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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

District Court, Arapahoe County
Honorable Ben Leutwyler, III., Judge
Case No. 16CR267

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

CHARLES LINNEBUR,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 16CA2133

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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 8,096 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

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/Kevin E. McReynolds

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III. Whether the court abused its discretion and reversibly erred by admitting Linnebur's statements to police that he had been drinking heavily during the week before his arrest.

IV. Whether the court abused its discretion and reversibly erred by allowing prosecutorial misconduct during voir dire and closing arguments.

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[1] *See Blakely v. Washington*, 542 U.S. 296 (2004).

STATEMENT OF THE CASE AND FACTS

Charles Linnebur crashed his truck into a fence on his way to a liquor store in Strasburg, Colorado and was arrested on suspicion of driving under the influence. A blood test showed Linnebur had a blood alcohol level of 0.343, nearly seven times the presumptive limit for impairment. (*See* TR 8/24/16 pp. 26-30; CF p. 92.) When arrested, Linnebur initially denied drinking, but later apologized to police for lying and admitted he had whiskey that day and had been drinking a 750 ml bottle of alcohol every day for the last week. (*See* TR 8/23/16 pp. 162-63, 213-14; CF pp. 2, 4.)

The district attorney charged him with felony DUI/DWAI and DUI per se because he had committed at least three prior impaired driving offenses. (*See* CF pp. 27-30.) Linnebur argued through counsel that he had not actually been impaired and that the potential for contamination rendered the blood alcohol testing evidence unreliable. (*See* TR 8/24/16 pp. 97-100, 102-05.)

The jury rejected these claims and convicted him of DWAI (the lesser included offense of DUI) and a separate charge of DUI per se.

(*See id.* pp. 128-29.) The court then held a hearing where the prosecution provided certified copies of Linnebur's prior impaired driving convictions and his DMV record, which confirmed his convictions and included his photograph. (*See id.* pp. 137-41.) The court found that Linnebur had committed these prior offenses and entered judgment for felony DWAI, merged the felony DUI per se conviction, and sentenced him to four years of community corrections. (*See id.* pp. 142-44; TR 10/24/16 pp. 8-12; CF p. 115.)

On appeal, Linnebur contends: (1) he was entitled to a trial by jury as to whether he previously committed impaired driving offenses; (2) insufficient evidence established his prior offenses; (3) the court erred by admitting his statements about drinking the week before his arrest; and (4) the prosecutor committed reversible misconduct.

These claims fail.

SUMMARY OF THE ARGUMENTS

For the purposes of the felony DUI statute, whether an offender has committed prior offenses is a *Blakely*-exempt fact that can be decided by a judge by the preponderance of the evidence. *See, e.g., People v. Schreiber*, 226 P.3d 1221, 1223-24 (Colo. App. 2009) (reaching the same conclusion regarding the indecent exposure statute); *State v. Palmer*, 189 P.3d 69, 75-76 (Utah Ct. App. 2008) (collecting cases from "virtually all jurisdictions that have addressed this issue" as having found no right to a jury trial on statutes that elevate misdemeanor DUI to felony DUI based on prior offenses) (*citing, e.g., State v. Kendall*, 58 P.3d 660, 667-68 (Kan. 2002)). The General Assembly's 2015 amendment creating felony DUI was designed to increase penalties, and thus the prior offense criteria required to establish this sentence enhancement need only be proven to the court.

The court also did not irrationally find Linnebur committed at least three prior impaired driving offenses. Certified conviction records and related photographic evidence established Linnebur and the "Charles J. Linnebur" convicted of the prior Adams County and

Jefferson County impaired driving offenses shared the same name, birthdate, signature, hometown and physical appearance.

The trial court reasonably admitted Linnebur's statement to police that he had been drinking every day of the week before his arrest because it was relevant/res gestae evidence of his blood alcohol level. In any event, the admission of this statement was harmless in light of the overwhelming evidence of Linnebur's guilt.

The trial court also did not abuse its discretion by failing to prevent alleged prosecutorial misconduct because: (1) the court took corrective action regarding Linnebur's objection to the prosecutor's reasonable doubt analogies; (2) the prosecutor's arguments about the lack of evidence of contaminated blood tests did not shift the burden of proof; and (3) the prosecutor's proper comments on credibility did not constitute reversible bolstering, especially on plain error review.

ARGUMENTS

I. The prior offense requirement for felony DUI need not be proven to a jury beyond a reasonable doubt.

Linnebur contends the trial court violated his right to trial by jury by allowing the judge to determine whether he had been convicted of prior impaired driving offenses, thereby elevating his present offenses into felonies under section 42-4-1301. (*See* OB pp. 4-26.)

He is wrong. The General Assembly created the felony provisions to increase the penalties for repeat offenders. Thus, the prior conviction exception to *Blakely* applies and Linnebur had no right to jury trial as to whether he committed the prior offenses.

A. Standards of review.

The People agree that Linnebur preserved this issue by arguing the prior conviction requirement for felony DUI/DWAI were elements that must be proven to a jury beyond a reasonable doubt. (*See* OB p. 4; CF pp. 62-76.) After considering this motion and the prosecution's response, the court held the prior conviction requirement for felony DUI/DWAI was a sentence enhancer/aggravator that did not require

trial by jury and could be decided by the judge under a preponderance of the evidence standard. (*See* TR 8/23/16 p. 4:4-24); *cf. Schreiber*, 226 P.3d at 1223-24 (applying a preponderance of the evidence standard to the prior conviction requirement for felony indecent exposure because the statute did not expressly provide for a higher burden of proof).

