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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; El Paso District Court; Honorable David S. Prince; and Case Number 16CR1103	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JAVARRAY CHARLES JANUARY	
Megan A. Ring Colorado State Public Defender JEFFREY SVEHLA 1300 Broadway, Suite 300 Denver, CO 80203 Phone Number: (303) 764-1400 Fax Number: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #51768	Case Number: 16CA1940
REPLY BRIEF	

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ARGUMENT

I. The district court violated Mr. January's constitutional right to be present when it conducted a pre-trial evidentiary hearing in his absence.

A. Contrary to the State's position, the record shows January's presence at the hearing would have helped counsel respond to the State's proffers.

The State argues the hearing was not critical because "any benefit which might have come from" January's presence "is nebulous and speculative at best." AB, p 18. The State complains January "offers no specifics" as to how he may have helped his attorney respond to its undisputed proffers at the hearing, which it contends would have supported the admission of the prior incident "even if" January had been present. AB, pp 18-21.[1]

But the record shows the benefits of January's presence were not "nebulous." His absence created "more than a minimal" risk that his right to a fair trial "might" have been impaired. *People v. Janis*, 206 COA 69, ¶ 14 (*cert. granted*, *People v. Janis*, 16SC515 (Feb. 21, 2017) (proceeding is critical where the record reflects "more than a minimal risk" that the defendant's absence "might" have impaired his right to a fair trial).

[1] In its brief, the State substitutes the victims' names for their initials. AB, pp 1-6, 15, 26, 29, 33, 45, 47. The victims' names need not be reduced to initials under C.A.R. 32(f), as they were not victims of sexual assault or minors.

January was active and vocal in the proceedings leading up to the hearing at issue. On April 18, 2016, January directly complained to the court that the proceedings have "been kind of dragging" and asked whether the parties had even talked to the witnesses and victims yet. (TR 4/18/16, pp 4:9-5:7). On the next date, May 31st, January asked the court directly to address his bond reduction request. (TR 5/31/16, p 3:14-25). And on June 13th, January once again addressed the court directly, and also argued with the prosecutor about bond. (TR 6/13/16, pp 4:7-15, 5:3-6). Also on June 13th, the court denied the State's 404(b) motion, ruling from the bench that evidence of a prior charge stemming from a 2015 incident would not be admissible at trial. (*Id*. at 6:9-22; CF, pp 9-11). Without an active, vocal January present, the court ruled the opposite way as to different prior act evidence at the hearing in question.

The State stresses the fact that the court ruled the prior incident admissible based only its factual proffers. AB, p 20. But this fact supports January's position, as he could have provided his attorney information to counter the State's proffers. *See People v. Ragusa*, 220 P.3d 1002, 1009 (Colo. App. 2009) (had defendant been present, she could have objected and corrected "misstatements (if any)" made by counsels).

The court's focus at the hearing was initially on a video of the prior act, which took place roughly five hours before the charged incident. Defense counsel complained he had not seen the video and asked for its exclusion under 404(b). (TR 7/11/16, p 3:2-23). The State explained at length to the court what the video shows, how it "puts into context" the alleged incident five hours later, and how it proves January's intent. (*Id*. at 3:24-5:9). The court asked defense counsel, "[A]ny rebuttal?," but counsel could not respond because he had not seen the video. (*Id*. at 5:10).

January was obviously involved in the videoed incident and could have given his lawyer information about what it did or did not show. Without January there to help, counsel asked for "the statement" about the prior act, which the State was able to relate, vaguely, to the court. The court decided it did not need to see the video based on the State's proffer and found the act was admissible under a *res gestae* theory. (*Id*. at 6:6-20). The court then "paused" the hearing, and when the parties went back on the record, the State described the statement in detail. (*Id*. at 7:5-20). Defense counsel was again unable to respond without January present. Based on the State's undisputed, detailed proffer, the court then finalized its ruling that the *res gestae* evidence would be admissible at trial. (*Id*. at 7:21-22).

Thus, the record does show January would have benefitted by being present at the hearing. He was demonstrably active in the proceedings, and would have been willing to give his lawyer information about the prior incident at issue, which involved him. Without information from January, defense counsel was unable to challenge the State's proffers, which led to the court making an uncontested ruling.

B. The court's ruling at the hearing significantly changed the parties' theories and the State's evidence at trial, indicating January's absence affected his right to a fair trial.

The court's uncontested ruling allowed evidence that figured prominently in the parties' theories and the State's evidence, undercutting the State's contention that January's absence did not "impair his right to a fair trial." AB, pp 10, 18.

