SUMMARY
June 29, 2023

2023COA58

No. 21CA0834, *People v. Garcia* — Constitutional Law — Sixth Amendment — Right to a Public Trial — Waiver — Due Process; Criminal Law — Charging Instruments — Constructive Amendment — Forfeiture

A division of the court of appeals considers two distinct waiver issues. The first issue is whether, pursuant to *Stackhouse v. People*, 2015 CO 48, the defendant waived his right to a public trial by failing to object to a known closure. The second issue is whether, pursuant to *People v. Rediger*, 2018 CO 32, the defendant waived his right to be tried in conformity with the charging instrument by failing to object to a constructive amendment. Reconciling *Stackhouse* and *Rediger*, the division concludes that the defendant waived the first right and forfeited the second. While several published court of appeals opinions have negotiated the guidance in *Stackhouse* and *Rediger*, this appears to be the first

published opinion to simultaneously resolve waiver issues in each context.

The division also concludes that the defendant's claim of prosecutorial misconduct does not constitute plain error, so it affirms the convictions. The division does, however, agree with the parties that remand is required so that the defendant can move the trial court to waive his costs and surcharges. Thus, the division affirms the judgment of conviction and remands for further proceedings related to the imposition of costs and surcharges.

COLORADO COURT OF APPEALS **2023COA58**

Court of Appeals No. 21CA0834
City and County of Denver District Court No. 20CR4320
Honorable Martin F. Egelhoff, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kenneth L. Garcia,

Defendant-Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE FOX
Welling and Kuhn, JJ., concur

Announced June 29, 2023

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¶ 1 Defendant, Kenneth L. Garcia, appeals the judgment of conviction entered on jury verdicts finding him guilty of burglary and forgery. This case presents two distinct waiver issues. The first issue is whether, pursuant to *Stackhouse v. People*, 2015 CO 48, Garcia waived his right to a public trial by failing to object to a known closure. The second issue is whether, pursuant to *People v. Rediger*, 2018 CO 32, Garcia waived his right to be tried in conformity with the charging instrument by failing to object to a constructive amendment. Reconciling *Stackhouse* and *Rediger*, we conclude that Garcia waived the first right and forfeited the second.

¶ 2 We also conclude that Garcia's claim of prosecutorial misconduct does not establish plain error, so we affirm his convictions. We do, however, agree with the parties that remand is required so that Garcia can move the trial court to waive his costs and surcharges. Thus, we affirm the judgment of conviction and remand the case for further proceedings related to the imposition of costs and surcharges.

I. Background

¶ 3 On March 25, 2020, at around 7 p.m., Michael Falls entered his condominium to discover a stranger — identified as Garcia in a

photo lineup and at trial — lying on his couch. The condo was Falls's primary residence, but he frequently rented it out through Airbnb and had listed it for sale. Thus, Falls was not in the unit every day. But because the COVID-19 pandemic was just beginning, every late-March Airbnb guest had cancelled, prompting Falls to return home on March 25. He testified that he had not been in the condo since March 20.

¶ 4 Falls testified that, upon entering, Garcia stood up and said, "Oh, Michael, you're here. I was thinking about buying this place." Garcia then pivoted, instead explaining that he had given Falls's real estate agent $500 to stay in the condo overnight. Falls called 911 and ran to the building's front door where a security guard was stationed. By the time police arrived to clear the unit, Garcia was gone.

¶ 5 As Falls enlisted building security's assistance, another resident heard a loud noise from an adjacent stairwell and went to investigate. The resident saw a man, whom he later identified as Garcia, dragging a moving dolly full of bags and clothing down the stairwell and out a rear building exit. Finding it strange that someone would hurriedly drag a loaded cart down the back

staircase — as opposed to using the elevator at the front of the building — the resident took Garcia's picture from his third-story balcony and then followed him outside, taking several more pictures of him before turning back. Falls later identified the moving dolly, as documented in the resident's photographs, as one that was stolen from his condo.