The People agree that "[w]hether a statutory provision is a sentence enhancer or a substantive element of the offense presents a legal question that [this Court] review[s] de novo." *Schreiber*, 226 P.3d at 1223 (citing *People v. Hogan*, 114 P.3d 42, 57 (Colo. App. 2004)); (OB p. 5). While such labels continue to be used to assess whether a particular legal requirement must be decided by a jury, *Blakely* itself "impliedly rejected any remaining difference [between elements and sentence enhancements] for the purposes of the jury trial requirement." *Lopez v. People*, 113 P.3d 713, 721 (Colo. 2005); *cf. Schreiber*, 226 P.3d at 1223 (finding the prior conviction requirement for felony indecent exposure is a sentence enhancer *because* such facts are *Blakely*-exempt).

Thus, where the legal requirement only involves the application of an offender's prior convictions, there is no right to a jury trial. *See* *Lopez*, 113 P.3d at 730-31.[2]

B. The trial court properly applied the prior conviction requirements of the felony DUI/DWAI amendments *Blakely*-exempt facts.

"The Sixth and Fourteenth Amendments to the United States Constitution require that any fact that increases the penalty for a crime beyond the statutory maximum*, except the fact of a prior conviction*, must be submitted to a jury and proven beyond a reasonable doubt." *People v. Montour*, 157 P.3d 489, 495 (Colo. 2007) (emphasis added); *see* *Blakely*, 542 U.S. at 308-09; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Since *Apprendi*, both the United States Supreme Court and our Supreme Court have repeatedly affirmed the vitality of the "prior

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[2] The People acknowledge that the POWPO statute does not clearly follow the prior conviction rule as the jury considers whether an offender's knowing possession occurred after his prior conviction. *See, e.g.,* COLJI-Crim. 12-1:16 (2017). This is, however, materially different than felony DUI and other sentence enhancement statutes as POWPO is not any level of crime if the prior conviction did not exist.

conviction" exception to the right to a trial by jury. *See, e.g., United States v. Booker*, 543 U.S. 220, 224 (2005); *People v. Huber*, 139 P.3d 628, 631 (Colo. 2006); *Lopez*, 113 P.3d at 723.

On appeal, Linnebur contends he was entitled to a jury trial as to whether he had prior convictions for impaired driving because: (1) this constitutes an element of felony DUI (*see* OB pp. 6-20); (2) if not an element, the prior conviction exception should not apply where it changes an offense classification from misdemeanor to felony (*see id.* 20-23); and (3) if the prior conviction exception applies, this Court should not follow it. (*See id.* pp. 23-27.)

He is wrong.

1. The felony DUI/DWAI prior convictions provision is not an element requiring trial by jury.

The felony DWAI statute provides in relevant part:

> A person who drives a motor vehicle or vehicle while impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, commits driving while ability impaired. Driving while ability impaired is a misdemeanor, *but it is a class 4 felony if the violation occurred after three or more prior convictions,*

> *arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI . . . or any combination thereof.*

§42-4-1301(1)(b), C.R.S. (2017) (emphasis added).

On appeal, Linnebur contends the prior conviction provision for the felony DUI/DWAI statute must be construed as an element that must be proven to a jury beyond a reasonable doubt. (*See* OB pp. 6-19.) To justify this interpretation, Linnebur attempts to distinguish the language and structure of section 42-4-1301 from other statutes that elevate offense levels based on prior convictions (*e.g.* indecent exposure, child abuse). (*See, e.g.,* OB pp. 14-17 (arguing the prior conviction requirement in the DWAI statute must be an element because it appears in the same subsection rather than in a separate subsection as occurs in the indecent exposure and child abuse statutes)).

But these grammatical structure theories ignore the actual test Colorado courts apply in such circumstances: "whether '[a requirement's] proof, while raising the felony level of an offense, is not necessarily required to secure a conviction.'" *Schreiber*, 226 P.3d at 1223 (quoting *People v. Leske*, 957 P.2d 1030, 1039 (Colo. 1998)); *People*

v. Becker, 347 P.3d 1168, 1170-72 (Colo. App. 2014) (applying *Schreiber* to conclude the prior conviction requirement in the child abuse statute is a sentence enhancement that should not be presented to the jury). Instead of guessing about legislative intent from whether the prior conviction requirement is in a separate subsection, this Court must instead apply the reasoning from courts that addressed the same question. *See, e.g., Schreiber*, 226 P.3d at 1223-24 (finding the prior conviction requirement that elevated indecent exposure from a misdemeanor to a felony is a sentence enhancement, not an element); *Becker*, 347 P.3d at 1170-72; *cf. Vega v. People*, 893 P.2d 107, 112-13 (Colo. 1995) (applying similar reasoning to conclude a special offender statute is a sentence enhancer because it only applies to one convicted of an underlying drug crime).

Schreiber is instructive. There, a division of this Court concluded that the prior conviction requirement for felony indecent exposure "establishes a sentence enhancer, not a substantive offense, because (1) a defendant may be convicted of the underlying offense without any proof regarding the sentence enhancer; and (2) the sentence

enhancement provision only increases the potential punishment." *See Schreiber*, 226 P.3d at 1223 (*citing, e.g., Vega*, 893 P.2d at 112.) In other words, the prior conviction provision is a sentence enhancer because (1) a defendant can be properly convicted of misdemeanor indecent exposure without proof of prior convictions, and (2) proof of prior convictions only increases the potential punishment by raising the offense to a felony. *See id.* at 1223-24; *accord Becker*, 347 P.3d at 1172 (same re: child abuse statute). Accordingly, the *Schreiber* division rejected defendant's claimed right to be tried by a jury on the prior conviction provision, and found this *Blakely*-exempt fact need only be proven to the trial judge by a preponderance of the evidence. *See Schreiber*, 226 P.3d at 1223.

