal closing argument, the prosecutor said that, in order to acquit Cuellar, the jury would have to believe that B.W. fabricated and lied about the incident. The prosecutor also argued that defense counsel had improperly insinuated that B.W. had invited the sexual assault. The prosecutor told the jury that our society does not tolerate such insinuations against crime victims.

¶ 13 The jury convicted Cuellar as charged.

II. Analysis

¶ 14 Cuellar contends that the court reversibly erred by (1) excluding evidence of B.W.'s previous sexual assault; (2) allowing the prosecutor to comment on, and admit evidence concerning, Cuellar's invocation of his right to counsel and right to remain silent; and (3) allowing the prosecutor to commit misconduct in closing. Cuellar additionally asserts that (4) the cumulative effect of the court's errors deprived him of a fair trial.

A. Evidence of B.W.'s Previous Sexual Assault

¶ 15 Cuellar argues that the court violated his right to present a complete defense by excluding evidence showing that B.W. had previously been sexually assaulted. We disagree.

1. Additional Facts

¶ 16 The court set November 15, 2019, as the deadline for motions and set the trial for March 9, 2020. On February 17, 2020, Cuellar sought leave to introduce evidence at trial under the rape shield statute showing that B.W. had previously been sexually assaulted and was a member of a "Sexual Assault Survivors Support Group" with which Cuellar was also involved (the prior sexual assault evidence). Under the defense's theory, Cuellar initially denied having sex with B.W. in the room at the casino because he knew that she had been sexually assaulted and he was afraid "of having been falsely accused by [her]." Thus, according to Cuellar, the prior sexual assault evidence was relevant to explain his inconsistent statements and would have bolstered his credibility. Cuellar did not provide details explaining the alleged connection between the prior sexual assault evidence and his differing accounts of his interaction with B.W.

¶ 17 The court ruled that the prior sexual assault evidence was inadmissible. It found that, although Cuellar's defense that B.W. consented to having sex with him largely rested on the credibility of his characterization of the incident, his explanation for his

inconsistent statements was not a sufficient basis for bringing the prior sexual assault evidence "within the overall exception to the rape shield statute."

2. Standard of Review

¶ 18 "We review a trial court's evidentiary rulings, including its determination of evidence's admissibility under the rape shield statute, for an abuse of discretion." *People v. Lancaster*, 2015 COA 93, ¶ 35, 373 P.3d 655, 661. "A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law." *People v. Williams*, 2019 COA 32, ¶ 21, 446 P.3d 944, 950.

3. Applicable Law

¶ 19 The rape shield statute "deems the prior or subsequent sexual conduct of any alleged victim to be presumptively irrelevant to the criminal trial." *People v. Weiss*, 133 P.3d 1180, 1185 (Colo. 2006). "The term 'prior or subsequent sexual conduct' includes sexual assaults on an alleged victim and prior sexual assault reports by the alleged victim." *Id.* "As a consequence, . . . the force of the statute generally makes a complainant's sexual history

inadmissible." *People in Interest of K.N.*, 977 P.2d 868, 872 (Colo. 1999).

¶ 20 Cuellar's argument implicates only one of the statutory exceptions to the presumption of irrelevance of prior sexual conduct. Under section 18-3-407(2), a victim's sexual history is admissible only if the defendant "makes an offer of proof showing the evidence is relevant to a material issue in the case." *Weiss*, 133 P.3d at 1186.

4. Cuellar's Motion Was Untimely

¶ 21 Section 18-3-407(2)(a) provides that evidence of a complainant's sexual history is admissible only if, among other requirements, the defendant submitted a "written motion . . . at least thirty-five days prior to trial, unless later for good cause shown." It is undisputed that Cuellar missed this deadline — he submitted his motion seeking leave to introduce the prior sexual assault evidence only twenty-one days before trial. Thus, Cuellar's motion was untimely. *See* § 18-3-407(2)(a) (providing that the court "shall" follow the procedures listed in that subsection, including the thirty-five-day notice requirement).

¶ 22 Although the court noted that Cuellar's motion was untimely, the court considered it on the merits. The parties disagree whether, by considering the merits of the motion, the court impliedly found that Cuellar satisfied the good cause standard found in section 18-3-407(2)(a). Because the court did not make such a finding, we do not consider the parties' arguments regarding whether Cuellar established good cause for his untimely filing. In any event, like the court, we elect to consider the merits of Cuellar's motion.

5. The Court Did Not Err by Excluding the Prior Sexual Assault Evidence

¶ 23 Cuellar argues that the court misapplied the law by ruling that the rape shield statute "is a flat out bar" to evidence of an alleged victim's prior sexual conduct. While the court characterized the rape shield statute as "just a flat out bar," it did so in the context of explaining that the admissibility of such evidence is not dependent on the purpose for which the evidence is offered. Indeed, immediately before and after the court made this statement, it noted that the rape shield statute's presumption of irrelevancy was subject to exceptions. The court also explained that it was attempting to "balance [defense counsel's ability] to explain

[Cuellar's] conduct both on the night in question, the facts and the statements to the police, [and] on the other hand, . . . [to] balance the policy decision behind the rape shield statute and the concerns [such] evidence presents."

