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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 09CA0572	
JOE ANTHONY MARTINEZ, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 12SC803
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 5407 words.

The brief complies with C.A.R. 28(k).

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

s/ Elizabeth Rohrbough

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ISSUES PRESENTED FOR REVIEW

This Court granted certiorari on the following issues:

> Whether the trial court committed reversible constitutional error by giving the jury a legally erroneous instruction on the time interval for deliberation, thereby lessening the prosecution's burden of proving deliberation necessary for first-degree murder.
>
> Whether the evidence was insufficient to support the first-degree murder conviction.

STATEMENT OF THE CASE

Joe Martinez, Gabriel Tapia, and Christine Sayesva were charged separately related to the June 29, 2005 shooting causing the death of Daniel Lee Medina.[1] After a preliminary hearing on August 25, 2005, the murder charges against Tapia and Martinez were bound over for trial, though conspiracy charges were dismissed (8/25/05, pp. 192-95).

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[1] Tapia was convicted, after a jury trial, of first degree murder-after deliberation in Pueblo County case no. 05CR1126, and that conviction was affirmed in *People v. Tapia,* 07CA0820 (Colo. App. Feb. 19, 2009) (not published). Sayesva pleaded guilty as an accessory in Pueblo County case no. 05CR1229.

On or about October 26, 2005, Martinez filed a motion requesting that the case be dismissed based upon Colorado's "make-my-day" law (v. 1, pp., 82-83). At an evidentiary hearing held on March 28, 2006, Sayesva testified concerning abuse she had suffered at the hands of the victim but she testified she had not discussed specifics with her new boyfriend, Martinez, only that the victim "was not a nice person" (3/28/06, pp. 115, 117).[2] The "make-my-day" motion was denied by an oral ruling on April 10, 2006 (4/10/06, pp. 2-8).

Martinez's jury trial was to begin on April 11, 2006; however, the parties agreed to continue the case until after Tapia's trial (4/11/06, pp. 97-98). After many continuances, a new judge took over the case, and the case was tried April 9 to 17, 2008 (v. 2, pp. 516-22).

After the prosecution concluded its case-in-chief, the defense moved for acquittal, and the trial court denied that motion (trial-4/15/08, pp. 1045-47, 1049-50). That ruling is discussed below in Argument II.

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[2] The opening brief devotes several pages to testimony from the March 28, 2006 hearing (opening brief at 2-6), but that evidence has no relevance to the issues upon which this Court granted certiorari review.

In addition to instructing the jury concerning the statutory definition of "after deliberation," the trial court, over defense objection that the additional instructioin was unnecessary, also gave an instruction concerning the time interval necessary for deliberation (Instructions nos. 11 and 12; v. 2, pp. 393, 394; trial-4/15/08, pp. 1084-85, 1090; trial 4/17/08, pp. 1303-1307). That ruling is discussed below in Argument I.

The jury was also instructed on the defense theory of the case:

> Mr. Martinez asserts that following an argument and confrontation with Danny Medina, Mr. Tapia shot Mr. Medina. Mr. Tapia pulled Mr. Medina from the yard and fired the last shot in the street area. Mr. Martinez did not know what Mr. Tapia was going to do and did not have the intent to promote or facilitate his actions. Furthermore, Mr. Martinez did not aid, abet, advise, or encourage Mr. Tapia to take the actions that he did. Therefore, Mr. Martinez is not guilty of the crimes for which he has been charged.

(Instruction No. 23; v. 2, p. 406).

On April 18, 2008, the jury returned a verdict finding Martinez guilty of first degree murder – after deliberation (trial-4/18/08, pp. 1428-29). On or about May 19, 2009, the defense filed a motion for new trial,

arguing, *inter alia,* that Instruction 12 was "unnecessary and prejudicial" (v. 2, pp. 426-34). On January 30, 2010, the trial court denied that motion by written order (v. 2, pp. 444-46) and sentenced Martinez to life in prison without the possibility of parole on January 30, 2009 (1/30/09, p. 5).

On direct appeal, Martinez argued that the trial court erred by: excluding evidence of the victim's violent character; precluding the defense from raising the defense of "make-my-day"; ruling that an excited utterance, if admitted, could be impeached with prior inconsistent statements; and giving an erroneous instruction concerning the meaning of "after deliberation." He also argued that insufficient evidence supported his conviction. In *People v. Martinez,* 09CA0572 (Colo. App. Sept. 6, 2012) (not published), the Court of Appeals rejected those arguments and affirmed the judgment of conviction.