Here, as in *Schreiber*, the prior conviction requirement for felony DWAI is a sentence enhancement – not an element – because: (1) a defendant can be properly convicted of misdemeanor DWAI without proof of prior convictions, and (2) a sufficient number of prior impaired driving convictions increases defendant's potential punishment. *See* §42-4-1301(1)(b) ("A person who drives a motor vehicle . . . while

impaired by alcohol . . . commits driving while ability impaired. Driving while ability impaired is a misdemeanor, but it is a class 4 felony if the occurred after three or more prior convictions . . .).[3]

Thus, under Colorado's test for this issue, the trial court correctly found the prior conviction provisions of section 42-4-1301 are sentence enhancers that need not be proven to a jury.[4]

2. The felony DUI/DWAI statute does not create a right to jury trial merely because it raises the offense level to a felony.

Alternatively, Linnebur contends that whether an element or a sentence enhancer, the prior conviction requirement must be proven to a jury because it transforms an offense from a misdemeanor to a felony,

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[3] This test also shows why POWPO is different, because proof of the prior conviction *is* required to prove any level of that crime.

[4] While Colorado's test is dispositive of the element/sentence enhancement question, the People additionally note that the title of the 2015 amendment creating felony DUI/DWAI also demonstrates it was a penalty enhancement. *See* 2015 Colo. Legis. Serv. Ch. 262 (HB 15-1043) (titled "An act concerning *penalties* for DUI offenders, and, in connection therewith, making an appropriation") (emphasis added).

and therefore imposes significant collateral consequences. (*See* OB pp. 9-10, 20-23.)

But both *Schreiber* and the majority of other state courts have rejected this collateral consequences argument – including in the context of misdemeanor-to-felony DUI statutes. *See* 226 P.3d at 1223 (recognizing "[t]he majority of other state courts to have addressed similar collateral consequences arguments" have rejected them). In holding that the prior conviction exemption from trial by jury applied to the indecent exposure statute's misdemeanor-to-felony provision, *Schreiber* relied upon cases addressing misdemeanor-to-felony DUI provisions. *See id.* (citing *Palmer*, 189 P.3d at 76).

Contrary to Linnebur's present claim "virtually all of the other jurisdictions that have addressed this issue have rejected" any proposition that the collateral consequences of a felony conviction create a right to jury trial or invalidate *Apprendi* or the *Blakely*-exempt nature of prior conviction provisions. *See Palmer*, 189 P.3d at 76 (collecting cases). Instead, these courts concluded that prior conviction provisions that elevate DUI to a felony need not be proven to a jury. *See id.*;

Kendall, 58 P.3d at 667-68 (rejecting argument that defendant's "two prior DUI convictions must be proven to a jury beyond a reasonable doubt before that fact can be used to change the classification of [the defendant's] crime from a misdemeanor to a felony"); *State v. Pike,* 162 S.W.3d 464, 470 (Mo. 2005) (holding DUI enhancement from a misdemeanor to a felony based on a prior conviction did not constitute a new offense); *State v. LeBaron,* 148 N.H. 226, 808 A.2d 541, 543-45 (2002) (holding prior convictions "need not have been . . . proved to the jury beyond a reasonable doubt" even though they increased defendant's sentence from a misdemeanor to a felony)).

Because Colorado continues to adhere to *Apprendi* and the prior conviction rule, this Court should follow *Schreiber* and the national majority rule that there is no right to jury trial on misdemeanor-to-felony DUI enhancements based on an offender's prior convictions.

3. This Court is bound by *Lopez* and the Supreme Court's acceptance of the prior conviction exemption.

Lastly, Linnebur contends the prior conviction exemption from the right to trial by jury is "unsound" and that this Court should not follow it. (*See* OB pp. 23-26).

But this Court cannot entertain this claim because our Supreme Court has repeatedly reaffirmed the prior conviction exemption. *See Lopez*, 113 P.3d at 723 (holding that the "prior conviction exemption . . . remains valid after *Blakely*" despite "some doubt about the continued vitality" of this rule); *Huber*, 139 P.3d at 631 (declining to revisit this question). Because this Court is bound by our Supreme Court, it must reject Linnebur's challenge to the prior conviction rule. *See People v. Reyes*, 2016 COA 98, ¶13 (acknowledging this Court is "bound to follow [a] limit placed by our supreme court"); *In re Estate of Ramstetter*, 2016 COA 81, ¶40 (recognizing this Court is bound to follow Colorado Supreme Court precedent).

In sum, because section 42-4-1301 merely enhanced Linnebur's potential penalty based on his prior convictions for impaired driving, he

had no right to have that issue tried by the jury. Accordingly, the trial court could properly decide that issue under a preponderance of the evidence standard. *See People v. Whitley*, 998 P.2d 31, 34 (Colo. 1999) (recognizing a preponderance of the evidence standard applies to sentence enhancement provisions based on a defendant's criminal history which does not have a statutory burden of proof as to the determination of prior criminal conduct) (*citing, e.g., People v. Lacey*, 723 P.2d 111, 114 (Colo. 1986); *accord Schreiber*, 226 P.3d at 1223-24.

II. A rational trial judge could find Linnebur committed the prior impaired driving offenses.

Linnebur next argues the prosecution failed to produce sufficient evidence connecting him to the "Charles J. Linnebur" of Strasburg, Colorado who committed three prior offenses. (*See* OB pp. 27-31.)

He is wrong.

A. Standards of review.

The People do not agree that Linnebur preserved his present insufficiency argument by making various evidentiary objections to the self-authenticating exhibits regarding his prior convictions. (*See* OB pp.

27-28; TR 8/24-16 pp. 138-39.) But the Court need not address this lack of preservation because Linnebur's claim fails on the merits.

The People agree that the Court generally reviews sufficiency of the evidence issues de novo and applies the substantial evidence test. (*See* OB p. 28.)