¶ 24 Thus, the court correctly applied the test for the admission of evidence under the rape shield statute. *See Weiss*, 133 P.3d at 1185-87. It just disagreed with Cuellar's argument that the prior sexual assault evidence was relevant to explain his inconsistent statements and, thus, bolster his credibility. The court concluded there is no distinction between offering the prior sexual assault evidence to prove that the alleged victim fabricated her allegations or to establish that she had previously consented to having sex with Cuellar — which Cuellar conceded would not have been a proper purpose to admit the evidence — and offering the evidence to explain his inconsistent statements.

¶ 25 We agree with the court that Cuellar did not overcome the statutory presumption that the evidence of B.W.'s sexual history was irrelevant. Because the prosecution charged Cuellar under section 18-3-402(1)(a), (4)(a), C.R.S. 2022, it had to prove that Cuellar "cause[d] submission of [B.W.] through the actual

application of physical force or physical violence." Cuellar's knowledge of B.W.'s sexual history was irrelevant to whether she consented to having sex with him on the night of the incident. *See K.N.*, 977 P.2d at 873 ("[W]here the material issue at trial is whether the complainant consented to the sexual contact, the understanding or state of mind of the accused regarding the complainant's sexual history is neither material nor relevant to the issue of whether the complainant consented.").

¶ 26 The holding in *People v. Melillo*, 25 P.3d 769 (Colo. 2001), a case on which each party rests its argument regarding the applicability of the rape shield statute, supports our conclusion that Cuellar's offer of proof was insufficient to establish the relevance of the prior sexual assault evidence. In *Melillo*, the defendant sought to introduce evidence that his stepdaughter had been sexually assaulted to provide context to his statements to an investigator after the stepdaughter's mother discovered the defendant alone with the stepdaughter in the defendant's bedroom. *Id.* at 774. According to the defendant, he "'hurried out of the bedroom' and began talking 'gibberish' to the mother because he realized 'how it must look.'" *Id.* The defendant argued that the evidence showing

that his stepdaughter had been sexually assaulted was relevant to explain why "he acted oddly" toward the mother and to rebut the investigator's testimony that the defendant "tried to distract" the girl's mother "before [he] got into trouble." *Id.* The trial court held that the evidence of the stepdaughter's prior sexual assault was inadmissible. *Id.*

¶ 27 The supreme court held that, because the defendant did not sufficiently explain why the evidence was relevant, the trial court did not abuse its discretion by excluding it. *Id.* at 776. Although, in this case, Cuellar argued that the prior sexual assault evidence was relevant to bolster his credibility, his argument rests on facts substantially similar to those in *Melillo*.

¶ 28 As the court correctly explained in ruling on Cuellar's motion, defendants generally seek leave to introduce evidence covered by the rape shield statute for two reasons: to bolster their credibility or to attack the credibility of a witness. If we were to accept Cuellar's arguments, evidence otherwise excluded under the rape shield statute could be admitted based solely on a defendant's claim that the victim's sexual history was relevant to explain the defendant's odd behavior after, or inconsistent accounts of, an alleged sexual

assault. Such a holding would eviscerate the rape shield statute. *See People v. McKenna*, 196 Colo. 367, 371-72, 585 P.2d 275, 278 (1978) (explaining that the rape shield statute provides "sexual assault victims . . . protection from humiliating and embarrassing public 'fishing expeditions' into their past sexual conduct . . . . [V]ictims of sexual assaults should not be subjected to psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders").

¶ 29 Because Cuellar did not overcome the presumption that the prior sexual assault evidence was irrelevant, we conclude that the court did not abuse its discretion by excluding it. *See Melillo*, 25 P.3d at 777; *see also* CRE 402 ("Evidence which is not relevant is not admissible."). Accordingly, we reject Cuellar's argument that the court violated his right to present a complete defense by excluding the prior sexual assault evidence. *See People v. Elmarr*, 2015 CO 53, ¶ 27, 351 P.3d 431, 438 ("[T]he right to present a defense is generally subject to, and constrained by, familiar and well-established limits on the admissibility of evidence. As a fundamental matter, evidence must be relevant to be admissible.").

B. Evidence Concerning Cuellar's Invocation of His Right to Counsel and Right to Remain Silent

¶ 30 Cuellar asserts that the court reversibly erred by (1) allowing the prosecutor to comment during opening statement on Cuellar's invocation of his right to counsel and right to remain silent and (2) admitting testimony from an officer and a detective that, while in custody, Cuellar invoked his right to remain silent. We conclude that, although the court erred by allowing the prosecutor to comment on, and the officer and the detective to testify about, Cuellar's invocation of his right to remain silent, such errors were harmless.

