SUMMARY
June 1, 2023

2023COA45

No. 20CA2145, *People v. Toro-Ospina* — Juries — Colorado Uniform Jury Selection and Service Act — Juror Questionnaires; Criminal Procedure — Trial Jurors — Orientation and Examination of Jurors

In this appeal of felony menacing convictions, a division of the court of appeals must determine, for the first time in Colorado, whether a trial court is required to ask prospective jurors to disclose their race or ethnicity when requested by a party. The division also decides, for the first time in Colorado, whether a trial court must provide the jury with an implicit bias instruction when requested by one of the parties. The division concludes that a trial court is not required to ask a race/ethnicity question, and it is not required to provide an implicit bias instruction. Rather, the decision whether to ask such a question or provide an implicit bias instruction is entrusted to the trial court's exercise of its sound

discretion. The division concludes that the trial court did not abuse that discretion by declining to ask the question or give the instruction in this case.

The division also addresses and rejects the defendant's arguments that the trial court erred by denying his *Batson* challenge related to two prospective jurors, preventing him from presenting evidence of the victim's alleged drug dealing, and permitting the prosecutor to engage in improper closing arguments. Thus, the division affirms the convictions.

COLORADO COURT OF APPEALS **2023COA45**

Court of Appeals No. 20CA2145
Arapahoe County District Court No. 19CR2273
Honorable Darren L. Vahle, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Luis Fernando Toro-Ospina,

Defendant-Appellant.

JUDGMENT AFFIRMED

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

Announced June 1, 2023

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¶ 1 A jury convicted defendant, Luis Fernando Toro-Ospina, of two counts of felony menacing. The trial court sentenced him to one year in the custody of the Department of Corrections, together with a two-year period of mandatory parole. He appeals the judgment, and we affirm.

I. Factual Background

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

¶ 3 Toro-Ospina, originally from Colombia, lived with his wife and three small children in an Aurora apartment complex. While in Colombia, Toro-Ospina was a security guard and received training in the use of rifles and handguns. After moving to Colorado, Toro-Ospina received his permit to own a firearm, and he carried a gun to protect himself and his family because he believed the surrounding neighborhood was dangerous.

¶ 4 One morning in July 2019, Toro-Ospina and his children were sleeping inside their apartment. He awoke to the repeated slamming of the apartment complex's backdoor. Maintenance workers, Jose Granados and Mitchell Oliver, were fixing the door.

They were also each picking up trash with a metal pole that had a claw attached to the end.

¶ 5 Toro-Ospina was armed with his gun when he approached Oliver to inquire about the slamming door. According to Toro-Ospina's later testimony, he spoke limited English, and the attempted conversation soon deteriorated into an argument. At some point during the encounter, Oliver raised the metal pole with the claw into the air. In response, Toro-Ospina pulled out his gun and fired it three times into the air.

¶ 6 Granados and Oliver offered different accounts of what transpired that morning. Granados testified that the gun was only aimed in the air, but that Toro-Ospina made no attempt to converse before firing the gun. Similarly, Oliver testified that Toro-Ospina never tried to converse with the men. But he also testified that Toro-Ospina pointed the gun directly at him before firing it into the air.

¶ 7 Oliver left the area to call police. Once on scene, officers arrested Toro-Ospina. The People brought two charges against him for felony menacing. At the completion of the trial, the jury

returned guilty verdicts on both menacing counts and corresponding sentence enhancers.

¶ 8 Toro-Ospina now appeals his convictions, asserting that the trial court erred by (1) denying his claim that the prosecutor excused two jurors on the basis of their race or ethnicity in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) denying his request to add questions concerning prospective jurors' race to a jury questionnaire; (3) denying his tendered implicit bias jury instruction; (4) prohibiting the presentation of evidence that Oliver was allegedly involved in drug dealing; and (5) permitting prosecutorial misconduct during closing argument. Toro-Ospina also argues that the cumulative impact of these alleged errors denied him a fair trial by an impartial jury.

II. *Batson* Challenges

¶ 9 Toro-Ospina contends that the prosecutor's peremptory strikes of prospective jurors — Juror R and Juror V— were based on their race. He argues that the trial court erred by denying his challenges to those strikes under *Batson*. We disagree.