B. Linnebur was previously convicted of the listed impaired driving offenses.

The proper analysis for sufficiency of the evidence is the substantial evidence test, which considers the relevant evidence in the light most favorable to the prosecution is sufficient to support a conclusion in a reasonable mind that the defendant committed the alleged prior offenses. *Cf. Clark v. People*, 232 P.3d 1287, 1291, 1288-89 (Colo. 2010) (applying this test to jury determinations of guilt). Importantly, it does not matter that a reviewing court might have reached a different conclusion, but only that there is a logical connection between the facts established and the conclusion inferred. *Id.* at 1291-92; *People v. Bennett*, 183 Colo. 125, 131, 515 P.2d 466, 469 (1973) (stating the prosecution need not "exclude every reasonable

hypothesis other than guilt" or disprove the defendant's theory in order for there to be sufficient evidence).

Because the prosecution only needed to establish Linnebur's prior convictions under a preponderance of the evidence standard, this Court should affirm if a reasonable trial judge could logically conclude the prosecution met this lower burden of proof.

1. Prior offense proceedings.

After the jury convicted Linnebur of DWAI and DUI per se, the trial court held a hearing regarding whether he met the criteria for felony DUI/DWAI. (*See* TR 8/24/16 pp. 128-44.) Both charges included allegations for the felony offense enhancement (three priors) based on his prior impaired driving convictions from 1989, 1990, and 1999. (*See* CF pp. 27-29.)

The prosecution produced certified copies of these prior convictions to show Linnebur was the same "Charles J. Linnebur" convicted in those cases. (*See* Exhibits pp. 19-54.) In particular, these records included:

- Exhibit 10

- Certified copies of case number 90T4422, the June 7, 1990 Jefferson County charge, guilty plea, and DUI conviction against "Charles J. Linnebur," which included biographical information such as his birthdate, signature, and address in Strasburg, Colorado. (*See* Exhibits pp. 19-33.)

- Exhibit 11
  - Certified copies of case number 88T17667, the Adams County charge, probation agreement, and DUI conviction against "Charles J. Linnebur," which included biographical information such as his birthdate, signature, and address in Strasburg, Colorado. (*See* Exhibits pp. 34-40.)
- Exhibit 12
  - Certified copies of case number 99T11956, the Adams County charge, guilty plea, probation agreement, and DUI conviction against "Charles J. Linnebur," which included his signature. (*See* Exhibits pp. 41-45.).

- Exhibit 13
    - Certified copies of the DMV dossier for "Charles J. Linnebur", which listed the three above convictions by date and county and also included his photograph, birthdate, and address in Strasburg, Colorado. (*See* Exhibits pp. 46-54)). This record also included physical description information (height, eye color, etc.) that matched the description of Linnebur in the court record for the present case. (*Compare* Exhibits pp. 49-50 *with* CF p. 135.)

Defense counsel objected to the admission of these certified records on evidentiary grounds, but did not make any argument challenging whether these documents adequately established Linnebur's identity. (*See* TR 8/24/16 pp. 135-37.) The prosecution responded by noting these were self-authenticating documents and then went through the details of each and the corroborating photograph and details from the DMV dossier. (*See id.* pp. 137-39.) The court admitted

the exhibits and the parties rested without further argument. (*See id.* pp. 141-42.)

Based on its review of these documents, including the photograph of "Charles J. Linnebur" and the corresponding identifying information, the trial court found the prosecution had proven that Linnebur had been convicted of each of these prior offenses. (*See id.* pp. 142-44.) Though the law only required proof by a preponderance of the evidence, the court found the evidence established each of Linnebur's prior convictions beyond a reasonable doubt. (*See id.*)

2. Analysis.

On appeal, Linnebur challenges the sufficiency of the prior conviction evidence because he believes there was insufficient evidence in the prosecution's exhibits to link those convictions to him. (*See* OB pp. 28-31.) In making this argument, Linnebur relies upon habitual criminal cases and contends the correlating details between Linnebur and the "Charles J. Linnebur" convicted of the prior offenses was insufficient. (*See id.*)

These arguments are legally and factually wrong.

Legally, Linnebur's cited cases are inapplicable because the prior conviction requirement in the felony DUI statute only needed to be established by a preponderance of the evidence. *See infra* Argument I.B.3. Accordingly, the "strict proof" of identity required for habitual criminal trials is irrelevant as those statutes require proof beyond a reasonable doubt – a far more demanding legal standard than the preponderance required to aggregate the offense level here.

Factually, Linnebur's mere disagreement with how the trial court weighed the prosecution's evidence cannot not meet the "daunting standard" of the sufficiency of the evidence test. The prosecution's case-in-chief included certified conviction and DMV records that established that Linnebur and the "Charles J. Linnebur" who committed the prior Jefferson County and Adams County impaired driving offenses share the same name, birthdate, signature, physical description and hometown (Strasburg, Colorado). (*Compare, e.g.,* Exhibits pp. 20, 23, 26, 30, 32 (Exhibit 10), 35-37 (Exhibit 11), 42-43 (Exhibit 12), 49-50 (Exhibit 13); *with* CF pp. 1-5, 13, 115, 135 (documents from the present case showing Linnebur's matching name, birthdate, signature, physical

description, and arrest near his home in Strasburg, Colorado)); *cf. also* §18-1.3-802, C.R.S. (2017) (recognizing that authenticated conviction records and any included photographs constitute *prima facie* evidence of a defendant's prior convictions and identity). Additionally, the prosecutor admitted the DMV dossier that included Linnebur's photograph and listed prior impaired driving offenses that matched the dates and locations of the certified conviction records. (*See* Exhibits 49, 52 (1999 Adams County), 53 (1990 Jefferson County), 54 (1988 Adams County)).

Thus, viewing this evidence in the light most favorable to the prosecution, the trial judge rationally found that Linnebur was the person convicted of these prior offenses. Accordingly, this Court should affirm the trial court's felony enhancement findings.