¶ 6 Garcia left Falls's condo in disarray. Items were strewn throughout the condo, empty or partially consumed cans and bottles littered each room, Falls's three beds appeared to have been slept in, and Falls's electronics were stacked on the floor. Personal items were taken from Falls's closets and used, Falls's personal collection of liquor was largely consumed, and a ring of dark hair dye stained one of the bathtubs. Based on the condition of the beds and the amount of alcohol consumed, Falls deduced that the condo had been occupied for a while, possibly by multiple people.[1]

¶ 7 Falls reported many items missing, including two moving dollies, a fifty-five-inch television, electronics, ceramics, furs, clothing, camping gear, and a large steel safe. The safe contained

[1] A fingerprint of another individual was recovered from a beer can left in Falls's condo.

jewelry, old and current checkbooks, and Falls's personal identifying documents.

¶ 8 Garcia left behind a laptop with a home screen showing an account for "Kenneth Garcia." A truck registered to Garcia was also parked outside the building around that time.

¶ 9 Normally, Falls secured his condo's front door with a keypad lock that could be unlocked by code or key. Falls also hung a lockbox nearby that contained a spare key for his real estate agent to use. While there were no obvious signs of forced entry, Falls noticed that the code to unlock his spare key lockbox no longer worked, suggesting that someone had tampered with it.

¶ 10 A MoneyTree employee testified that on March 23, 2020 — two days before Falls found Garcia in his home — a man she identified as Garcia tried to cash a $7,000 check from one of Falls's checkbooks. The checkbook had been stored in the missing safe and documented checks paid from Falls's closed business bank account. The employee called Falls, who informed her that the account was closed and that he did not authorize the check.

¶ 11 The People charged Garcia with second degree burglary and forgery. A jury found Garcia guilty as charged. The trial court

sentenced Garcia to fourteen years in the custody of the Department of Corrections for the burglary conviction and a consecutive term of two years for the forgery conviction.

¶ 12 Garcia asserts four errors on appeal. He contends that the trial court violated his right to a public trial and allowed a constructive amendment, claiming each was a structural error. The People counter that we should not review the contentions because defense counsel waived them. Garcia next argues that the trial court plainly erred by failing to intervene and remedy, sua sponte, prosecutorial misconduct. Finally, Garcia requests a remand so he can move the trial court to waive his costs and surcharges. The People concede that a remand is appropriate for that limited purpose.

II. Waiver

¶ 13 We first address whether Garcia waived his right to a public trial, concluding that he did. Next, we consider whether Garcia waived his right to be tried in conformity with the charges set out in the complaint and conclude that he forfeited that right. Thus, we then turn to whether the court reversibly erred by allowing the constructive amendment.

A. Applicable Law and Standard of Review

¶ 14 "Constitutional and statutory rights can be waived or forfeited." *Richardson v. People*, 2020 CO 46, ¶ 24. Waiver is "the *intentional* relinquishment of a *known* right or privilege." *Rediger*, ¶ 39 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). While waivers may be explicit or implied, they must be supported by some evidence of intent to relinquish the known right. *Forgette v. People*, 2023 CO 4, ¶¶ 28-29. We "do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver." *Rediger*, ¶ 39 (quoting *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984)).

¶ 15 Forfeiture, on the other hand, is the failure to make a timely assertion of a right. *Forgette*, ¶ 29. Forfeitures generally occur through neglect. *Rediger*, ¶ 40.

¶ 16 We review claims of waiver de novo. *Richardson*, ¶ 21. If we conclude that Garcia waived his contentions, our analysis necessarily ends. *Rediger*, ¶ 40 ("[A] waiver extinguishes error, and therefore appellate review . . . ."). But if we conclude that Garcia forfeited either contention, we then consider whether any error was

structural or plain. *Forgette*, ¶ 30 ("[U]nlike in the case of a waiver, an appellate court may review a forfeited error under the plain error standard.").

1. Was the Right or Privilege Known?

¶ 17 We first examine how appellate courts define the "known" prong of the waiver test. *Rediger*, ¶ 39.

