SUMMARY
June 1, 2023

2023COA47

No. 21CA0976, *People v. Gallegos* — Criminal Law — Affirmative Defenses — Admission Rule — Credible Evidence Requirement — Scintilla of Evidence — Felony Murder Affirmative Defense

A division of the court of appeals considers whether a defendant is entitled to the felony murder affirmative defense where the defendant denies having committed the predicate felony and, thus, denies he committed felony murder. The few Colorado cases addressing a defendant's ability to assert an affirmative defense while denying having committed the charged offense analyzed affirmative defenses that are materially different from the felony murder affirmative defense. Unlike those affirmative defenses, the elements of the felony murder affirmative defense are distinct from the elements of felony murder. Thus, the division concludes that a defendant need not be compelled to admit the predicate felony, and

thus admit felony murder, to assert the felony murder affirmative defense.

For this reason, and because some credible evidence supported the defendant's affirmative defense, the division holds that the trial court erred by rejecting the defendant's tendered instruction on the felony murder affirmative defense. Accordingly, the division reverses the defendant's conviction for felony murder and remands the case for a new trial on that charge. Finding no other reversible error, the division affirms the defendant's remaining convictions.

COLORADO COURT OF APPEALS **2023COA47**

Court of Appeals No. 21CA0976
Arapahoe County District Court No. 19CR1440
Honorable Ben L. Leutwyler III, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kenneth Alfonso Gallegos,

Defendant-Appellant.

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

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

Announced June 1, 2023

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¶ 1 This case presents an unresolved issue in Colorado: whether a defendant can assert the felony murder affirmative defense despite denying he committed the predicate felony and, thus, denying he committed felony murder.

¶ 2 Colorado law allows criminal defendants to assert a variety of affirmative defenses. The general affirmative defense statute provides that, "unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue." § 18-1-407(1), C.R.S. 2022. The General Assembly has also adopted a specific affirmative defense to the crime of felony murder. At the time of the charged crime in this case, the felony murder affirmative defense consisted of six elements, as we explain below. § 18-3-102(2), C.R.S. 2018.

¶ 3 Among other arguments, the People contend that "a defendant is not entitled to an affirmative defense instruction if he denies committing the charged crime." The People thus argue that a defendant charged with felony murder must acknowledge the conduct giving rise to that crime, including the conduct giving rise to the predicate felony, before he can assert the felony murder affirmative defense.

¶ 4 As we explain below, the few Colorado cases addressing a defendant's ability to assert an affirmative defense while denying having committed the charged offense analyzed two affirmative defenses — entrapment and self-defense — that are materially different from the felony murder affirmative defense. Because a defendant can be convicted of felony murder even if another person caused the victim's death, the felony murder affirmative defense focuses on elements that allow the jury to weigh the defendant's responsibility and whether the defendant should be convicted of murder for a death he did not directly cause. Thus, unlike other affirmative defenses, the elements of the felony murder affirmative defense are distinct from the elements of felony murder.

¶ 5 We conclude that a defendant need not be compelled to admit felony murder, and thus admit the predicate felony, to assert the felony murder affirmative defense.

¶ 6 Kenneth Alfonso Gallegos appeals the judgment of conviction entered on a jury verdict finding him guilty of felony murder, attempted aggravated robbery, conspiracy to commit aggravated robbery, and attempted theft of less than fifty dollars. Because Gallegos did not have to admit to the predicate felony of robbery

before having the right to assert the felony murder affirmative defense, and because some credible evidence supported the affirmative defense, we hold that the trial court erred by rejecting Gallegos's tendered instruction on the felony murder affirmative defense. We reverse Gallegos's felony murder conviction, affirm his remaining convictions, and remand for a new trial on the felony murder charge.

I. Background and Procedural History

¶ 7 The jury could reasonably have found the following facts.

¶ 8 Gallegos and three other individuals — his then girlfriend, Julianna Serrano; Dominic Stager; and Demarea Mitchell (the group) — drove to the home of L.C., from whom Serrano had arranged to buy vape supplies. Although L.C. had agreed to sell the supplies to Serrano, the group planned to take them without paying. The prosecutor and the defense disputed Gallegos's role in developing, and his advance knowledge of, the plan.

¶ 9 L.C. approached the car in which the group was sitting and asked for payment. Gallegos, Stager, and Mitchell got out of the car. Stager slid a gun that he had brought to Mitchell, who grabbed it and approached L.C. Mitchell and L.C. began fighting. L.C.

wrestled Mitchell to the ground and kneeled on top of him. Mitchell shot L.C., who ran into his house screaming as the group reentered the car and, with Gallegos behind the wheel, drove off. L.C. died from the gunshot wound.

¶ 10 Each member of the group was charged with various offenses. In exchange for plea deals, Serrano and Stager agreed to testify for the prosecution at Gallegos's trial.

¶ 11 After the jury handed down its guilty verdict, the trial court sentenced Gallegos to life in the custody of the Department of Corrections.

II. Analysis

¶ 12 On appeal, Gallegos contends that the trial court committed reversible error by refusing to instruct the jury on (1) the affirmative defense to felony murder; (2) the lesser nonincluded offense of accessory to a crime; and (3) the correct elements of complicity. Gallegos argues that his conviction should also be reversed (4) because, during opening statement, the prosecutor improperly commented on Gallegos's silence; and (5) due to cumulative error. We agree with Gallegos's first argument and reject his remaining arguments.

A. The Instruction on the Felony Murder Affirmative Defense

1. The Law Governing Felony Murder

¶ 13 The offense of felony murder rests on the policy that, if a defendant "'commit[s] or attempt[s] to commit' one of the enumerated predicate offenses and in the course of or in furtherance of that 'crime'" a person other than a participant dies, the defendant is guilty of murder. *Doubleday v. People*, 2016 CO 3, ¶ 22, 364 P.3d 193, 197 (quoting § 18-3-102(1)(b), C.R.S. 2015). At the time Mitchell fatally shot L.C., felony murder was classified as first degree murder. *See* § 18-3-102(1)(b), C.R.S. 2018. (Felony murder is now classified as second degree murder. *See* § 18-3-103(1)(b), C.R.S. 2022.) Conversely, "if the defendant did not commit the [charged] predicate offense . . . , then he cannot be convicted of felony murder because the commission or attempt to commit the predicate offense is an essential element of felony murder." *Doubleday*, ¶ 22, 364 P.3d at 197.

¶ 14 Felony murder is a two-tier crime: the jury must first decide whether the defendant committed the predicate felony; if so, it must then determine whether the defendant is also guilty of felony murder as a result of a death caused by "anyone" in "the course of

or in furtherance of the crime." § 18-3-102(1)(b), C.R.S. 2018; *see also Auman v. People*, 109 P.3d 647, 657 (Colo. 2005) (holding that a defendant can be found guilty of felony murder even if the other participant caused the death after the defendant had been arrested). (The current version of the felony murder statute refers to a death caused by "any participant." § 18-3-103(1)(b), C.R.S. 2022.)

