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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

District Court, El Paso County
Honorable David L. Shakes
Case No. 17CR705

Plaintiff-Appellee,

THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant-Appellant,

JESSIE MEDINA JR.

▲ **COURT USE ONLY** ▲

Case No. 18CA192

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ANSWER BRIEF

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STATEMENT OF THE ISSUES PRESENTED

I. Whether the defendant's refusal to admit elements of his underlying offense means he should not have received an overdose affirmative defense instruction in the first place, negating any errors related to this defense.

II. Whether the trial court plainly erred in permitting the prosecutor's closing argument statements regarding the "same course of conduct" and "good faith" requirements of the overdose defense statute.

III. Whether the court abused its discretion in rejecting the defendant's request for jury instructions as to a section of the overdose defense statute inapplicable to the instant case.

IV. Whether the court abused its discretion in finding the defendant's statements "opened the door" to testimony that the defendant said he ate large quantities of drugs for the express purpose of concealing evidence.

INTRODUCTION

The defendant, Jessie Medina, appeals his conviction for possession of methamphetamine. On appeal, he argues the trial court plainly erred in permitting several of the prosecution's comments during closing argument. He also argues the court erred in declining to instruct the jury that, in some circumstances, drug overdose victims may claim an affirmative defense to drug crimes. Finally, he claims the court abused its discretion in admitting evidence that the defendant consumed large quantities of drugs for the purpose of preventing parole officers from finding them.

STATEMENT OF THE FACTS

Early one Monday morning, two probation officers arrived at a motel room. TR 8/28/2017, pp 100:4-101:3. The officers were dispatched because of an alert that the defendant, a parolee, had low battery in his GPS ankle-bracelet, suggesting possible parole violations. *Id.* at 100, 106.

The officers knocked on the room's door, but for several minutes it stayed closed. TR 8/29/2017, pp 47-48. During this time, the officers heard someone moving around inside. *Id.* at 48. Finally, the defendant opened the door. One of the probation officers restrained the defendant outside the room. TR 8/28/2017, p 126. The officers then searched the room for contraband and other occupants. *Id.* This search was lawful, conducted pursuant to the defendant's parole. CF, p 110; TR 8/29/2017, p 34. Ultimately, it yielded contraband including a bottle of alcohol and various syringes, both suggestive of parole violations. TR 8/28/2017, p 103; EX 1.

At some point during or after this search (though not before), the defendant spoke to the officers. *See, e.g.*, TR 8/29/2017, pp 35:24-36:2. His precise words are the subject of some dispute. The defendant claims that while the officers were searching, he told them he had to go to the hospital because he had taken too many "pills." *Id.* However, neither the defendant, nor the officers, testified the defendant said he had taken or possessed methamphetamine.

The officers agreed that the defendant said he had taken too many pills. TR 8/28/2017, pp 137:25-138:7. But they said they could not recall the defendant specifically asking for medical attention or to be hospitalized. TR 8/29/2017, p 49:10-13.[1]

More importantly, the officers testified, the defendant told them he had eaten "17 Adderall pills," that he had done so just before letting the officers in, and that he had done so for the specific purpose of concealing evidence, explaining that he ate the pills "to prevent you guys from finding them." *Id.* at 48:1-3, 48:24-25, 49:3-5; *see also* TR 8/28/2017, pp 138:25-139:1 (second officer testifying defendant said he ate drug stash "to avoid us finding it.").

In any case, after the search ended, the officers took the defendant to a hospital. *Id.* at 107:9-13. Once there, the defendant showed symptoms suggesting an overdose. *Id.* at 157:1-4. He was in severe distress, and required intensive treatment. *Id.* As part of

[1] One officer testified the defendant "may" have made such a statement, but only once officers were already taking him to the hospital. TR 8/29/2017, p 49:14-19.

treatment, medical personnel cut through the defendant's pants and underwear. *Id.* at 157:8-11. When they did, a sealed container fell from the area of the defendant's anal cavity. *Id.* at 143-44, 157, 168. This container contained a crystalline substance that later tested positive for methamphetamine. *Id.* at 157; TR 8/29/2017, p 12.