The prosecutor's first remarks to the jury in opening were, "They say a picture's worth a thousand words," referring to the video of the prior incident, which it immediately assured the jurors they would see. (TR 7/12/16, p 127:1-13). The State also used the prior incident to contextualize January's response. The State posited January got out of control and angry five hours before the incident, the officers responded reasonably by putting him in segregation, and January was "still upset" when he saw the officers again just before the alleged incident. (*Id*. at 127:9-129:2). The State made this theory more explicit in closing. The prosecutor argued that January was "still mad" and "angry" about the prior incident, and that

the prior incident demonstrated his criminal intent and motive for the alleged incident. (TR 7/13/16, pp 57:15-23, 59:18-60:15, 77:4-5).

The defense anticipated the *res gestae* evidence by theorizing in opening that the officers responded inappropriately to the prior incident and unreasonably re-escalated things at the time of the alleged incident. (TR 7/12/16, pp 131:5-134:12). Defense counsel made this theory into direct argument in closing, contending the jurors "would not be here today" but for the alleged victims acting "unprofessionally," violating "their protocol," and escalating the situation in response to the prior incident. (TR 7/13/16, pp 62:25-63:6). "The first event matters," counsel argued, as "it's intimately tied to everything that happened." (*Id*. at 63:9-10).

The State then presented extensive *res gestae* evidence at trial. Officer Herrera testified about the *res gestae* incident at length. (TR 7/12/16, pp 138:10-139:20, 140:11-144:15, 146:10-148:20, 155:16-159:3, 163:13-165:17). Officer Everitt testified *only* about the prior incident, and most of Officer's Padilla's testimony was likewise about the prior incident. (*Id*. at 169:16-178:8, 195:2-198:10, 202:7-204:10). Several other officers' testimony focused on the actual incident, but they all described an "angry," "agitated" January, who needed to be "controlled." (*Id*. at 208:15-214:2, 221:12-224:15, 231:4-232:10, 236:24-237:21).

C. The cases the State cites are inapposite.

The State discusses only one case, *People v. Greenlee*, 200 P.3d 363 (Colo. 2009), in arguing the hearing was not a critical stage. The State insists the defendant in *Greenlee* advanced a similar argument to the one January now advances. AB, pp 20-21. However, the question in *Greenlee* was whether the trial court erred in admitting evidence of a prior act involving the defendant, which occurred two months before trial. *Greenlee*, 200 P.3d at 365. The Court found the evidence was not barred under the hearsay rule before reaching its ultimate Rule 403 conclusion that the evidence was admissible because its relevance was not "substantially outweighed" by the danger of unfair prejudice. *Id*. at 366-68. The Court did not even decide whether the evidence was admissible as *res gestae*, given its relevancy finding. *Id*. at 368. The State focuses this Court on part of the *Greenlee* Court's "not sufficiently reliable" language. AB, p 20. But that language appears in the Court's discussion of Rules 404(b) and 403. *Greenlee*, 200 P.3d at 366-68.

The question here is *not* whether the trial court erred in admitting hearsay, irrelevant, or unduly prejudicial evidence. It is about whether the hearing was a critical stage – a question that in turn depends on how *significant* the evidence was and how the defendant's absence "might" have created "more than a minimal risk"

that his ability to defend the charges and get a fair trial was "impaired." *See Janis*, ¶ 14. There was no critical stage question presented in *Greenlee*, and the significance of the prior act evidence at issue there was not even discussed, as the Court found no error with its admission in the first place.

The State also uses a number of parentheticals in its discussion of the issue, but the cases it cites parenthetically likewise have no bearing on this issue. AB, pp 19-21. The defendant in *People v. White*, 870 P.2d 424, 430, 458-59 (Colo. 2004), did not *even argue* on appeal that the hearings held in his absence were critical. The defendant in *People v. Richardson*, 181 P.3d 340, 346-47 (Colo. App. 2008), was absent from a phone conference where the parties discussed the defense's motion to continue, but the defendant had authorized his counsel in advance of the hearing to waive speedy trial and get the continuance. The defendant in *Richardson* was also absent when the court answered a legal question asked by the jury during deliberations, but the court found his presence would not have been useful, and considered any error harmless because the trial court properly answered the question. *Id*. In *People v. Isom*, 140 P.3d 100, 104 (Colo. App. 2006), the defendant argued the trial court erred in admitting a videotape and, in a "related argument," contended he should have been present when it allowed the jury to view the tape during deliberations; the court rejected his argument, finding his

presence "would have been useless." *Bell v. People*, 406 P.2d 681, 685 (Colo. 1965), does not contain any analysis on this question.