On March 18, 2013, this Court granted certiorari on the issues concerning the instruction on the interval necessary for "after deliberation" and sufficiency of the evidence.

Further procedural background will be provided as needed.

STATEMENT OF THE FACTS

In the early morning hours of June 29, 2005, the victim awakened his 16-year-old son (trial-4/10/08, pp. 408-409). The victim was angry and said they needed to gather guns and ammunition and "go take care of something," but the son persuaded the victim that they should leave the weapons at home and handle the matter "like men" (trial-4/10/08,p. 410). They drove to the home of Christine Sayesva, the son's mother and victim's ex-wife (trial-4/10/08, pp. 411-12). Phone records showed that the victim had called Sayesva 18 times between 2:57 a.m. and 3:24 a.m. (trial-4/15/08, p. 911). By the time they arrived at Sayesva's home, the victim was calmer (trial-4/10/08, pp. 441-42). The victim told his son to go inside and talk to his mother (trial-4/9/08, pp. 411-412).

The son went in the house and found Sayesva in the kitchen; while he was talking to her, he heard gunshots (trial-4/10/08, pp. 417-19). The son made sure his sisters were safely upstairs in the house, then ran outside and found the victim lying dead in the street (trial-4/10/08, pp. 419, 461).

The victim had been shot six times; the final, fatal wound was a shot to the head close to the brain stem (trial-4/10/08, pp. 547, 590, 607-608, 630). Two nonfatal shots entered from the back, and three from the front; one of the nonfatal shots had broken the victim's right femur and another had rendered his right arm useless (trial-4/10/08, pp. 560-61, 564-66; 569, 593-94). Drag marks in the yard and a blood trial, as well as pre-mortem "road rash" on the victim's back, demonstrated that the 180-pound victim, while still alive but incapacitated, had been dragged from near the front porch of Sayesva's home to the street (trial-4/10/08, pp. 591-92, 594; trial-4/11/08, pp. 737, 747, 809-810; Exhibits 18, 21, 25).

A neighbor across the street heard arguing and then heard popping sounds (trial-4/10/08, p. 517). The neighbor called 911, grabbed a pair of high-powered binoculars, and saw a man lying in the street with two men standing over him, one wearing a shirt standing near the head and one shirtless with obvious tattoos standing near the feet (trial-4/10/08, p. 518, 525-26). The shirtless man said, "Get the fuck up. I'll fuck you up" and shot the victim in the head (trial-4/10/08, pp. 518-

19, 528). The neighbor saw the men flee in a white Ford Taurus (trial-4/10/08, pp. 519-20).

A second neighbor heard sounds like fireworks and then "a bunch of swearing and cussing" (trial-4/15/08, pp. 929-30). He went to look out the window, and saw two men standing by another; he heard a voice say "get up mother[fucking] bastard" and then a final shot (trial-4/15/08, p. 931). He saw the two men run into the house, then come out of the house and leave in a white Taurus (trial-4/15/08, p. 932)

A third neighbor described what he heard as "yelling" and "bangs" (trial-4/15/08, p. 936). He looked out and saw two men standing at the feet and the head of a man lying down; the neighbor heard the man closer to the head of the victim say, "…see mother fucker, see what happens when you mess with my house. See mother fucker, see what happens" (trial-4/15/08, p. 937). The neighbor heard one more shot and saw the two men run in to the house (trial-4/15/08, p. 938).

A fourth neighbor heard gunfire, a voice saying "I got him, I got the fucker" and then another gunshot (trial-4/15/08, p. 942).

A fifth neighbor heard arguing, four shots, and someone saying "we have to get [fucking] out of here" (trial-4/15/08, p. 989).

A sixth neighbor heard fireworks or gunshots and yelling, including, "I'm going to blow your brains out" (trial-4/15/08, pp. 1043-44). She called 911, then went to the window, looked out, saw a flash, and heard a gunshot (trial-4/15/08, pp. 1043-44).

A seventh neighbor heard arguing, including "get out of my house," four gunshots, a pause, and a final gunshot (trial-4/15/08, p. 1105).