A. Additional Facts

¶ 10 During jury selection, Juror R stated that, in the past year, he had had a bad experience with law enforcement. Because of this experience, Juror R stated that he would have trouble listening to police officers' testimony and that he would automatically question their credibility. He also stated that he was uncomfortable in a courtroom setting.

¶ 11 During subsequent jury questioning, the prosecutor asked prospective jurors their views on the appropriate use of a firearm. Juror V responded that her use of a firearm in self-defense would be appropriate if "someone enters [her] home, and [her] daughter's sleeping and someone tries to harm [them]."

¶ 12 The prosecutor challenged Juror R for cause. In response to the trial court's additional questions, Juror R explained that maybe one or two of the police officers identified as potential witnesses "might tell the truth." Juror R also stated that he was capable of finding someone guilty based on the presented evidence. The trial court did not expressly rule on the challenge for cause and, after allowing the lawyers to question the panel, proceeded to the exercise of peremptory challenges.

¶ 13 The prosecutor exercised four peremptory challenges, using two of them to excuse Juror R and Juror V. Defense counsel raised *Batson* challenges as to these jurors, explaining that Juror R appeared to be a Black man and Juror V appeared to be a Latina. Counsel reminded the court that Juror R indicated that he could follow the law despite his negative interactions with police. With respect to Juror V, counsel argued that there was no legitimate basis to suggest that she would be "bad for the prosecution."

¶ 14 The prosecutor countered that Juror R stated he could not trust police officers to tell the truth and that several officers would be testifying. Thus, the prosecutor reasoned, Juror R's assessment of some of the anticipated evidence might be tainted by his distrust of law enforcement. As for Juror V, the prosecutor referenced her statement that a firearm could be used in self-defense if protecting her children in her home while they were sleeping. Because her explanation paralleled the fact pattern of this case — Toro-Ospina allegedly carrying a weapon to protect his children — the prosecutor argued that Juror V's ability to deliberate fairly would be compromised by her sympathy for Toro-Ospina's self-defense argument.

¶ 15 The trial court denied both *Batson* challenges, providing the following rationale:

> This is a somewhat diverse pool of jurors. We have a number of people who are people of color, both remaining on the jury and have been excused by both sides. And the Court does not find either a pattern or some evidence that this is a discriminatory practice by the Prosecution that exercised four challenges, and left open two. Those two challenges – there are still people who are of color who could be challenged by the People, and they waived two of their challenges, and two of their challenges were exercised on what appeared to be Caucasian individuals.
>
> With regard to [Juror R], who is African-American and [Juror V], who appears to be Hispanic by name and appearance, the Court finds that there are race-neutral reasons given by the Prosecution. So that even if the Court had made the first step of *Batson* and found some sort of discriminatory appearance, the Court does find that these are race-neutral reasons for which a reasonable lawyer can strike someone that doesn't have anything to do with race.

B. Applicable Law and Standard of Review

¶ 16 During the jury selection process, a party may not discriminate based on a prospective juror's race or ethnicity. *See* U.S. Const. amend. XIV; Colo. Const. art. II, §§ 16, 25; *see also Batson*, 476 U.S. at 85-87. When a *Batson* challenge alleging racial

discrimination is raised, the trial court engages in a three-step analysis. First, the court must determine if the objecting party made a prima facie showing that the peremptory strike was based on race; second, if the objecting party is successful in making such a prima facie showing, the striking party must offer a race-neutral reason for the removal of the prospective juror; and third, the court must determine whether the objecting party has shown by a preponderance of evidence that the strike was purposefully discriminatory on the basis of race. *See People v. Ojeda*, 2022 CO 7, ¶¶ 21-27.

¶ 17 Our standard of review for a *Batson* challenge depends on which step of the trial court's analysis is challenged. *See Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998). We review de novo a trial court's rulings on steps one and two. *Id.* at 590-91. However, "[i]t is well settled that the trial court's determination in the third step of the *Batson* analysis of actual racial discrimination is an issue of fact to which we afford due deference and review only for clear error." *Id.* at 590.