1. Additional Facts

¶ 31 During opening statement, the prosecutor provided a chronological narrative of the facts to which the prosecution witnesses would testify. While discussing the investigation into the alleged sexual assault, the prosecutor said that the detective arrived at the jail

> to talk to [Cuellar]. [Cuellar had] asked for a lawyer, so [the detective] arrived to see if he could get DNA swabs from [Cuellar].
>
> And when he was, in fact, getting the DNA swabs from [Cuellar], [Cuellar] said, I don't

> even know what's going on, and [the detective] said, well, you have asked for a lawyer, so we can't talk to you. And [Cuellar] said, no, no, I don't — that's not what I want, I want to know what's going on, I want to talk.

The court overruled defense counsel's objection that the prosecutor had improperly commented on Cuellar's invocation of his right to remain silent. (Defense counsel did not also object on the ground that the comment referred to Cuellar's invocation of his right to counsel.)

¶ 32 During trial, the officer testified that he had advised Cuellar of his *Miranda* rights, including the "right to remain silent" and the "right to an attorney," and that Cuellar understood the advisement but nonetheless voluntarily agreed to speak with the officer. The court overruled defense counsel's objection that the testimony was irrelevant.

¶ 33 The detective testified that he had learned that Cuellar "refused a [sexual assault] exam, and didn't want to speak to [the officer], wanted to consult with his attorney before answering any question[s] at that time." Defense counsel did not object to this testimony.

¶ 34 The officer and the detective additionally testified that, throughout the more than two years between the alleged sexual assault and the trial, Cuellar had never told them that he and B.W. had engaged in consensual sex. The detective further testified that Cuellar had never "reached out" to him to offer such a statement. Defense counsel did not object to this testimony.

2. Standard of Review

¶ 35 We review the court's evidentiary rulings for an abuse of discretion. *Lancaster*, ¶ 35, 373 P.3d at 661.

¶ 36 By contemporaneously objecting that the prosecutor improperly commented on Cuellar's right to remain silent during opening statement, Cuellar preserved his argument on that ground. We need not decide, however, whether that objection also preserved his argument that the detective's testimony — which the prosecutor previewed during the prosecution's opening statement — violated Cuellar's right to remain silent because we conclude that the court's error by allowing the testimony was harmless under either the constitutional harmless error or the plain error standard.

¶ 37 Although neither the prosecutor nor the detective expressly asserted that Cuellar invoked his right to remain silent, they said,

in the presence of the jury, that the detective was initially unable to speak to Cuellar because Cuellar had "asked for," or "wanted to consult with," an attorney. The prosecutor paraphrased the detective's words to Cuellar: "[Y]ou have asked for a lawyer, so we can't talk to you."

¶ 38 By making these statements, the prosecutor and the detective referenced Cuellar's invocation of his right to remain silent. *See Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (explaining that a defendant protects his right to remain silent by invoking his right to an attorney); *Miranda v. Arizona*, 384 U.S. 436, 472-75 (1966) (holding that a defendant's invocation of his right to an attorney protects his right to remain silent); *see also People v. Reynolds*, 194 Colo. 543, 549-51, 575 P.2d 1286, 1292 (1978) (holding that the prosecutor violated the defendant's right to remain silent by commenting on the defendant's post-arrest silence after he had "invoked his right to remain silent until a lawyer was present").

¶ 39 Because the prosecutor's and the detective's references to Cuellar's right to remain silent implicated a constitutional right, *see People v. Burnell*, 2019 COA 142, ¶¶ 41-44, 459 P.3d 736, 743-44, we review any preserved error for constitutional harmless error, *see*

Hagos v. People, 2012 CO 63, ¶ 11, 288 P.3d 116, 119. Under this standard of review, an error "require[s] reversal unless the reviewing court is 'able to declare a belief that [the error] was harmless beyond a reasonable doubt.'" *Id.* (alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

¶ 40 However, defense counsel did not object on the ground that the prosecutor's comment violated Cuellar's right to counsel. Therefore, Cuellar's arguments that the prosecutor's comment violated his right to counsel are unpreserved. *See People v. Short*, 2018 COA 47, ¶ 53, 425 P.3d 1208, 1222 (holding that, to preserve an argument, a defendant must object on that ground). For the same reason, even if Cuellar preserved his objection that the detective's statement violated his right to remain silent by objecting to the comment the prosecutor made in the prosecution's opening statement, such objection did not preserve Cuellar's argument that the detective's comment violated his right to counsel.

¶ 41 The remainder of Cuellar's arguments about the statements at trial regarding his invocation of the right to counsel and the right to remain silent are also unpreserved. Defense counsel lodged his only other contemporaneous objection to the statements regarding

the *Miranda* advisement when the officer testified that he gave Cuellar such an advisement. Defense counsel's objection that the testimony was irrelevant did not preserve Cuellar's argument that such evidence also violated Cuellar's right to counsel and his right to remain silent. *See id.*; *see also People v. Daley*, 2021 COA 85, ¶ 78, 496 P.3d 458, 471 ("If [the defendant] thought that the evidence was inadmissible on other evidentiary grounds, she was required to object on those specific grounds.").