People v. Fuentes, 258 P.3d 320 (Colo. App. 2011), is the only case the State parenthetically cites that approaches relevancy here. In *Fuentes*, the defendant was absent on a date where the court allowed the State's motion for continuance. *Id*. at 327. But, unlike here, defendant Fuentes failed to explain how he would have objected to the motion, or what basis he would have had for objecting. *Id*. More significantly, the court's ruling in *Fuentes* did not result in a crucially important evidentiary ruling that dramatically influenced the parties' theories and the State's evidence at trial.

D. This Court reviews for constitutional harmless error.

Our Supreme Court's decision in *Luu v. People*, 841 P.2d 271 (Colo. 1992), shows this Court reviews for constitutional harmless error. The defendant in *Luu*, who did not understand English at the time of his trial, argued the trial court violated his right to be present when he was without an interpreter for closing arguments and the instructions conference. *Luu*, 841 P.2d at 272. Defense counsel in *Luu* affirmatively told the trial court the interpreter's presence was not "necessary" and would not affect Luu's rights. *Id*. Luu himself was present and did not do anything to suggest he had an objection. *Id*. Even still, the Court

addressed the error directly, finding constitutional harmless error to be the appropriate standard. *Id.* at 275. Constitutional harmless error is *a fortiori* appropriate here, too, where the court and defense counsel only noted January's absence and January was not present to lodge an objection. *See also People v. Cardenas*, 411 P.3d 956, 963 (Colo. App. 2015) (applying same standard to same issue).

Despite *Luu*, the State contends plain error review is appropriate under *People v. Miller*, 113 P.3d 743 (Colo. 2005). AB, pp 11-12. The State argues *Miller*, which our Supreme Court decided 12 years after *Luu*, "disavowed the approach of reviewing every alleged" constitutional error for "harmlessness beyond a reasonable doubt." AB, p 12.

Miller held plain error review applies where "the defendant fails to object" in the trial court. *Miller*, 113 P.3d at 752. It was a case about forfeited errors or, as the Court put it in *Miller*, "unobjected-to" errors. *Miller*, 113 P.3d at 748. Our Supreme Court recently explained forfeiture is "the failure to make the timely assertion of a right." *People v. Rediger*, 416 P.3d 893, 902 (Colo. 2018).

But January did not fail to object; he was denied the opportunity to object. As noted in the opening brief, his absence made objecting impossible, so the nature of the error here places it outside *Miller*'s holding. OB, p 7. The State does not

dispute his right to be present was personal to him and could not have been waived by counsel. *See Penney v. People*, 360 P.2d 671, 673 (Colo. 1961). In this way, the issue resists *Miller*'s preservation analysis.

Janis helps illustrate the difference between the defendant's failure to object resulting in forfeiture and the defendant's inability to object due to his absence. The defendant in *Janis* left the courtroom due to PTSD when the victim testified at trial. *Janis*, ¶ 9. Counsel explained at a sidebar she was leaving, but neither he nor Janis objected. *Id*. This Court found waiver and invited error did not apply, but did review for plain error, suggesting forfeiture analysis. *Id*. at ¶ 10. This was consistent with *Miller*, as Janis, unlike January, was present and had the chance to object before she left the courtroom.[2]

Moreover, plain error applies where the error was "not brought to the attention of the court." Crim. P. 52(b). But here the trial judge noticed the problem for himself. He stated at the outset of the hearing at issue, "And we should be clear for our record. Mr. January is not present." (TR 7/11/16, p 2:14-

[2] There is a split of authority in this Court on what standard of reversal to apply in this context. *People v. Garcia*, 251 P.3d 1152, 1156 (Colo. App. 2010), also applies a plain error standard of review to a "right to be present" issue, while *Cardenas*, 411 P.3d at 963, applies a constitutional harmless error standard. January contends constitutional harmless error is the more appropriate standard since a defendant cannot object when he is not present. *See People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008) (one division of the appellate court is not bound by another division).

15). The judge therefore had the opportunity to prevent the error by securing January's presence or passing the matter.