2. Jury Instructions

a. Standard of Review of a Trial Court's Refusal to Give an Affirmative Defense Instruction

¶ 15 "We review a court's decision whether to give a particular jury instruction for an abuse of discretion." *People v. Coahran*, 2019 COA 6, ¶ 14, 436 P.3d 617, 621. "A court abuses its discretion if it bases its ruling on an erroneous understanding or application of the law." *Id.* We "review jury instructions de novo to determine whether the instructions accurately informed the jury of the governing law." *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011).

¶ 16 "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."

Mathews v. United States, 485 U.S. 58, 63 (1988). "In order to present an affirmative defense for the jury to consider, a defendant must offer 'some credible evidence' to support the claimed defense." *Pearson v. People*, 2022 CO 4, ¶ 16, 502 P.3d 1003, 1007 (quoting § 18-1-407(1), C.R.S. 2022).

¶ 17 Whether sufficient evidence supports an affirmative defense instruction is a question of law we review de novo. *People v. Wakefield*, 2018 COA 37, ¶ 8, 428 P.3d 639, 643. "If a defendant meets this standard, and a trial court refuses to give an affirmative defense instruction, then the prosecution's burden of proof has been impermissibly lowered, implicating a defendant's constitutional rights." *Pearson*, ¶ 16, 502 P.3d at 1007. "Such an error, if preserved, is subject to constitutional harmless error review." *Id.*

b. The Relevant Jury Instructions

¶ 18 The court gave the jury Gallegos's tendered theory of defense instruction:

> Kenneth Gallegos submits the following theory of defense: He contends that he did not plan to rob [L.C.]; that he did not shoot and kill [L.C.]; that he did not bring a gun, ask anyone to bring a gun, or make a plan to use a gun to

> rob [L.C.]; that he did not know . . . Stager had brought a gun nor did he ask him to bring a gun; that there is no evidence that . . . Gallegos ever had a gun; and, that there is also insufficient evidence that the persons involved in the robbery took a thing of value.

This instruction was consistent with defense counsel's argument at trial that the jury should acquit Gallegos on all counts.

¶ 19 The court's instruction on felony murder followed the model instruction:

> [T]he elements of the crime of Murder in the First Degree-Felony Murder are:
>
> 1. That the defendant,
>
> 2. in the State of Colorado, at or about the date and place charged,
>
> 3. acting alone or with one or more persons,
>
> 4. committed or attempted to commit the crime of Robbery . . . and
>
> 5. in the course of or in furtherance of the crime of Robbery . . . that he was committing or attempting to commit, or in the immediate flight therefrom,
>
> 6. the death of a person, other than one of the participants, was caused by anyone.

See COLJI-Crim. 3-1:02 (2018). (Although the felony murder instruction referred to "the crime of Robbery," Gallegos was not separately charged with simple robbery. He was tried for, among other offenses, aggravated robbery, attempted aggravated robbery, and conspiracy to commit aggravated robbery.)

¶ 20 However, the court refused to accept Gallegos's tendered felony murder affirmative defense instruction, which read in pertinent part, as follows:

> It is an affirmative defense to the charge of murder in the first degree (felony murder) that the defendant:
>
> 1. Was not the only participant in the aggravated robbery; and
>
> 2. did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
>
> 3. was not armed with a deadly weapon; and
>
> 4. had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
>
> 5. did not engage himself in or intend to engage in and had no[] reasonable ground to believe that

> any other participant intended to engage . . . in conduct likely to result in death or serious bodily injury; and
>
> 6. endeavored to disengage himself from the commission of aggravated robbery or flight therefrom immediately upon having reasonable grounds to believe that another participant [was] armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.
>
> In addition to proving all the elements of the crime charged beyond a reasonable doubt, the prosecution also has [t]he burden to disprove any one or more of the elements of the affirmative defense beyond a reasonable doubt.

The elements of Gallegos's proposed felony murder affirmative defense instruction tracked those listed in the version of section 18-3-102(2) in effect at the time. *See* § 18-3-102(2), C.R.S. 2018.

¶ 21 While the prosecutor acknowledged that record evidence supported the first three elements of the affirmative defense, he argued that no evidence supported the fourth element. The prosecutor also generally challenged whether the fifth element of the affirmative defense was satisfied. The prosecutor did not address the sixth element.

¶ 22 The court declined to instruct the jury on the felony murder affirmative defense for two reasons. First, the court agreed with the prosecutor that the proposed instruction was "diametrically . . . opposed to the theory that the Defense has proposed throughout the case and in the theory of the Defense instruction." The court characterized Gallegos's theory of defense as "an outright denial of everything" and concluded that, because Gallegos was "not acknowledging in any way . . . his involvement in any part of this crime," he was "not legally entitled" to assert the felony murder affirmative defense.

¶ 23 Second, the court declined to give the felony murder affirmative defense instruction because it "simply [could not] find even a scintilla of evidence" to support element four of the defense — that "Gallegos had no reasonable ground to believe that no other participant was armed with a gun."

¶ 24 Gallegos challenges both determinations.

3. The Law Governing Entitlement to an Affirmative Defense

¶ 25 As a general rule, a defendant has the right to interpose an affirmative defense so long as some credible evidence supports it. *See People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011) ("It is too well

settled to merit further discussion that a trial court is obliged to instruct the jury on a requested affirmative defense if there is any credible evidence . . . supporting it."); *see also* § 18-1-407(1) (stating that, to raise an affirmative defense, the defendant "shall present some credible evidence on that issue").

¶ 26 Some divisions of this court, however, have engrafted a second requirement onto certain affirmative defenses: an affirmative defense is "not available to a defendant who denies any wrongdoing." *E.g.*, *People v. Grizzle*, 140 P.3d 224, 225-26 (Colo. App. 2006). As one division stated, the defendant's admission to the conduct underlying the charged offense is "a prerequisite for [a defendant] to demand an affirmative defense instruction." *People v. Snider*, 2021 COA 19, ¶ 21, 491 P.3d 423, 430. (We refer to this assertion as the admission rule.)

¶ 27 To determine whether Gallegos was entitled to raise the felony murder affirmative defense, we consider whether (1) the admission rule precluded Gallegos's assertion of the affirmative defense and (2) Gallegos presented some credible evidence to support the affirmative defense.

a. The Admission Rule

¶ 28 The most categorical expression of the admission rule is the holding in *Snider*, in the context of self-defense, that "a defendant is not entitled to an affirmative defense instruction if he denies committing the charged crime." *Id.* at ¶ 16, 491 P.3d at 429. Although this broad articulation of the admission rule would appear to preclude Gallegos from asserting the felony murder affirmative defense because he denied committing the predicate offense of robbery, we decline to extend the admission rule to the two-tier crime of felony murder.