The victim's death was "virtually instantaneous" as a result of the final shot to the head (trial-4/10/08, pp. 547-48, 607-608).

Police officers stopped a white Ford Taurus not far from the scene (trial-4/9/08, pp. 356-57; trial-4/11/08, pp. 677-79). It was driven by Joe Martinez, who was wearing a blue car racing jersey (trial-4/9/08, pp. 360-62; Exhibit 3). Gabriel Tapia, wearing no shirt and sporting tattoos, was the passenger (trial-4/9/08, p. 361; Exhibit 4). The first neighbor positively identified Tapia as the man he had seen shoot the

victim in the head and identified Martinez as the other man he had seen standing by the victim (trial-4/10/08, pp. 521, 529, 664-66).

At the traffic stop, a six-shot revolver was found underneath the car; forensic testing linked the gun to the shooting (trial-4/9/08, pp. 358-59; trial-4/11/08, p. 712; trial-4/15/08, pp. 1001-1003, 1008-26). Both the car and the gun belonged to Sayesva (trial-4/10/08, pp. 413-15). Martinez, who was romantically involved with Sayesva and had been living in her house, had three bullets for the gun in his pocket (trial-4/10/08, p. 431; trial-4/11/08, pp. 682-83, 731). Martinez insisted to the police that he had no idea that there had been a shooting, that he was merely following Sayesva's instructions to pick up the passenger and give him a ride (trial-4/11/08, p. 684; trial-4/15/08, p. 1039).

Further facts will be provided as needed.

SUMMARY OF THE ARGUMENT

1. The jury was correctly instructed concerning the statutory definition of "after deliberation," and the Court of Appeals appropriately concluded that an additional jury instruction concerning the interval

necessary for "after deliberation" did not constitute plain error because there was no reasonable possibility it contributed to the jury's guilty verdict.

2. Viewed in the light most favorable to the prosecution, sufficient evidence supports Martinez's conviction for first degree murder – after deliberation because he aided, abetted, advised, and encouraged Tapia in killing the victim.

ARGUMENT

I. The jury was correctly instructed concerning the statutory definition of "after deliberation," and the Court of Appeals appropriately concluded that an additional jury instruction concerning the interval necessary for "after deliberation" did not constitute plain error because there was no reasonable possibility it contributed to the jury's guilty verdict.

Martinez argues that his conviction should be reversed based upon a jury instruction concerning the time needed for deliberation. Copies of Instructions 11 and 12 are appended to this brief.

Standard of review/preservation of claim. The People do not agree with either Martinez's standard of review or his statement

regarding preservation. Here, the Court of Appeals correctly concluded, "Because defense counsel conceded, albeit incorrectly, that the second instruction was a correct statement of the law, we conclude that defendant did not object in the trial court on the same basis he now asserts on appeal. Thus, we review only for plain error." *People v. Martinez,* 09CA0572, slip op. at 15-16.

With regard to preservation, the record reflects that defense counsel did not dispute that the interval for deliberation need not be long or that the instruction was supported by the cases cited by the prosecution but objected that it was unnecessary to give a second instruction in addition to the statutory definition of "after deliberation" (trial-4/15/08, pp. 1084-85, 1090; trial 4/17/08, 1303-1307).

Clearly, an issue is unpreserved for review when no objection was made in the trial court. *People v. Miller,* 113 P.3d 743, 751 (Colo. 2005). However, an issue is also unpreserved for review if an objection was made in the trial court, but on different grounds than those raised on appeal, or on unspecified grounds which failed to alert the trial court to the issue on which a defendant seeks review on appeal. *People v.*

Ujaama, 302 P.2d 296, 304 (Colo. App. 2012) *citing People v. Renfro,* 117 P.3d 43, 47 (Colo. App. 2004) and *People v. Rodriguez,* 209 P.3d 1151, 1156 (Colo. App. 2008).

As set forth by this Court:

> Plain error review reflects a "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *United States v. Frady,* 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). Plain error review allows the opportunity to reverse convictions in cases presenting particularly egregious errors, but reversals must be rare to maintain adequate motivation among trial participants to seek a fair and accurate trial the first time.

Hagos v. People, 288 P.3d 116, 121-22 (Colo. 2012).