On this basis, the defendant was charged with possession of methamphetamine. CF, pp 2-3. He was not, however, charged for any crime based on possession of pills, alcohol, or any other substance. *Id.*

Before trial, the defendant moved to suppress the statements he had made during the (lawful) search of his room, including his claim to have eaten pills in order to destroy evidence. CF, pp 62-65. The trial court partially granted the motion, holding such statements "should be excluded in the prosecution's case in chief." CF, p 111.

At trial, the defendant, appearing pro se,[2] advanced two theories. His main theory was that the methamphetamine found in his

[2] Pro se litigants are "bound by the same rules of procedure and evidence as bind those who are admitted to practice law before the

underwear had been placed on him, without his knowledge, as part of a long-standing and concerted harassment effort engineered by parole officers. To this end, the defendant spent most of the trial trying to elicit testimony that parole officers, prosecutors, and others had engaged in a systematic pattern of wrongful abuse, including:

- Intentionally failing to repair defendant's GPS ankle bracelet to increase the chance he would be unjustly incarcerated. TR 8/28/2017, pp 108:18-25, 116:11-23.

- Wrongfully reporting positive drug tests in order to unfairly increase defendant's punishments. *Id.* at 109:25-111:13.

- Falsely claiming defendant did not have permission to reside in a certain location. *Id.* at 111-113.

- Tampering with evidence in order to create a misleading impression of defendant's guilt. *Id.* at 106-107.

- Wrongfully searching defendant's home for contraband on an unrelated occasion. *Id.* at 172-173.

- Maliciously prosecuting defendant for a prior drug charge that he was later acquitted of. TR 8/29/2017 at 77:11-14.

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courts of this state." *Loomis v. Seely*, 677 P.2d 400, 402 (Colo. App. 1983).

- Intentionally delaying the filing of charges in order to harass defendant. TR 8/28/2017, p 163:19-164:14.

- Conducting a "vendetta" against defendant, *id.* at 117:2-8, and doing so with the connivance of the District Attorney, who had "tried to prosecute . . . the last time and they know if they lose to this, they know the consequences." TR 8/29/2017, pp 76:23-25, 78:14-18.

This effort, in the defendant's view, culminated with parole officers or others "fabricat[ing]" the methamphetamine evidence found on the defendant's person while he was hospitalized. Pet. Br. 34. Or, as the defendant put it: "I didn't have [methamphetamine] on me . . . [and] after this jury trial I'll be able to come forward to the director of the adult parole and present everything that's happened . . . and bring it to light what they have been doing to me for malicious prosecution." TR 8/98/2017, p 40:16-20.

Secondarily, the defendant suggested he might be entitled to an affirmative defense under § 18-1-711, C.R.S (hereinafter § 711). Section 711 provides that if someone in "good faith" reports to law enforcement that an overdose is in progress, and cooperates with law enforcement

when they arrive, then he may avoid liability for certain drug crimes. *Id.* Over the prosecution's objection, the trial court instructed the jury as to this affirmative defense. TR 8/29/2017, pp 54-57.

After the presentation of evidence and closing argument, the jury convicted the defendant. CF, p 143.

SUMMARY OF THE ARGUMENT

The defendant's sworn testimony, in which he flatly denied committing the underlying drug crime he was charged with, should have barred any jury instructions as to the affirmative overdose defense. Because the defendant was not entitled to have the jury instructed on the defense, he cannot show that any error related to this defense prejudiced his case. Thus, this Court need not address any alleged errors related to the affirmative overdose defense, rendering each of the defendant's appellate arguments nugatory. This, alone, is sufficient to affirm the conviction.

Even if this Court reaches the defendant's arguments, each is unavailing. The prosecutor's closing argument statements regarding the

"same course of conduct" and "good faith" requirements for overdose defense accurately reflect the law, and the trial court did not err, let alone plainly err, in allowing them.

Likewise, the trial court did not abuse its discretion in rejecting the defendant's request for a jury instruction discussing provisions that apply only to overdose victim who *do not report* their overdoses, a circumstance not applicable here.