¶ 29 The evolution of the admission rule, beginning with *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989), informs our analysis. *Huckleberry* concerned the narrow issue of whether an alibi is an affirmative defense, for which a defendant is entitled to a jury instruction. *Id.* at 1238. The court concluded that an alibi is not an affirmative defense because "[a]n alibi defense essentially denies that the defendant committed the act charged, while an affirmative defense basically admits the doing of the act charged but seeks to justify, excuse or mitigate it." *Id.* The *Huckleberry* court did not consider whether a defendant may assert an affirmative defense

only if he "basically admits" the offense. *Id.* Consistent with section 18-1-407(1), the court referred to a single requirement for asserting an affirmative defense — that "some credible evidence" support it. *Id.*

¶ 30 After the supreme court decided *Huckleberry*, divisions of this court examined defendants' entitlement to an affirmative defense in two entrapment cases, *People v. Hendrickson*, 45 P.3d 786 (Colo. App. 2001), and *People v. Grizzle*, 140 P.3d 224 (Colo. App. 2006). The entrapment statute, discussed in *Hendrickson*, provides that "[t]he commission of *acts which would otherwise constitute an offense* is not criminal if the defendant engaged in the proscribed conduct because he was induced to do so by a law enforcement official." § 18-1-709, C.R.S. 2022 (emphasis added). Thus, the entrapment defense includes the element that "the defendant *must in fact have engaged in the proscribed conduct* because he was induced to do so by a law enforcement official." *Hendrickson*, 45 P.3d at 792 (quoting *Evans v. People*, 706 P.2d 795, 799 (Colo. 1985)). Based on this language, and with support from *Huckleberry*, the *Hendrickson* court concluded that "the rule in Colorado . . . require[s] a defendant to admit committing acts that

would otherwise constitute an offense before being entitled to assert an affirmative defense of entrapment." *Hendrickson*, 45 P.3d at 791. Similarly, *Grizzle* reiterated that "[a] defendant must admit to having engaged in the proscribed conduct to be entitled to an entrapment instruction." 140 P.3d at 226. *Hendrickson* and *Grizzle* did not apply the admission rule to any offense other than entrapment.

¶ 31 In *Snider*, a division of this court extended the admission rule to the affirmative defense of self-defense. *See Snider*, ¶ 24, 491 P.3d at 431 ("[W]e cannot conclude that Snider's testimony regarding *possibly blocking* [the deputy] constituted an admission to causing *bodily injury* to the deputy. Thus, Snider was not entitled to an affirmative defense instruction [on self-defense].") (emphasis added). The self-defense statute states that a defendant's "*us[e] [of] physical force upon another* person" is justified "in order to defend himself or a third person." § 18-1-704(1), C.R.S. 2022 (emphasis added). Thus, the defendant's actual use of physical force upon another is an element of self-defense. *See Galvan v. People*, 2020 CO 82, ¶ 22, 476 P.3d 746, 753.

¶ 32 In reaching its conclusion, the division in *Snider* quoted the language in *Hendrickson* that echoes the text of the entrapment statute: a defendant must "admit [to] committing acts that would otherwise constitute an offense before being entitled to assert an affirmative defense." *Snider*, ¶ 16, 491 P.3d at 430 (quoting *Hendrickson*, 45 P.3d at 791). The *Snider* division did not explain, however, that this language harkens back to the entrapment statute.

¶ 33 In applying *Hendrickson* to the self-defense affirmative defense, *Snider* cited *People v. Whatley*, 10 P.3d 668, 670 (Colo. App. 2000). Although the *Whatley* court noted that the defendant "did not admit to having engaged in the conduct which led to the [assault] charge," it premised its ruling that the defendant was not entitled to argue self-defense on his failure to offer any "evidence of self-defense." *Whatley*, 10 P.3d at 670.

¶ 34 *Whatley*'s holding is consistent with the statutory requirement that a defendant seeking to argue an affirmative defense must "present some credible evidence on [the] issue." § 18-1-407(1). *Snider*, by contrast, relied solely on the admission rule in concluding that the defendant could not argue self-defense and did

not address whether the defendant had presented "some credible evidence." *Snider*, ¶ 17, 491 P.3d at 430.

¶ 35 While our supreme court has reaffirmed *Huckleberry*'s description of an affirmative defense, *see, e.g.*, *Galvan*, ¶ 21, 476 P.3d at 753, the court has never imposed on the affirmative defense statute a categorical requirement that the defendant admit to the underlying charged offense. And the General Assembly has not done so either; the affirmative defense statute remains unchanged since the court decided *Huckleberry*.

¶ 36 Indeed, in *Wakefield*, ¶¶ 17-20, 428 P.3d at 645-46, a division of this court held that the trial court erred by *not* giving a self-defense instruction where the defendant denied committing the charged crime. In doing so, the court held that a defendant who denies committing the charged crime may nevertheless be entitled to an affirmative defense instruction where "the basis for the instruction . . . did not depend on rejection of defendant's version of events in sworn testimony." *Id.* at ¶ 27, 428 P.3d at 646.

¶ 37 For these reasons, we respectfully disagree with *Snider* to the extent the opinion suggests that a defendant charged with *any* offense must admit to the offense before he can assert *any*

affirmative defense — at least in the context of felony murder. *See People v. Smoots*, 2013 COA 152, ¶ 20, 396 P.3d 53, 57 ("We are not obligated to follow the precedent established by another division, even though we give such decisions considerable deference."), *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816).

i. The Felony Murder Affirmative Defense Does Not Include as an Element that the Defendant Committed the Predicate Offense

¶ 38 The People's argument that the admission rule should apply fails to acknowledge the material distinction between felony murder and other crimes. The language of the felony murder affirmative defense differs from that of the entrapment and self-defense affirmative defenses because the affirmative defense elements of the former are not inextricably intertwined with the elements of the offense. For example, the felony murder affirmative defense does not specify that the defendant committed "acts which would otherwise constitute an offense," as in the entrapment affirmative defense, § 18-1-709, or that the defendant "us[ed] physical force upon another person," as in the self-defense affirmative defense, § 18-1-704(1).

¶ 39 The lack of overlapping elements between the offense of felony murder and the related affirmative defense is consistent with the two-tier nature of felony murder — the defendant can be convicted of murder for a death he did not cause so long as the prosecution proves all elements of the predicate offense beyond a reasonable doubt. *See Doubleday*, ¶ 26, 364 P.3d at 197-98. The affirmative defense does not justify or excuse the *predicate offense*. But it can allow a defendant to avoid a *murder* conviction. To do so, the defendant must satisfy each element of the felony murder affirmative defense, which are "grounds deemed by law to be sufficient to render [the defendant] exempt from criminal responsibility for the consequences of the conduct." *Huckleberry*, 768 P.2d at 1239.