III. The trial court reasonably admitted Linnebur's admissions to heavily drinking before his arrest.

Next, Linnebur contends the trial court abused its discretion and reversibly erred by allowing the prosecution to present Linnebur's statements to police that he had been drinking heavily every day of the week before his DUI arrest. (*See* OB pp. 31-36.)

This claim fails because Linnebur's statement was relevant to his blood alcohol level, constituted res gestae evidence and, in any event, its admission was harmless.

A. Standards of review.

The People agree that trial courts are accorded considerable discretion in deciding questions governing the admissibility of evidence, its relevance, its probative value, and its prejudicial impact. (*See* OB p. 32); *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993).

"To say that a court has discretion in resolving [an] issue means that it has the power to choose between two or more courses of action and is therefore not bound in all cases to select one over the other." *People v. Milton*, 732 P.2d 1199, 1207 (Colo. 1987); *People v. Rhea*, 2014

COA 60, ¶58 ("[U]nder the abuse of discretion standard, the test is not whether we would have reached a different result, but rather, whether the trial court's decision fell within a range of reasonable options").

Accordingly, this Court should affirm unless the *only* reasonable choice was to exclude Linnebur's drinking admissions.

The People agree that Linnebur preserved this claim. (*See* TR 8/23/16 pp. 213-14.) Preserved evidentiary claims are reviewed for harmless error, such that any abuse of discretion would only require reversal if it substantially influenced the verdict or impaired the fairness of the trial. *See* Crim. P. 52(a); *People v. Garcia*, 169 P.3d 223, 229 (Colo. App. 2007).

Thus, even if the court's ruling was manifestly arbitrary, it must be "disregarded as harmless whenever there is no reasonable probability that it contributed to the defendant's conviction." *Crider v. People,* 186 P.3d 39, 42 (Colo. 2008). This standard must account for an error's impact in light of the trial record as a whole. *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009). Additionally, because the error is not one of constitutional dimension, Linnebur bears the burden

of establishing prejudice from the error. *People v. Vigil*, 718 P.2d 496, 500 (Colo. 1986); *People v. Casias*, 2012 COA 117, ¶60.

B. Evidence of Linnebur's admission about drinking heavily in the days before his arrest was relevant and admissible.

The Colorado Rules of Evidence strongly favor the admission of material evidence. All relevant evidence is admissible unless otherwise provided by constitution, statute or rule." *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009); C.R.E. 402. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.'" *Douglas v. People*, 969 P.2d 1201, 1204 (Colo. 1998) (quoting C.R.E. 401). Where evidence is admissible under general relevancy, there is no need to consider whether it was also admissible as res gestae. *See People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009) .

Res gestae is a theory of relevance that applies to certain evidence that is relevant because of its special relationship to the charged crime. *See id.* Res gestae evidence, which can include another offense, is

evidence that is "related to the charge on trial, that helps to 'provide the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred.'" *People v. Skufca*, 176 P.3d 83, 86 (Colo. 2008) (quoting *People v. Quintana*, 882 P.2d 1366, 1373 (Colo. 1994)). Res gestae evidence is generally "linked in time and circumstances to the charged crime, it forms an integral and natural part of the crime, or it is necessary to complete the story of the crime for the jury." *Id.*

1. Relevant background.

Linnebur crashed his truck into a fence on his way to the liquor store in Strasburg. (*See* CF pp. 1-2; TR 8/23/16 pp. 140-42, 149-50.) His neighbor reported him and Deputy Brophy went to town to look for Linnebur's vehicle. (*See* CF pp. 1-2; TR 8/23/16 pp. 143-44, 149-50.)

Deputy Brophy found Linnebur's vehicle by the liquor store and followed him as he left town before initiating a traffic stop. (*See* TR 8/23/16 pp. 150, 158-60.) Though he had red eyes and smelled of alcohol, Linnebur denied drinking. (*See id.* pp. 161-62, 199.) Another officer, Deputy Vinson, attempted to conduct roadside sobriety tests, but

felt unsafe completing these tests because Linnebur kept swaying and losing his balance. (*See id.* pp. 163, 177, 189-90, 203-07.)

Deputy Vinson arrested Linnebur for suspected DUI and took him to the police station for a blood test. (*See id.* pp. 207-09.) At trial, Deputy Vinson testified that Linnebur volunteered that he had lied about not drinking and had a small bottle of whiskey earlier that day. (*See id.* pp. 213-14.) Anticipating the next testimony, defense counsel objected and approached for a bench conference:

> [Defense]: Judge, I wanted to stop the deputy before -- to make this objection. [The prosecution] mentioned it in opening -- I think in opening statements -- about how Mr. Linnebur had told this deputy that he had drank a 5 milliliter bottle of H&H liquor, but he had also been drinking a 750-milliliter bottle every day for the past, you know, blank amount of time.
>
> I am objecting to this as prejudicial, irrelevant. The fact that he may have been on some kind of bender or binge for an unspecified amount of time, I don't think is relevant to what happened here.
>
> He made an admission of drinking that day. I am not objecting to that, but as far as drinking, you know, a bottle of liquor per

day, I think there is 404 evidence, and there was none pled in this case.

[Prosecutor]: I would respectfully disagree. I think this evidence is highly probative of the reliability of the blood test results, which are extremely high and could only be explained by someone who has been drinking quite a lot for quite a while, and, in fact, drank quite a lot that day, which the Defendant never admits to drinking quite a lot that day. He admits to drinking quite a lot in the days leading up to that day.

So, I think that I should be allowed to elicit the Defendant's admissions in that respect.

THE COURT: Any final comment?

[Defense]: No, Judge.

THE COURT: All right. The objection is overruled. I find that it is relevant. It is probative and, as part of res gestae, I think that it is admissible.

I agree that it is prejudicial, but I believe that its prejudicial value does not substantially outweigh its probative value.