C. Three-Step *Batson* Analysis

1. Step One

¶ 18 At step one, the party opposing a peremptory challenge must demonstrate a prima facie case that the challenge was based on race. *See Ojeda*, ¶ 22. The People do not contest that Toro-Ospina met this burden. Indeed, both parties concede this issue was rendered moot when the prosecutor proceeded to make a step two argument and the trial court entered its ruling at step three. *See, e.g.*, *People v. Wilson*, 2015 CO 54M, ¶ 12. Because we agree with the parties that this issue is moot, we turn to step two.

2. Step Two

¶ 19 "At step two, the prosecutor's explanation must be 'based on something other than the race of the juror,' and will be deemed race-neutral provided there is no discriminatory intent inherent in the prosecutor's explanation." *People v. Robinson*, 187 P.3d 1166, 1172 (Colo. App. 2008) (citation omitted).

¶ 20 It is here that Toro-Ospina argues the trial court erred in conducting its *Batson* analysis with respect to Juror R. We disagree, concluding that the trial court properly determined that

the prosecutor offered a race-neutral explanation for striking Juror R.

¶ 21 Juror R candidly acknowledged his distrust of the police, as illustrated by his reference to "a brigade of law enforcement" when describing the prosecution's witness list. And while we agree with Toro-Ospina that diminished views of law enforcement may correlate with racial or ethnic identity, in this instance neither Juror R nor the prosecutor linked Juror R's race with his adverse interactions with law enforcement. *See, e.g.*, *Ojeda*, ¶ 46. Juror R's recent adverse experience with law enforcement and his acknowledged skepticism about their trustworthiness provided a race-neutral explanation for the challenge. Thus, we conclude that the prosecution provided a race-neutral explanation for excusing Juror R, and therefore the court did not err by denying this *Batson* challenge.

3. Step Three

¶ 22 "The inquiry at step three requires the trial court to decide whether to believe counsel's race-neutral explanation for a peremptory challenge." *Wilson*, ¶ 13. "Though the trial court must evaluate all relevant facts, 'the ultimate burden of persuasion

regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Id.* at ¶ 14 (citation omitted).

¶ 23 Toro-Ospina focuses his argument with respect to the prosecution's strike of Juror V on this step. Toro-Ospina first argues that Juror V's answer to the question concerning the use of a gun was not analogous to the facts of this case and that the prosecutor's failure to engage in conversation with Juror V after she provided her answer demonstrated that the proffered explanation was pretextual. Recall that Juror V stated that the use of a gun would be appropriate to protect her home and sleeping children. This is contrary, Toro-Ospina argues, to the events that precipitated his altercation. However, the overall suggestion that the use of a gun is an appropriate means to protect a person's sleeping children closely aligned with Toro-Ospina's explanation for why he carried a firearm. Moreover, on the morning of the altercation, Toro-Ospina's children were sleeping in the apartment, and the confrontation with Oliver took place just outside the apartment complex's door.

¶ 24 Toro-Ospina also argues that the pretextual nature of the explanation is illustrated by the fact that four other prospective jurors gave similar answers to those of Juror V, yet they were not

dismissed. According to Toro-Ospina, those prospective jurors were presumably white.[1]

¶ 25 The People initially respond by asserting that the race of the prospective jurors who were dismissed is unknown because jurors were not asked about their race or ethnicity. Second, the People note that of the four prospective jurors who referred to the use of a gun, only one was selected for the jury. Thus, Juror V's response may be compared only to the response of the one empaneled juror. *See People v. Beauvais*, 2017 CO 34, ¶ 57 ("[A]n empaneled juror is similarly situated to a dismissed potential juror for the purposes of an appellate court's comparative juror analysis *if* the empaneled juror shares the same characteristics for which the striking party dismissed the potential juror.") (emphasis added). Here, the difference in answers between Juror V and the seated juror hinged upon Juror V's reference to the presence of a sleeping child. The empaneled juror's answer did not contain that specific detail.

¶ 26 Toro-Ospina also notes that he and Juror V shared the same ethnicity and suggests that this circumstance supports an inference

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[1] There is no record of the race of those prospective jurors.

that the prosecution excused Juror V based upon an improper assumption that Juror V favored the defense due to their shared ethnicity. But one of the victims, Granados, was also Latino. Thus, Toro-Ospina's argument on this point is, at best, logically strained.

