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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

El Paso County District Court
Honorable David S. Prince, Judge
Case No. 16CR1103

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JAVARRAY CHARLES JANUARY,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 16CA1940

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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 8,974 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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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/ Brenna Brackett

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STATEMENT OF THE CASE

Defendant was a resident at a juvenile detention facility when he spit at two correctional officers, hitting them with saliva and blood. Defendant was charged with two counts of second degree assault for, with the intent to infect, injure, harm, harass, annoy, threaten, or alarm, causing two detention facility employees to come into contact with saliva and blood.

A jury found defendant guilty as to one employee, and not guilty as to the second. (CF, pp 28-29). The court sentenced defendant to probation. (TR 9-26-2016, pp 10-15).

STATEMENT OF THE FACTS

Defendant was a resident in a facility of the Division of Youth Corrections. (TR 7-12-2016, pp 136-37). RH worked as a youth security officer and was supervising defendant's unit one evening. (TR 7-12-2016, pp 136-37). Defendant violated procedure by standing without first asking permission. (TR 7-12-2016, pp 138-40). Then a female intern came to the unit and defendant got loud and rowdy, whistling and yelling sexual remarks. (TR 7-12-2016, pp 139-40, 156). RH told

defendant to stop and that his conduct was not appropriate; he had to repeat this at least three times before defendant responded. (TR 7-12-2016, pp 139-41).

Defendant finally sat down, but then demanded, "Give me my F'ing phone call." (TR 7-12-2016, p 141:8-20). RH told defendant he would have to take a time-out and requested a staff member to escort defendant to a different location for that purpose. (TR 7-12-2016, pp 139-42). Defendant was silent for a moment, but then "exploded up out of his chair[,] flipping the staff desk," and rushed around the desk and toward RH with clenched fists. (TR 7-12-2016, pp 142-43).

RH radioed a "code red," and because defendant was rushing him with clenched fists, RH engaged with him in a physical struggle. (TR 7-12-2016, p 143:7-24). RH undertook progressively more forceful actions as his initial attempts to gain control were unsuccessful and defendant grew more aggressive. (TR 7-12-2016, pp 143-44).

Another staff member arrived, and he and RH were finally able to get defendant under control. (TR 7-12-2016, p 144:12-14, p 146:3-10). As RH gathered some items that had scattered so that he could leave,

defendant broke free from the other staff member and ran toward RH again. (TR 7-12-2016, p 146:10-19; *see also* TR 7-13-2016, p 12:16-23). Defendant struck both RH and the other staff member. (TR 7-12-2016, p 146:17-25). Defendant continued struggling and yelling, "get the fuck off me, you're not gonna restrain me," and more officers arrived and joined the effort to get defendant under control. (TR 7-12-2016, pp 170-72). Defendant was "cussing" and agitated, still trying to assault RH. (TR 7-12-2016, pp 196-97; TR 7-13-2016, p 11:14-15). Defendant was calling RH a "bitch" and saying he was "going to fuck him up," statements he continued making throughout the night. (TR 7-13-2016, p 12:2-5).

Once several staff members were on scene, RH left so that they could try to de-escalate the situation. (TR 7-13-2016, p 12:5-7; TR 7-12-2016, pp 172-73). Still, it took several minutes for the staff to restrain defendant. (TR 7-12-2016, pp 173-74, 197). Finally, defendant was transferred to a holding cell in intake. (TR 7-12-2016, p 174:, p 197:15-24; 7-13-2016, p 11:21-22).

Awhile later, AZ had RH try to "process" with defendant, but defendant was still calling him a "little bitch," demonstrating that he was not ready to leave intake; AZ decided that defendant would spend the night there. (TR 7-13-2016, pp 14-15).

So, about five hours after the initial incident with RH, two other officers went to give defendant bedding in the holding cell. (TR 7-12-2016, pp 207-08; Env, EX 1, "Intake" Camera: 11:13:00). Defendant was irritated, was pacing back and forth, and wanted to get out. (TR 7-12-2016, p 208:8-17). One officer spoke to him for several minutes, trying to calm him down. (TR 7-12-2016, p 208:18-23). But when the officer finally entered to give defendant his bedding, defendant got up and "rushed the holding cell trying to push past" him. (TR 7-12-2016, p 210:2-4). Defendant pushed past both officers, who initiated a physical response and called a "code red." (TR 7-12-2016, p 210:5-18, pp 222-23; Env, EX 1, "Intake" Camera: 11:13:30-35).

When a "code red" is called, everyone available is supposed to respond. (TR 7-12-2016, p 143:10-13, p 170:1-5; *see also* TR 7-13-2016, p 16:17-18). Accordingly, both RH and AZ responded to the intake area,

but they remained "hands-off" because other staff members were present and capable of getting the situation under control, and defendant was still worked up about the earlier incident. (TR 7-12-2016, pp 149-50; TR 7-13-2016, p 16:13-17). Indeed, defendant was yelling about the earlier incident, and about RH in particular, as he struggled with the other staff in the holding cell. (TR 7-12-2016, pp 199-200, 237-40).

Several minutes, and more than six staff members later, the officers finally got defendant restrained in handcuffs. (TR 7-12-2016, pp 198-99, 211-12, 223; Env, EX 1, "Intake" Camera: 11:13:30-11:16:20).

RH and AZ had put the bedding back in the holding cell and opened the cell for officers to escort defendant back in. (Env, EX 1, 11:15:00-20; TR 7-13-2016, p 16:13-19). But when the other staff members stood defendant up, defendant saw RH standing next to AZ. (TR 7-13-2016, p 16:19-21). Defendant called RH a "bitch" in a loud, aggressive tone, said, "I'm gonna fuck you up," then spit on RH and AZ. (TR 7-12-2016, pp 152-53; TR 7-13-2016, p 16:19-22; Env, EX 1, "Intake" Camera: 11:16:20-25). The spit, which also contained blood, hit RH in

the face, glasses, and mouth. (TR 7-12-2016, p 152:17-21). Spit and blood also landed in AZ's eyes. (TR 7-13-2016, pp 16-17).