II. Repeated improper evidence violated due process and the rules of evidence.

A. Standard of review and preservation.

January agrees this Court reviews for an abuse of discretion this unpreserved evidentiary issue. OB, p 13; AB, p 25. However, it is important to note that due process violations, like the one here, can be subject to abuse of discretion review. *See, e.g.*, *People v. Rodriguez*, 914 P.2d 230, 290 (Colo. 1996). January maintains the court's erroneous rulings denied him due process and his right to a fair trial, for reasons set out in the opening brief. U.S. CONST. amends. V, VI, XIV; Colo. CONST. art. II, §§ 16, 25; OB, pp 13-17.

B. The improper evidence was not relevant as to whether the victims came into contact with blood and saliva.

The State argues the victims' testimony at issue was relevant to whether they were exposed to blood or saliva, which it was required to prove at trial. AB, p 27; (Suppressed CF, p 46; Supplemental CF, p 2); C.R.S. § 18-3-203(1)(f.5)(I). The State contends the testimony shows the victims "undertook inconvenient

measures," making it more likely that they did, in fact, come into contact with blood and saliva. AB, p 27.

But the victims did not testify as to inconvenient measures. All Herrera said was that he scheduled an appointment with a doctor, and all Zamarron said was that he was on "blood-borne pathogenic – ." (TR 7/12/16, p 154:11-18; TR 7/13/16, p 16:22-23). As the State argues elsewhere in its brief, the testimony "asserted only that the victims took reasonable precautions based on their exposure to blood." AB, p 30. Moreoever, both witnesses testified they came into contact with blood and saliva *before* giving the improper testimony at issue. (TR 7/12/16, p 152:17-18; TR 7/13/16, p 16:22-23). So assuming their testimony was not too speculative and unclear to be totally irrelevant in the first place, any remaining traces of relevance dissipated by the time the witnesses testified about HIV and blood-borne pathogens.

C. The evidence was not relevant to January's intent.

The State contends in a related argument that the victims' testimony was relevant to whether January intended to harass, annoy, threaten, or alarm them. AB, p 29. But the cases the State cites demonstrate a victim's reaction is a relevant consideration only where the alleged offense is menacing, a general intent crime. AB, pp 28-29. *People v. Lopez*, 399 P.3d 129 (Colo. App. 2015), *People v.*

Gagnon, 703 P.2d 661 (Colo. App. 1985), and *People v. Manzanares*, 942 P.2d 1235 (Colo. App. 1996) – all were menacing cases. Menacing requires the defendant be aware "that his or her conduct is practically certain to cause the result" of putting the victim in fear of imminent serious bodily injury. *Gagnon*, 703 P.2d at 663; C.R.S. § 18-3-206(1) (menacing statute). This awareness "is the gravamen of" menacing, and therefore a victim's reaction to the defendant's conduct can be relevant to show his or her intention to put the victim in fear of imminent serious bodily injury. *Manzanares*, 942 P.2d at 1239; *Lopez*, 399 P.3d at 132-33. But there is nothing in the case law to support the proposition that how a victim reacted to second-degree assault can be relevant to the defendant's intent.

The State contends that because January caused the victims to react by taking precautionary medical measures, it is more likely they felt threatened and he intended to cause them to feel harassed or annoyed. AB, pp 28-29. Assuming January caused the victims to take medical precautions, that would not mean he thereby intended to harass or annoy them. As the State notes, there was no evidence or argument at trial that January had an infectious disease. He then could not have anticipated, let alone intended, to harass or annoy the victims based on that non-existent fact.

D. The evidence was unfairly prejudicial under Rule 403.

The State argues the victims' testimony was not so inflammatory "that it would have caused the jury to convict defendant on that basis." AB, p 30. But that position does not answer the question presented under Rule 403. The question is not whether the evidence was so prejudicial that it would have caused conviction because it was admitted. Such a question wrongly suggests a more exacting standard than the Rule contemplates. The correct question is whether admission of the evidence was error because it had an "undue tendency to suggest a decision on an improper basis." *See, e.g., People v. McClelland*, 350 P.3d 976, 984 (Colo. App. 2015), *and People v. Dist. Ct.*, 869 P.2d 1281, 1286 (Colo. 1994). As explained in the opening brief, the improper suggestion here was the "significant social stigma" associated with HIV. OB, pp 15-16.

The State complains of a lack of authority related to that stigma and its inflammatory nature. AB, p 30. But plenty of authority exists for that proposition. *See, e.g., People v. Dembry*, 91 P.3d 431, 435 (Colo. App. 2004) (noting trial court's weighing of "the possible prejudicial effect of defendant's HIV status"); *People v. Shawn*, 107 P.3d 1035, 1036 (Colo. App. 2005) (observing that the "dangers of HIV are widely known"). Moreover, the General Assembly has enacted legislation reflecting society's inflammatory understanding of HIV/AIDS.