¶ 18 "Defendants . . . affirmatively waive their right to public trial by not objecting to known [courtroom] closures." *Stackhouse*, ¶ 17, *cited with approval in People v. Hernandez*, 2021 CO 45, ¶ 35. In *Stackhouse*, ¶ 2, the trial court closed the courtroom to the public during jury selection due to space limitations and to prevent interaction between family members and potential jurors. The court explained its reasoning to the parties and asked if the parties had "anything further" for the court to consider; defense counsel did not object. *Id.* Our supreme court concluded that, under the circumstances, the closure was known to counsel. *See id.* at ¶¶ 9-10, 16; *see also Forgette*, ¶¶ 6-8 (concluding that where the parties alerted the trial court to a sleeping juror, but where defense counsel did not object or request relief, defense counsel knew the right at stake, and thus waived the claim of error).

¶ 19 In contrast, our supreme court did not find evidence of knowledge in *Rediger*. There, an elemental jury instruction did not match the charging document, resulting in a constructive amendment. *Rediger*, ¶¶ 8-10. The trial court asked the attorneys for their positions on the jury instructions; defense counsel replied that he was "satisfied" with the instructions. *Id.* at ¶ 10. Reasoning that the record reflected no express or implied evidence of counsel's intent to waive the objection — or that counsel was even aware of the discrepancy — the supreme court concluded that Rediger did not waive, and instead forfeited, his objection. *Id.* at ¶¶ 42-44. The *Rediger* court relied, in part, on the fact that the record revealed "no discussion of this particular instruction at all." *Id.* at ¶ 43. That defense counsel read the instructions was an insufficient basis from which to infer that counsel recognized, or was aware of, the particular error at issue. *Id.* at ¶ 45.

¶ 20 The distinguishing factor between *Stackhouse* and *Rediger* is some evidence of presumed awareness or recognition of the claimed error in light of the surrounding context. *See Forgette*, ¶ 34 ("Here, as in *Stackhouse*, Forgette's counsel was fully aware of the sleeping juror but did not object or ask the court to take any action to

address the issue."); *Phillips v. People*, 2019 CO 72, ¶ 26 (distinguishing *Stackhouse* because in that case defense counsel was "clearly aware of the public closure and nevertheless chose not to raise an objection to it"); *People v. Tee*, 2018 COA 84, ¶ 30 ("[T]he record compels the conclusion that because defense counsel recognized the predeliberation concern, this case falls on the *Stackhouse* side of that line.").

¶ 21 As the *Tee* division elegantly articulated,

> A principled line between these cases would be that in *Rediger* . . . merely reading the instructions does not compel the conclusion that counsel recognized prejudice to the defendant's right to be tried on the statutory elements under which he had been charged . . . . The explanation could have been inadvertence, as the difference in elements was not striking. Contrasting *Stackhouse*, counsel's mere presence when the trial court directed that the courtroom be closed permits no reasoned doubt that counsel recognized the defendant's public trial right was being impaired.

Tee, ¶ 29. We agree with the *Tee* division's assessment that some evidence of recognition is required, except in cases where the surrounding context, like that in *Stackhouse*, leaves "no reasoned doubt that counsel recognized" the right at stake. *But see People v.*

Allgier, 2018 COA 122, ¶¶ 14-18, 26-28 (distinguishing *Stackhouse* from *Rediger* on slightly different grounds, but ultimately choosing to leave "reconciling any discrepancy between *Rediger* . . . and *Stackhouse*" to the supreme court).

¶ 22 In *People v. Carter*, 2021 COA 29, ¶ 30, a division of this court distinguished *Rediger* based on the degree of recognition. In that case, the prosecution charged Carter with failing to present proof of insurance. But the jury instructions recited the elements for operating a motor vehicle without insurance, which — unlike the charged offense — required proof that the defendant operated a vehicle. *Carter*, ¶¶ 15-17. The division found that, unlike in *Rediger*, the record revealed evidence that defense counsel recognized the error where (1) counsel reviewed each instruction separately; (2) counsel failed to include the incorrect instructions among the group she objected to; (3) the parties discussed each instruction separately; (4) defense counsel failed to object to a presumption instruction that could only relate to the amended charge and not the original charge; and (5) defense counsel referred to the charge as "driving without insurance" during closing argument. *Id.* at ¶ 30. On those facts, the division concluded that