Besides RH and AZ, two of the other officers saw defendant spit towards RH. (TR 7-12-2016, p 152:14-15, p 200:19-25, p 238:3-15; TR 7-13-2016, p 16:19-22). Although other officers present did not see the spitting, two of them heard defendant "hock," or "cough it up" before spitting, and another saw the spit afterwards. (TR 7-12-2016, p 224:7-13, p 232:5-10, pp 214, 217).

When AZ asked defendant if he knew he had spit on her, he responded, "I don't give a fuck who I spit on." (TR 7-12-2016, p 201:7-10; TR 7-13-2016, p 21:5-11).

Defendant was charged with two counts of assault in the second degree, for allegedly "while lawfully confined in a detention facility, with intent to infect, injure, harm, harass, annoy, threaten, or alarm" RH and AZ, each "a person in a detention facility whom the defendant knew or reasonably should have known to be an employee of a detention facility, unlawfully and feloniously caus[ing] such person to come into contact with saliva and blood by any means." (Supp, pp 1-2).

SUMMARY OF THE ARGUMENT

Defendant's constitutional right to be present was not violated by his absence at an impromptu hearing the day before trial. Defendant's absence during argument and the trial court's order on the admissibility of evidence about the earlier incident did not impair his right to a fair trial. The admissibility of the evidence was based on the prosecution's proffer of the anticipated evidence. Defendant has not explained how the outcome would have been different had he been there. Although he contends he could have helped defend and respond to the prosecution's factual allegations about the earlier incident, the trial court ruled based on the prosecution's expected evidence; it did not make any factual determinations about how events actually transpired.

Nor was his right to a fair trial impaired by his absence from court when his attorney learned that there was video surveillance of the charged conduct which he had not realized he had been given in discovery. This happened only by chance during court, but was not a part of the actual court proceedings, so defendant'd constitutional right to be present was not violated. Further, defendant has not explained

how it would have been useful for him to witness his counsel's realization.

Additionally, any possible error was harmless because defendant had the opportunity to consult with counsel after the hearing and prior to trial, and counsel could have re-raised the two issues with the trial court if defendant had anything new to contribute. Instead, defendant actually benefitted from the impromptu pretrial hearing being held in his absence, rather than delayed to the morning of trial, because his attorney had the opportunity to prepare for trial knowing about the video and the admissibility of evidence of the earlier incident.

The trial court did not plainly err by allowing the victims' testimony that they sought precautionary medical care after being exposed to saliva and blood. The evidence was relevant to establishing two elements of the charged crimes: that defendant caused the victims to be exposed to blood or saliva, and that he did so with the requisite intent. Moreover, the single brief reference to HIV and the mere mention of blood-borne pathogens would not incline a jury to convict defendant on an improper basis, such as bias, sympathy, anger, or

shock. Nor did the comments even suggest that defendant was infected with HIV; rather, the victims took reasonable precautionary measures based simply on the fact that they were exposed to saliva and blood.

Finally, the prosecutor's comments during voir dire and rebuttal closing were proper. The prosecutor's illustration comparing the reasonable doubt standard to the decision to buy a home was in line with Colorado's reasonable doubt definition invoking "matters of importance" to reasonable people. Although some jurisdictions disapprove of comparing the reasonable doubt standard to any decision made in the normal course of life, Colorado's definition explicitly allows comparison to "important" decisions. Further, unlike other questionable illustrations, the prosecutor here properly focused on the hesitation to act when comparing home-buying to reasonable doubt. Moreover, any error was plain where this illustration was not obviously improper in Colorado; and it was a brief and the jury was instructed on the proper definition of reasonable doubt.

ARGUMENT

I. Defendant's constitutional right to be present was not violated by his absence when the trial court ruled on whether the earlier incident was relevant and defense counsel realized he had not viewed some of the discovery he had received.

Defendant contends that his constitutional right to be present was violated when he was absent for a hearing the day before trial during which the parties litigated the admissibility of certain evidence and defense counsel discovered that he had missed a video of the incident which had been previously provided in discovery. Defendant had no constitutional right to be present at this hearing because his absence did not impair his right to a fair trial.

A. Preservation and Standard of Review

The People agree that whether a defendant's constitutional right to be present was violated is reviewed de novo. *See People v. Janis*, 2016 COA 69, ¶ 10, *cert. granted by People v. Janis*, (No. 16SC515, Feb. 21, 2017).

The People agree with defendant's implicit acknowledgement that neither he nor his counsel raised this claim of error in the trial court—

neither at the hearing itself, nor when the case came on for trial the next morning with defendant present. The People disagree with defendant's argument that this court should nonetheless review the alleged error under a constitutional harmless error standard. The plain error standard of review applies because neither defendant nor his counsel raised an objection in the trial court. *See People v. Miller*, 113 P.3d 743, 749 (Colo. 2005) ("constitutional harmless error analysis is reserved for those cases in which the defendant preserved his claim for review by raising a contemporaneous objection"); *see also Hagos v. People*, 2012 CO 63, ¶ 14.

Preserved claims of error are properly reviewed under a more exacting standard than un-objected to claims because, by timely objecting, a defendant alerts the trial court to an alleged error, generally affording the trial court an opportunity to prevent or correct the alleged error. *See Martinez v. People*, 2015 CO 16, ¶ 13; *People v. Smalley*, 2015 COA 140, ¶ 81. While defendant was not present to personally lodge an objection during the pretrial hearing, his attorney did not object, and defendant himself did not object when he appeared

in court the next morning before trial started. An objection at the later time would still have afforded the trial court an opportunity to correct the alleged error, such as by reconsidering its evidentiary ruling in defendant's presence.

Defendant's reliance on *People v. Luu*, 841 P.2d 271, 275 (Colo. 1992), as binding precedent requiring application of the constitutional harmless error standard to a claimed violation of the right to be present is misplaced. *Luu* did not consider whether the plain error standard of review applied; the court simply assumed that if the error was not structural, it would be reviewed under the constitutional harmless error standard. *See id.* at 273-75.