¶ 40 None of those elements of the affirmative defense requires the defendant to have committed the predicate offense. For example, a defendant satisfies the first element of the felony murder affirmative defense by showing he "[w]as not the only participant in the underlying crime" — that is, others participated. § 18-3-102(2)(a), C.R.S. 2018. The remaining elements of the felony murder affirmative defense are likewise not linked to elements of the

predicate offense the way the entrapment and self-defense affirmative defenses are inextricably intertwined with their underlying offenses. The second through sixth elements of the felony murder affirmative defense are a series of denials that the defendant engaged in certain conduct or had a certain intent or belief. Those elements are consistent with a defendant's denial that he engaged in criminal conduct. Thus, a defendant can assert that the second through sixth elements apply to him regardless of whether he admits that he committed the predicate offense or an act underlying the predicate offense.

ii. Gallegos Was Entitled to Assert the Felony Murder Affirmative Defense

¶ 41 We next consider whether Gallegos's theory of defense barred him from asserting the felony murder affirmative defense.

¶ 42 First, Gallegos's theory of defense was not an "outright denial of everything," and he did not fail to acknowledge "in any way . . . his involvement in any part of this crime," as the People contend. Although Gallegos denied the charges against him, he did not deny that he drove the group to and from the crime scene, that

he was present during the attempted robbery, or that Mitchell shot and killed L.C. in Gallegos's presence.

¶ 43 Second, Gallegos's denial that he committed the charged offenses was not "diametrically opposed" to the felony murder affirmative defense. Rather, to assert the felony murder affirmative defense, Gallegos first needed to point to some credible evidence that, regardless of whether he committed the predicate offense, others participated in the crime. § 18-3-102(2)(a), C.R.S. 2018. The prosecution conceded that this first element of the affirmative defense was satisfied. Further, Gallegos's denial that he committed any of the charged offenses did not inherently contradict the remaining second through sixth elements of the felony murder affirmative defense, *see* § 18-3-102(2)(b)-(f), C.R.S. 2018. Those elements were consistent with his denial of having committed or attempted to commit the robbery.

¶ 44 Under the People's reasoning, Gallegos would either have to admit the predicate felony, to which the affirmative defense does not apply, or abandon his right to assert the felony murder affirmative defense. If he chose the latter, he would be left without a defense to felony murder if the jury found him guilty of the predicate offense of

robbery, even if he could have satisfied the elements of the felony murder affirmative defense. This argument erroneously equates guilt of the predicate offense with guilt of felony murder. But a defendant convicted of a predicate offense does not automatically stand convicted of felony murder. The predicate offense and felony murder are discrete crimes with discrete elements and discrete defenses. A jury may convict a defendant of the predicate offense yet acquit on the felony murder count.

¶ 45 More significantly, "[r]equiring a defendant to concede [commission of the predicate offense] so that he may obtain a [felony murder affirmative defense] instruction would relieve the prosecution of its burden of proving all of the elements of the crime, thus depriving the defendant of his constitutional right to a trial by jury." *Wakefield*, ¶ 37, 428 P.3d at 648. "Such a scenario would ensnare [Gallegos] . . . in a catch-22," *id.* — either admit to, and be convicted of, the predicate offense, or deny the predicate offense and risk being convicted of felony murder. Gallegos would face a wrongful conviction for first degree murder if denied the right to present a potentially meritorious affirmative defense. *Cf. People v. Rea*, 7 P.3d 995, 1002 (Colo. App. 1999) (explaining that the

rationale for allowing a lesser offense instruction "is to ensure that a jury does not convict a defendant of an offense greater than the one actually committed merely because the greater offense is the only crime charged and the jury is aware that some crime was committed"). We cannot interpret the felony murder affirmative defense in a manner that produces such an unreasonable result. *People v. Desantiago*, 2014 COA 66M, ¶ 13, 409 P.3d 389, 391 ("[W]e will not construe the language of a statute in such a manner as to lead to an absurd, unreasonable, or illogical result.").

¶ 46 For these reasons, the court erred by concluding that Gallegos's denial that he committed any of the charged offenses precluded him from asserting the felony murder affirmative defense. We next consider whether some credible evidence supported Gallegos's affirmative defense.

b. "Some Credible Evidence"

i. Relevant Law

¶ 47 As explained above, a defendant is not entitled to an affirmative defense unless "some credible evidence" supports it. § 18-1-407(1). Courts have characterized "some credible evidence" as "a scintilla of evidence." *Galvan*, ¶ 24, 476 P.3d at 754 (quoting

People v. Saavedra-Rodriguez, 971 P.2d 223, 228 (Colo. 1998)). "The small quantum of evidence that must appear in the record in order to warrant an instruction on an affirmative defense may come from any source, even from the prosecution." *People v. Newell*, 2017 COA 27, ¶ 21, 395 P.3d 1203, 1207. Such evidence can be circumstantial. *Id.* at ¶ 29, 395 P.3d at 1208. The "scintilla of evidence" standard is "'exceedingly low,' making preclusion of an affirmative defense appropriate only when there is 'simply no evidence . . . in th[e] record' [to support it]." *Snider*, ¶ 15, 491 P.3d at 429 (quoting *People v. Jacobson*, 2017 COA 92, ¶ 15, 474 P.3d 1222, 1225).

¶ 48 In weighing a defendant's entitlement to an affirmative defense, courts review the evidence in the light most favorable to the defendant. *Newell*, ¶ 21, 395 P.3d at 1207.

ii. "Some Credible Evidence" Supported Gallegos's Affirmative Defense

¶ 49 The trial court erred by concluding that Gallegos's proposed felony murder affirmative defense lacked a "scintilla" of evidentiary support and, specifically, that no evidence supported element four of the defense — Gallegos had no "reasonable ground" to believe

that any other member of the group was "armed with . . . a weapon." § 18-3-102(2)(d), C.R.S. 2018.

¶ 50 The evidence introduced at trial established the following:

- Serrano and Stager did not implicate Gallegos in their initial statements to law enforcement officers. Specifically, they did not expressly tell the officers that Gallegos took part in planning the robbery or that Gallegos had advance knowledge either that Stager would bring a gun to L.C.'s home or that the gun was in the car when the group pulled up to the house.
- Stager testified that, before entering into his plea deal, he told the officers he did not know Gallegos.
- Serrano testified that she initially told the police "[Gallegos] is being blamed for things he didn't do," that he is "being held responsible for things that . . . he had nothing to do with," and that he "had no role in this."
- She further described a letter that Gallegos had sent her from jail in which he said they had to "snitch." Serrano interpreted "snitch" to mean they needed to tell the police

that Stager and Mitchell were "the ones that did this," which Serrano told the jury was true.

- Stager initially testified that he and Gallegos did not talk about a gun being in the car, and "[w]e kind of just left it in the backseat." (Stager later testified that the gun may have been in the front seat.)
- Serrano testified that the group did not discuss using the gun, she did not remember whether they discussed scaring L.C. with a gun, and "[t]here wasn't much said. There wasn't really a plan."
- Serrano also testified that she and Gallegos were sitting in the front seat and that Stager had the gun with him in the back seat, and she did not know there was a gun in the car until after they arrived at L.C.'s house, when Stager showed that he had a gun in his waistband.
- Before their plea deals, neither Serrano nor Stager said that Gallegos saw the gun while he was in the car or knew about the gun before L.C. and Mitchell began fighting. Serrano never said that Gallegos was aware of the gun before the fight.