¶ 27 Based on this record, we conclude that the trial court did not clearly err by determining that the prosecutor's reasons for striking Juror R and Juror V were not the product of discrimination. *See People v. Rodriguez*, 2015 CO 55, ¶ 12 ("[T]he trial court's step-three ruling should be based on its evaluation of the prosecutor's credibility and the plausibility of his explanation."). Accordingly, we reject Toro-Ospina's *Batson* contentions.

III. Race/Ethnicity Jury Question

¶ 28 Toro-Ospina contends that the trial court erred by denying his request to inquire about race and ethnicity on a questionnaire that was distributed to prospective jurors before the start of the jury selection. We disagree.

A. Additional Facts

¶ 29 Prior to trial, Toro-Ospina filed a motion asking for the standard jury questionnaire to include a question concerning prospective jurors' ethnicity. Toro-Ospina argued that this

information was essential to the invocation and assessment of *Batson* challenges. The trial court denied this request in a written order without explanation. Toro-Ospina challenges this ruling on appeal.

B. Standard of Review

¶ 30 We review a trial court's decisions regarding the content of a juror questionnaire for an abuse of discretion. *See* Crim. P. 24(a)(3). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, unfair, or contrary to law. *See, e.g.*, *People v. Maestas*, 2014 COA 139M, ¶ 11.

C. Analysis

¶ 31 Section 13-71-115(1), C.R.S. 2022, contemplates the use of a standard juror questionnaire in Colorado:

> On or before the first day of the term of trial or grand juror service, each juror shall be given a juror questionnaire requesting the following information about the juror: Name, sex, date of birth, age, residence, and marital status; the number and ages of children; educational level and occupation; whether the juror is regularly employed, self-employed, or unemployed; spouse's occupation; previous juror service; present or past involvement as a party or witness in a civil or criminal proceeding; and such other information as the jury commissioner deems appropriate after

> consulting with the judges in the judicial district.

Unless the trial court directs otherwise, the answers to these questions are to be provided to counsel for their use in the jury selection process. *See* § 13-71-115(2). But the statute does not require or otherwise address whether a prospective juror may be requested to indicate their racial or ethnic identity.

¶ 32 Crim. P. 24(a)(3), which governs the orientation and examination of jurors, provides that "[i]n the discretion of the judge, juror questionnaires, posterboards and other methods *may* be used" in the jury selection process. (Emphasis added.) Thus, the decision whether to permit additional questions of prospective jurors is committed to the trial court's sound discretion.

¶ 33 Toro-Ospina argues that information related to the racial and ethnic identity of prospective jurors is often significant in deciding whether to exercise a *Batson* challenge in the first instance and, relatedly, in formulating arguments relative to the three-step *Batson* analysis. If prospective jurors' race and ethnicity are not known to the litigants and court, they are often left to speculate about prospective jurors' racial and ethnic identity based on skin tone,

names, or other intangible factors that may provide some indicia of race and ethnicity, but that also lend themselves to the risks of unstated assumptions and implicit biases. Asking jurors to voluntarily disclose their race or ethnicity on a questionnaire, Toro-Ospina maintains, would afford prospective jurors the self-dignity of stating how they identify by race and ethnicity rather than having that identification assumed and assigned by the court and counsel. *See Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1268 (Mass. 2003) ("Self-identification is the most commonsense method for determining the ethnic and racial composition of the jury venire . . . .").

¶ 34 In service of these objectives, as Toro-Ospina notes, a number of jurisdictions, including the federal courts, obtain information on prospective jurors' race for use in the jury selection process. *See* 28 U.S.C. § 1869(h) (the juror qualification form shall elicit the race of a prospective juror "solely to enforce nondiscrimination in jury selection"); *see also United States v. Hernandez-Estrada*, 749 F.3d 1154, 1169-70 (9th Cir. 2014) (discussing race and ethnicity questions from the questionnaire). Numerous state courts follow the same procedure but often give the prospective juror discretion

whether to provide their racial or ethnic identity. *See, e.g.*, *State v. Edwards*, 102 A.3d 52, 61 (Conn. 2004) (addressing "the use of racial or ethnic self-identification in juror questionnaires as a ground for a peremptory challenge"); *Arriaga*, 781 N.E.2d at 1268 (mandating that the jury commissioner develop a question, modeled after the federal form, that requires jurors to disclose their race and ethnicity).