Twelve years after *Luu*, the supreme court in *People v. Miller*, relying largely on two Supreme Court cases announced after *Luu*, disavowed the approach of reviewing every alleged error of constitutional dimension for harmlessness beyond a reasonable doubt, even if no objection was proffered. 113 P.3d at 748-49. Indeed, the supreme court explicitly overruled the application of constitutional harmless error analysis to unpreserved claims of error:

> Today, we clarify that constitutional harmless error analysis is reserved for those cases in which the defendant preserved his claim for review by raising a contemporaneous objection. To the extent that some of our prior holdings state otherwise, we overrule those contrary statements.

Id. at 749.[1]

Thus, after *Miller*, *Luu* is not controlling precedent on this issue and instead plain error review applies here, where defendant nor his counsel ever raised an objection in the trial court. *See also Janis*, ¶ 10; *People v. Garcia*, 251 P.3d 1152, 1156 (Colo. App. 2010).

B. The Hearing

After the trial readiness conference, the case was continued to the trial date the next week. (CF, p 24). But the day before trial, the court held an unplanned hearing to address an issue that apparently came up as the parties were preparing for trial. (*See* CF, p 25; TR 7-11-2016, pp 2-3). Because the short hearing was unplanned, defendant had not been brought to court.

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[1] *People v. Cardenas*, 2015 COA 94M, ¶ 23, also cited by defendant, relied on *Luu* and a similar pre-*Miller* case—*Key v. People*, 865 P.2d 822, 826 (Colo. 1994)—to apply the constitutional harmless error standard to an unpreserved claim of error.

Defense counsel explained the reason the case was being called: The charges in the case were based on an incident that occurred around 11pm when defendant was alleged to have spit on two officers. (TR 7-11-2016, p 2:17-23). Defendant had also been involved in an incident about five hours earlier that resulted in defendant's placement in the intake cell, but no charges were filed based on that earlier incident. (TR 7-11-2016, pp 2-3). The hearing continued:

> [Defense counsel]: … The only video footage we have in the case is from that separate event. There's a number of police reports that...
> [Prosecutor]: That's not true. There is a video of the intake cell. That's on video.
> [Defense counsel]: The intake cell?
> [Prosecutor]: Yeah.
> [Defense counsel]: Okay. Because I have not seen video footage of inside the...
> [Prosecutor]: It's on the same disc that you received.

(TR 7-11-2016, p 3:2-11).

Defense counsel then asked the court to exclude all evidence of the earlier incident because: there were no charges based on it, it was separated from the charged conduct by five hours, and its admission

would violate CRE 404(b) and "misdirect the jury away from the question that they're going to be answering." (TR 7-11-2106, p 3:12-23).

The prosecutor responded that defense counsel "left out" important information: the prior incident involved both victims, led to defendant's placement in the intake holding cell, and "[w]hen officers went to give him that bedding for the night, he was still fuming" about the earlier incident. (TR 7-11-2016, pp 3-4). Additionally, while defendant was being moved to the intake holding cell, he had been "talking about how he was going to get [RH] later the next time he got a chance." (TR 7-11-2016, p 4:9-14). Thus, argued the prosecution, the earlier incident was res gestae, as it "put[] into context what happens at the holding cell," as well as "go[ing] to the intent that [d]efendant had later on when he attacked [RH and AZ]." (TR 7-11-2016, pp 4-5).

Defense counsel followed up by arguing that, even if the particular statement defendant allegedly made was admissible as res gestae, the whole event was not necessarily so. (TR 7-11-2016, p 5:11-18).

The court ruled that the earlier event was res gestae as it was a continuous flow of events, and also that the earlier event demonstrated the defendant's motivation. (TR 7-11-2016, p 6:18-25, p 7:21-23).

Defense counsel then circled back to the video surveillance of the charged incident. He explained that he had had trouble with the video provided in discovery and ultimately had not realized that he had received footage of the charged incident. (TR 7-11-2016, pp 8-9). He noted that defendant had announced ready for trial based on seeing only the other video, which showed "basically a blank hallway." (TR 7-11-2016, pp 9-10). Defense counsel did not make any particular request at that time, and the court ended the hearing noting, "Whatever request is made, we'll cross that bridge when we get to it." (TR 7-11-2018, pp 9-10).

The following exchange took place the next morning, before the trial began:

> THE COURT: Mr. Peters was gonna talk with his client about some video. I assume there's nothing to report.
> [Defense counsel]: There's nothing to report.

(TR 7-12-2016, p 3:10-12). The prosecutor added that, in light of defense counsel's recent revelation about the existence of video of the charged incident, she had re-extended the previous plea offer and defendant had again rejected it. (TR 7-12-2016, pp 3-4).

C. Law and Analysis

A criminal defendant has a constitutional right to be present "at all critical stages of the prosecution." *People v. White*, 870 P.2d 424, 458 (Colo. 1994). "A critical stage of criminal proceedings is one where there exists more than a minimal risk that the absence of the defendant might impair his or her right to a fair trial." *People v. Cardenas*, 2015 COA 94M, ¶ 22.

Put another way, a defendant is constitutionally guaranteed the right to be present only when his "presence has a relation, reasonably substantial, to the fulness of [his] opportunity to defend against the charge," and "a fair and just hearing would be thwarted by his absence." *Luu*, 841 at 275 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)). But such a guarantee does not exist when a defendant's "presence would be useless, or the benefit nebulous." *White*, 870 P.2d at 458

(quoting *Larson v. Tansy*, 911 F.2d 392, 394 (10th Cir. 1990)); *see also Luu*, 841 P.2d at 275.