- Serrano and Stager incriminated Gallegos only after they were charged as adults and entered into plea agreements that spared them potential life sentences. In exchange for agreeing to testify against Gallegos, they received lighter sentences — no more than two years in a juvenile detention facility.

¶ 51 After striking their favorable plea deals, Serrano and Stager said, for the first time, that Gallegos possessed advance knowledge of the gun. Once they entered into their pleas, Stager testified it was Gallegos's idea to bring the gun, and Serrano testified it was Gallegos's idea to rob L.C. and that "Plan B" was to scare L.C. with a gun. We acknowledge that, if the jury believed such testimony, it would undermine any inference that Gallegos had no reasonable ground to believe that any other member of the group was armed.

¶ 52 But we do not consider the persuasiveness of the evidence in reviewing whether a defendant was entitled to an affirmative defense. The "scintilla of evidence" standard does not require that the defendant seeking the affirmative defense establish that he would likely have been acquitted if the court had granted his tendered affirmative defense instruction. *See Galvan*, ¶ 24, 476

P.3d at 754 (equating the "scintilla of evidence" standard with "'any credible evidence, including even highly improbable' evidence" (quoting *Speer*, 255 P.3d at 1119)).

¶ 53 Gallegos met the low threshold of pointing to "some credible evidence" that, if believed, would show that the prosecution could not disprove the fourth element of the felony murder affirmative defense. *See id.* at ¶ 21, 476 P.3d at 753 (explaining that the prosecutor bears the burden of disproving an affirmative defense beyond a reasonable doubt).

¶ 54 In conducting this analysis, we do not act as fact finders. "It is for the jury, not the judge, to decide which witnesses and even which version of the witnesses' testimony is to be believed." *Newell*, ¶ 28, 395 P.3d at 1208. The jury could have credited Serrano's and Stager's initial accounts of Gallegos's role in the incident before they entered into their favorable plea agreements. *See United States v. Jackson*, 849 F.3d 540, 556 (3d Cir. 2017) (noting that evidence regarding witnesses' guilty pleas "all went to the heart of whether the . . . witnesses were credible"). As Serrano admitted at trial, she would "probably not" have obtained the plea deal if she had stuck by her initial assertions that "[Gallegos] didn't have anything to do

with it, [Gallegos] didn't do this, [and Gallegos] is being blamed for things he didn't do."

¶ 55 In addition, some credible evidence supported the fifth and sixth elements of Gallegos's proposed felony murder affirmative defense instruction. Serrano testified that "there wasn't really a plan" and initially denied that Gallegos was involved with the robbery. If believed, this testimony would provide some credible evidence in support of the fifth element — that Gallegos did not "intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury." § 18-3-102(2)(e), C.R.S. 2018.

¶ 56 Further, there was some credible evidence that Gallegos sought to disengage "immediately upon having reasonable grounds to believe that" another participant was armed with a gun — the sixth element. § 18-3-102(2)(f), C.R.S. 2018. Stager testified that, when Mitchell and L.C. began fighting, Gallegos "told me . . . it's not good, like, we got to go, like, stop it." Stager also testified that it looked to him as though Gallegos was going over to Mitchell and L.C. to try to stop the fight moments before L.C. was shot. Moreover, Serrano and Stager's testimony regarding the timeline of

events is vague and inconsistent, and they never definitively said when Gallegos first saw the gun. Additionally, the jury could give credence to Serrano's and Stager's statements before they struck their plea deals, which would support the defense's argument that Gallegos had no knowledge that Stager had brought a gun to L.C.'s house until Mitchell and L.C. began fighting. This credible evidence supports the sixth element of the affirmative defense.

¶ 57 In sum, we hold that the evidence viewed in the light most favorable to Gallegos was sufficient to support giving the felony murder affirmative defense instruction and that the trial court erred by declining to give it. Failing to instruct on the affirmative defense "impermissibly lowered" the prosecution's burden of proof for the felony murder charge, and the People have failed to meet their burden of showing that "the error was harmless beyond a reasonable doubt." *Pearson*, ¶ 16, 502 P.3d at 1007. For these reasons, we reverse Gallegos's conviction for felony murder and remand for a new trial on that charge.

B. Instruction on the Lesser Nonincluded Offense of Accessory

¶ 58 Gallegos contends that the trial court further erred by declining to give the jury his proposed instruction on the lesser

nonincluded offense of accessory. Defense counsel argued to the trial court that, if given the proposed instruction, the jury could convict Gallegos of being an accessory and acquit on the other charges, based on the theory that he merely "dr[ove] away after the attempted robbery." According to defense counsel, Gallegos could be convicted of accessory based on "the same facts leading to the original charge [of] robbery."

¶ 59 The court declined to give the instruction after finding that Gallegos's role in driving the group away from L.C.'s house was not part of the same "facts leading to the original charges of felony murder, aggravated robbery and conspiracy to commit aggravated robbery." The court also concluded there was no rational basis for Gallegos to be acquitted of robbery or aggravated robbery but convicted of being an accessory.

1. Relevant Law and Standard of Review

¶ 60 "[A] defendant is entitled to an instruction on the defense theory of the case as revealed by the evidence," including "an instruction that permits the jury to find a defendant innocent of the charged offense and guilty of a lesser charge." *People v. Naranjo*, 2017 CO 87, ¶ 16, 401 P.3d 534, 538. Thus, "[d]efendants have a

right to have the jury instructed on non-included lesser offenses in conjunction with a theory of defense." *People v. Trujillo*, 83 P.3d 642, 645 (Colo. 2004); *see also People v. Nozolino*, 2014 COA 95, ¶ 44, 350 P.3d 940, 948 ("A lesser non-included offense instruction is tantamount to a theory of the case instruction.").

¶ 61 A lesser nonincluded offense "requires proof of at least one element not contained in the charged offense." *Naranjo*, ¶ 17, 401 P.3d at 538. It arises from the same facts as those giving rise to the charged offense. *See People v. Montante*, 2015 COA 40, ¶ 34, 351 P.3d 530, 540. "The rationale for allowing such an instruction is to prevent the jury from convicting a defendant of a greater crime than he or she actually committed because the jury had no other option." *Trujillo*, 83 P.3d at 645.

¶ 62 Defendants are entitled to present the jury with a lesser nonincluded offense instruction "so long as a rational evidentiary basis exists to simultaneously acquit [them] of the charged offense and convict [them] of the lesser offense." *Naranjo*, ¶ 15, 401 P.3d at 537. A defendant bears a higher burden under the "rational evidentiary basis" standard than under the "any evidence" standard required to support an ordinary theory-of-the-case instruction. *Id.*

at ¶ 18, 401 P.3d at 538 (quoting *People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992)). Thus, before a court may submit a lesser nonincluded offense instruction to the jury, "there must be some evidence in the record to rationally support a conviction on the lesser offense." *People v. Aragon*, 653 P.2d 715, 720 n.5 (Colo. 1982).