Accordingly, here, although defense counsel did object below that the instruction was superfluous to the other instruction defining deliberation, Martinez's claim on appeal that the instruction constituted an incorrect statement of the law is reviewable only for plain error. Crim. P. 52(b); *see also People v. Malloy,* 178 P.3d 1283, 1288 (Colo. App. 2008) (where a defendant does not object at trial on the grounds

asserted on appeal, reversal is not warranted in the absence of plain error).

Factual/procedural background. The record reflects that the jury was instructed: "'AFTER DELIBERATION' means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner." (Instruction No. 11; v. 2, p. 393; Appendix A). The jury was also instructed, "The only time requirement for deliberation and premeditation is an interval sufficient for one thought to follow another. The length of time required for deliberation need not be long." (Instruction No. 12; v. 2, p. 394; Appendix B).

During an initial discussion of jury instructions after the prosecution rested, defense counsel objected that it was inappropriate to give the jury the additional instruction defining deliberation (trial-4/16/08, pp. 1084-85). After the prosecution gave case citations to support its position, defense counsel stated, "*Clearly the law is now and has been recently that deliberations requires enough time for one thought*

to follow another. That's what those cases say" (trial-4/16/08, p. 1090) (emphasis added). When jury instructions were discussed again after both sides had rested, the defense again objected that "having two separate instructions like this is unnecessary and unduly highlights this time period" (4/17/08, p. 1303; *see also* pp. 1306-1307). While the trial court gave both instructions over the defense objections (v. 2, pp. 393, 394; Appendix A; Appendix B), the prosecution did not discuss the interval necessary for deliberation during closing arguments (*see* trial-4/17/08, pp. 1360-72, 1393-1417).

A month after trial, the defense filed a motion for new trial, alleging, *inter alia,* "The Court erred in instructing the jury with the further definition of 'after deliberation' when it was already defined in the jury instructions. This definition was unnecessary and prejudicial as it further limited the element of 'after deliberation'" (v. 2, p. 430). In denying that motion, the trial court found that the instruction was proper but that a new trial was not warranted because the jury was properly instructed on the definition of "after deliberation" and because the evidence of deliberation was overwhelming (v. 2, p. 445).

Court of Appeals' ruling. Although the Court of Appeals concluded that the instruction was plainly erroneous in light of *Key v. People,* 715 P.2d 319 (Colo. 1986), the Court of Appeals concluded that there was no reasonable possibility that the instruction contributed to Martinez's conviction for the following reasons:

> First, considering the instructions as a whole, we conclude that they did not permit the jury to return a verdict without finding beyond a reasonable doubt that defendant acted "after deliberation," as the term is defined in section 18-3-101(3), C.R.S. 2011. [Instruction 11], defining "after deliberation," was identical to the statutory language in section 18-3-101(3). In addition, the prosecution did not make any reference, or draw attention to, the clearly erroneous second instruction during closing arguments. *See Key*, 715 P.2d at 323 (where other jury instructions stated the proper definition, the erroneous language "did not so distort the definition of 'after deliberation' . . . that the prosecution was relieved of its burden of proving the mental culpability requirement of first-degree murder beyond a reasonable doubt").
>
> Second, in our view there was ample evidence in this case that the victim was shot after deliberation of an appreciable length of time. Here, the evidence established that the victim was shot several times while in the yard, fracturing his right leg, rendering his right arm useless, and causing him to fall to the ground.

> The victim was then dragged from the yard into the street where defendant and Tapia stood over the victim and yelled obscenities at him. At that point, Tapia shot the victim in the head. Even assuming, though highly unlikely, that the shots fired at the victim in the yard were inadvertent, there is certainly evidence of an appreciable length of time between the first shots and the fatal shot. That is, sufficient for several neighbors in the early morning hours to be alerted by the first shots and get to a position to hear the shouts of profanity from both defendant and Tapia and to observe the firing of the fatal shot.
>
> Consequently, we conclude that the error here in giving the latter instruction did not raise a reasonable possibility that it contributed to the guilty verdict as to after deliberation first degree murder.

People v. Martinez, 09CA0572, slip op. at 17-19.