Finally, the trial court did not abuse its discretion in finding the defendant's statements as to his motivations for overdosing, his level of cooperation with law enforcement, and law enforcement's purported vendetta against him, combined to "open the door" to the defendant's statements that he had eaten large quantities of drugs for the express purpose of destroying evidence.

ARGUMENT

I. Because the defendant refused to admit to elements of his underlying offense, he should not have received an overdose affirmative defense instruction in the first place, negating any errors related to this defense.

A. Standard of Review and Issue Preservation

At trial, the prosecution contemporaneously objected to the trial court giving the overdose affirmative defense instruction. TR 8/29/2017, pp 54-57. Even if they had not, a trial court's judgment may be upheld on any grounds, even those not relied on by that court itself. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006); *see also People v. Eppens,* 979 P.2d 14, 22 (Colo. 1999) ("[A] party may defend the judgment of the [trial] court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the [trial] court").

Where an affirmative defense instruction "should not have been given in the first place . . . any error in such instructions was harmless." *People v. Somerville*, 703 P.2d 615, 618 (Colo. App. 1985). This is

because in such cases, "[i]f anything, the defendant was benefitted and not prejudiced by" the provision of an unmerited affirmative defense, even an imperfect one. *Id.*

B. Discussion

A defendant may not claim an affirmative defense if, according to his own sworn testimony, he could not have committed the underlying crime. This is precisely what happened here: in sworn testimony, the defendant categorically denied the offense he was charged with, namely, knowingly possessing methamphetamine. Thus, the trial court should not have instructed the jury on the overdose affirmative defense in the first place, making any errors related to this defense harmless.

"The essence of an affirmative defense is the admission of the conduct giving rise to the charged offense." *People v. Huckleberry*, 768 P.2d 1235, 1239 (Colo. 1989). Therefore, an "affirmative defense . . . is not available to a defendant who denies any wrongdoing." *People v. Grizzle*, 140 P.3d 224, 225-26 (Colo. App. 2006). This rule is based on the core concern that a defendant "not be allowed to obtain a judgment

based on a finding that he has perjured himself." *People v. Garcia*, 826 P.2d 1259, 1263 (Colo. 1992).

In this case, the overdose defense statute presupposes the commission of otherwise-criminal conduct. *See* § 711(1) (protection from "arrest and prosecution *for an offense*") (emphasis added); *id.* § (3) (defense "shall apply to the following *criminal offenses*") (emphasis added). In turn, the underlying offense, knowing possession of methamphetamine, has several key elements: (1) knowingly (2) possessing (3) methamphetamine. § 18-18-403.5(1), C.R.S.

At trial, the defendant sought, and received, the overdose affirmative defense instruction. TR 8/29/2017, pp 54-57. Yet in sworn testimony, he precluded this defense by repeatedly denying he had "knowingly" possessed the methamphetamine at all. Rather, his testimony was:

> [O]ne of the things that hurts me the most is *I never had anything on me*. I consumed everything to killed [sic] myself. I knew what I had on me. And to think that my naked body was there I mean lifeless and they're taking pictures of *something that I knew I didn't have on me*, it infuriated me . . .

Id. at 31:10-15 (emphases added).

On cross-examination, the defendant reaffirmed this denial:

> Q. . . . [Y]ou indicated that you did not believe you were in possession of methamphetamine in the hospital; is that correct?
>
> A. Uh-huh.
>
> Q. Okay. So you had no idea you had a baggy of methamphetamine in your underwear area?
>
> A. That's correct.
>
> Q. You don't ever recall putting one there prior to them knocking on your door?
>
> A. No.
>
> Q. So these, what has been admitted as People's Exhibit 4 is not your drugs?
>
> A. It's not mine. I would admit to whatever I was guilty of if was mine.
>
> Q. Okay. So to be clear you didn't put it in your underwear when they are knocking on the door because you didn't want them to find it?
>
> A. No.
>
> Q. You have no idea how it got there?
>
> A. No.

Id. at 37:21-38:15.