¶ 63 In deciding whether to instruct the jury on a lesser nonincluded offense, "a trial court must consider the evidence in the light most favorable to the defendant." *People v. Lopez*, 2020 COA 119, ¶ 9, 471 P.3d 1285, 1288. "We review whether the record contains sufficient evidence for a lesser nonincluded offense instruction for an abuse of discretion. If statutory interpretation is required, we review that de novo." *People v. Leyba*, 2019 COA 144, ¶ 44, 490 P.3d 483, 494 (citation omitted), *aff'd on other grounds*, 2021 CO 54, 489 P.3d 728. "When a trial court erroneously fails to give a jury instruction that the defendant requested and to which he was entitled, we review that omission under the harmless error standard" and will reverse "if there is 'a reasonable probability that it contributed to the defendant's conviction.'" *Lopez*, ¶ 10, 471 P.3d

at 1288 (quoting *Mata-Medina v. People*, 71 P.3d 973, 980 (Colo. 2003)).

2. There Was a Rational Basis for the Jury to Acquit Gallegos of Attempted Aggravated Robbery While Convicting Him of Being an Accessory

¶ 64 The trial court erred by determining that the "analysis and the facts supporting [an accessory instruction] don't arise as part of the facts leading to the original charges." Gallegos's act of driving the group away from L.C.'s house, where the attempted robbery occurred, was part of the same overall course of events as the attempted aggravated robbery.

¶ 65 The facts here are substantially similar to those in *People v. Best*, in which a division of this court held that the trial court reversibly erred by failing to give a lesser nonincluded offense instruction on accessory. 665 P.2d 644, 646 (Colo. App. 1983). In that case, the jury had convicted the defendant of aggravated robbery, among other offenses. *Id.* at 645. The defendant testified that he drove his friend to a bar with no advance knowledge of his friend's plans to commit armed robbery and that he reluctantly drove his friend away from the bar after the crime. *Id.* at 646. The division concluded that, "[w]hile the evidence certainly support[ed]

the jury's verdicts, defendant's testimony, if believed, would have supported a [guilty] verdict of . . . accessory to crime, but not guilty of aggravated robbery . . . . Thus, the trial court's failure to give the lesser non-included offense instruction[] constitutes reversible error." *Id.* at 646.

¶ 66 For two reasons, we hold that the trial court erred by not giving the jury Gallegos's tendered accessory instruction because a jury could have simultaneously acquitted him of attempted aggravated robbery and convicted him of being an accessory.

¶ 67 First, there was a rational evidentiary basis for the jury to acquit Gallegos of attempted aggravated robbery. To convict Gallegos of this offense, the jury had to find beyond a reasonable doubt that he knowingly engaged in conduct constituting a substantial step toward "tak[ing] anything of value from the person or presence of another by the use of force, threats, or intimidation," § 18-4-301(1), C.R.S. 2022; § 18-2-101(1), C.R.S. 2022, while in possession of a deadly weapon. § 18-4-302(1)(d), C.R.S. 2022. The only evidence implicating Gallegos in the planning of, and establishing his involvement in, the attempted robbery was Stager's and Serrano's post-plea testimony. But for the reasons explained in

Part II.A.3.b.ii above, the jury had a "rational evidentiary basis" to give credence to the accounts Stager and Serrano provided before their plea agreements. Based on those accounts and other record evidence, the jury could have acquitted Gallegos of attempted aggravated robbery if it did not believe that he "knowingly" attempted to take the vape supplies from L.C. by force, threats, or intimidation.

¶ 68 Second, if the jury did not believe the prosecutor had proved the "knowingly" element of attempted aggravated robbery, it still had a rational evidentiary basis to convict Gallegos of being an accessory. The undisputed evidence showed that Gallegos drove the group away from L.C.'s house. Acting as a getaway driver could be viewed as "render[ing] assistance" to the group "with intent to hinder, delay, or prevent [their] discovery, detection, apprehension, prosecution, conviction, or punishment." § 18-8-105(1), C.R.S. 2022.

¶ 69 For these reasons, the court erred by not instructing the jury on the lesser nonincluded offense of accessory in conjunction with Gallegos's theory of defense that his involvement in the attempted

robbery was limited to the role of getaway driver. *Trujillo*, 83 P.3d at 645.

3. The Court's Error in Failing to Give the Jury Gallegos's Proposed Accessory Instruction Was Harmless

¶ 70 Although the trial court should have given the jury the option of holding Gallegos accountable under the theory that he was solely liable for driving the group from the scene, we do not see a "reasonable probability" that, premised on this theory, the jury would have acquitted Gallegos of attempted aggravated robbery. *Lopez*, ¶ 10, 471 P.3d at 1288 (quoting *Mata-Medina*, 71 P.3d at 980). Accordingly, we conclude that the failure to provide the accessory instruction was harmless.

¶ 71 As the People note, Gallegos's verdict was not that of "a jury that felt compelled to convict on a greater charge because it believed [he] was guilty of some lesser, uninstructed-on crime." To the contrary, the court instructed the jury on *other* lesser nonincluded offenses at defense counsel's request — in particular, theft and attempted theft — and the jury still convicted of the greater offense.

¶ 72 We recognize that, if the jury believed that Gallegos's sole criminal act was merely aiding the group by acting as a getaway

driver, and none of the charged offenses reflected such conduct, there could have been a "reasonable probability" that the lack of an accessory instruction contributed to the jury's conviction for attempted theft (also a lesser nonincluded offense), *Mata-Medina*, 71 P.3d at 980, because it had "no other option," *Trujillo*, 83 P.3d at 645. *See also, e.g.*, *Lopez*, ¶ 15, 471 P.3d at 1289 (concluding there was a reasonable probability that the trial court's failure to give an instruction on the lesser nonincluded offense of public indecency contributed to the verdict finding defendant guilty of the greater offense of indecent exposure). But if the jury convicted Gallegos of theft only because it believed it had "no other option," it would not have *also* convicted Gallegos of the greater offenses of attempted aggravated robbery and conspiracy to commit aggravated robbery.

¶ 73 Thus, the jury had the option to stop with its finding that Gallegos had committed the least culpable conduct charged and was therefore guilty of attempted theft — that is, that Gallegos knowingly attempted to obtain something of value, without authorization or by threat or deception, and with the intent to permanently deprive L.C. of the use or benefit of the thing of value. *See* § 18-4-401, C.R.S. 2022 (theft statute). But it did not do so.

Rather, the jury also found that Gallegos attempted to take the vape supplies from L.C.'s *person or presence* while *possessing a deadly weapon*. *See* § 18-4-302 (aggravated robbery statute). And it also found that Gallegos *agreed* with another person or persons that they, or one or more of them, would engage in conduct that constituted aggravated robbery. § 18-2-201(1), C.R.S. 2022 (conspiracy statute); *cf. Trujillo*, 83 P.3d at 648 ("If the jurors had accepted Trujillo's argument that he was reacting to protect himself from an intruder into his home, or that he should be guilty of only the non-included offense charges, the jurors would not have convicted him on the first-degree assault charges."); *Mata-Medina*, 71 P.3d at 983 ("In considering and declining a reckless manslaughter conviction and choosing the greater offense [of second degree murder], the jury implicitly rejected criminally negligent homicide. . . . [A]ny error resulting from the trial court's failure to provide an instruction on criminally negligent homicide under these circumstances was harmless."). For these reasons, the trial court's error in not giving the jury Gallegos's proposed instruction on accessory does not require reversal of Gallegos's convictions.

