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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
District Court of Teller County Honorable Linda Billings-Vela, Judge Case No. 12CR64	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant-Appellant, KEVIN RODERICK.	▲ **COURT USE ONLY** ▲ Case No. 14CA0474
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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 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains **3194** words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Rebecca A. Adams

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Signature of attorney or party

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STATEMENT OF THE CASE AND THE FACTS

The defendant, Kevin Roderick, was charged with second degree assault, crime of violence, and menacing after he punched a coworker and fractured his face. (R. CF, pp. 24-25). Following a jury trial, the defendant was convicted of menacing.[1] (R. CF, p. 102). The trial court sentenced the defendant to two years of supervised probation and 45 days in jail. (R. CF, p. 102).

It was the defendant's theory of the case that he acted in self-defense.

SUMMARY OF THE ARGUMENT

The trial court did not commit plain error in permitting the prosecutor to argue, in rebuttal closing argument, that the defendant had tailored his trial testimony. The prosecutor may properly make a specific tailoring argument, where, as here, the allegation is coupled with reference to an evidentiary basis in the record. In any event, any

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[1] The jury was unable to reach a verdict on the second degree assault charge, and the charge was ultimately dismissed. (R. Tr. 1/27/14, p. 2).

error was not plain as it did not undermine the fundamental fairness of the trial.

The trial court properly precluded the defendant from asking about the victim's drinking habits because the testimony was irrelevant to the charged offenses and amounted to improper character evidence. Moreover, any error was harmless.

ARGUMENT

I. The prosecutor did not commit misconduct during rebuttal closing argument.

The defendant contends that the trial court plainly erred in permitting the prosecutor to argue that the defendant had tailored his testimony. His claim fails.

A. Standard of Review

The People agree that the defendant failed to preserve this claim.

To justify reversal for prosecutorial misconduct, a defendant must make two analytically independent showings: (1) evaluated in the context of the argument as a whole and in light of the evidence presented at trial, the prosecutor's conduct was improper; and (2) such

actions warrant reversal under the appropriate standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). "Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion[;] the trial court is best positioned to evaluate whether any statements made by counsel affected the jury's verdict." *Domingo-Gomez v. People*, 125 P.3d 1043, 1049-50 (Colo. 2005).

The People agree that these issues may be reviewed only for plain error. *See People v. Miller*, 113 P.3d 743, 749-50 (Colo. 2005). "Prosecutorial misconduct during closing arguments rarely constitutes plain error that requires reversal." *People v. Nardine*, 2016 CO 85, ¶ 63. "Only prosecutorial misconduct which is flagrantly, glaringly, or tremendously improper warrants reversal." *Domingo-Gomez*, 125 P.3d at 1053 (quotation omitted).

B. Rebuttal Closing Argument

During his direct examination, the defendant testified that he had read one of the witness's statements regarding the time he arrived at work. (Supp. R. Tr. 11/6/13, p. 138). And on cross-examination, the

defendant admitted that he read all of the witnesses' statements before trial and heard their testimony before taking the stand. (Supp. R. Tr. 11/6/13, pp. 148-49).

During the closing argument, defense counsel described the victim as a bully and the initial aggressor, and counsel challenged his version of events. In response, the prosecutor made the following argument during rebuttal closing argument:

> I wish [the victim] had more things to tell you, but the problem is, as a result of the defendant's actions, he can't. All of this information right here, this is coming from the defendant's mouth. And you have a bias/credibility instruction in here, and you are supposed to weigh each witness' testimony about what type of benefit they would receive if convicted, what type of detriment if they weren't acquitted. All of that, you get to decide whether or not someone is telling you the truth.
>
> And we also discussed how Mr. Roderick had the luxury of sitting here listening to every single person testify. He mentioned looking at [PS's] statement before this trial, so he has the luxury of looking at everything in the file. He knows how everyone is gonna testify, therefore, it's pretty easy for him to put on this and to kinda work around the evidence, because the photos don't lie certainly.

> Simple truth is [the victim] is not on trial here. You may think of him as a bully, you may think of him as a shoddy worker, it doesn't matter. It does matter in the way that that's the reason why Mr. Roderick does not like him. That's the reason why Mr. Roderick beat him to a bloody pulp that day. Mr. Roderick was P.O.'d at this guy and beat him up.