¶ 42 We review all errors "that were not preserved by objection for plain error." *Hagos*, ¶ 14, 288 P.3d at 120. "Plain error is obvious and substantial." *Id.* "An obvious error is one that contravenes a clear statutory command, a well-settled legal principle, or Colorado case law." *People v. Kadell*, 2017 COA 124, ¶ 25, 411 P.3d 281, 287. An error is substantial if it "so undermined the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶ 14, 288 P.3d at 120 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)).

3. Applicable Law

¶ 43 "Every person accused of a crime has the right to remain silent in the face of a criminal accusation." *People v. Ortega*, 198 Colo.

179, 182, 597 P.2d 1034, 1036 (1979). "It is well established that 'the prosecution may not refer to a defendant's exercise of his Fifth Amendment right to remain silent in the face of accusation.'" *Burnell*, ¶ 45, 459 P.3d at 744 (quoting *People v. Key*, 185 Colo. 72, 75, 522 P.2d 719, 720 (1974)).

4. The Court Erred by Allowing the Prosecutor to Comment on, and the Officer and the Detective to Testify About, Cuellar's Invocation of His Right to Remain Silent

¶ 44 We initially address Cuellar's argument that the prosecutor's comments and the officer's and detective's testimony violated his right to counsel. However, other than noting that the prosecutor, officer, and detective referenced Cuellar's invocation of his right to counsel, Cuellar does not discuss *how* such references violated his right to counsel. Indeed, Cuellar does not cite to any authority holding that a reference at trial to the defendant's request for an attorney violates the defendant's right to counsel. For this reason, Cuellar's "argument is undeveloped, and we do not address it on the merits." *People v. Stone*, 2021 COA 104, ¶ 52, 498 P.3d 666, 677 (*cert. granted* Oct. 17, 2022).

¶ 45 Turning to the merits of Cuellar's developed arguments, we conclude that the court erred by allowing the prosecutor to

comment on, and the officer and the detective to testify about, Cuellar's invocation of his right to remain silent.

¶ 46 The People assert that the prosecutor, officer, and detective did not discuss Cuellar's invocation of his right; rather, they assert that the prosecutor merely commented on, and elicited testimony concerning, Cuellar's inconsistent statements to the officer and detective, which was permissible. *See People v. Lewis*, 2017 COA 147, ¶¶ 31-34, 433 P.3d 70, 76-77 (holding that a prosecutor may contrast the differences between what a defendant said with what he or she did not say). The People are correct that the prosecutor acted properly by highlighting the inconsistencies in Cuellar's statements to the officer and the detective concerning whether and when he and B.W. had engaged in sex. *See id.*; *see also People v. Quintana*, 665 P.2d 605, 610 n.7 (Colo. 1983) (explaining that "[t]he failure to make any statement should be distinguished from the situation where an accused does make a statement to law enforcement officials but the statement omits significant details which are later included in a subsequent statement," because, "[i]n the latter situation[,] the accused has not elected to remain silent, but instead has waived that right and made a statement").

¶ 47 Thus, the court did not err by allowing the officer to testify that Cuellar did not tell him that Cuellar and B.W. had engaged in consensual sex — such testimony did not address, or even implicate, Cuellar's right to remain silent. Rather, it properly focused on Cuellar's inconsistent statements. *See People v. Rogers*, 68 P.3d 486, 492 (Colo. App. 2002) ("A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits." (quoting *United States v. Goldman*, 563 F.2d 501, 503 (1st Cir. 1977))). For the same reason, we reject Cuellar's argument that "the prosecutor misled the jury by eliciting testimony that implied Cuellar sprung a consent defense for the first time at trial" — there is no general prohibition against a prosecutor questioning witnesses about the defendant's inconsistent statements.

¶ 48 But a prosecutor's ability to highlight inconsistencies in a defendant's statements does not mean that a prosecutor may comment on, or witnesses may testify about, a defendant's invocation of his right to remain silent, *see Burnell*, ¶¶ 45-47, 459 P.3d at 744 (holding that the court erred by stating that the defendant invoked his Fifth Amendment rights), or present evidence

suggesting that a defendant should have affirmatively offered an exculpatory statement to law enforcement officers to prove his innocence, *see Ortega*, 198 Colo. at 183, 597 P.2d at 1037. Indeed, as *Burnell* holds, a court errs by allowing a prosecutor to comment on a defendant's invocation of his right to remain silent, even if the "prosecutor did not directly argue that [the defendant's] silence reflected guilt." *Burnell*, ¶ 46, 459 P.3d at 744.

¶ 49 As in *Burnell*, "we perceive no valid reason for the prosecutor to have mentioned" Cuellar's invocation of his right to remain silent by saying the detective could not speak to Cuellar because Cuellar had "asked for a lawyer." *Id.* The prosecutor could have commented on Cuellar's inconsistent statements, and the officer and the detective could have testified about such statements, without mentioning that Cuellar (1) "asked for a lawyer"; (2) "wanted to consult with his attorney before answering any question[s] at that time"; and (3) never "reached out" to the detective to explain that he and B.W. had engaged in consensual sex. The court, therefore, erred by allowing the prosecutor to comment on the first statement and allowing the detective to testify about the second and third statements. *See id.* at ¶ 47, 459 P.3d at

744; *Ortega*, 198 Colo. at 183, 597 P.2d at 1037. (Cuellar does not cite to, and we are unaware of, any Colorado case holding that a reference to an officer's provision of a *Miranda* warning to the defendant, without more, violates the defendant's right against self-incrimination. Thus, we do not consider Cuellar's undeveloped argument that we should reverse his conviction because the jury learned he received a *Miranda* warning. *See Stone*, ¶ 52, 498 P.3d at 677.)