Legal standards and analysis. Crim. P. 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." This Court has defined plain error as "an error that is obvious, substantial, and grave, seriously affecting the substantial rights of the accused." *People v. Moore*, 925 P. 2d 264, 268-69 (Colo. 1996). Plain error occurs when, after reviewing the entire record, a court can conclude with "fair

assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Id.* at 269; *see also Hagos,* 288 P.3d at 121.

Plain error review addresses obvious and substantial error, and the defendant bears the burden of persuasion. *People v. Miller,* 113 P.3d at 749. As the burden of establishing plain error is on the defendant, a defendant establishes plain error by "showing a 'reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.'" *United States v. Dominguez Benitez*, 542 U.S. 74, 82-83 (2004) *quoting Strickland v. Washington,* 466 U.S. 668, 694 (1984). Stated another way, "[a] defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Dominguez Benitez*, 542 U.S. at 83.

Presently, pursuant to Colorado statute:

> The term "after deliberation" means not only intentionally but also that the decision to commit the act has been made after the exercise of

> reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

§ 18-3-101(3), C.R.S. (2013). Thus, the jury here was correctly instructed concerning this statutory definition of "after deliberation" in Instruction 11 (v. 2, p. 393; Appendix A).

More than a hundred years ago, this Court stated:

> It matters not how short the interval, if it was sufficient *for one thought to follow another,* and the defendant actually formed the design to kill, and deliberated and premeditated upon such design before firing the fatal shot, this was sufficient to raise the crime to the highest grade known to the law.

Van Houton v. People, 43 P. 137, 142 (Colo. 1895)(emphasis added); *compare* Instruction 12 (v. 2, p. 394; Appendix B). That language remained a basic principle of Colorado law through the 1960s. *See, e.g., Hinton v. People,* 458 P.2d 611, 613 (Colo. 1969); *Bradney v. People,* 426 P.2d 765, 767 (Colo. 1967).

In 1973, this Court overruled *Van Houton,* based on a 1971 amendment of the first- and second-degree murder statutes. *People v.*

Sneed, 514 P.2d 776 (Colo. 1973). This Court held, for first-degree murder, "an appreciable length of time must have elapsed to allow deliberation, reflection and judgment." *Id.* at 778. Subsequent cases from this Court and the Court of Appeals have followed that rule. *See Key v. People,* 715 P.2d at 322; *People v. McBride,* 228 P.3d 216, 224-25 (Colo. App. 2009). Accordingly, the Court of Appeals concluded that "the error in giving the instruction was obvious." *People v. Martinez,* 09CA0572, slip op. at 17.

Nonetheless, in the present case, this Court should conclude, as the Court of Appeals did, that no plain error occurred because the jury was provided with the correct definition of "after deliberation" in Instruction 11 and no reference was made to the erroneous instruction in the course of closing arguments. *See Key*, 715 P.2d at 323 (erroneous instruction did not so distort the correct definition of "after deliberation" that the prosecution was relieved of its burden of proving the mental culpability requirement of first degree murder beyond a reasonable doubt); *see also People v. Grant,* 174 P.3d 798, 810 (Colo. App. 2007) (prosecutor's reference to "deliberation" as requiring only the time

necessary for "one thought to follow another" in closing argument not plain error); *People v. Cevallos-Acosta,* 140 P.3d 116, 123 (Colo. App. 2005) (brief references to deliberation as "one thought to follow another" during jury voir dire and closing argument not plain error); *People v. Caldwell,* 43 P.3d 663, 672 (Colo. App. 2001) (even assuming the "one thought to follow another" language to be error, the prosecution's isolated use of it was not plain error).

Moreover, overwhelming and undisputed evidence in this case demonstrates that Tapia fired the final, fatal shot to the victim's head after the victim had suffered multiple gunshot wounds, including one which had broken his right leg and another that had rendered his right arm useless, and had been dragged from the yard to the street. Enough time had elapsed after the initial gunshots for numerous neighbors to witness the final shooting. Those circumstances amply demonstrate that the final shot was fired intentionally, after deliberation of an appreciable length of time. Thus, as the Court of Appeals correctly concluded, the error did not raise a reasonable possibility that it contributed to the guilty verdict.

II. Viewed in the light most favorable to the prosecution, sufficient evidence supports Martinez's conviction for first degree murder – after deliberation because he aided, abetted, advised, and encouraged Tapia in killing the victim.