defense counsel waived any objection to the constructive amendment but concluded, in the alternative, that any error was not plain. *Id.* at ¶ 14. *But see People v. Smith*, 2018 CO 33, ¶ 18 (suggesting that the "known" prong of the waiver test could only be met in the constructive amendment context where the record revealed that the trial court and parties "discussed or acknowledged the pertinent differences" between the charging document and proposed jury instructions "or the implications of those differences").

2. Was the Relinquishment Intentional?

¶ 23 We next turn to the second prong of the waiver test: intentional relinquishment. Appellate courts are more likely to conclude that defense counsel intentionally relinquished a known right where counsel could have chosen not to assert the right for "sound strategic reasons." *See Stackhouse*, ¶ 16 (concluding that defense counsel waived the public trial right, in part, because counsel could have intentionally not objected as a "strategic parachute to preserve an avenue of attack on appeal"); *Tee*, ¶ 34 (same); *cf. Phillips*, ¶¶ 27-28 (there is no sound strategic reason not to raise pertinent suppression arguments in the first instance).

Appellate courts are more likely to find waiver in this context to avoid "gamesmanship" and "sandbagging." *Phillips*, ¶ 29.

¶ 24 While evidence of a sound strategic purpose can support a finding of a waiver, the party asserting waiver need not prove a strategic purpose. *Tee*, ¶¶ 39-40; *see also Allgier*, ¶ 22 ("But despite extensive recognition by . . . courts of the sandbagging problem, we have not found a test for detecting it as a basis for finding a waiver.").

¶ 25 Our supreme court recently rejected a waiver claim on the intentional relinquishment prong in *People v. Turner*, 2022 CO 50. In that case, the trial court excluded Turner's codefendant's wife from the courtroom after she was apparently arrested for harassing a witness and victim advocate the night before. *Turner*, ¶¶ 4-5. Turner's counsel, when asked for a position, stated that he lacked sufficient information about the supposed arrest to object. *Id.* at ¶ 4. The supreme court concluded that, "[a]lthough there may be sound strategic reasons for waiving the right to a public trial in some instances, strategic choice does not appear to be what happened here." *Id.* at ¶ 13 (citation omitted). Instead, the court held that, while defense counsel recognized the right at stake,

counsel took care not to intentionally relinquish it. *See id.*; *cf. People v. Murray*, 2018 COA 102, ¶¶ 43-44 (finding intentional relinquishment where the trial court asked defense counsel for a position on whether a deferred judgment could be admitted as impeachment evidence and defense counsel replied, "Based upon our research, I think it can.").

¶ 26 The *Carter* case is also instructive. Recall that in *Carter*, defense counsel did not object to a constructive amendment. Having decided that defense counsel recognized the error, the division concluded that defense counsel intentionally relinquished the known right because the constructive amendment was favorable to the defense. *Carter*, ¶¶ 31-32. The original charge included no element of motor vehicle operation, unlike the amended charge, effectively heightening the prosecution's burden of proof. Thus, there was a sound strategic reason not to object to the constructive amendment.

¶ 27 With these precedents as our guide, we turn to whether Garcia waived his contentions, as the People posit.

B. Right to a Public Trial

¶ 28 Garcia first argues that the court violated his right to a public trial because the video livestream did not show the lawyers or jury, and the record does not reflect whether jury selection was live-streamed. But we need not decide whether the livestreamed proceedings constituted a closure in violation of Garcia's right to a public trial because we conclude that Garcia waived the contention.

¶ 29 Garcia's jury trial was one of the first in-person trials to take place in Denver after a second lockdown due to the COVID-19 pandemic. Due to spacing limitations in the courtroom, the trial court conducted jury selection in the jury assembly room to ensure proper social distancing. The trial court explained this policy to the parties during a pretrial hearing. Neither party objected.