5. The Court's Errors Do Not Require Reversal

¶ 50 *Burnell* further holds that "not every reference to a defendant's exercise of the right to remain silent requires reversal." *Burnell*, ¶ 45, 459 P.3d at 744. "Reversal is only required where the prosecutor's comment on the defendant's exercise of the right creates an inference of guilt or where the prosecutor argues that the defendant's silence constituted an implied admission of guilt." *Id.* That did not occur here.

¶ 51 The record reflects that the prosecutor, officer, and detective briefly referenced Cuellar's right to remain silent while discussing how the detective became involved with the case and Cuellar's inconsistent statements — not to imply that Cuellar was guilty

because he invoked his right to remain silent. The prosecutor, officer, and detective did not say that Cuellar's silence reflected guilt. *See id.* at ¶ 46, 459 P.3d at 744. Further, they did not "provide any detail about the specific questions" that Cuellar refused to answer before he voluntarily spoke to the officer and the detective. *Id.* In addition, during closing argument, the prosecutor did not repeat the comment about Cuellar's initial request for a lawyer or reference the officer's or the detective's challenged statements. Thus, the references to Cuellar's invocation of his rights were brief, were not the focus of the prosecutor's comments or the officer's and the detective's testimony, and were not repeated in closing argument.

¶ 52 Moreover, the evidence against Cuellar was overwhelming. The only contested issue at trial was whether B.W. consented to engage in sex with Cuellar. B.W. testified that Cuellar "violently and aggressively" sexually assaulted her. She had significant bruising on her shoulder, arm, leg, and foot. She also had abrasions to her vagina. Further, there was blood on the bedding in the room.

¶ 53 Cuellar's consent defense did not account for B.W.'s physical injuries, which corroborated her account of the incident. Moreover, Cuellar's inconsistent statements undercut his theory of defense that he and B.W. engaged in consensual sex. As noted above, Cuellar initially denied that he and B.W. had engaged in sex; he later contended that they had engaged in consensual sex the day before the incident; and, at trial, defense counsel asserted that B.W. had consented to having sex with Cuellar in the room at the casino. Thus, contrary to Cuellar's argument, the case did not rest solely on his and B.W.'s conflicting accounts.

¶ 54 Given this evidence, we conclude that the prosecutor's, officer's, and detective's brief references to Cuellar's invocation of his right to remain silent were harmless under the constitutional harmless error standard of reversal and were not substantial under the plain error standard of reversal. In other words, we are convinced that the court's errors were "harmless beyond a reasonable doubt." *Hagos*, ¶ 11, 288 P.3d at 119 (quoting *Chapman*, 386 U.S. at 24).

C. Prosecutorial Misconduct

¶ 55 Cuellar argues that the court reversibly erred by allowing the prosecutor to commit misconduct during closing argument. According to Cuellar, the prosecutor (1) misstated the law and lowered the burden of proof by arguing that the jury could acquit Cuellar only if the jurors believed that B.W. "fabricated this whole entire thing, that she lied about this whole [thing]"; and (2) denigrated defense counsel by arguing that counsel insinuated that B.W. invited the sexual assault and by saying that "[t]his society, our laws [do not] tolerate that." Although we agree that the prosecutor's comments were improper, we conclude that such errors were harmless.

1. Additional Facts

¶ 56 In rebuttal closing argument, the prosecutor told the jury that, "[i]n order for you to find [Cuellar] not guilty, you have to believe a number of things. You have to believe that [B.W.] fabricated this whole entire thing, that she lied about this whole —" Defense counsel interrupted the prosecutor to object that the prosecutor had misstated the law.

¶ 57 The court overruled the objection. It contemporaneously instructed the jury that

> you only need to follow the instructions that are given in this particular case as to what the law is in the case, regarding both the burden of proof, and beyond a reasonable doubt, as to what the elements [are]. . . . [Y]ou can discern both what the evidence . . . shows and what the evidence doesn't show in this particular case.

¶ 58 The prosecutor then argued that

> [i]n order to find [Cuellar] not guilty, you have to believe that [B.W.] fabricated this whole entire thing, that she was able to fabricate an elaborate story, and get [Cuellar] falsely accused. That she made up the fact that they had sex on [the night before the incident], and that somehow she went, fast forward to the [night of the incident], and wanted to have consensual sex again, and then . . . the only reason why she made this up, this whole entire story up, was because [Cuellar] couldn't perform sexually?
>
> That makes absolutely zero sense.