Here, the pretrial hearing on July 11 was not a "critical stage." Defendant's absence did not impair his right to a fair trial, and any benefit which might have come from his presence is nebulous and speculative at best. *See, e.g.*, *White*, 870 P.2d at 458-59 (pretrial hearing was not a critical stage where the only action taken by the court was to accede to the defendant's request, adequately conveyed by his attorneys, to proceed with a providency hearing without waiting for a second competency evaluation, and the benefit of the defendant's presence at this hearing would have been nebulous); *People v. Richardson*, 181 P.3d 340, 346-47 (Colo. App. 2007) (no due process right to be present at hearing on motion to continue and during trial court's consultation with counsel about responding to a jury question because his presence would not have been useful).

Defendant argues that he could have helped in defending and responding to the prosecution's "allegations" regarding the facts of the earlier incident as the trial court considered whether that incident was

admissible. But defendant offers no specifics on how he could have helped "defend" and "respond" to the prosecution's argument, or how his presence could have altered the court's ruling. *See People v. Fuentes*, 258 P.3d 320, 328 (Colo. App. 2011) (although the defendant contended on appeal that he could have objected to the prosecution's continuance motion had he been present when the court ruled on it, he did not state any basis for an objection nor any reason that it should have been successful, and the new trial date was within speedy); *cf. Luu*, 841 P.2d at 276 (Quinn, J., specially concurring) (agreeing with the majority's conclusion that the defendant's "absence" (because his interpreter was absent, although the defendant was physically present) during closing argument did not "compromise[] the basic fairness of the trial" and noting that "[i]t would be utter speculation were this court to conclude that the interpreter's absence during summation somehow deprived defense counsel of information which, but for the interpreter's absence, would probably have been used by defense counsel either to object to or to rebut some aspect of the prosecution's summation."); *see also* Crim. P. 43(c)(2) (defendant's presence not required at a conference or argument

on a question of law); *Bell v. People*, 158 Colo. 146, 154, 406 P.2d 681, 685 (1965) (the defendant "was present at all stages when the proceedings required his presence" and there was no error in "the exclusion of accused during conferences of court and counsel on questions of law, at the bench or in chambers" (citation omitted)).

Indeed, the court's ruling was based on the prosecutor's offer as to what she anticipated the *prosecution's* evidence would show, which would have supported the admission of the earlier incident even if the defense had presented evidence that events had unfolded differently. The supreme court considered and rejected a similar (but more well-developed) claim in *People v. Greenlee*, 200 P.3d 363, 367 (Colo. 2009). The defendant there argued that evidence that he made a particular statement two months before the charged murder was inadmissible, in part because it was "not sufficiently reliable" because two other witnesses who had been present did not recall the defendant making the statement. *Greenlee*, 200 P.3d at 366-67. The supreme court rejected the "conflicting recollections" as a basis for excluding the evidence because "the reliability of lay witness testimony goes to the

weight given to the evidence by the fact-finder, not to its admissibility." *Id.* at 367. Thus, even if defendant had offered a conflicting account of the earlier incident, the ruling on the admissibility of the evidence would have been the same.

Defendant also contends that he "should have been present to witness how" defense counsel learned about the existence of surveillance video of the charged incident. He does not explain how not being present "to witness" his counsel's discovery that he had missed a toggle button on the video impaired his right to a fair trial, or how it would have been useful in any way for him to "witness" this discovery. *See People v. Isom*, 140 P.3d 100, 104 (Colo. App. 2005) (the defendant had no due process right to be present when the court considered whether to allow the jury to review a videotape because "[his] presence would have been useless" (because he was represented and the court had no reason to consult with the defendant)).

Indeed, this discovery occurred only by *chance* during the court hearing itself, and could just as easily have occurred while the prosecutor and defense counsel were discussing the case off the record,

away from court—and that in no way would have impacted defendant's constitutional right to be present.

Finally, defendant contends that the People cannot establish that any error here was harmless beyond a reasonable doubt. As noted earlier, the People contend that the plain error standard is the appropriate lens through which to view this alleged error. Under the plain error standard, the defendant must establish that the error was so clear-cut and obvious that a trial judge should be able to avoid it without the benefit of objection. *Romero v. People*, 2017 CO 37, ¶ 6. Further, an error is only plain if it "so undermine[s] the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶ 14 (quoting *Miller*, 113 P.3d at 750).

In any event, the alleged error is not reversible under either standard. First, as to the argument and ruling on the admissibility of the earlier incident, the record shows that the defense had received substantial information about the incident in discovery, and thus was aware of it and its relation to the charged incident, such that defense

counsel would have pursued relevant information about it prior to the July 11 day-before-trial hearing. Further, if defendant had any important, additional information about the incident, defense counsel could have raised the issue again before trial started. *See Garcia*, 251 P.3d at 1155-56 (concluding the record showed the defendant was not prejudiced by his absence for the testimony of the first witness at a suppression hearing because he had previously reviewed the witness's report with counsel and could have discussed the testimony with counsel during the recess; defense counsel did not request more time to confer with his client or ask to recall the witness; and the defendant did not identify "specific examples of anything that he or his counsel might have said or done had he been present during the first part of the hearing.").

Additionally, any error did not prejudice defendant where the court did not consider a factual issue, such as whether the earlier incident occurred as the prosecution asserted; rather, the trial court considered a legal question of admissibility of evidence in light of the facts as the prosecution expected to present them. *See People v. Harris*,

914 P.2d 434, 437 (Colo. App. 1995) (even if the trial court erred by allowing counsel to argue motion in the defendant's absence, it was harmless beyond a reasonable doubt where he did not demonstrate "how the fundamental fairness of the trial was affected by his absence during the argument phase of the suppression hearing at which he was represented by counsel and at which purely legal issues were presented and argued").

Second, although defense counsel noted that defendant's decision to go to trial might have been different had he been aware of the surveillance, that decision was made well before the July 11 hearing. Additionally, the prosecution re-extended its pretrial offer in light of defense counsel's mistake, but defendant again rejected the offer.

Moreover, rather than being prejudiced, the events that unfolded in this case were to defendant's benefit. This hearing was unplanned and apparently occurred when a question arose during the parties' trial preparation as to the admissibility of the earlier incident. Because the impromptu hearing was held in his absence, rather than delayed until he was in court the next day, defense counsel was able to prepare for

trial knowing that evidence of the earlier incident would be admissible and knowing about the video surveillance of the charged incident.