¶ 35 The People make a number of arguments in defense of the trial court's decision not to include the racial identity question on the questionnaire. Initially, the People correctly note that, in the trial court, Toro-Ospina requested only that the questionnaire inquire regarding prospective jurors' ethnicity, but on appeal, he argues the questionnaire should have inquired about race and ethnicity. Thus, they argue, his argument is unpreserved as it relates to a question about race.

¶ 36 More substantively, the People argue that asking a juror to disclose their race or ethnicity could make it easier for the parties to use race or ethnicity in an improper way during jury selection. Thus, the People reason, asking prospective jurors about their race or ethnicity on a questionnaire could actually increase the risk of

express or implicit biases, tainting the process of selecting a jury. Given these potential dynamics, and the absence of a rule, a statute, or case law requiring that such a question be included in a jury questionnaire, the People argue the decision whether to include a question is properly left to the sound discretion of our trial courts.

¶ 37 The parties' arguments present important policy questions. But we do not sit as a policy-making body. We are tasked with reviewing only whether the trial court abused its discretion by declining to pose the race/ethnicity question to prospective jurors. As previously noted, Crim. P. 24(a)(3) entrusts the decision whether to use jury questions to the trial court's sound discretion. And the General Assembly has thus far not included such a requirement in the statutorily mandated questionnaire. *See* § 13-71-115(1). Likewise, we are aware of no Colorado appellate decision requiring a trial court to inquire about a prospective juror's race or ethnicity. We conclude that such policy decisions are properly entrusted to the General Assembly and the Colorado Supreme Court rather than an intermediate appellate court. And because such a directive has not yet been promulgated, we conclude the trial court did not abuse

its discretion by declining to include the requested race/ethnicity question on the jury questionnaire.[2]

IV. Implicit Bias Jury Instruction

¶ 38 Toro-Ospina also contends that the trial court abused its discretion by not giving the jury his proposed instruction discussing the need to protect against implicit biases in the deliberative process. Again, we disagree with the contention.

A. Additional Facts

¶ 39 Toro-Ospina's counsel tendered an implicit bias jury instruction derived from a standard instruction adopted by the federal courts in the Western District of Washington. The trial court declined to give the tendered instruction after the following exchange with defense counsel:

> [THE COURT]: With regard to the implicit bias from the 9th Circuit, any record you want to make on that?
>
> . . . .
>
> [DEFENSE COUNSEL]: Mr. Toro-Ospina is obviously not English speaking, and so I think

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[2] We do not suggest that the trial court, in the sound exercise of its discretion, was precluded from asking prospective jurors to voluntarily disclose their race or ethnicity as part of a jury questionnaire.

> it's important for the jury to consider any sort of implicit biases that they might have. It's a standard instruction that's given, and so I believe it would be helpful in their determination.
>
> . . . .
>
> [THE COURT]: All right. As I said, this is a 9th Circuit opinion that sounds like a launching to state instruction [sic]. The Court did not find that to be persuasive in any way, so the Court will deny the giving of that instruction.

¶ 40 Although the trial court did not provide the implicit bias instruction, it did permit counsel to explore the topic during the questioning of jurors. Near the completion of that process, defense counsel had the following exchange with a prospective juror in the presence of other prospective jurors:

> Q. And does anybody believe that implicit bias — does anybody know what that is, "implicit bias?"
>
> A. (No verbal response.)
>
> Q. Yes, Juror B.
>
> A. Implicit bias is basically your life experiences telling you what to think about somebody without knowing anything about them. That's basically what it is.
>
> Q. Do we all have implicit bias?

A. Absolutely.

Q. Why is knowing about implicit bias, you think important?

A. So I'm a medical student, and I'm going to be a doctor. We get told about this all the time. So when you see a patient — when you walk into the room, you already have so many judgments about them, and you just make a better doctor, and you treat them better if you know what those judgments are. Li[k]e, for example, it's a single mom who doesn't speak English. You know, my judgment like a lot of people would jump to a conclusion, Oh, you got yourself in that situation when that may not be the case. Like, she may have some war in some other country and got here and had to raise her kids on her own. So like, the empathy and understanding that there could be another explanation is very important.