¶ 59 Moments later, the prosecutor said,

> And let's not forget who is on trial here. [B.W.'s] not on trial. [Cuellar] is on trial. [Cuellar] is the individual who did this, who subjected [B.W.] to what she had to go through.
>
> [B.W.] didn't do anything wrong. [Defense counsel] would want you to believe that hey,

> guess what, guys? He didn't directly say it, but he's insinuating, she went through a break-up, she was drinking, she came willingly to the casino to meet [Cuellar], a person, another guy, and they got a room together. What [defense counsel] is insinuating to you is that you should find [Cuellar] not guilty because [B.W.] invited this upon herself.

¶ 60 The court overruled defense counsel's objection, noting that "[c]losing arguments are not evidence." The prosecutor then said "that's what [defense counsel is] insinuating. This society, our laws [do not] tolerate that. [B.W.] did absolutely nothing wrong. [Cuellar] is the one who is on trial here."

2. Standard of Review

¶ 61 We review claims of prosecutorial misconduct under a two-step analysis. *Wend*, 235 P.3d at 1096. "First, [we] must determine whether the prosecutor's questionable conduct was improper based on the totality of the circumstances and, second, whether such actions warrant reversal according to the proper standard of review." *Id.*

¶ 62 Because defense counsel contemporaneously objected to the prosecutor's statement that, in order to acquit Cuellar, the jury would have to believe that B.W. fabricated and lied about the

incident, and because the statement had the potential to lower the prosecution's burden of proof, we review the court's error in allowing the statement for constitutional harmless error. *See People v. Vidauri*, 2021 CO 25, ¶ 10, 486 P.3d 239, 241 ("In a criminal case, the prosecution must prove every element of the charged offense beyond a reasonable doubt."); *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008) ("Depending upon the way in which argument is improper, and the particular risk it poses or right upon which it infringes, prohibited comments during closing argument may well, but need not, amount to constitutional error."); *see also Hagos*, ¶ 11, 288 P.3d at 119 (explaining the constitutional harmless error standard of reversal).

¶ 63 Defense counsel also contemporaneously objected to the prosecutor's characterization of the theory of defense. Because the prosecutor's comment did not "specifically and directly offend" any of Cuellar's constitutional rights, we review the court's error in allowing the comment for nonconstitutional harmless error. *Wend*, 235 P.3d at 1097. "Under this standard, reversal is required only if the error affects the substantial rights of the parties." *Hagos*, ¶ 12, 288 P.3d at 119. "That is, we reverse if the error 'substantially

influenced the verdict or affected the fairness of the trial proceedings.'" *Id.* (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)).

¶ 64 However, because defense counsel did not contemporaneously object to the prosecutor's statement about "[t]his society, our laws," we review the court's error in allowing that statement for plain error. *See id.* at ¶ 14, 288 P.3d at 120 (explaining the plain error standard of reversal).

3. Applicable Law

¶ 65 "We must evaluate claims of improper argument in the context of the argument as a whole and in light of the evidence before the jury." *People v. McMinn*, 2013 COA 94, ¶ 60, 412 P.3d 551, 563. "In doing so, we recognize that prosecutors have wide latitude in the language and style they choose to employ, as well as in replying to an argument by opposing counsel." *Id.*

¶ 66 "Prosecutors may comment on the evidence admitted at trial and the reasonable inferences that can be drawn therefrom." *Id.* at ¶ 61, 412 P.3d at 564. However, a prosecutor "may not misstate or misinterpret the law." *Id.* at ¶ 62, 412 P.3d at 564. "Nor may a

prosecutor . . . make remarks for the purpose of denigrating defense counsel." *Id.*

4. The Court Erred by Allowing the Prosecutor to Make the Challenged Statements

a. The Prosecutor's Statement That the Jury Could Acquit Cuellar Only if It Disbelieved the Entirety of B.W.'s Testimony

¶ 67 The prosecutor misstated the law by arguing that the jury could not acquit Cuellar unless it "believe[d] that [B.W.] fabricated this whole entire thing, that she lied about this whole [thing]." *See United States v. Cornett*, 232 F.3d 570, 574 (7th Cir. 2000) ("[I]t is improper for a prosecutor to argue that the jury must find that a witness lied to acquit the defendant."); *United States v. Reed*, 724 F.2d 677, 681 (8th Cir. 1984) (holding that it was improper for the prosecutor to argue that, to acquit the defendant, the jury must find that the defendant "is telling the truth and that [the government witnesses] are lying to you"); *State v. Fleming*, 921 P.2d 1076, 1078 (Wash. Ct. App. 1996) ("This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken."); *see also Liggett v. People*, 135 P.3d 725, 732 (Colo. 2006) ("[W]hile it is appropriate to juxtapose conflicting

accounts of the facts and ask the fact-finder to resolve the dispute, it is not appropriate to compound that task by implying that the fact-finder must determine one or more of the witnesses is lying.").