(Supp. R. Tr. 11/7/13, pp. 45-46).

The prosecutor went on to address the defendant's claims that the victim smelled like whiskey at the time of the assault and that the alcohol acted as a blood thinner, which explained the large quantity of blood. (Supp. R. Tr. 11/7/13, p. 46). Specifically, the prosecutor noted that no other witness testified that the victim smelled like alcohol or appeared drunk and that there was no evidence in the record that alcohol affects blood loss. (Supp. R. Tr. 11/7/13, p. 46).

The prosecutor then addressed the defendant's version of events:

> But just for the sake of argument, I'm gonna step aside and talk about the defendant's version of the story; of course, the defendant being biased and working around the facts, but we're gonna go through that.

(Supp. R. Tr. 11/7/13, p. 47). The prosecution then discussed the defendant's testimony and explained why the defendant's actions were

not reasonable based on the evidence presented. (Supp. R. Tr. 11/7/13, pp. 47-49).

The defendant did not object.

C. Law and Analysis

A prosecutor should not make tailoring arguments that are not tied to evidence in the record. *Martinez v. People*, 244 P.3d 135, 142 (Colo. 2010). But "prosecutors may properly argue inferences, anchored in evidence, about the truthfulness of a witness' testimony." *Davis*, 312 P.3d at 201; *see also Domingo-Gomez*, 125 P.3d at 1051. Prosecutors are allowed wide latitude in the language and presentation style they choose to employ, *Domingo-Gomez*, 125 P.3d at 1048, and a prosecutor may "employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance," *People v. Carter*, 2015 COA 24M, ¶ 70. "[B]ecause arguments delivered in the heat of trial are not always perfectly scripted, reviewing courts accord prosecutors the benefit of the doubt when their remarks are ambiguous or simply inartful." *People v. Samson*, 302 P.3d 311, 317 (Colo. App. 2012).

If a defendant testifies, the prosecutor may properly make a specific tailoring argument, where the allegation is coupled with reference to an evidentiary basis in the record. *Martinez* , 244 P.3d at 141. Here, in the defendant's closing argument, he attacked the victim's credibility, described him as "a bully" and the initial aggressor, and argued that his version of events was "the only version that makes sense." (Supp. R. Tr. 11/7/13, pp. 23, 45).[2] In rebuttal, the prosecutor argued that the reason the defendant's story could fit with the facts is that he provided his version of events at trial after reading the witnesses' statements and listening to their trial testimony. The defendant testified that he read the witnesses' statements prior to giving his testimony, and the prosecutor specifically noted in closing that the defendant "mentioned looking at [PS's] statement before this trial." (Supp. R. Tr. 11/7/13, p. 46).

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[2] Defense counsel also argued, "Mr. Roderick took the stand yesterday to tell you what really happened on May 15," (Supp. R. Tr. 11/7/13, p. 24), and "Mr. Roderick's story is the only story that's based in fact in this case." (Supp. R. Tr. 11/7/13, p. 26).

Thus, unlike *Martinez*, where the prosecutor generically challenged the defendant's testimony based on his mere presence at trial, here, the prosecutor made a specific tailoring argument and explicitly noted the defendant's review of the witness statements, to which the defendant testified at trial. *See Martinez*, 244 P.3d at 141-42.

Even if any of the comments was improper, none was so flagrantly, glaringly, or tremendously improper as to undermine the fundamental fairness of the trial. The comments made up a small part of the prosecutor's rebuttal closing argument, were linked to evidence in the record, and were in direct response to defense counsel's opening salvo. And any error necessarily did not so prejudice the defendant as to require reversal because the trial court instructed the jury that it must base its decision solely on the admitted evidence and the law provided by the court in the instructions and that neither sympathy nor prejudice should influence the decision. (R. Tr. 11/7/13, pp. 10). Absent a showing of jury bias, which the defendant has not even alleged, the jury is presumed to follow the instructions given by the court. *People v. Santana*, 255 P.3d 1126, 1132-33 (Colo. 2011); *see also, e.g.*, *People v.*

Bowring, 902 P.2d 911, 921 (Colo. App. 1995) (concluding that, in light of instructions, any improper appeal to sympathy did not require reversal).