¶ 30 The record does not indicate whether members of the public were permitted to observe jury selection in person or virtually.

¶ 31 Back in the courtroom, the trial court explained the orientation of the room on the record: "[T]his is our jury box over here. It's not big enough to distance . . . 13 people six feet apart. That's why you're back in the spectator section of the courtroom." A diagram of the jurors' seating assignments suggests that the

jurors were spread out on either side of the courtroom gallery, but the diagram does not indicate whether any benches were reserved for spectators.

¶ 32 The court continued,

> This courtroom is a public courtroom, and these are public proceedings. However, because of space limitations, we have limited access for the public. And so these proceedings are being made available to the public by way of audio videoconferencing . . . . What people can see and hear is they can see me, they can hear me, they can see the witness, they can hear the witness, all right? That's because we've got cameras on our laptops here, and we can project. They can't see [the jurors], they can't . . . see the lawyers, although they can hear through the microphones.

Garcia's counsel did not object or request additional relief.

¶ 33 We first assess whether defense counsel recognized the right — Garcia's public trial right — implicated by the proceedings and conclude that she did. Here, as in *Stackhouse*, the trial court explained its procedures to both parties, presenting an opportunity for timely objections or requests for additional relief. Indeed, the trial court explicitly stated that the proceedings were "public" and explained what an online viewer could and could not see on the

livestream. Thus, defense counsel's presence in the courtroom during each discussion about the court's proposed COVID-19 protocols leaves "no reasoned doubt" that counsel recognized the public trial right at stake. *See Tee*, ¶ 29; *see also Stackhouse*, ¶¶ 9-10, 16.

¶ 34 Having established that the right was known, we turn to whether defense counsel intentionally relinquished it. We, again, conclude that *Stackhouse* controls. Failure to object to a known closure in this context constitutes a waiver, and counsel's failure to do so here forecloses relief on appeal. *Stackhouse*, ¶ 17; *Forgette*, ¶ 35 (holding that a trial court does not err where it takes some action to rectify a problem and counsel raises no objection or request for additional relief).

¶ 35 This case is unlike *Turner*, ¶¶ 4-5, in which the supreme court rejected a waiver claim on the intentional relinquishment prong when defense counsel declined to object because he lacked sufficient information. Unlike defense counsel in *Turner*, counsel here did not tell the court that she required additional information about a trial condition or the COVID-19 protocol before raising Garcia's public trial right and requesting relief. Indeed, the trial

court detailed the reason for the purported closures and the measures the court took to remediate public trial concerns. The conditions leading to the partial closure in *Turner* were much more vague.

¶ 36 The People are correct that they need not assert a strategic purpose to establish intentional relinquishment. We find *Stackhouse*'s reasoning on this point directly applicable, and thus we decline to consider whether Garcia's own COVID-19 concerns constituted a strategic reason to waive the right to a public trial. *See Stackhouse*, ¶ 15.

¶ 37 Because Garcia intentionally relinquished a known right, the claim is waived and we have nothing left to consider. *See Rediger*, ¶ 40. Thus, we do not consider whether any error was structural. *See Stackhouse*, ¶ 8 ("[E]ven fundamental rights can be waived, regardless of whether the deprivation thereof would otherwise constitute structural error.").

C. Constructive Amendment

1. Waiver or Forfeiture

¶ 38 Garcia next argues that the court violated his right to be tried in conformity with the charging instrument by allowing a

constructive amendment to the forgery charge. The People respond that Garcia waived the claim of error by failing to object at trial.

¶ 39 A constructive amendment occurs when a jury instruction "changes an essential element of the charged offense and thereby alters the substance of the charging instrument." *Rediger*, ¶ 48. (quoting *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996)). "This violates a defendant's constitutional right to due process because it presents a risk that the defendant will be convicted of an offense or conduct that was not originally charged." *Carter*, ¶ 51.

¶ 40 In the charging instrument, the prosecution alleged that Garcia, with intent to defraud, "unlawfully, feloniously, and falsely made, completed, altered, or uttered a written instrument which was or which purported to be, or which was calculated to become or to represent if completed, *a check*; in violation of section 18-5-102(1)(c), C.R.S. [2022]." (Emphasis added.) The trial court read the charging document to the jury pool before jury selection.