And in closing argument, he returned to this theme yet again:

> I could easily tell you that yeah I had something on me it would be covered by that [overdose affirmative defense] statute. But the fact is *I didn't have anything on me*. And I'm not *going to stand up here and plead to something* or admit to something that's not true.

Id. at 40-12:16 (emphases added).

In sum, this is a paradigmatic case of a defendant who, in sworn testimony, "denies any wrongdoing," making him ineligible for the affirmative defense he sought. *Grizzle*, 140 P.3d at 225-26.

Hoping to evade this conclusion, the defendant cites *People v. Wakefield*, 2018 COA 37. *Wakefield* held that a defendant who claimed a shooting was accidental could also receive an affirmative self-defense instruction. In reaching this result, the court emphasized that based on the specific facts alleged, a self-defense claim and an accidental shooting claim could logically coexist because "a person can both hold a firearm in self-defense and still kill a victim accidentally." *Id.* ¶ 35. As such, the court found the basis for a self-defense instruction "did not

depend on rejection of defendant's version of events in sworn testimony." *Id.* ¶ 27. Here, by contrast, the defendant's sworn testimony was a categorical denial that he "knowingly" possessed methamphetamine. If credited, it would make it logically impossible for the defendant to have committed the underlying offense of "knowing" drug possession. Further, the *Wakefield* court found the "most important[]" factor in reaching its decision was the "right of a person to defend his or her life that is established by . . . the Colorado Constitution," a concern absent here. *Id.* ¶ 26.

Likewise, the defendant cites *Brown v. People*, 239 P.3d 764 (Colo. 2010). But *Brown* involved an instruction regarding a lesser-included offense – not an affirmative defense. *Id.* at 768. Further, as in *Wakefield*, the court found that there was not "inconsistency of the defendant's sworn testimony," a crucial difference from this case. *Id.* Finally, *Brown* relied on the fact that the lesser-included-offenses statute does not "presuppose[] the commission of acts that would constitute an offense." *People v. Brown*, 218 P.3d 733, 738 (Colo. App.

2009) (citation omitted). The overdose defense statute, by contrast, *does* expressly presuppose that an offense occurred.

Rather than rely on these cases, this Court should follow the logic of *People v. Grizzle*. *Grizzle* involved a defendant charged with attempted sexual assault against a minor. There, as here, the defendant claimed he was entitled to an affirmative defense instruction (specifically, entrapment). Like the overdose statute, the entrapment statute presupposes an underlying offense. § 18-1-709, C.R.S. (describing act "which would otherwise constitute an offense . . . "). But the defendant's sworn testimony was that he "believed . . . he was . . . agreeing to meet with an adult," and he refused to "admit that he believed the 'victim' to be under the age of fifteen years," an element of the underlying crime. *Grizzle*, 140 P.3d at 225-26. Because the defendant's testimony "did not admit to all of the elements" of the underlying offense, this Court found, that he was not "entitled to assert the affirmative defense." *Id.* at 226. The same result should obtain here.

Where an affirmative defense instruction "should not have been given in the first place . . . any error in such instructions was harmless." *Somerville*, 703 P.2d at 618. Thus, because the overdose defense instruction should not have been given at all, any errors related to this defense must be negated. In this case, such errors include, at a minimum, the prosecutor's alleged misstatements of law during closing arguments, Pet. Br. at 8-18 (Defense Argument I), and the trial court's allegedly incomplete jury instruction. *Id.* at 19-25 (Defense Argument II). This would leave only the trial court's supposed error in permitting testimony the defendant said he ate pills for the purpose of destroying evidence. *Id.* at 26-34 (Defense Argument III). Yet even that error should only be considered for prejudice it caused with respect to the underlying possession offense, because any impact it had on the affirmative-defense claim is also negated.