II. The trial court did not plainly err by allowing the victims' testimony that they took precautions against potential blood borne pathogenic diseases after being exposed to saliva and blood.

Defendant contends that the trial court plainly erred by failing to intervene when the two victims mentioned blood-borne pathogens. There was no error, and certainly no plain error.

A. Preservation and Standard of Review

The People agree that defendant did not object to the two statements, and so review is for plain error.

The People agree that rulings on the admissibility of evidence are generally reviewed for an abuse of discretion. *See People v. Theus-Roberts*, 2015 COA 32, ¶ 23.[2]

[2] Defendant also includes a standard of review for alleged due process violations, (Opening Brief, p 13), but makes no meaningful argument on this claim (*see* Opening Brief, pp 13-17 (arguing that the evidence was irrelevant and unduly prejudicial based on the rules of evidence, and asserting, without elaboration or argument, that the admission of the evidence violated defendant's right to a fair trial). As such, the People

B. Challenged Testimony

RH testified that he had minor cuts to his lip and mouth from the first incident with defendant. (TR 7-12-2016, p 154:14-16). So after defendant spit on him, "[o]nce [he] identified that it was blood, that's when it became a concern. And I scheduled appointments with the comp doctor to see if I could get any HIV testing, things such as that." (TR 7-12-2016, p 154:16-18).

Then, as AZ described the charged incident in her testimony, she explained that defendant "spit on us intentionally. I had blood spat into my eyes. And now I am on blood-borne pathogenic --" (TR 7-13-2016, p 16:22-23). The comment stopped there because defense counsel objected regarding AZ's testimony about defendant's state of mind. (TR 7-13-2016, pp 16-17).

C. Law and Analysis

Contrary to defendant's assertion, evidence about the victims' reactions to defendant's conduct was not irrelevant just because the

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are unable to respond and respectfully suggest that this court decline to address it. *See, e.g., Interest of J.O.*, 2015 COA 119, ¶ 19 n.3.

prosecution did not argue that defendant intended to infect when he spit on them.[3] The evidence was relevant (1) to the issue of whether the victims were exposed to defendant's blood or saliva, and (2) to defendant's intent to "harass, annoy, threaten, or alarm." *See* § 18-3-203(1)(f.5)(I), C.R.S. (2017).

First, the prosecution had to establish, as an element of this form of second-degree assault, that defendant caused the victims to come into contact with blood or saliva. *See id.* Evidence that the victims undertook inconvenient measures—such as making and attending medical appointments or undergoing testing or prophylactic treatment based on the possible risk of infection—makes it more likely that defendant's blood or saliva did, in fact, come into contact with the victims. *See* CRE 401 (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).

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[3] There was no evidence that defendant had any sort of infectious disease. (*See generally, trial*; *see also* TR 6-13-2016, p 2:18-24 (prosecutor acknowledged there was no allegation that defendant had a disease and has been trying to infect somebody)).

Second, a victim's reaction is also a relevant consideration in determining whether a defendant had the requisite intent. *See People v. Lopez*, 2015 COA 45, ¶ 8 (in determining whether a defendant charged with menacing had the intent to place a victim in fear, "[w]hat the victim saw or heard, and *how the victim reacted*, are relevant considerations" (emphasis added) (quoting *People v. Manzanares*, 942 P.2d 1235, 1239 (Colo. App. 1996)); *see also People v. Gagnon*, 703 P.2d 661, 663 (Colo. App. 1985) ("While it is not necessary to prove actual subjective fear on the part of the victim as an element of the offense, nonetheless what the victim saw or heard, *and his reactions thereto*, are relevant considerations in determining whether defendant had the requisite intent to place him in fear." (emphasis added) (citation omitted)).

Here, the victims both reacted to defendant's spitting by taking precautionary medical measures—seeking testing or other guidance or treatment related to blood-borne pathogenic diseases. Their reaction shows they more likely felt threatened or alarmed—that they could have contracted a blood-borne illness, and they more likely felt harassed

or annoyed by defendant's conduct—which caused the need to undertake medical precautions. Where defendant's conduct caused this response in both victims, it is more likely that his *intent* was to accomplish just that result.

The victims' reactions also conveyed to the jury an impression of the volume of liquid defendant projected at RH and AZ. That it was a sufficient quantity to raise a concern about the possibility of blood-borne infections suggests an amount greater than would typically be expelled during a forcefully yelled insult. (*See* TR 7-12-2016, p 134:12-15 (defense opening contending that the spit and blood was just an incidental "spray")).

Thus, evidence that defendant's conduct caused the victims to be concerned about contracting a blood-borne illness supports a finding that the victims were "harassed, annoyed, threatened, or alarmed," and, in turn, that defendant intended his conduct to harass, annoy, threaten, or alarm.

Nor was the evidence here unduly prejudicial. "Evidence is unfairly prejudicial if it introduces extraneous considerations into the

trial, such as bias, sympathy, anger, or shock, that cause the jury to decide the case on an improper basis." *People v. Friend*, 2014 COA 123M, ¶ 37. The mere *mention* of HIV did not create an undue risk that the jury would be swayed by any of these improper considerations to find defendant guilty.

First, even if stigma may attach to an HIV diagnosis as defendant suggests, it is not so inflammatory that it would have caused the jury to convict defendant on that basis. The only case relied on by defendant is a civil challenge to a correctional policy of categorically segregating HIV-positive prisoners from the general prison population based on outdated notions about HIV, *Henderson v. Thomas*, 913 F. Supp. 2d 1267 (M.D. Ala. 2012), which does not suggest that a criminal jury would be inclined to find a defendant guilty of spitting on prison guards just because he is HIV-positive.