¶ 41 Paragraph 7 of the corresponding jury instruction listed the possible legal instruments that Garcia could have forged: "*a deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument* which did or might evidence, create,

transfer, terminate, or otherwise affect a legal right, interest, obligation, or status." (Emphasis added.)

¶ 42 During the jury instruction conference, the court explained that it had removed a portion of the pattern elemental instruction that it found unhelpful.[2] The court solicited objections, to which defense counsel responded, "No objection from Defense with those changes." No party raised or objected to the fact that paragraph 7 of the instruction listed more types of legal instruments than the complaint.

¶ 43 Unlike the first waiver claim, here we perceive no evidence that defense counsel recognized the error. This case is unlike *Stackhouse*, where there was "no reasoned doubt" that the surrounding context alerted defense counsel to the right at stake. *Tee*, ¶ 29. The trial court did not raise the issue sua sponte or

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[2] The pattern instructions label this particular elemental instruction as "Forgery (Legal Right, Interest, Obligation, or Status)," to distinguish the type of forgery referenced in the instruction from other types of forgery. *See* COLJI-Crim. 5-1:03 (2022). Anywhere that the pattern instruction read "Forgery (Legal Right, Interest, Obligation, or Status)," the trial court simply replaced the phrase with "forgery."

otherwise signal to the parties the right at stake. Here, counsel's failure to object is more likely explained by inadvertence. *See id.*

¶ 44 Unlike in *Rediger*, the parties discussed each instruction one by one, and defense counsel explicitly said that she had no objection to the erroneous instruction. But defense counsel did not apparently exhibit recognition of the error, unlike the lawyer in *Carter*, who not only approved of a supplemental instruction that could only apply to the amended charge, but also referred to the amended charge in her closing argument. And the attorney in *Carter* had a good reason to allow the constructive amendment, as it heightened the prosecution's burden of proof; here, the constructive amendment arguably made it easier for the prosecution to meet its burden by, in theory, allowing more than one avenue of proof. We "indulge every reasonable presumption against waiver" and therefore hesitate to conclude that counsel recognized the error, especially where there was no strategic advantage in allowing the constructive amendment. *See Rediger*, ¶ 39 (quoting *Curtis*, 681 P.2d at 514). Thus, we conclude, pursuant to *Rediger*, that defense counsel did not waive the constructive amendment claim. *See id.*; *see also Smith*, ¶ 18.

¶ 45 Garcia argues that the error is structural, requiring automatic reversal. We are not persuaded. Constructive amendments are not structural errors. *Carter*, ¶¶ 36-48 (examining the tenuous history underlying the legal proposition that constructive amendments are "per se reversible" and concluding that constructive amendments are not structural errors); *see also Rediger*, ¶¶ 51-52 (reviewing a constructive amendment claim for plain error). Accordingly, we turn to whether the court plainly erred by allowing the constructive amendment. *Forgette*, ¶ 30 ("[A]n appellate court may review a forfeited error under the plain error standard.").

2. Plain Error

¶ 46 Citing *People v. Deutsch*, 2020 COA 114, ¶¶ 26-27, the People concede that the jury instruction constructively amended the complaint. But the People dispute whether the error was plain. An error is plain if it is obvious and substantial and so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Hagos v. People*, 2012 CO 63, ¶ 14.

¶ 47 We conclude that the trial court did not plainly err by allowing a constructive amendment. Even if the error was obvious, it was

not substantial, nor does it cast serious doubt on the reliability of the conviction.