B. Applicable Law

¶ 41 We review jury instructions de novo, as a whole, to determine whether they accurately informed the jury of the governing law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). But we review a trial court's decision whether to give a particular instruction for an abuse of discretion. *See, e.g.*, *Day v. Johnson*, 255 P.3d 1064, 1068 (Colo. 2011). If a trial court abused its discretion by failing to provide an instruction requested by a defendant, we review under the harmless error standard. *See Brown v. People*, 239 P.3d 764,

767 (Colo. 2010). We reverse only if the error affected the defendant's substantial rights. *Id.*

C. Analysis

¶ 42 In pertinent part, Toro-Ospina's proposed instruction stated,

> Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias can affect how we evaluate information and make decisions.

On appeal, Toro-Ospina argues that the tendered instruction was warranted because of the potential language barrier between Toro-Ospina and the jury, and that this barrier could have triggered implicit biases against him.

¶ 43 The People counter that the instruction was unnecessary because it was effectively encompassed by the pattern jury instruction, which states, "[Y]ou must not be influenced by sympathy, bias or prejudice in reaching your decision." COLJI-Crim. E:01 (2022). Moreover, even if the standard instruction was not fully adequate, the People argue any error in not giving the defense-tendered instruction was harmless because defense

counsel was afforded the opportunity to educate potential jury members about implicit biases during the jury selection process.

¶ 44 We agree with Toro-Ospina that the pattern instruction — COLJI-Crim. E:01 — does not adequately inform the jury about the concept of implicit bias. We also appreciate that Toro-Ospina's instruction would have advised the jurors to consider not only their conscious biases but also the possible prejudices they harbor on an unconscious level. *See People v. Rhodus*, 870 P.2d 470, 474-75 (Colo. 1994); *People ex rel. Burke v. Dist. Ct.*, 60 Colo. 1, 18, 152 P. 149, 155 (1915) ("Prejudice is a mental condition or status, not susceptible of direct and positive proof. As a rule, it is the result of no dishonest motives, and he whose acts are affected by prejudice is usually unconscious of its influence."). The importance of jurors being reminded of the risk that their judgments may be skewed by implicit biases is arguably more salient in a case such as this, in which most of the People's witnesses testified in English, but Toro-Ospina testified in Spanish, thus necessitating translation of his testimony into English.

¶ 45 But for two independent reasons, we conclude that the court's decision not to give the requested instruction does not require reversal of Toro-Ospina's convictions.

¶ 46 First, we harken back to our previous discussion concerning the tendered jury questionnaire. Here, too, we are aware of no statute or case law that mandates the giving of an implicit bias instruction. Moreover, the explanatory note accompanying the Western District of Washington's model instruction states that "[r]esearch regarding the efficacy of jury instructions is still young and some of the literature has raised questions whether highlighting the notion of unconscious bias would do more harm than good." *See* U.S. Dist. Ct. for the W. Dist. of Wash., *Criminal Jury Instructions – Unconscious Bias*, https://perma.cc/68VK-ZDKH (defining unconscious bias and differentiating the term from conscious bias). While that jurisdiction elected to require an implicit bias jury instruction based on competing research, the Colorado Supreme Court has not issued such a mandate.

¶ 47 Until such time as the General Assembly or the Colorado Supreme Court requires an implicit bias instruction, the decision whether to give such an instruction rests with the trial court. While

a trial court is free to provide such an instruction when exercising its discretion, we cannot conclude the trial court here abused its discretion by declining to do so. *See Vigil v. People*, 2019 CO 105, ¶ 14 (noting that a trial court does not abuse its discretion as long as the court's decision "fell within a range of reasonable options").

¶ 48 Second, even if we were to conclude otherwise, the exchange between Toro-Ospina's counsel and Juror B thoughtfully articulated the inherent risks of implicit bias and the need to be mindful of those concerns in the deliberative process. Given this discussion in the presence of the other prospective jurors, we conclude that any error associated with declining the instruction was harmless.

V. Exclusion of Evidence of Victim's Character

¶ 49 Toro-Ospina contends that the trial court erred by not allowing him to introduce, in support of his self-defense claim, evidence of Oliver's character. We disagree.

A. Standard of Review

¶ 50 We review a trial court's rulings on evidentiary issues for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002).