And if this Court does set aside alleged prejudicial errors related to the affirmative defense instruction, evidence of the defendant's guilt was overwhelming. Uncontested evidence shows the substance at issue

was methamphetamine. TR 8/29/2017, p 12. Photographic and testimonial evidence reveals the methamphetamine fell from the area of the defendant's anal cavity, which medical personnel could only access by cutting through his clothing. TR 8/28/2017, pp 143-44, 157,168; EXS 2-3. And the defendant, by his own admission, possessed and was using other drugs in violation of his parole agreement. *E.g.*, TR 8/29/2017, p 30:6-12 ("I popped all the pills that I had.").

Against this overwhelming physical and testimonial evidence, no reasonable juror could, in the absence of the overdose defense, have voted for acquittal. On these grounds alone, this Court should affirm the conviction.

II. The trial court did not plainly err in allowing the prosecution's closing argument statements as to the "course of events" and "good faith" prongs of the overdose affirmative defense.

A. Standard of Review and Issue Preservation

As the defendant concedes, these alleged errors were unpreserved. Pet. Br. at 8. Thus, plain error review is the appropriate standard, meaning this Court must determine if: (1) there was error, (2) the error was obvious, and (3) the error so undermined the trial's fundamental fairness as to cast serious doubt on the reliability of the judgment. *Hagos v. People*, 2012 CO 63, ¶ 14.

Prosecutors are accorded considerable leeway in making their arguments. "During closing argument, prosecutors have wide latitude to address the strength and significance of evidence, as well as *any reasonable inferences* that may be drawn from the evidence." *People v. Garner*, 2015 COA 175, ¶ 51 (emphasis added).

B. Additional Facts

Section 711 provides an affirmative defense for some who report drug overdoses. In relevant part, it reads:

> (1) A person is immune from arrest and prosecution for an offense described in subsection (3) of this section if: . . .
>
> (a) The person *reports in good faith* an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider . . . [and] . . .
>
> (d) The offense arises from the same course of events *from which the emergency drug or alcohol overdose event arose* . . .
>
> (3)(a) The immunity described in subsection (1) . . . shall apply to . . . [u]nlawful possession of a controlled substance . . .
>
> (5) As used in this section, unless the context otherwise requires, "emergency drug or alcohol overdose event" means an *acute condition* including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, and that a layperson would *reasonably believe to be* a drug or alcohol overdose that requires medical assistance.

(Emphases added.). The jury instructions accurately restated this language. TR 8/29/2017, pp 68-70.

In closing argument, the prosecution discussed various provisions of this affirmative defense. The defendant now argues the trial court plainly erred in permitting two of the prosecutor's closing argument

comments: one on the "same course of events" provision, § 711(1)(d), and the other on the "good faith" provision. *Id.* § (1)(a).

C. Discussion

The trial court did not err, much less obviously err, in permitting the prosecution's closing argument comments about either the "course of events" instruction or the "good faith" instruction. Moreover, even had the court committed "obvious error," reversal is not warranted because such errors did not "so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *People v. Weinreich*, 119 P.3d 1073, 1078 (Colo. 2005).

1. The trial court did not obviously err in allowing the prosecution to suggest defendant's possession of methamphetamine was not an event that "arose" from the "course of events" that caused the medical symptoms of the defendant's Adderall overdose.

During closing argument, the prosecution restated, verbatim, the § 711(1)(d) requirement that "the offense for which the defendant is

charged arose from the same course of events which the drug or alcohol overdose emergency event arose from." TR 8/29/2017, p 73:15-17. The prosecution then commented on why, based on the evidence presented, this requirement was not satisfied:

> The defendant is not charged with possession of Adderall. The defendant is not charged with the consumption of Adderall. The defendant is not charged with drug paraphernalia.
>
> The only thing the defendant is charged with is possession of methamphetamine that was located in his underwear, around his backside, after he had been laying in the hospital bed . . .
>
> He's not been charged with Adderall. He's not been charged with possession or use of Adderall. He has been charged with something entirely different that was located on his person later.
>
> You did not here [sic] a single officer tell you that the moment he walked in the door, "Hey, I have a bunch of meth on me. I took a bunch myself. I took all that I had. Please help me." Well, if he would have said that, we wouldn't be here. None of [the] officers told you that. They did say that he admitted to taking one thing. Adderall.