Further, the defendant's failure to object indicates defense counsel's belief that the comments were not overly damaging. *See People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010) ("Defense counsel's failure to object is a factor that may be considered in examining the impact of a prosecutor's argument and may 'demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging.'" (quoting *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990))). This is especially true where, as here, the jury failed to convict the defendant of the most serious offense.

Under these circumstances, any error did not so undermine the fundamental fairness of the trial as to require reversal. *See, e.g.*, *Martinez* , 244 P.3d at 142-43 (concluding generic tailoring argument was harmless).

II. The trial court properly precluded the defendant from asking about the victim's drinking habits.

A. Standard of Review

The People agree that the defendant's claim is preserved.

"A trial court's rulings on evidentiary issues are reviewed for an abuse of discretion." *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). A trial court is accorded considerable discretion in deciding questions concerning the admissibility and relevancy of character evidence, its probative value, and any prejudicial impact. *People v. Montes-Rodriguez*, 219 P.3d 340, 343 (Colo. App. 2009), *rev'd on other grounds*, 241 P.3d 924 (Colo. 2010).

The People do not agree that any error was of constitutional magnitude. No constitutional right was implicated; thus, the nonconstitutional harmless error standard applies. *See People v. Summitt*, 132 P.3d 320, 327 (Colo. 2006); *People v. Cauley*, 32 P.3d 602, 605 (Colo. App. 2001).

B. Factual Background

At trial, defense counsel asked a prosecution witness whether he knew the victim "to be a drinker." (Supp. R. Tr. 11/6/13, p. 43). The

prosecutor objected, and defense counsel argued that the evidence was relevant to the victim's character:

> Your Honor, this goes to specifically what happened the morning of May 15, 2012. It goes to specifically [the victim] not having a memory of what happened. It also is going to lay the foundation that it would not be uncharacteristic of [the victim] to be drinking on the job. I think it's important for the jury to know that that is something that is not out of his character.

(Supp. R. Tr. 11/6/13, p. 43). The trial court ruled that whether or not the victim was "historically a drinker" was not relevant. (Supp. R. Tr. 11/6/13, p. 43).

The defendant continued to argued that it was relevant that "it would not be out of character for [the victim] to come to work under the influence." (Supp. R. Tr. 11/6/13, p. 44). The trial court sustained the objection:

> Your question can be limited to what he observed of [the victim] that morning, but, otherwise, it's absolutely impermissible, irrelevant character evidence of [the victim]. It's not a pertinent character trait that's at issue here, so the objection is sustained. His observations of him that morning, you're allowed to ask that question.

(Supp. R. Tr. 11/6/13, p. 45).

The defendant argued that other witnesses would testify that it was the victim's habit to come to work drunk, and the evidence was admissible under CRE 406. (Supp. R. Tr. 11/6/13, pp. 46, 48-49). The court again sustained the objection:

> Based on the offers of proof that the Court has heard, the proffer is not that the Defense is seeking to elicit this testimony to indicate that the victim . . . has a propensity for violence or has previously acted violently, which may be relevant to show that the victim was the initial aggressor. The proffer is that under 406 the witnesses would be testifying that on occasion or several times [the victim] has come to work drunk or hung over and that's caused problems.
>
> The closest the Court can find – and I'll continue to follow up on this – is a federal case, *United States v. Pinto*, "Evidence when a defendant, a drunk, had on four occasions wandered into various houses or buildings to sleep during an eight-year period was not admissible as habit evidence."
>
> The Court disagrees with [defense counsel's] assessment that the Court has to analyze these two, 404 and 406, completely separate and independently. The drafters of the rules were exceptionally articulate in indicating to the courts that generally character evidence is not admissible to prove that a person acted in conformity therewith unless it is a pertinent

> character trait. Being a chronic alcoholic is not a pertinent character trait in a self-defense case.
>
> So the objection will be sustained. The Court is happy to receive any other case law that Counsel has to offer.

(Supp. R. Tr. 11/6/13, pp. 53-54).

Following the afternoon recess, the trial court again addressed the evidence of the victim's drinking and found that the evidence was not relevant but indicated that it would reconsider its ruling if the defendant could establish relevancy. (Supp. R. Tr. 11/6/13, pp. 93-94).