B. Additional Facts

¶ 51 Defense counsel attempted to elicit testimony from Toro-Ospina that he had witnessed Oliver participate in drug deals in and around the apartment complex. The trial court asked counsel to explain the relevance of such testimony. Counsel argued that due to the potential violence associated with drug deals, Toro-Ospina acted reasonably in self-defense on the morning of the altercation. The court rejected the argument, ruling that evidence of Oliver's alleged drug dealing was improper character evidence and was therefore irrelevant absent specific evidence linking Oliver to past instances of violent conduct:

> If there is an interaction between them where that person has threatened [Toro-Ospina], if he has witnessed that person committing violence against somebody else, then it might be pertinent to the reasonableness of his conduct. But simply saying, Have you seen [Oliver] participate in drug deals in the past, simply draws into the light — bad character of the alleged victim in the case that's not a relevant character [trait] in the case.
>
> . . . .
>
> If there's some prior violence [Toro-Ospina's] witnessed, that he's aware of some prior violence between them, hostility between them, that's something different. But just evidence

> that [Oliver] may have sold drugs, I'll find is not a pertinent character trait. I'll also find, even if it has some relevance, it's relevance is far outweighed by the undue prejudice under 403.

C. Analysis

¶ 52 Relevant evidence is admissible so long as its probative value is not substantially outweighed by the danger of unfair prejudice. *See* CRE 403. Had Toro-Ospina offered testimony that he was aware of Oliver being violent during alleged drug deals, such evidence may have been relevant to establish Oliver's pertinent character trait of violent tendencies, which may have supported Toro-Ospina's claim of self-defense. *See People v. Jones*, 675 P.2d 9, 16 (Colo. 1984) ("Evidence of the victim's character trait for violence is legally relevant to the issue of self-defense because the inference that the victim was the initial aggressor is made more probable with the evidence than without it."); *see also* CRE 404(a)(2).

¶ 53 Oliver's alleged propensity for violence, however, was not the testimony that was offered. Instead, the proffered testimony was only that Oliver engaged in drug dealing. The required inferential leap — that all drug dealers engage in violence and therefore Toro-

Ospina legitimately feared Oliver was more prone to violence — is a leap too far. As the trial court discerned, such evidence was not relevant, and any theoretical relevance was substantially outweighed by its unfairly prejudicial impact because it would have tainted Oliver as a drug dealer without any evidence that he had a history of engaging in violence. We therefore conclude that the trial court did not err by disallowing evidence of Oliver's alleged drug dealing.

VI. Alleged Prosecutorial Misconduct

¶ 54 Toro-Ospina also argues that the prosecutor committed misconduct that unfairly prejudiced the jury. Specifically, Toro-Ospina claims that the prosecutor's closing argument denigrated him. Toro-Ospina also alleges that in rebuttal closing argument, the prosecutor misstated the law and the evidence. We disagree with these contentions.

A. Standard of Review and Applicable Law

¶ 55 "[A] prosecutor, while free to strike hard blows, is not at liberty to strike foul ones." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005) (citation omitted). A prosecutor's conduct warrants

reversal when their conduct is "flagrantly, glaringly, or tremendously improper." *Id.* at 1053 (citation omitted).

B. Analysis

¶ 56 To review a claim of prosecutorial misconduct, we engage in a two-part analysis. *See id.* at 1048. We must first determine if the prosecutor's statements were improper, and if so, we must then determine if reversal is warranted under the proper standard of review. *Id.* Thus, we must first look at each prosecutorial statement that Toro-Ospina challenges.

1. Denigration of Toro-Ospina

¶ 57 First, Toro-Ospina claims that the prosecutor denigrated him when she stated the following during her closing argument:

> Ladies and gentlemen, he knows they are out there picking up trash. *He won't admit that the thing in Mitchell Oliver's hand is a trash claw because to do so would essentially thwart his claim that he believed he was in danger* by this object, but he goes on to say that he talks to Mitch Oliver and that Mitch Oliver is defiant. He's not giving him the answers he wants, I assume. And at some point, based on the Defendant's testimony, Mitch Oliver raises his hand with the bucket and the metal object in his hand.

(Emphasis added.)