For example, C.R.S. § 18-3-415.5(3)(b), (5)(b)(2), allows the State, upon learning that a defendant had "notice of his or her HIV infection" prior to committing a sexual offense, to ask for mandatory sentencing "of at least the upper limit of the presumptive range for the level of offense committed." This reflects society's fear of the virus. The legislature has also acknowledged its stigma and the difficult connection it has to marginalized populations. C.R.S. § 25-4-1401(1) creates treatment funding for "individuals of lower income" who have AIDS or HIV out of the General Assembly's express recognition that that population has a special need for treatment. *See also* Thomas J. Coates, *Stigma in the HIV/AIDS epidemic: A Review of the Literature and Recommendations for the Way Forward*, AIDS, 2008 Aug. 22.

The State also argues the victims' testimony indicated only that they "took reasonable precautions based on their exposure to blood" and "in no way intimated that" January "was HIV-positive." AB, pp 30-31. Herrera did not describe a causal relationship between the spit and getting HIV testing, but the intimation was there. He testified about the testing in response to the State's question about what he did after the incident. (TR 7/12/16, p 154:11-18).

E. This Court should reverse for the trial court's errors in admitting the irrelevant, highly prejudicial evidence at issue here.

The State notes it agreed before trial January was not trying to infect anyone, but argues the error here was still not obvious to the court because the victims' testimony did "not suggest" January's "intent to infect anyone." AB, p 32. The State again takes a position that contradicts its relevancy argument. Its relevancy argument, in part, is that the testimony is relevant *because* it demonstrates January's intent. AB, pp 28-29. This contradiction undercuts both its relevancy and plain error arguments. In any case, the best understanding of the record is that while the testimony did not demonstrate January's intent, it did carry significant prejudicial danger. That obvious prejudicial danger, the clear irrelevance of the testimony, and the fact that the court before trial received assurance from the State that there was "no allegation" that "January has some sort of disease," all support a finding that the error was obvious. (TR 6/13/16, p 2:20-24); OB, p 16.

The State argues January was not prejudiced because the victims' testimony was brief and was not combined with improper argument or instructions. AB, p 32. While brief, the testimony was very damaging – the comments stigmatized January and cast him as an abhorrent person willing to spread dangerous diseases while in custody. Moreover, there is no requirement that for error to be plain, it must be aggravated by improper argument or instructions. The State also

emphasizes that the jury acquitted January of assaulting Zamarron, and for that reason he was not prejudiced. AB, p 33. But that one not guilty verdict simply shows the State's evidence was weak, making the error here appear all the more comparatively significant.

III. The prosecutor's repeated impermissible comments violated due process.

A. Review is *de novo*.

The State complains January failed to state the standard of review "for the determination of whether a prosecutor's comments are improper in the first place," pointing to *Domingo-Gomez v. People*, 125 P.3d 1043 (Colo. 2005), and *Wend v. People*, 235 P.3d 1089 (Colo. 2010). AB, pp 34-35. But January cited to both these decisions in his opening brief. OB, pp 17-18.

More to the point, the case law contemplates a *de novo* standard of review for unpreserved prosecutorial misconduct issues like this one. *Domingo-Gomez*, 125 P.3d at 1051-53 (directly reviewing the prosecutor's statements and determining some were improper); *see also People v. Rhea*, 349 P.3d 280, 291 (Colo. App. 2014) ("applicable standard of review depends on whether the issue was preserved"). Where counsel objected and thereby prompted the trial court to exercise its discretion, review is for a gross abuse of discretion. *People v. Garner*,

2015 COA 175, ¶ 26. But where counsel "did not contemporaneously object to" the prosecutor's comments, "review is for plain error." *Id*. at ¶ 34.

Wend, 235 P.3d at 1093, and *Domingo-Gomez*, 235 P.3d at 1053, were both plain error cases and, in both, the Court analyzed the unpreserved misconduct directly, without deference to the trial court. This makes sense. Where the trial court never exercised its discretion, there is no ruling for this Court to review for an abuse of discretion. The parties agree this issue is not preserved. OB, p 17; AB, p 35. So as in *Wend* and *Domingo-Gomez*, this Court should review directly the propriety of the State's comments here before moving on to decide whether to reverse for plain error.