Second, even if, as defendant suggests, there is an undue risk of prejudice against a defendant who is HIV-positive, the two comments defendant challenges asserted only that the victims took reasonable precautions based on their exposure to blood, and in no way intimated

that defendant was HIV-positive. Certainly, reasonable jurors are aware that HIV testing may be performed as a precaution in many circumstances, even absent any indication suggesting exposure to HIV. *See, e.g.*, AMERICAN RED CROSS, *Infectious Disease Testing*, https://www.redcrossblood.org/biomedical-services/blood-diagnostic-testing/blood-testing.html (last visited August 6, 2018) (donated blood is tested for HIV); CENTERS FOR DISEASE CONTROL AND PREVENTION, *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings* (2006), https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm (last visited August 6, 2018) (CDC recommends routine screening for HIV for patients 13-64 years of age in all healthcare settings and reiterates recommendation for universal HIV screening of pregnant women early in pregnancy); *see also* § 18-3-415, C.R.S. (2017) (diagnostic testing for sexually transmitted infection mandated for certain defendants or juveniles charged with certain sexual offenses).

Furthermore, even if the trial court erred in allowing these two brief comments, there was no plain error requiring reversal in this case.

Defendant contends that the purported error was obvious because the prosecution agreed, before trial, that there was no allegation that defendant intended to infect anyone. But the challenged comments—alluding to medical treatment sought in response to the incident—do not suggest, based on all the facts in this case, that defendant had an intent to infect anyone. Even if they do, that is not the *only* thing that the comments suggest. Thus, the prosecutor's pretrial agreement that she was not arguing that defendant had the intent to infect did not make the challenged comments obviously inadmissible.

Additionally, the challenged comments did not "so undermine[] the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *Miller*, 113 P.3d at 750 (citation omitted). The two comments were brief; the prosecutor did not mention HIV, blood-borne pathogens, or any risk of infection during closing argument;[4] and the court instructed the jury not to be influenced by sympathy, bias, or prejudice. (*See* TR 7-13-2016, pp 57-

[4] Defense counsel, on the other hand, *did* mention HIV during closing argument, and implicitly told the jury that defendant was *not* HIV positive. (*See* 7-13-2016, pp 70-71).

62, 73-77 (prosecution's closings); Supr, p 36). *See People v. French*, 141 P.3d 856, 860 (Colo. App. 2005) (admission of irrelevant evidence was harmless where the testimony was brief, the prosecutor did not dwell on it in closing argument, and the trial court instructed the jury not to be swayed by sympathy or prejudice), *judgment vacated on other grounds*, (Colo. No. 06SC64, Sept. 11, 2006).

Finally, the jury verdict—convicting defendant of assault for spitting on RH but acquitting of the charge naming AZ as the victim—shows that rather than convicting defendant based on improper considerations, the jury carefully considered the evidence and instructions to reach its verdict. *See People v. Larsen*, 2017 CO 29, ¶ 16 (split verdicts suggest any exposure to prejudicial information did not influence the jury); *People v. Braley*, 879 P.2d 410, 414-15 (Colo. App. 1993) (split verdicts indicated that the jury could fairly and properly weigh and evaluate allegedly unduly prejudicial evidence).

III. The prosecutor's voir dire comments about reasonable doubt and rebuttal closing comments directing the jury to relevant evidence and the issues it was charged with determining were proper.

Finally, defendant alleges that the prosecutor committed misconduct so egregious that it amounted to plain error when she offered the jury an illustration on reasonable doubt and argued that the issues raised by the defense were "distractions." The prosecutor's comments were proper, and certainly do not amount to plain error.

A. Preservation and Standard of Review

Defendant does not state the standard of review for the determination of whether a prosecutor's comments are improper in the first place. "Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion." *People v. Ortega*, 2015 COA 38, ¶ 50 (quoting *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005)). Accordingly, the reviewing court will not disturb the trial court's ruling absent "a showing of gross abuse of discretion resulting in prejudice and a denial of justice." *Id.* (quoting *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010)).

This court determines "whether the prosecutor's questionable conduct was improper based on the totality of the circumstances." *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). Thus, the court evaluates the claimed improper argument in the context of the argument as a whole and in light of the evidence before the jury. *People v. Arzabala*, 2012 COA 99, ¶ 64.

The People agree that defendant did not object to the claimed improper comments, so review is according to the plain error standard: reversal is warranted only for misconduct that is "flagrantly, glaringly, or tremendously improper." *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005).

B. Law and Analysis

1. Reasonable Doubt

Defendant first contends that the prosecutor misstated the law and lowered the prosecution's burden of proof by offering an illustration to conceptualize the reasonable doubt standard. The prosecutor did not misstate the law, but if she did, it was not plain error.

During voir dire, the prosecutor discussed with a prospective juror the factors that she had considered in buying a house, which included the market, comparables, types of loans, the neighborhood, resale value, and the appearance of the house. (TR 7-12-2016, pp 72-73). The prosecutor then asked this juror, a Broncos fan, "Would you have cared if it was owned by a Raiders' family?" (TR 7-12-2016, pp 72-73). The prosecutor followed up, asking whether the juror would have "cared if there was an inspection on the house and there was a crack in the foundation? Would that cause you some hesitation on purchasing the house that you liked?" (TR 7-12-2016, p 73:7-10). She concluded her voir dire by explaining that, "that's kind of how reasonable doubt is": that something "superfluous" is not a reasonable doubt—a Raider's fan owning the house doesn't cause you to hesitate; but a crack in the foundation does cause hesitation. (TR 7-12-2016, p 73:12-22).

The prosecution must prove every element of a charged offense beyond a reasonable doubt. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citation omitted). But the constitution does not require the use of any particular words to describe the standard; "[r]ather, taken as a whole,

the instructions must correctly convey the concept of reasonable doubt to the jury." *Id.* (citations and alteration marks omitted).

In Colorado, the model jury instruction (on which the trial court instructed the jury in this case, (Supr, p 40)), defines reasonable doubt as:

> a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

COLJI-Crim. E:03 (2017); *see People v. Robb*, 215 P.3d 1253, 1262-63 (Colo. App. 2009) (concluding this definition is consistent with due process requirements, but noting that other definitions could also be constitutionally permissible).