¶ 68 The prosecutor's comment was improper because it had the potential to lower the prosecution's burden of proof. *See Cornett*, 232 F.3d at 574 ("Viewed in isolation, the prosecutor's remarks misstated the burden of proof because the jury could have believed that the witnesses told the truth and yet still found that the government had failed to prove [the defendant's] guilt beyond a reasonable doubt."); *Reed*, 724 F.2d at 681 (holding that the prosecutor's "argument [was] improper because it involve[d] a distortion of the government's burden of proof"); *Fleming*, 921 P.2d at 1078 (explaining that "[t]he prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof" because "[t]he jury would not have had to find that [the victim] was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony"); *cf. Liggett*, 135 P.3d at 732 (holding that a prosecutor "effectively distorts the government's burden of proof" by

implying that the fact finder must determine whether a witness was lying).

¶ 69 While the People are correct that the prosecutor had the right to respond to Cuellar's theory of defense that he and B.W. had engaged in consensual sex on the night of the incident, *see McMinn*, ¶ 61, 412 P.3d at 564, the prosecutor's sweeping statement did not merely respond to the consent defense. As in *Cornett* and *Fleming*, the prosecutor unequivocally told the jury that it *must* disbelieve the prosecution's witness before it could acquit the defendant. Moreover, here, the prosecutor argued that the jury had to believe that B.W. *lied* about the entire incident before it could acquit Cuellar. That was a misstatement of the law. Although B.W.'s testimony alone could have proved each of the elements of section 18-3-402(1)(a) and (4)(a), the jury could have believed her testimony on some, but not all, of the elements of the offense of sexual assault and still acquitted Cuellar. The jurors need not have disbelieved B.W.'s testimony regarding the "whole entire thing" to hand down a verdict of acquittal.

b. The Prosecutor's Characterization of the Theory of Defense

¶ 70 In addition, the prosecutor's characterization of the theory of defense improperly denigrated defense counsel. Cuellar's theory of defense was that B.W. had consented to having sex with him. During B.W.'s cross-examination and in closing argument, defense counsel highlighted that B.W. (1) met Cuellar alone at the casino at 1:30 in the morning; (2) paid for a ride to the casino; (3) planned on spending the night with Cuellar at a room in the casino; and (4) rented a room with only one bed. Defense counsel said in closing: "Where was [Cuellar] going to stay at 1:30 in the morning when he got there? How alone and down do you have to be feeling to invite him over, and then say, we're just friends, at 1:30 in the morning?" While perhaps inartful, these arguments supported the defense theory that B.W. engaged in consensual sex with Cuellar. Giving defense counsel the benefit of the doubt, we do not interpret his arguments as an insinuation that the jury should acquit Cuellar because B.W. "invited this upon herself." *Cf. People v. McBride*, 228 P.3d 216, 221 (Colo. App. 2009) ("[R]eviewing courts accord prosecutors the benefit of doubt where remarks are 'ambiguous,' . . . or simply 'inartful.'") (citation omitted).

¶ 71 We acknowledge that the prosecutor had wide latitude to respond to defense counsel's argument. *See McMinn*, ¶ 60, 412 P.3d at 563; *People v. Rojas*, 181 P.3d 1216, 1224 (Colo. App. 2008) (concluding that the prosecutor's remark that the defense had "smeared" and "smashed" the accuser's character and that "what they accuse her of is shameful" did not "rise to the level of denigration of the defense or 'character assassination' when viewed in the light of defense counsel's closing"). But that latitude is not without limit. "[R]emarks . . . made for the obvious purpose of denigrating defense counsel . . . constitute professional misconduct." *People v. Jones*, 832 P.2d 1036, 1038 (Colo. App. 1991). The prosecutor who made the statements exceeded the wide latitude afforded to him by improperly characterizing the theory of defense.

c. The Prosecutor's Characterization of Defense Counsel's Consent Argument as Intolerable

¶ 72 The prosecutor also committed misconduct by proclaiming in closing that "[t]his society, our laws [do not] tolerate" defense counsel's insinuation that B.W. invited the sexual assault. By condemning defense counsel's argument so harshly, the prosecutor

improperly "created a sense of animosity against defense counsel and [the] theory of defense." *People v. Nardine*, 2016 COA 85, ¶ 49, 409 P.3d 441, 452.

¶ 73 As the division in *People v. Salazar* explained in reviewing a substantially similar comment in reference to the defendant's charged conduct, "the remark was improper" and "[w]e do not approve of such an appeal to emotion." 648 P.2d 157, 159 (Colo. App. 1981); *see Nardine*, ¶ 35, 409 P.3d at 450 ("A prosecutor may not use arguments calculated to inflame the passions and prejudices of the jury . . . ."). Although, in *Salazar*, the prosecutor's improper statement asked the jury to hold the defendant accountable because the defendant's alleged "crime won't be tolerated in this community," 648 P.2d at 159, and here, the prosecutor argued that our society does not tolerate a defense lawyer's insinuation that the victim of a sexual assault invited the assault, the statements were improper for the same reason. They improperly urged the jurors to send a message through their verdict that our society will not tolerate certain statements or conduct, rather than focus on whether the prosecution had proved the elements of the charged offense. *See id.*; *Nardine*, ¶ 51, 409 P.3d at

452 (explaining that the prosecutor's statement "inappropriately encouraged the jury to decide the case based on passion and emotion rather than on a rational assessment of the evidence"); *see also Harris v. People*, 888 P.2d 259, 264 (Colo. 1995) (explaining that a "prosecutor's argument should be 'restricted to the evidence and reasonable inferences to be drawn therefrom on the issue of whether guilt is proved beyond a reasonable doubt'" (quoting *People v. Ferrell*, 200 Colo. 128, 131, 613 P.2d 324, 326 (1980))).