C. Instruction on Complicity

¶ 74 Gallegos additionally challenges the trial court's instruction on complicity.

1. Additional Facts

¶ 75 The court gave the jury an instruction on complicity that said, in pertinent part,

> For the defendant to be guilty as a complicitor of the crime(s) of Robbery, Attempted Robbery, Aggravated Robbery, Attempted Aggravated Robbery, Theft, or Attempted Theft as defined at the end of this Instruction, the prosecution must prove each of the following conditions beyond a reasonable doubt:
>
> 1. Another person committed the crime(s) [listed above and] as defined at the end of this Instruction, and
>
> 2. the defendant, with the desire or the purpose or design to aid, abet, advise, or encourage the other person in planning or committing that crime,
>
> 3. aided, abetted, advised, or encouraged the other person in planning or committing that crime, and
>
> 4. the defendant was aware of *all of the circumstances relating to the elements of the commission of that crime*, as defined at the end of this Instruction.

(Emphasis added.)

¶ 76 Gallegos objected to this instruction and requested that the court instead give the complicity instruction that appears in the Colorado Jury Instructions — Criminal. The model complicity instruction mirrors the first three elements of the court's instruction but differs as to the fourth element: "the defendant was aware of *all of the elements of that crime*, as defined at the end of this Instruction." COLJI-Crim. J:03 (2022) (emphasis added).

2. Applicable Law

¶ 77 A trial court "has substantial discretion in formulating the jury instructions so long as they are correct statements of the law and fairly and adequately cover the issues presented." *Riley*, 266 P.3d at 1094 (quoting *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006)). "Elemental instructions that substantially track the language of the controlling statute are generally sufficient and proper." *People v. Sandoval*, 2018 COA 156, ¶ 13, 488 P.3d 441, 445. Although the model instructions can be "helpful resource material," they were not "approved as accurate reflections of the law." *Garcia v. People*, 2019 CO 64, ¶ 22, 445 P.3d 1065, 1069 (quoting COLJI-Crim. Preface (2008)); *see also Krueger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009) ("[T]he pattern instructions are not

law, not authoritative, and not binding on this court. Therefore, they do not trump case law.").

3. The Trial Court Accurately Informed the Jury on the Law of Complicitor Liability

¶ 78 Gallegos does not dispute that the first three elements of the court's complicity instruction substantially tracked the complicity statute, which provides that "[a] person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense." § 18-1-603, C.R.S. 2022.

¶ 79 Additionally, and contrary to Gallegos's argument, the fourth element of the court's instruction substantially tracks the Colorado Supreme Court's language interpreting the complicity statute in *People v. Childress*, 2015 CO 65M, ¶ 29, 363 P.3d 155, 164. In that case, the supreme court clarified that a complicitor must possess "the intent . . . to aid, abet, advise, or encourage the principal in his criminal act or conduct," and also "an awareness of those circumstances attending the act or conduct he seeks to further that

are necessary for commission of the offense in question." *Id.* The supreme court further explained that "circumstances attending the act or conduct" means "those elements of the offense describing the prohibited act itself and the circumstances surrounding its commission . . . as distinguished from any element requiring that such act have a particular effect, or cause a particular result." *Id.*

¶ 80 The table below illustrates the similarity between the language in *Childress*, the instruction the court gave, and the model instruction.

Childress	The Trial Court's Instruction	COLJI-Crim J:03
A defendant must have an awareness of "*those elements* of the offense describing the prohibited act itself *and the circumstances surrounding its commission.*" *Childress*, ¶ 29, 363 P.3d at 164 (emphasis added).	A defendant must have an awareness of "all of the *circumstances relating to the elements* of the commission of that crime." (Emphasis added.)	A defendant must have an awareness of "all of the *elements* of that crime." (Emphasis added.)

The court's instruction sufficiently tracks *Childress* as to be an accurate statement of the law.

¶ 81 We reject Gallegos's assertion that, under the court's instruction, the jury could have convicted him of complicity "simply for an awareness of the 'circumstances' of the offense, rather than an awareness of the elements necessary for commission of the offense." The court's instruction specified that Gallegos must have been aware of *all* the circumstances relating to the elements of the listed offenses. That would necessarily include an awareness of all of the acts and circumstances constituting elements of the crimes.

¶ 82 Further, we reject Gallegos's argument that the court's instruction improperly "direct[ed] the jury's attention to [Gallegos's] awareness of the facts surrounding the offense rather than to whether [Gallegos] knew that these facts satisfied the elements of the offense." Gallegos cites to no authority, nor are we aware of any, holding that a defendant can be convicted of complicity only if he was aware that his acts satisfied the elements of that offense.

¶ 83 On the contrary, the language of the instruction accurately characterized the facts the jury would have had to find to convict Gallegos as a complicitor. *See Childress*, ¶ 29, 363 P.3d at 164 (distinguishing "the circumstances surrounding [the crime's] commission" from "any element requiring that such act have a

particular effect, or cause a particular result"). Moreover, the second element of the court's instruction required the jury to find that Gallegos had the *desire, purpose, or design* to aid, abet, advise, or encourage the other members of the group in the commission of the charged offenses, negating the risk that a jury would convict Gallegos simply for his awareness of the circumstances.

¶ 84 Thus, we conclude that the trial court did not err by providing the jury with its instruction on complicity.

D. The Prosecutor's Comments on What Gallegos Did Not Do

¶ 85 We reject Gallegos's assertion that the prosecutor engaged in misconduct during her opening statement by improperly commenting on Gallegos's constitutional right to silence.

1. Additional Facts

¶ 86 During her opening statement, the prosecutor described the events leading up to L.C.'s shooting. She told the jury, "There are five people that could have told you everything that went down. We're obviously not going to hear from one of them." (There is no dispute that this latter statement referred to L.C.) The prosecutor next previewed the evidence the jury would see and hear, including the witnesses' testimony, forensic evidence, video footage from a

neighbor's doorbell camera, and a video recording of a conversation between Gallegos and his mother at the sheriff's office. The prosecutor then told the jury what the evidence would not show:

> And just as important as what the defendant did to plan, to recruit and to carry this out, is what he didn't do. You won't hear anything about wanting to back away, to disengage from this plan that he had set in motion. You won't hear anything about him trying to help [L.C.], trying to stop the fight between [L.C.] and [Mitchell], you won't hear that he made a 9-1-1 call saying that someone was shot, you won't hear him take accountability, you won't see remorse for [L.C.]—

Defense counsel objected on Fifth Amendment grounds, and the court overruled the objection. The prosecutor continued, "You won't hear that, you won't hear any of that."