This is particularly true because the court's errors here violated January's rights to due process and a fair trial, which further suggests *de novo* review. U.S. CONST. amends V, VI, XIV; Colo. CONST. art. II, §§ 16, 25; OB, pp 17-18 (noting *de novo* review appropriate for due process violations); *Domingo-Gomez*, 125 P.3d at 1048 (prosecutor's duty to advocate "within permissible means" implicates a defendant's right to a fair trial); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (due process right to proper reasonable doubt instruction).

B. The State's improper definition of reasonable doubt by analogy lowered its burden of proof.

The State in *voir dire* defined the reasonable doubt standard by analogy to a crack in the foundation of a home that a juror (the buyer) is considering purchasing. The State told the venire that such a crack would "cause you to hesitate," and therefore would constitute reasonable doubt. (TR 7/12/16, p 73:18-20).

The State misses the point when it notes the constitution does not require the use of any particular words to describe the reasonable standard, citing to *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). AB, pp 36-37. While *Victor* is good law, the problem here is the State's definition was at odds with the model definition the court gave the jury. The model definition of course does not mention a Denver Broncos fan considering buying a home with a cracked foundation owned by an Oakland Raiders fan. (Supp. CF, p 40); COLJI, E:03. So even assuming the State's analogy was proper, it confused the jury. *See, e.g., People v. Stellabotte*, 421 P.3d 1164, 1170 (Colo. App. 2016) (aff'd on other grounds, *People v. Stellabotte*, 421 P.3d 174 (Colo. 2018) (error to instruct "jury in a manner that invites confusion").

The bigger problem is the "crack in the foundation" analogy lowered the State's burden of proof by dramatically overstating the reasonable doubt standard.

OB, p 20. The State disputes this, maintaining its analogy correctly reflected the model instruction of the standard in COLJI. AB, pp 37-38; COLJI, E:03. It understands its "crack in the foundation" analogy as nothing more than "an example of a circumstance" that would cause a reasonable person to hesitate in a matter of personal importance. AB, pp 37-39. The State is mistaken. The proper instruction contained in COLJI states reasonable doubt is doubt that would cause a reasonable person to hesitate in a matter of personal importance. COLJI, E:03. But a crack in the foundation in a home would cause any remotely reasonable person to do more than hesitate. *No one* would buy a home with a cracked foundation. January was not like a home inspector obligated to demonstrate a catastrophic problem with a potential home. He was not obligated to demonstrate anything, let alone present evidence that would cause someone to "hesitate."

C. The prosecution denigrated the defense in its rebuttal argument.

The prosecutor made a series of improper remarks in rebuttal. He called January's defense a "distraction" and likened counsel and January to "children" who "don't want you to see what their wrongs are." He added that the jurors who "have children" or "work with children" must regard the defense's arguments as "mere" childish distraction, a "cloud of smoke." (TR 7/13/16, pp 74:18-22, 75:13-14). These unresponsive arguments denigrated defense counsel, were

inflammatory, and infantilized the defense and the defendant in bad faith. OB, pp 22-23.

The State argues its remarks, in context, were made in legitimate response to defense counsel, who failed to make "pertinent" arguments. AB, pp 44-49. The State is wrong. Counsel's arguments were "pertinent" and in no way invited an improper response. Counsel attacked the victims' and witnesses' credibility, arguing the adult officers over-reacted in unprofessional ways by using nerve strikes on January, a juvenile, in front of other children. (TR 7/13/16, pp 62:25-68:4). This was fair advocacy and a more-than-reasonable characterization of the evidence.

D. The State's improper comments should be analyzed together.

The State analyzes separately for purposes of reversal its misconduct in *voir dire* and in rebuttal argument. AB, pp 40-42, 49. The State does not explain why it analyzes the two separately and does not cite authority for doing so. Case law indicates the two should be analyzed together for purposes of reversal. *See, e.g, People v. Carter*, 402 P.3d 480, 494-95 (Colo. App. 2015) (analyzing misconduct in *voir dire* and closing argument together), *and People v. Marioneaux*, 618 P.2d 678, 682-83 (Colo. App. 1980) (same). This Court should similarly consider the two together and reverse.

CONCLUSION

Each issue presented requires reversal and remand for a new trial.

MEGAN A. RING
Colorado State Public Defender

JEFFREY SVEHLA, #51768
Deputy State Public Defender
Attorneys for JAVARRAY JANUARY
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on October 18, 2018, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Brenna A. Bracket of the Attorney General's office.