Let's rephrase. The prejudicial effect does not outweigh the probative value, and so I will overrule the objection and allow that testimony.

(TR 8/23/16 pp. 214-15.) Based on this ruling, Deputy Vinson recounted Linnebur's statement that he had been sober for a long time "but in the last week he had consumed approximately a 750-milliliter bottle of alcohol every day." (*See id.* p. 216:9-11.)

The prosecution's expert witness testified that testing of Linnebur's blood sample showed a blood alcohol content of 0.343 per 100 ml of blood – many times the legal limits for influence or impairment (0.08 & 0.05). (*See* TR 8/24/16 pp. 18, 27-30.) Defense counsel challenged this blood testing evidence by suggesting improperly collected and stored samples could "ferment" and artificially inflate the results. (*See id.* pp. 56, 103.) The expert and the prosecution discounted this possibility as nothing in the evidence indicated Linnebur's sample had fermented. (*See id.* pp. 52, 93.)

2. Analysis.

On appeal, Linnebur claims the trial court reversibly erred by admitting his statement about drinking a bottle of alcohol every day for the week before his arrest. (*See* OB pp. 47-48, 54-57.)

The People disagree.

First, as the trial court found, this evidence was admissible under C.R.E. 401 and as res gestae to help explain Linnebur's extraordinarily high blood alcohol result. Absent additional explanatory evidence, the jury could have incorrectly speculated about contamination of Linnebur's blood sample instead of recognizing the truth that Linnebur actually drank enough to cause that result. Thus, Linnebur's confessed and habitual drinking of large amounts of liquor including shortly before his arrest was relevant to disputed issues before the jury.

Second, even if no reasonable court would have admitted Linnebur's two-line confession about drinking the day and week before his DUI arrest, its admission was harmless because: (1) the full trial record included overwhelming evidence of Linnebur's guilt;[5] and (2) the jury acquitted him of DUI and convicted on the lesser included offense of DWAI – demonstrating the verdicts were based on his conduct at the scene. (*See* CF pp. 100-01) (verdicts)); *People v. Delgado-Elizarras*, 131

[5] Indeed, at sentencing defense counsel admitted "at trial the evidence was fairly overwhelming that [Linnebur] consumed a large amount of alcohol and had driven drunk." (*See* TR 10/24/16 p. 4:17-18.)

P.3d 1110, 1112-13 (Colo. App. 2005) (where the prosecutor introduced other act evidence, the jury's rejection of one of the charges against him "demonstrate[d] that the jury based its verdicts on the evidence of defendant's conduct at the scene, and not on any conclusions regarding defendant's propensity to engage in criminal conduct").

Accordingly, this Court should not reverse Linnebur's felony DWAI and DUI per se convictions based on the court's admission of his statement to Deputy Vinson.

IV. The trial court did not abuse its discretion or reversibly err by not preventing alleged prosecutorial misconduct.

Lastly, Linnebur contends he is entitled to a new trial because the trial court allowed the prosecution to commit misconduct during voir dire and at closing arguments. (*See* OB pp. 36-43.)

The People disagree.

A. Standards of review.

The People agree that Linnebur preserved his claim that the prosecution used improper reasonable doubt analogies during voir dire. (*See* OB p. 36.) The People also agree that Linnebur did not preserve

any of his claims that the prosecutor's closing argument shifted the burden of proof or improperly commented on Deputy Vinson's credibility. (*See id.* p. 37.)

The People agree that claims of prosecutorial misconduct are reviewed for an abuse of discretion because trial courts are in the best position to assess any alleged misconduct. (*See id.*); *Domingo-Gomez v. People*, 125 P.3d 1043, 1049-50 (Colo. 2005); *Rhea*, 2014 COA 60, ¶42.

Applying this standard, claims of alleged misconduct are reviewed under a two-step analysis. *See Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, this Court must determine if the questioned conduct was improper based on the totality of the circumstances. *See id.* (citing *Domingo-Gomez*, 125 P.3d at 1048). Second, this Court must determine whether the questioned conduct warrants reversal under the proper standard of review. *See id.* These are independent steps, thus this Court could find a prosecutor's conduct improper and still affirm the judgment because the error did not warrant reversal. *See id.*

Where defense counsel preserved a misconduct claim, it is subject to "general harmless error review." *See Rhea*, 2014 COA 60, ¶¶42-43

(internal quotation omitted). Thus, as with evidentiary claims, Linnebur bears the burden of demonstrating a reasonable probability that his preserved claims of misconduct contributed to his conviction in light of the evidence as a whole.

The People agree that Linnebur's unpreserved misconduct claims are subject to plain error review. "Under plain error review, reversal is required only if the appellate court, after reviewing the entire record, can say 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." *Nicholls v. People*, 2017 CO 71, ¶60 (internal quotation omitted). Plain error is "strong medicine" that provides "a basis for relief only on rare occassions because (1) it is dificult to fault the trial court for failing to rule on an issue that had not been presented to it, and (2) an accused should not be able to withold his objections until completion of his trial . . . and later complain of matters which, if he had made a timely objection, would have allowed the trial court to take corrective action." *People v. Ujaama*, 302 P.3d 296, 304 (Colo. App. 2012) (internal citations and quotations omitted).

B. There is no cognizable claim for prosecutorial misconduct.

When reviewing claims of prosecutorial misconduct "[f]actors to consider when determining the propriety of statements include the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction." *Domingo-Gomez*, 125 P.3d at 1048. Reviewing courts also consider "the severity and frequency of the misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to defendant's conviction." *People v. Merchant*, 983 P.2d 108, 114 (Colo. App. 2009).