¶ 48 First, it is unlikely that the jury convicted Garcia of forgery for falsely uttering a deed, will, codicil, contract, assignment, commercial instrument, or promissory note. Falls testified that checkbooks were stolen from his condo. A MoneyTree employee testified Garcia tried to cash a $7,000 check from one of Falls's checkbooks. The prosecution's closing argument about the forgery charge referenced the check. At no time during testimony or argument was a deed, will, or other legal instrument mentioned. *See People v. Weeks*, 2015 COA 77, ¶ 59 ("Because the jury was given no evidentiary basis upon which to find defendant guilty of [the additional bases for conviction], the jury likely disregarded the challenged parts of the instruction rather than forcing the evidence to fit those parts."); *cf. Rediger*, ¶ 51 (finding plain error where there was a substantial likelihood that a jury could find Rediger guilty of a crime not charged in the information).

¶ 49 Second, overwhelming evidence supported Garcia's forgery conviction. *See* § 18-5-102(1)(c). The jury heard (1) Falls identify Garcia as the man in his condo; (2) the check was stolen from

Falls's condo; (3) a MoneyTree employee identified Garcia as the person trying to cash the stolen check; and (4) a MoneyTree Customer History Report assigned to Kenneth Garcia documented the attempt to cash the check. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) ("[A]n erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant's guilt."). For these reasons, any error in allowing the constructive amendment was not plain.

III. Prosecutorial Misconduct

¶ 50 Garcia also contends that the prosecutor committed reversible prosecutorial misconduct during rebuttal closing argument by alluding to a "screening process."

A. Additional Background

¶ 51 At trial, Garcia presented a general denial defense and challenged the State's investigation, arguing repeatedly that the investigation was never about "finding the truth." In particular, defense counsel argued that the detective did not investigate the individual whose fingerprints were found on the scene because it

would require additional work and the evidence did not fit her narrative.

¶ 52 During rebuttal closing argument, the prosecutor responded, as follows:

> [Defense counsel] talked quite a bit about what wasn't collected, who wasn't spoken with, what surveillance wasn't retrieved. I want to point out to you, folks, we have duties as prosecutors, as representatives of the district attorney's office . . . . We have a duty to not bring charges against people that we cannot — we do not have a good faith belief that we can prove the charge against that person. We are not in the business of rounding up people because their DNA or fingerprints were found in a unit. . . . We have a duty to bring charges against the person that we believe committed the crime and that we have a good-faith belief that we can prove that crime was committed beyond a reasonable doubt. Unfortunately, for the defendant, that person is Kenneth Garcia.

The prosecutor also referenced the "truth" of the case on several occasions.

B. Standard of Review

¶ 53 We engage in a two-step analysis when reviewing claims of prosecutorial misconduct. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, we determine whether the prosecutor's conduct was improper based on the totality of the circumstances. *Id.*

Second, we decide whether such actions warrant reversal under the proper standard of review. *Id.* "While [prosecutors] can use every legitimate means to bring about a just conviction, [they have] a duty to avoid using improper methods designed to obtain an unjust result." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005).

¶ 54 Because Garcia's prosecutorial misconduct claims are unpreserved, we review them for plain error, *Hagos*, ¶ 14, and will not reverse unless the misconduct was obvious and substantial, and so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Smith*, ¶ 24.

¶ 55 "Prosecutorial misconduct in closing argument rarely constitutes plain error." *People v. Smalley*, 2015 COA 140, ¶ 37; *see also Hagos*, ¶ 23 (reversals on plain error review "must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time"). Reversal for plain error is only warranted when there is a substantial likelihood that the error affected the verdict. *People v. Constant*, 645 P.2d 843, 847 (Colo. 1982). Thus, even if improper, a prosecutor's comments during

closing do not necessarily warrant reversal if the combined prejudicial impact of the statements does not cast serious doubt on the reliability of the conviction. *People v. Nardine*, 2016 COA 85, ¶ 66.

C. Analysis

¶ 56 "[T]he prosecution's presentation of evidence about charging decisions may imply that, because of a pretrial screening process, only guilty parties are charged with crimes and thus the defendant must be guilty." *People v. Mendenhall*, 2015 COA 107M, ¶ 62 (citing *Domingo-Gomez*, 125 P.3d at 1052). "Screening process" arguments are improper to the extent that they suggest additional evidence of guilt exists and reveal the speaker's personal opinion. *Id.*

¶ 57 Similarly, a prosecutor must not opine on the truth or falsity of a witness's testimony during closing argument. *Wilson v. People*, 743 P.2d 415, 419 (Colo. 1987). But a prosecutor may draw reasonable inferences from the evidence as to a witness's credibility. *Id.* at 418.