Martinez also contends that the evidence is insufficient to sustain his murder conviction as an accomplice to Tapia.

Standard of review/preservation of claim. The People agree that an appellate court "reviews the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the convictions." *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). When reviewing for sufficiency, the court must view the evidence in the light most favorable to the People to determine if the conviction was supported beyond a reasonable doubt. *People v. Gonzales,* 666 P.2d 123, 127 (Colo. 1983); *People v. Bennett,* 515 P.2d 466, 469 (Colo. 1973).

The People agree that this issue was preserved by the defense motion for acquittal and the trial court's ruling denying it (trial-4/15/08, pp. 1045-47, 1049-50).

Trial court's ruling. In denying the motion for judgment of acquittal, the trial court stated:

> It is my understanding that the proper standard to be applied to a defendant's motion for acquittal when relevant, admissible evidence, both direct and circumstantial evidence, can be viewed in the light most favorable to the prosecution is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge, in this case charges, beyond a reasonable doubt. It is certainly true that the evidence points to Mr. Tapia being the person that pulled the trigger. However, the evidence also certainly does place this defendant a few feet from the head of the victim at the time of the fatal shot. That a person certainly could when viewed in the light most favorable to the prosecution the jurors certainly could conclude that it would take two people to drag Mr. Medina out into the street from the yard and certainly a juror could believe testimony of a neighbor that the statement was made that we got him. Then certainly a juror could find beyond a reasonable doubt that this defendant was involved in this homicide.

(trial-4/15/08, pp. 1049-50).

Court of Appeals' ruling. The appellate court concluded:

> Here, the prosecution's evidence, when viewed in the most favorable light to the prosecution, established the following: (1) the victim was shot

five times while he was in the yard; (2) the initial five shots were not fatal, but they would have rendered the victim helpless; (3) the victim weighed approximately 180 pounds; (4) it would have been difficult to drag the victim by the legs because of the fracture injury to his right leg: (5) the victim was still alive when he was dragged from the yard to the street; (6) both defendant and Tapia yelled obscenities at the victim before the latter shot him fatally in the head; (7) defendant lived, and was in a romantic relationship, with mother, the former wife of the victim; (8) the gun used to kill the victim belonged to the mother and was a six-shot revolver; (9) in addition to the five shots to the victim, another bullet hole was discovered on the front porch, leading to a reasonable inference that the gun was reloaded before the victim was shot in the head; (10) bullets capable of being fired from the gun were found in defendant's pants pockets; (11) defendant was identified by one witness as the man standing near the victim's head; (12) another witness testified that the man standing near the victim's head said to the victim, prior to the final shot, "see what happens when you mess with my house"; (13) the victim drove Tapia from the scene of the crime; and (14) when questioned by the police, defendant denied in any knowledge of the shooting.

Based on the foregoing, we conclude that – while not the strongest circumstantial case – viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a reasonable juror to conclude, beyond a reasonable doubt, that defendant was guilty as a complicitor of after

> deliberation first degree murder in the slaying of the victim. *People v. McIntier,* 134 P.3d 467, 471-72 (Colo. App. 2005) ("An appellate court is not permitted to act as a thirteenth juror and set aside a verdict because it might have drawn a different conclusion had it been the trier of fact.").

People v. Martinez, 09CA0572, slip op. 21-23.

Legal standards and analysis. It is the fact-finder's function to determine what weight should be given to all parts of the evidence and to resolve conflicts, inconsistencies, and disputes in the evidence. *Kogan v. People,* 756 P.2d 945, 950 (Colo. 1988); *People v. Aalbu,* 696 P.2d 796, 811 (Colo. 1985). Thus, an appellate court is not permitted to sit as a thirteenth juror and set aside a verdict because it might have drawn a different conclusion from the same evidence. *Kogan,* 756 P.2d at 950; *People v. West,* 724 P.2d 623, 631 (Colo. 1986). The People must be given the benefit of every reasonable inference which might be fairly drawn from the evidence. *People v. Brassfield*, 652 P.2d 588, 592 (Colo. 1982), *quoting People v. Downer,* 557 P.2d 835, 838 (Colo. 1976). Where reasonable minds could differ, the evidence is sufficient to sustain a conviction. *People v. Fuller,* 791 P.2d 702, 706 (Colo. 1990).