1. Linnebur cannot show reversible error from any inartful analogies at voir dire.

Before the parties' voir dire questioning, the court instructed the panel on the reasonable doubt standard and the presumption of innocence. (*See* TR 8/23/16 pp. 15-17.) The prosecution repeated this definition before asking jurors questions about life decisions (buying a vehicle or getting married) and asking whether particular

circumstances would cause them to hesitate in making those decisions. (*See id.* pp. 55-58.) Defense counsel objected to this questioning at a bench conference stating:

> I think these examples given by [the prosecutor] are kind of confusing on what reasonable doubt is, so I would ask that either he rephrase his examples or the definition *or have the Court read the definition at this point to the jury so they understand what the law is they are going to have to follow on this*.

(*See id.* p. 58:20-25) (emphasis added). The court did not find the prosecution's questions misleading and offered to read the complete reasonable doubt instruction again at the end of the prosecution's voir dire. (*See id.* p. 59:1-7.) Defense counsel agreed and the court provided the instruction. (*See id.* at pp. 59:8; 61:12-24.) The issue was not raised again and the court repeatedly instructed the jury with the model definition of reasonable doubt. (*See id.* pp. 118-19 (court instructions before opening statements); 8/24/16 pp. 75-78 (final instructions); CF p. 81 (written instruction)).

On appeal, Linnebur contends the trial court abused its discretion and reversibly erred by allowing the prosecution to pose questions involving reasonable doubt analogies at voir dire. (*See* OB pp. 39-40.)

The Court should reject these conclusory assertions because: (1) in context, the prosecution's analogies were not misleading (*see* TR 8/23/16 pp. 55-58); (2) the court provided the exact relief Linnebur requested – an additional instruction on reasonable doubt during voir dire (*see id.* at pp. 58-59; 61:12-24); (3) defendant's countervailing reasonable doubt discussion at voir dire – and the court's further instructions – ensured the jury was not misled (*see id.* pp. 69-71); and (4) even assuming no reasonable trial court would allow such questions, they were harmless in light of the court's repeated and accurate instructions on the burden of proof and the court's primacy in defining the legal standards the jury must apply. (*See, e.g.,* TR 8/24/16 pp. 75-78); *Merchant*, 983 P.2d at 114 (courts must consider the full context, and any corrective action, in determining whether prejudicial misconduct occurred).

2. Linnebur cannot show plain error from the prosecution's closing arguments.

Because claims of improper argument must be evaluated in the context of the argument as a whole and the evidence before the jury, a prosecutor is afforded considerable latitude in replying to an argument by defense counsel. *People v. Gladney*, 250 P.3d 762, 769 (Colo. App. 2010). "Given the sometimes fuzzy line between hard-but-fair blows and foul blows, and because arguments delivered in the heat of trial are not always perfectly scripted, reviewing courts accord prosecutors the benefit of the doubt where remarks are ambiguous, or simply inartful." *People v. Lovato*, 2014 COA 113, ¶64.

Prosecutorial misconduct during closing arguments "rarely, if ever, is so egregious as to constitute plain error." *Rhea*, 2014 COA 60 ¶43 (quoting *People v. Constant*, 645 P.2d 843, 847 (Colo. 1982)). This case does not present one of these rare occasions.

a. The prosecution did not shift the burden of proof.

Even where "a prosecutor's comments and questions may imply a defendant has the burden of proof, such comments and questions do not necessarily shift the burden of proof, constituting error." *People v. Santana*, 255 P.3d 1126, 1131 (Colo. 2011). The Colorado Supreme Court's test for "assessing the strength of the prosecution's burden-shifting actions and whether they have shifted the burden of proof" considers "the degree to which:"

> (1) the prosecutor specifically argued or intended to establish that the defendant carried the burden of proof; (2) the prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) the jury is informed by counsel and the court about the defendant's presumption of innocence and the prosecution's burden of proof.

Id. at 1131-32 (internal citations omitted). In applying these factors, reviewing courts must consider "the strength of the burden-shifting actions in light of the whole record" in order to "*protect a prosecutor's ability to 'comment on the lack of evidence confirming defendant's theory*

of the case.'" *Id.* at 1132 (quoting *People v. Medina*, 190 Colo. 225, 226, 545 P.2d 702, 703 (1976)) (emphasis added).

On appeal, Linnebur contends the prosecutor improperly shifted the burden of proof by pointing out the lack of evidence to support his counsel's arguments that the blood test could have been contaminated. (OB pp. 40-41.)[6]

This claim fails under the *Santana* factors:

First, the prosecution directly referenced the reasonable doubt instructions immediately before making the arguments about the lack of evidence to support defense counsel's contaminated blood sample theory – arguing this constituted a "speculative doubt." (*See* TR 8/24/16 pp. 91-92.) Accordingly the first *Santana* factor weighs against a finding of burden-shifting because the prosecutor did not "specifically

[6] Despite citing *Santana*, Linnebur's Opening Brief does not discuss how the Supreme Court's factors could support his burden-shifting claim. (*See* OB pp. 40-41). Accordingly, this Court should not consider any such arguments should he raise them for the first time in reply. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990).

argue[] or intend[] to establish that the defendant carried the burden of proof." 255 P.3d at 1131.

Second, there was nothing improper in the prosecution using its closing arguments to respond to defense counsel's alternative explanations for the evidence showing Linnebur was very drunk when he was pulled over. (*See* TR 8/24/16 pp. 91-93, 109).[7] By focusing on what the evidence showed and casting doubt on speculative contamination theories, the prosecution made precisely the type of argument the Colorado Supreme Court sought to protect through the burden-shifting test in *Santana*. *See Santana*, 255 P.3d at 1131-32; *see also People v. Gibbons*, 397 P.3d 1100, 1110 (Colo. App. 2011) (finding no burden-shifting error where the prosecutor commented on the lack of evidence to support the defendant's theory).