¶ 58 Even if we assume that the prosecutor's challenged statements were improper screening arguments that revealed the prosecutor's

opinion of Garcia's guilt, we nevertheless conclude that reversal is not required because the statements did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Smith*, ¶ 24.

¶ 59 First, the statements did not suggest that some additional, unadmitted evidence supported Garcia's guilt — a concern that informs the bar on screening process arguments. *See Domingo-Gomez*, 125 P.3d at 1052 ("Prosecutorial remarks of personal knowledge, combined with the power and prestige inexorably linked with the office may encourage a juror to rely on the prosecution's allegation that unadmitted evidence supports a conviction."). Instead, the statements attempted to explain why police did not investigate the individual whose fingerprint was found on the scene. *See id.* at 1054 (prejudicial effect of screening process remarks lessened when tied to evidence presented at trial); *see also People v. Liggett*, 114 P.3d 85, 89 (Colo. App. 2005) (a prosecutor has wide latitude in responding to the arguments of defense counsel), *aff'd*, 135 P.3d 725 (Colo. 2006).

¶ 60 Second, overwhelming evidence — outlined below — supported Garcia's burglary conviction. A person commits second degree

burglary, as relevant here, by knowingly breaking an entrance or unlawfully entering a dwelling with intent to commit therein a crime against another person or property. § 18-4-203, C.R.S. 2022. The jury heard (1) Falls identify Garcia as the stranger in his dwelling; (2) Garcia greeted Falls by name and gave him inconsistent explanations for why he was there; (3) a laptop registered to "Kenneth Garcia" was left in the condo; (4) a vehicle registered to Garcia was parked near the building during the period in question; (5) there were no Airbnb bookings scheduled at the time; (6) a neighbor identified Garcia as the man fleeing the building; (7) the neighbor's photographs of Garcia were admitted into evidence; (8) items were missing from Falls's dwelling; (9) a MoneyTree employee identified Garcia as the man who attempted to cash a check from a checkbook taken from Falls's dwelling; and (10) someone apparently tampered with Falls's spare key lockbox. Thus, the strength of the evidence of Garcia's guilt as to the burglary charge supports the conclusion that any error in the admission of the prosecutor's statements did not substantially affect the verdict. *See People v. Estes*, 2012 COA 41, ¶ 42 (prosecutorial misconduct in closing argument did not warrant reversal under plain error standard

because, among other things, overwhelming evidence supported the guilty verdict). And as previously discussed, overwhelming evidence supported Garcia's forgery conviction.

¶ 61 Finally, defense counsel's failure to contemporaneously object to the statements Garcia now challenges on appeal indicates that the comments were not overly damaging in the context of live argument. *See Domingo-Gomez*, 125 P.3d at 1054; *People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010) (counsel's failure to object is a factor that may be considered in examining the impact of a prosecutor's argument and may demonstrate that counsel believed the live argument was not overly damaging).

¶ 62 Accordingly, because any misconduct by the prosecutor during closing argument neither substantially influenced the verdict nor cast serious doubt on the reliability of the judgment of conviction, reversal is not required. *See Hagos*, ¶ 14; *Nardine*, ¶ 66.

IV. Fees and Surcharges

¶ 63 Garcia contends, the People concede, and we agree that the sentencing court imposed statutorily mandated but waivable surcharges and fees outside Garcia's presence. The sentencing court assessed surcharges and fees in the amount of $591.50

without affording Garcia an opportunity to request a waiver or reduction due to indigency. A remand is appropriate to allow Garcia to request a waiver or reduction in fees. *Yeadon v. People*, 2020 CO 38, ¶ 15.

V. Disposition

¶ 64 The judgment of conviction is affirmed, and the case is remanded to allow Garcia to request a waiver of surcharges and fees.

JUDGE WELLING and JUDGE KUHN concur.