¶ 74 Thus, the prosecutor improperly denigrated defense counsel by telling the jury that defense counsel's statements about the victim were intolerable.

5. The Court's Errors Were Harmless

¶ 75 Although the court erred by allowing the prosecutor to misstate the law by arguing that the jury must disbelieve B.W. before it could acquit Cuellar, such error was harmless in light of the court's instructions, the overwhelming evidence of Cuellar's guilt, and the brief nature of the argument. *See Cornett*, 232 F.3d at 575 ("Generally, a prosecutor's improper comments do not deprive a defendant of a fair trial when the district court properly

instructs the jury and the weight of the evidence is in the government's favor.").

¶ 76 When defense counsel objected to this argument, the court told the jury it needed to follow the court's instructions on the prosecution's burden of proof and the beyond a reasonable doubt standard. In its instructions to the jury, the court correctly listed the elements of the charged offense and stated as follows:

- "While the attorneys may comment on some of these rules, you must follow the instructions I give you."
- "The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged."

¶ 77 Thus, the court properly instructed the jury that it must not accept the prosecutor's characterization of the law in closing argument, the prosecution's burden of proof, or the elements of the charged offense. Absent evidence to the contrary, which Cuellar does not allege and which does not appear in the record, "we assume the jury heeded the court's instructions." *People v. Villa*, 240 P.3d 343, 352 (Colo. App. 2009).

¶ 78 As we explain above, the evidence against Cuellar was overwhelming. Although the prosecutor repeated the improper comment about disbelieving B.W. immediately after the court instructed the jury, the prosecutor did not do so again. Indeed, the prosecutor's rebuttal closing argument focused on the evidence and not on whether the jury could only acquit Cuellar if it disbelieved B.W.

¶ 79 For these reasons, we conclude that the court's error in allowing the prosecutor to make the statement about disbelieving B.W. was harmless beyond a reasonable doubt. *See Hagos*, ¶ 11, 288 P.3d at 119.

¶ 80 We further conclude that the court did not reversibly err by allowing the prosecutor to improperly characterize the theory of defense, *see id.* at ¶ 12, 288 P.3d at 119, or proclaim that defense counsel's argument regarding consent was intolerable, *see id.* at ¶ 14, 288 P.3d at 120; *see also McMinn*, ¶ 58, 412 P.3d at 563 ("Prosecutorial misconduct in closing argument rarely constitutes plain error."). Following defense counsel's objection to the prosecutor's characterization of the theory of defense, the court properly told the jury that "[c]losing arguments are not evidence."

See Salazar, 648 P.2d at 159. The court subsequently instructed the jury that it "must not be influenced by sympathy, bias, or prejudice in reaching [its] decision." "[W]e assume the jury heeded the court's instructions." *Villa*, 240 P.3d at 352. In addition, the evidence was overwhelming, and the prosecutor did not repeat the improper statements.

¶ 81 Accordingly, we conclude that the court's errors do not require reversal under the nonconstitutional harmless error and plain error standards. *See Hagos*, ¶¶ 11, 14, 288 P.3d at 119-20.

D. Cumulative Error

¶ 82 Cuellar contends that the cumulative effect of the court's errors deprived him of a fair trial. "Though an error, when viewed in isolation, may be harmless or not affect the defendant's substantial rights, reversal will nevertheless be required when 'the cumulative effect of [multiple] errors and defects substantially affected the fairness of the trial proceedings and the integrity of the fact-finding process.'" *Howard-Walker v. People*, 2019 CO 69, ¶ 24, 443 P.3d 1007, 1011 (alteration in original) (quoting *People v. Lucero*, 200 Colo. 335, 344, 615 P.2d 660, 666 (1980)).

¶ 83 As we explain above, the court's errors — allowing the prosecutor to comment on, and the officer and the detective to testify about, Cuellar's invocation of his right to remain silent and allowing the prosecutor to say that the jury could not acquit Cuellar unless it disbelieved B.W. and to denigrate defense counsel and the theory of defense — were individually harmless. When we consider the cumulative effect of the court's errors, we conclude they do not "show the absence of a fair trial." *Id.* at ¶ 26, 443 P.3d at 1012. The prosecutor's comments were brief and did not violate Cuellar's constitutional rights. Moreover, the court correctly instructed the jury on the applicable law, including the burden of proof.

III. Disposition

¶ 84 The judgment of conviction is affirmed.

JUDGE FOX and JUDGE SCHOCK concur.