Third, both counsel and the trial court repeatedly and consistently reminded the jury that the prosecution carried the burden to prove Linnebur guilty beyond a reasonable doubt. (*See, e.g.,* TR 8/23/16 pp.

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[7] At sentencing, defense counsel admitted the evidence that Linnebur drove drunk was overwhelming. (TR 10/24/16 p. 4:16-18.)

118-19; 8/24/16 pp. 75-78, CF pp. 79, 81, 88-89); *accord Domingo-Gomez*, 125 P.3d at 1045 (appellate courts presume the jury understood and followed the instructions).

Thus, Defendant cannot satisfy any of the *Santana* factors for establishing improper burden-shifting, let alone such "flagrantly, glaringly, or tremendously improper" conduct that could justify reversal under plain error review.

b. The prosecution did not improperly comment on the credibility of Deputy Vinson.

Last, Linnebur challenges remarks from the prosecution's closing argument as improper expressions of the prosecutor's personal belief. (*See* OB pp. 41-42.) In context, however, these comments were not improper as they were related back to the credibility instructions and the jury's role to decide who to believe. (*See* TR 8/24/15 pp. 94-96.)

In the challenged comments, the prosecutor explained that Deputy Vinson displayed his credibility by admitting to his mistakes and correcting his misstatement from a prior hearing:

Deputy Vinson. We learned a lot about Deputy Vinson. We learned that he is an honest person. He wanted to clear up what he thought may have been some incorrect information he gave at a prior hearing. He wanted to provide that up. No one confronted him with of a transcript of any prior testimony that was different from what he told you. I didn't. [Defense counsel] didn't.

Deputy Vinson just thought he may have misspoke at a prior hearing, and he took this opportunity to make sure that you all got the truth. He took this opportunity to make sure that Mr. Linnebur got the benefit of the truth.

He said after he reviewed his report, and he was thinking back to that prior hearing he may have misspoke at that prior hearing, but he got it right at this hearing, he was not able to do the [roadside sobriety] test.

Deputy Vinson is honest, and we also found out that he is human. He is capable of making a mistake.

What mistake did he make?

We know that the DUI -- not the DUI. The 911 call notes identified a caller as Meredith Kord, K-o-r-d. But you heard from the actual 911 caller, it's Meredith Korb, K-o-r-b. Clearly the caller is misidentified slightly, her last name spelled incorrectly.

We know Meredith Korb, the real 911 caller, is not a nurse. She did not draw the Defendant's blood.

. . .

> Deputy Vinson wrote in his report that the nurse is named Meredith Kord, K-o-r-d, same misspelling as in the call notes, but we know -- you have People's Exhibit 8 -- the nurse's name is really Ava Foster.
>
> This is obviously a typographical error, and you can do with that what you will as jurors. If you think that invalidates all the rest of Deputy Vinson's testimony, set it aside. But it shouldn't.
>
> All that shows is that Deputy Vinson is a human being, made a mistake typing up his report.

(*See* TR 8/24/15 pp. 94-95).

Immediately after making this argument, the prosecution referenced the credibility instruction and the jurors' role in deciding what testimony to believe:

> As jurors, the instructions tell you you have to consider all of the evidence in deciding whether any one piece of evidence makes sense or not, and you have an instruction that helps you with that. It's Number 6.
>
> Instruction Number 6 tells you how to evaluate the credibility of testimony, and in that second paragraph, toward the end, it says you should consider how the testimony of each witness is supported by other evidence.
>
> All of Deputy Vinson's testimony is supported by Deputy Brophy's testimony and Isaac Avram's testimony, and each one of them support one another.

(*See id.* p. 96:6-17.)[8]

Rather than offering an improper personal opinion about Deputy Vinson's credibility, the prosecution's argument merely highlighted this witness's admitted fallibility and commented on "how well and in what manner [Vinson] measured up to the tests of credibility set forth in the instruction." *See Constant*, 645 P.2d at 845-46; *People v. Nardine*, 2016 COA 85, ¶53 (applying *Constant* and concluding the prosecutor properly commented on witness credibility when making similar arguments that related back to the credibility instruction).[9]

Thus, contrary to Linnbebur's claim, the prosecution did not offer any improper personal opinion on veracity, but merely made "an

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[8] Notably, defense counsel not only failed to object to these comments, he incorporated the Deputy Vinson is "human" and "honest" theme into his own closing argument to challenge his credibility. (*See* TR 8/24/15 pp. 100-02.)

[9] Linnebur selectively relies upon parts of *Nardine* to suggest the comments in this case constitute "vouching." The improper comments in that case were phrased as the prosecutor's personal opinion "witnesses I present to you, I presume they're telling the truth." *See* 2016 COA 85, ¶54. No such improper phrasing occurred here.

acceptable comment on the credibility of witnesses." *See Domingo-Gomez*, 125 P.3d at 1051.

And even assuming *arguendo* that parts of the prosecutor's closing arguments on credibility constituted misconduct that no reasonable judge would allow, they cannot justify reversal for plain error because:

- The court instructed the jurors that closing arguments are not evidence and that their verdicts must be based on the evidence at trial. (*See, e.g.,* TR 8/23/16 pp. 119-20; 8/24/16 pp. 75-76; CF p. 79);
- Any alleged prejudice was diminished by defense counsel's countervailing arguments using the prosecutor's own theme to challenge Deputy Vinson's credibility;
- "[T]he fact that a defendant did not object may indicate his belief that the live argument was not overly damaging." *People v. Avila*, 944 P.2d 673, 676 (Colo. App. 1997); and
- The allegedly improper comments made up a small part of the prosecution's overall closing arguments. *See Domingo-Gomez*, 125 P.3d at 1053.

CONCLUSION

For these reasons, this Court should affirm the judgment.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **MEREDITH ROSE** and all parties herein via Colorado Courts E-filing System (CCES) on May 30, 2018.

/s/ Tiffiny Kallina