C. Law and Analysis

Under CRE 401, evidence is relevant if it has a tendency to render a fact of consequence more or less probable than it would be without such evidence. However, evidence that is relevant must be excluded if the danger of unfair prejudice significantly outweighs its probative value. CRE 403. "A trial court has considerable discretion not only in determining whether evidence has logical relevance, by tending to prove a material fact [under CRE 401] but also whether it is sufficiently probative of that fact to avoid exclusion for various policy reasons [under CRE 403]." *People v. Saiz*, 32 P.3d 441, 446 (Colo. 2001).

Under CRE 404(a), "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" except under circumstances not applicable here. Habit evidence, on the other hand, is relevant to prove that the conduct of a person on a particular occasion was in conformity with the habit. *See* CRE 406; *People v. Trujillo*, 2015 COA 22, ¶ 10. A habit "denotes one's regular response to a repeated situation" and "is the person's regular practice of responding to a particular kind of situation with a specific type of conduct." *Id.* (quoting 2 Kenneth S. Broun, *McCormick on Evidence* § 195, at 1080-81 (7th ed. 2013)).

A defendant also has the right to effective cross-examination of the witnesses against him. *Merritt v. People*, 842 P.2d 162, 165-66 (Colo. 1992). However, the opportunity for effective cross-examination does not mean unlimited cross-examination. *Id.* at 166. The trial court must exercise its discretion to preclude inquiries that have no probative value, are irrelevant, or are prejudicial. *People v. Hanna*, 981 P.2d 627,

630 (Colo. App. 1998); *see also People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993).

The defendant argues that the trial court erred in refusing to permit testimony regarding the victim's drinking because it was proper habit evidence. The defendant argues that "testimony regarding [the victim] coming to work drunk was relevant to show that he was drunk on May 15, 2012." (OB, p. 26). This is nothing more than improper character evidence prohibited by CRE 404(a).

Moreover, even if this Court were to analyze the evidence as habit evidence, the fact that the victim came to work drunk on multiple occasions is not sufficient to establish a "habit," which is more specific and requires a "regular practice of responding to a particular kind of situation with a specific type of conduct." *Trujillo*, ¶ 10. The defendant did not allege that the victim came to work drunk every day but only that he had done so on "multiple occasions" in the past. (Supp. R. Tr. 11/6/113, p. 52). This in insufficient to establish a "habit."

And even if the victim had a "habit" of coming to work drunk, that evidence is still not relevant. Even assuming that the victim had a

habit of coming to work drunk and came to work drunk on the date in question, that is irrelevant to whether or not the defendant assaulted the victim. This is especially true where, as here, there was no history of violence or aggression on the part of the victim due to his alleged drinking. While the defendant and the victim did not like each other, there had never been any prior physical conflict between them, so even assuming that the "habit" evidence established that he victim was drunk on the day in question, it was not relevant to the defendant's state of mind because he had no reason to believe he was in danger due to the victim's intoxication. Nor was it relevant to the defendant's theory of self-defense because he never had to previously defend himself against the victim when the victim was drunk. (Supp. R. Tr. 11/6/13, pp. 53, 87).[3]

Finally, even assuming any error occurred, it was harmless. The defendant argues that the evidence was relevant both to show that the victim was drunk and that because the victim was drunk the defendant

[3] Defense counsel conceded that the use of alcohol had not caused any specific conflict between the defendant and the victim. (Supp. R. Tr. 11/6/13, pp. 87, 92-93).

"continued to believe he was still in danger, even after he had hit [the victim] in self-defense." (OB, p. 31). However, while the defendant testified that he smelled whiskey on the victim's breath before the assault, he did not testify that the victim was drunk or that he believed the victim was drunk, nor did he testify that he believed he was still in danger even after he hit the victim because the victim was drunk. (Supp. R. Tr. 11/6/13, p. 140). Additionally, no other witnesses testified that the victim had been drinking that morning, and [PS] specifically stated that it did not appear that the victim had been drinking. (Supp. R. Tr. 11/6/13, p. 60). Finally, the jury was unable to reach a verdict on the more serious assault count and only convicted the defendant of menacing, confirming that the jury properly considered the evidence did not convict the defendant on an improper basis.

CONCLUSION

Based on the foregoing reasons and authorities, the People respectfully request that this Court affirm the defendant's conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **JESSICA A. SCOTELLA**, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on March 31, 2017.

/s/ Cortney Jones