The prosecutor's illustration in this case reflects just this definition. The illustration offered an example of a circumstance that, as described in the reasonable doubt definition, would cause a reasonable person to hesitate to act in a matter of importance to

himself: a reasonable person in the market for a home, viewing a house that is suitable in many ways, would hesitate upon discovering that the foundation was cracked. Notably, the prosecutor specifically pointed to the hesitation to act here. This illustration was proper.

The People acknowledge, as defendant points out, that a few jurisdictions do prohibit comparing the reasonable doubt standard to decisions that people make about their own affairs, because there is simply no decision like convicting someone of a crime. *See, e.g.*, *Holmes v. State*, 972 P.2d 337, 343 (Nev. 1998); *Com. v. Ferreira*, 364 N.E.2d 1264, 1273 (Mass. 1977).

But other jurisdictions disagree, and allow reasonable doubt to be defined with reference to important or serious decisions people make regarding their own affairs. *See, e.g.*, *State v. Coward*, 972 A.2d 691, 705 (Conn. 2009) ("the kind of doubt which, in the serious affairs which concern you in everyday life, you would pay heed and attention to"); *United States v. Rios*, 830 F.3d 403, 432-33 (6th Cir. 2016) ("proof which is so convincing that you would not hesitate to rely and act on it in making an important decision in your own life").

And Colorado defines reasonable doubt in line with the latter approach, invoking "matters of importance to" reasonable people. COLJI-Crim. E:03 (2017). Further, this definition passes constitutional muster. *See People v. Alvarado-Juarez*, 252 P.3d 1135, 1137 (Colo. App. 2010); *Robb*, 215 P.3d at 1262-63.

The example here, the decision to purchase a home, fit within this class. Buying a home is a matter of importance to most people, not a trivial decision—such as determining the picture created by a jigsaw puzzle, *see People v. Carter*, 2015 COA 24M-2, ¶ 58 (assuming prosecutor's analogy was improper)), or a decision that is made frequently and without much, if any, contemplation—such as the daily decision to drive a car, *see People v. Baca*, 2015 COA 153, ¶¶ 9-13 (assuming trial court's comment was improper and amounted to instruction).

Thus, regardless of whether the illustration would have been acceptable in Nevada or Massachusetts, under Colorado law it was proper.

Nor was the illustration improper simply because a different prosecutor's analogy between reasonable doubt and buying a house was improper in *People v. Doubleday*, 2012 COA 141, *rev'd on other grounds*, 2016 CO 3. There, the prosecutor told the jury that having doubts was part of any important decision, but that "[y]ou all obviously got over any reasonable doubts that you had about buying the house otherwise you wouldn't have bought it." *Id.* at ¶ 61. In contrast, the prosecutor here focused on the *hesitation to act*, and did not imply "that the jurors could render a guilty verdict despite the reasonable doubts that they might have." *Id.* at ¶ 62; *see also State v. Estes*, 418 A.2d 1108, 1115-16 (Me. 1980) ("courts commonly approve an instruction explaining reasonable doubt as 'such a doubt as in the graver transactions of life would cause reasonable, fair-minded, honest, and impartial people to hesitate and pause.'").

Finally, even if this court were to conclude that the illustration was improper, it was not plain error.

"Plain error is error that is obvious, and that so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Carter*, ¶ 51.

First, the alleged error was not obvious. Courts have recognized that reasonable doubt illustrations may be "problematic" for certain reasons—if they: "(1) 'quantify the concept of reasonable doubt'; (2) 'inappropriately trivialize the state's burden'; (3) 'equate the burden of proof to an everyday choice'; or (4) 'use iconic images, which invite the jury to jump to a conclusion about a defendant's guilt.'" *People v. Van Meter*, 2018 COA 13, ¶ 28 (quoting *People v. Camarigg*, 2017 COA 115M, ¶¶ 44-47). But the house-buying illustration here avoided these identified pitfalls.

Similarly, the illustration avoided the problems identified in two published Colorado cases considering house-buying illustrations. As discussed above, the illustration here avoided the problem identified in *Doubleday* by appropriately honing in on a reasonable person's hesitation to act in a particular matter of importance (buying a home). For the same reason, it also avoided the problem in *People v. Cevallos-*

Acosta, where the prosecutor told the jury that "having doubts about important decisions such as buying a house is natural" but that a "reasonable doubt wouldn't just make you stop and hesitate, it would make you change your mind." 140 P.3d 116, 123-24 (Colo. App. 2005). Here, unlike *Cevallos-Acosta*, the focus was on the hesitation to act. Accordingly, error here, if any, was not obvious. See *Van Meter*, ¶ 32 (puzzle analogy was not obvious error "without the benefit of the guidance provided by this opinion").

Second, the illustration did not undermine the fundamental fairness of the trial. It was brief, occurred early in trial, and was not repeated after voir dire. See *Doubleday*, ¶ 62; *Cevallos-Acosta*, 140 P.3d at 124. The jurors were instructed—both orally and in writing—at the end of trial with the proper definition of reasonable doubt. (Supr, p 40; TR 7-13-2016, pp 51-55). See *Doubleday*, ¶ 62; *Cevallos-Acosta*, 140 P.3d at 124.

Accordingly, even if this illustration was error, it was not plain error requiring reversal.

2. Denigrating defense counsel

Defendant also contends that a comment from the prosecutor during rebuttal closing denigrated defense counsel. There was no misconduct; the comment was properly attempting to focus the jury's attention on the relevant evidence and the issues that the jury was charged with determining.