¶ 87 On appeal, Gallegos argues that these statements violated his Fifth Amendment rights because they impermissibly directed the jury's attention to Gallegos's (1) post-arrest silence and (2) failure to testify at trial. We disagree.

2. Standard of Review

¶ 88 "Claims of prosecutorial misconduct are evaluated in a two-step analysis: whether, based on the totality of the circumstances, 'the prosecutor's questionable conduct was improper,' and, if so,

'whether such actions warrant reversal according to the proper standard of review.'" *People v. Coleman*, 2018 COA 67, ¶ 25, 422 P.3d 629, 635 (quoting *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010)). We review de novo alleged violations of a defendant's constitutional rights, including alleged violations occurring during a prosecutor's opening statement. *People v. Castro*, 2022 COA 101, ¶ 20, 521 P.3d 1035, 1038. "When the allegedly improper conduct 'directly offend[s] a defendant's constitutional rights,' such as with 'impermissible comment on a defendant's exercise of a specific constitutional right,' review is for constitutional harmless error." *Coleman*, ¶ 26, 422 P.3d at 635 (quoting *Wend*, 235 P.3d at 1097).

3. Fifth Amendment

¶ 89 The Fifth Amendment privilege against self-incrimination "protects one accused of a crime from providing the *state* with evidence of a testimonial nature." *Wilson v. Indus. Comm'n*, 730 P.2d 911, 913 (Colo. App. 1986). Thus, a criminal defendant has the right to remain silent during custodial interrogations and to not testify against himself at trial. *Miranda v. Arizona*, 384 U.S. 436, 468 (1966); *Perez v. People*, 2021 CO 5M, ¶ 15, 479 P.3d 430, 433. At trial, a prosecutor may not implicitly or expressly highlight the

defendant's invocation of his Fifth Amendment right against self-incrimination. *People v. Burnell*, 2019 COA 142, ¶ 45, 459 P.3d 736, 744 ("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.'" (quoting *People v. Key*, 185 Colo. 72, 75, 522 P.2d 719, 720 (1974))). However, such references require reversal only if they "create[] an inference of guilt or where the prosecutor argues that the defendant's silence constituted an implied admission of guilt." *Id.*

4. The Prosecutor's Opening Statement Was Permissible

¶ 90 For four reasons, we do not believe that the prosecutor's challenged statements, when read in context, impermissibly referred to Gallegos's invocation of his Fifth Amendment right against self-incrimination.

¶ 91 First, the prosecutor did not describe any custodial interrogation of Gallegos, nor did she say that Gallegos invoked his right to remain silent following his arrest. Rather, the prosecutor spoke about a conversation between Gallegos and his mother in which Gallegos "feigned ignorance" and "ma[d]e excuses" rather than take accountability for his role in the robbery. But feigning

ignorance and making excuses are not equivalent to silence. And even if they were the same as silence, Gallegos did not make the statements during a custodial interrogation. His mother is not a state actor and, although the conversation took place at the sheriff's office, Gallegos did not make the statements while in custody or while being interrogated. Thus, the prosecutor's comments did not infringe on Gallegos's Fifth Amendment right to silence.

¶ 92 Second, the prosecutor did not refer to Gallegos's decision not to testify. The prosecutor never said during her opening statement that Gallegos would not testify at trial. In addition, we cannot say that the prosecutor's comments, "in context, [were] calculated or intended to direct the attention of the jury to [Gallegos's] . . . failure to exercise his right to testify in his own behalf." *Martinez v. People*, 162 Colo. 195, 200, 425 P.2d 299, 302 (1967). Rather, the prosecutor's statement that the jury would not "hear [Gallegos] take accountability" was part of her review of the anticipated evidence the prosecution planned to present — including the testimony of Serrano, Stager, and the deputy; the doorbell video camera footage; the gunshot residue and DNA evidence; and the recorded conversation between Gallegos and his mother. Thus, the

prosecutor directed the jury to infer Gallegos's guilt based on his lack of remorse *as demonstrated through the anticipated evidence*, and not based on his invocation of his Fifth Amendment right against self-incrimination.

¶ 93 Third, the prosecutor's comments served a separate purpose from drawing attention to Gallegos's silence. Specifically, the comments challenged Gallegos's potential felony murder affirmative defense, which would require, among other elements, some credible evidence that he "[e]ndeavored to disengage himself from the commission of the underlying crime . . . upon having reasonable grounds to believe that another participant [was] armed with a deadly weapon." § 18-3-102(2)(f), C.R.S. 2018. Accordingly, if there was no evidence that Gallegos attempted to disengage from the attempted robbery — for example, by trying to help L.C., attempting to stop the fight, calling 911, taking accountability, or showing remorse — then Gallegos would not be entitled to the felony murder affirmative defense.

¶ 94 Fourth, this case is distinguishable from *People v. Howard-Walker*, in which a division of this court determined that "the prosecutor stepped over the line" by telling the jury "that the only

person who knew the location of the fruits of the burglary was [the defendant] and 'he won't [testify].'" 2017 COA 81M, ¶ 92, 446 P.3d 843, 861, *rev'd on other grounds*, 2019 CO 69, 443 P.3d 1007. Unlike in *Howard-Walker*, where only the defendant possessed certain material information, here, the prosecutor asserted that "[t]here are five people that could have told [the jury] everything that went down," and although they "obviously [were] not going to hear from one of them" (presumably L.C.), they would "hear[] a great deal from . . . Serrano and . . . Stager." This statement emphasized the evidence the jurors *would* hear through the testimony of Serrano and Stager, rather than directing them to critical evidence they *would not hear* because of Gallegos's decision not to testify. Moreover, unlike in *Howard-Walker*, the prosecutor never took the extra step of telling the jury it would not hear from Gallegos at the trial.

¶ 95 Accordingly, we conclude that the prosecutor's challenged statements were permissible.

E. No Cumulative Error

¶ 96 In light of our decisions discussed above, we reject Gallegos's argument that all of his convictions should be reversed for

cumulative error. Specifically, we held that the trial court committed only one reversible error, and that such error only impacted his felony murder conviction. We further concluded that, while the trial court committed one error implicating Gallegos's other convictions, that error was harmless. "[A] single error is insufficient to reverse under the cumulative error standard." *People v. Thames*, 2019 COA 124, ¶ 69, 467 P.3d 1181, 1194. Accordingly, we hold that there is no basis for reversing Gallegos's convictions for attempted aggravated robbery, conspiracy to commit aggravated robbery, or attempted theft of less than fifty dollars on grounds of cumulative error. *Id.*

III. Disposition

¶ 97 The judgment of conviction is reversed with regard to Gallegos's felony murder conviction, and the case is remanded for a new trial on that charge. The judgment of conviction on the attempted aggravated robbery, conspiracy to commit aggravated robbery, and attempted theft of less than fifty dollars charges is affirmed.

JUDGE FOX and JUDGE SCHOCK concur.