¶ 58 Toro-Ospina's claim is that the prosecutor told the jury that he lied during his testimony, thereby creating insurmountable prejudice because the case hinged on credibility. "[A] prosecutor cannot communicate her opinion on the truth or falsity of witness testimony during final argument . . . ." *Id.* at 1049. Such diminishing of a witness's testimony occurs when the prosecutor expressly uses the word "lie." *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

¶ 59 However, we conclude the prosecutor did not state that Toro-Ospina lied. She stated, instead, that he would not admit that the victim was holding a pole with a trash collection claw at the end of it. This was an important aspect of the prosecution's case that was anchored in the evidence and clearly intended to challenge the credibility of Toro-Ospina's testimony. *See Domingo-Gomez*, 125 P.3d at 1051. We therefore conclude that the trial court did not err by declining to sua sponte respond to the argument.

2. Misstatement of the Law

¶ 60 Toro-Ospina also argues that the prosecutor misstated the law, which unfairly prejudiced the jury. During the closing argument, defense counsel repeatedly mentioned the prosecutor by

name while also explaining that more evidence should have been provided, such as photographs of the scene, surveillance footage of the site, or other witnesses to testify about the altercation.

¶ 61 The prosecutor offered the following in her closing rebuttal argument:

> Members of the jury, understanding that Defense Counsel wants you to focus on me, I want you to focus on the evidence in this case. And I want you to remember that the evidence in this case is what came from that witness stand. It's not something that Defendant or Defense Counsel suggests could have possibly been gathered. Evidence is not a suggestion that there may have been other witnesses.
>
> . . . .
>
> The evidence came from that witness stand. I want you to focus on the people who testified who were there, who experienced this for themselves, and what they said about what happened that day.

¶ 62 These comments did "not suggest to the jury that the prosecutor had formed an opinion of guilt based on evidence not presented at trial," nor did the prosecutor misstate the law in her attempt to redirect the jury back to the testimony of the three individuals involved. *People v. Allee*, 77 P.3d 831, 836 (Colo. App.

2003). Thus, we conclude the trial court did not err by permitting this argument.

3. Misstatement of Evidence

¶ 63 Lastly, Toro-Ospina contends that the prosecutor misstated Granados's testimony, thereby undermining the fundamental fairness of the trial.

¶ 64 Granados's statements during cross-examination included the following exchange:

> Q. And although you were scared, you didn't feel threatened; is that correct?
>
> A. Correct, yes.
>
> Q. And, in fact, you stay there and you have a conversation with this man, correct?
>
> A. But that was after he shot.
>
> Q. So right. After — you stay there — and you heard the sounds, you stay there and you have a conversation with this man, correct?
>
> A. *Yes, but that doesn't mean I wasn't afraid.*
>
> Q. Okay. But again, you didn't feel threatened. You said that previously, right?
>
> A. *Yeah, I didn't feel threatened, but the fear was there.*

(Emphasis added.)

¶ 65 During rebuttal closing, the prosecutor stated, "When you hear Defense Counsel stand up here and say that *Jose Granados testified that he didn't feel threatened, and you know that's not true,* you think about your recollection when you go back there." (Emphasis added.)

¶ 66 As Toro-Ospina argues, the prosecutor misstated Granados's testimony. Granados said he did not feel threatened but also noted that he felt fear. The prosecutor's misstatement, however, does not rise to the level of improper conduct. A prosecutor is given reasonable leeway in recalling a witness's testimony and arguing the reasonable inferences to be derived therefrom. *See Domingo-Gomez*, 125 P.3d at 1048. The distinction between feeling threatened and feeling fear is sufficiently gray that the prosecutor's argument cannot be characterized as flagrantly, glaringly, or tremendously improper. *Id.* at 1053. Thus, we discern no error in permitting this argument.

VII. Cumulative Error

¶ 67 The doctrine of cumulative error is based on the concept that multiple errors, in isolation, may be harmless, but the synergistic

effect of multiple errors may be so prejudicial that the combined errors deprived a defendant of a fair trial. *See People v. Vialpando*, 2022 CO 28, ¶ 33.

¶ 68 Here, Toro-Ospina alleges numerous errors. We have not concluded that multiple errors were committed. For this reason, cumulative error does not exist.

VIII. Disposition

¶ 69 We affirm the judgment of conviction.

JUDGE NAVARRO and JUDGE TOW concur.