As relevant here, "[a] person commits the crime of murder in the first degree if ... [a]fter deliberation and with the intent to cause the death of a person other than himself [or herself], he [or she] causes the death of that person or of another person." § 18-3-102(1)(a), C.R.S. (2013). In addition, "[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. (2013). Thus, to convict a defendant of murder as a complicitor, a defendant must have had the culpable mental state required for murder and must have intended that his or her conduct promote or facilitate the commission of first degree murder committed by the principal. *People v. Candelaria,* 107 P.3d 1080, 1090-91 (Colo. App. 2004). Mere presence at the scene and association with the principal are insufficient to sustain a conviction as an accomplice. *People v. Duran,* 272 P.3d 1084, 1092 (Colo. App. 2011).

Here, as discussed above in Argument I, overwhelming evidence in this case demonstrates that the final, fatal shot to the victim's head

was fired after the victim had suffered multiple gunshot wounds, including one which had broken his right leg and another that had rendered his right arm useless, and had been dragged from the yard to the street. These circumstances not only showed that self-defense was not a credible defense, but also that the final shot was fired intentionally and after deliberation.

Viewed in the light most favorable to the prosecution, it was a fair inference from injuries on the victim's body, particularly that there were abrasions on his back consistent with being dragged across the ground but not on either of his legs or his buttocks (*see* trial-4/10/08, pp. 591-92, 647-48), that the victim had been dragged to the street through the combined efforts of Martinez and Tapia. Moreover, even if only one man had dragged the victim, as opined by the defense expert (trial-4/17/08, pp. 1215-16, 1222 *but see* pp. 1232-33), given that the victim was shot five times in the yard and a bullet strike was observed on the front porch (trial-4/11/08, pp. 807-808), it was also a reasonable inference that one of the men had to have reloaded the six-shot revolver (trial-4/15/08, pp. 1002-1003) before the final shot, possibly while the

other was dragging the victim. Thus, it may be inferred from that evidence that Martinez aided and abetted Tapia in killing the victim.

While the victim was lying in the street, before Tapia fired the final shot, the individual closer to the victim's head, who was identified as Martinez in one eyewitness's account (trial-4/10/08, pp. 518-19), was heard to say, "see what happens when you mess with my house" (trial-4/15/08, p. 937). Another witness reported hearing one man say, "I got the motherfucker" to the other before the final shot (trial-4/15/08, p. 943). Viewed in the light most favorable to the prosecution, it is a fair inference from those comments that Martinez advised and encouraged Tapia in killing the victim. This case may be distinguished from *Duran,* where a panel of the Court of Appeals concluded that there was no evidence of Duran's actions that would support a determination that he aided, abetted, advised or encouraged the principal in shooting the shots that killed the victim. *Duran,* 292 P.3d at 1092.

Finally, the murder weapon was a revolver that belonged to Sayesva, who was Martinez's girlfriend, and Martinez had additional ammunition for it in his pocket when he drove Tapia, in her car, away

from the scene (trial-4/10/08, pp. 413-15, 431; trial-4/11/08, pp. 682-83, 731). It is a fair inference from those circumstances, especially when combined with Martinez's actions and overheard statements, that Martinez aided, abetted, and encouraged Tapia in killing Sayesva's ex-husband. Thus, under the totality of the circumstances, viewed in the light most favorable to the prosecution, sufficient evidence supports his conviction for first degree murder – after deliberation.

CONCLUSION

For the above reasons, this Court should affirm the decision of the Court of Appeals.

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CERTIFICATE OF SERVICE

This is to certify that I duly served the within **PEOPLE'S ANSWER BRIEF** upon SHANN JEFFERY, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on November 27, 2013.

/s/ C. D. Moretti

INSTRUCTION NO. 11

Concerning the charge of Murder in the First Degree – After Deliberation in this case certain words or phrases have a particular meaning.

The following are the definitions of these words and phrases which are applicable.

"CULPABLE MENTAL STATE" means 'intentionally' or 'knowingly.'

"PERSON," when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.

"AFTER DELIBERATION" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

APPENDIX A: INSTRUCTION 11

INSTRUCTION NO. 12

The only time requirement for deliberation and premeditation is an interval sufficient for one thought to follow another. The length of time required for deliberation need not be long.

APPENDIX B: INSTRUCTION 12