"A prosecutor's reference in closing argument to defense counsel's 'tactics' may be improper because it is directed to opposing counsel rather than to the law and facts of the case." *People v. Allee*, 77 P.3d 831, 836 (Colo. App. 2003) (citing *People v. Coria*, 937 P.2d 386 (Colo. 1997), as deciding that the trial court should have sustained objections to prosecutor's references to "Theatrics 101," "smoke and mirrors," and "diversionary tactics")). But where the prosecutor's comments, such as exhorting the jury "not [to] be confused by the [d]efense tactic to look for things that aren't there," are made in the context of attempting to draw the jury's focus to relevant evidence rather than to denigrate defense counsel, they do not constitute misconduct. *Id.*

Additionally, "a prosecutor has wide latitude in the language and presentation style used." *Domingo-Gomez*, 125 P.3d at 1048. She may "employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance." *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010). And "because 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." *Domingo-Gomez*, 125 P.3d at 1048.

It is clear from the above authorities that context is important in determining the propriety of a prosecutor's comments, and so the whole of the closing arguments should be considered.

Here, the prosecutor's initial closing argument discussed the evidence and how it fit into the elements of the crime, on which the court had just instructed the jury. (*See* TR 7-13-2016, pp 57-62). The only allusion to the defense was to explain that the theory that defendant had unintentionally "sprayed" spit when making an offensive comment (the theory that had been elucidated during the defense

opening argument (TR 7-12-2016, p 134: 12-15)) didn't fit with the evidence. (*See* TR 7-13-2016, p 62:4-9).

Defense counsel then began his closing: "We would not be here today in the courtroom if [RH] did not act unprofessionally, violate their protocol, escalate a situation …." (TR 7-13-2016, pp 62-63). Defense counsel argued: that RH was "extremely unprofessional" and cursed at defendant while refusing to let him call his family; that RH "made up" the presence of the female intern he testified that defendant was yelling sexual comments at; that RH had violated policy by using (escalating) physical force and failing to immediately leave the room when another staff member arrived during the earlier incident; that the staff used an excessive degree of force and that the measures taken in this case "teaches the wrong message" in a juvenile facility. (TR 7-13-2016, pp 62-68). Defense counsel lamented the poor conditions defendant suffered in the intake cell, and turned back to argue again that the staff had violated policy or just did not do what was "appropriate" in a myriad of ways that night. (TR 7-13-2016, pp 68-73).

The prosecutor then made her rebuttal closing. Although she responded to many of defense counsel's arguments, she also, correctly, pointed out that most of the issues he raised were not pertinent to the determination that the jury was charged with making: "And that's what you have to determine. Did this defendant spit blood and saliva on our two victims[?]" (TR 7-13-2016, p 74:15-17). "Folks, this is what this case is about. This is what the law asks you to determine: Did the defendant do the spitting?" (TR 7-13-2016, p 76:3-4).

Referencing the debate about whether a female intern was standing at the defendant's unit prior to the earlier incident, and whether defendant had some justification for spitting on the victims arising from the alleged excessive force during that earlier incident, the prosecutor commented (and defendant challenges as improper):

> These are mere distractions. You have children, many of you. Many of you work with children. Children don't want you to see what their wrongs are, so they distract you. That's what's going on. Defense is trying to distract you from what happened in that second video.

(TR 7-13-2016, p 74:18-22). Directly following, the prosecutor redirected the jury's attention to relevant evidence on the pertinent issues: "He's trying to place this case about [RH] and [AZ]. And yet their testimony and the testimony of all the other witnesses is consistent with the video." (TR 7-13-2016, p 74:22-24).

This was a proper response to defense counsel's closing, attempting to focus the jury on relevant evidence. And although the mention of children was merely a rhetorical flourish, the prosecutor should also be given the benefit of the doubt since it was made during the heat of trial in rebuttal closing, *see Domingo-Gomez*, 125 P.3d at 1048, especially considering that defense counsel had just made a comparison characterizing RH's conduct as childish.[5]

The prosecutor then waded into the debate on the degree of force used, because defendant had raised and argued excessive force—during

[5] In defense counsel's closing, he criticized RH for pushing aside a table during the earlier incident, asserting that it showed "how angry" RH was, and compared RH to a child: "You're supposed to be the adult in this room. Many of you on this jury are professionals with dealing with children, have lifetime experience on this. You're supposed to be the level-headed person in the room. You don't become the child in the room like [RH] did." (TR 7-13-2016, p 68:18-25).

trial as well as closing argument—despite the fact that it was not a legal excuse or justification for the charged conduct. Again here, the prosecution pointed out that this debate was a "mere distraction" and a "cloud of smoke," (TR 7-13-2016, p 75:13-14), properly attempting to re-direct the jury to the issues they were charged with deciding and the evidence relevant to those determinations:

> He spits blood and saliva on two staff members. This is confirmed by the video. This is what happened. This is what you have to decide as a juror. Did you see the defendant do the spit? Did you hear witnesses that confirmed that happened? You did. That's the determination you make.
> Don't focus on distractions. You focus on what really happened on February 25th, 2016, starting at 11:13 p.m.

(TR 7-13-2016, p 76:12-19).

Thus, the prosecutor's arguments were all responsive to the defense arguments and were attempts to focus the jury's attention to relevant evidence; they were not intended to denigrate defense counsel. *See Carter*, ¶¶ 62, 72 (the prosecutor's comment that defense counsel was trying to distract the jury with "red herrings," taken in context, was

not misconduct); *People v. Perea*, 126 P.3d 241, 248 (Colo. App. 2005) (prosecution did not denigrate defense counsel with rebuttal closing argument that he was "blowing smoke today to try to divert you from what's going on in this case, to obscure the facts of the case").

Further, if this court concludes that some prosecutorial comments were improper, they were still responsive to defense arguments and were not so flagrant or prejudicial to rise to the level of plain error. *See People v. Manier*, 197 P.3d 254, 258 (Colo. App. 2008) (although it is improper for a prosecutor to denigrate defense counsel, comment regarding "common defense attorney tactic[s]" did not rise to the level of plain error).

CONCLUSION

For the foregoing reasons and authorities, the People respectfully ask this Court to affirm the judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **M. SHELBY DEENEY** and all parties herein via Colorado Courts E-filing System (CCES) on August 9, 2018.

/s/ Tiffiny Kallina