Id. at 73:18-23, 74:11-19.

The defendant argues this statement implied an incorrect reading of § 711. Not so. The prosecutor's comments about the "same course of events" instruction were well within the "wide latitude" accorded to closing arguments, because the statutory interpretation they implied was an accurate one. *Garner*, ¶ 51.

When interpreting a statute, a court's "primary goal is to ascertain and give effect to the legislative intent." *People v. Aryee*, 2014 COA 94, ¶8. To do this, the court first looks "to the plain language of the statute, giving words and phrases their commonly understood meanings." *Id.*

Here, the text states the defense applies only if "[t]he offense *arises from* the same course of events *from which the emergency drug or alcohol overdose event arose* . . ." § 711(1)(d) (emphasis added). In turn, an "emergency drug or alcohol overdose event" means "an acute [medical] condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance." *Id.* § (5). Thus, an offense is only eligible for the

defense if it was *caused by* whatever caused the "acute condition" at issue.

Had the legislature intended a broader meaning, one extending to acts that did *not* cause the medical condition at issue, then it would have done so explicitly. *In re Parental Responsibilities of A.R.L.*, 2013 COA 170, ¶ 34. Indeed, comparable statutes in other states expressly cover all crimes discovered "as a result of" receiving medical treatment, broad language that would have covered the methamphetamine at issue. *E.g.*, La. Stat. Ann. § 14:403.10(A) (overdose reporting defense for all evidence "obtained as a result of the person's seeking medical assistance").[3] But Colorado's statute does *not* include such language, only further supporting the prosecutor's interpretation.

Where, as here, the statutory text is clear, this ends the inquiry. *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 284 (Colo. 2000). Yet the statute's purpose and policy aims only further support this conclusion.

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[3] *Accord* N.C. Gen. Stat. Ann. § 90-96.2(b)(5); Tenn. Code Ann. § 63-1-156(b).

Although the legislature intended § 711 to save lives, it also carefully limited the defense to ensure individuals could not escape criminal liability for unrelated offenses. *See, e.g.,* § 711(3) (specifically limiting offenses the defense is available for); *see also* § 18-1-102(e), C.R.S. (criminal code should be construed to promote acceptance of responsibility and accountability by offenders). A reading requiring a causal nexus between the event that caused the overdose and the crime at issue serves this goal.

Applying this reading, the prosecutor's remarks were clearly appropriate. There is no evidence that the presence of methamphetamine in the defendant's underwear was caused by the event that caused the medical conditions he experienced. To the contrary, no one, including the defendant, said that methamphetamine caused the defendant's acute medical crisis. Instead, the "overdose event" the defendant experienced was caused by something entirely

separate: the consumption of Adderall.[4]

Against this, the defendant's only argument is that "there is no limitation . . . requiring the possession charge to be related to the drug reportedly consumed." Pet. Br. at 14. There is, however, a requirement that the substance at issue, whatever it was, *caused the overdose symptoms in the first place*. And where there is no evidence that it did, the prosecutor was right to say so.

Moreover, even if the court had erred in permitting this comment, such an error was surely not "obvious." *Hagos*, ¶ 14. As the defendant concedes, no citable "appellate case has dealt directly with [§ 711's] interpretation or application." CF, p 83.[5] *See People v. Kadell*, 2017 COA

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[4] Of course, the defendant testified the methamphetamine was not even on his person when the officers arrived, and that it was only placed on him after he requested, and was receiving, medical attention. *See* TR 8/29/2017, pp 37:21-38:15, 40:12-16. If credited, this account makes it logically impossible for the "overdose event" to have "arose from" the methamphetamine, since that substance would not have entered the defendant's possession, much less his body, until *after* the defendant had requested and received treatment.

[5] The People likewise could not identify any published opinions directly interpreting the provisions of § 711 at issue in this case. And to the extent unpublished opinions may have addressed the statute, parties

124, ¶ 26 ("[L]ack of prior guidance is one consideration we must take into account when determining whether the trial court committed obvious error").

This lack of precedential guidance, combined with the cogent statutory and policy arguments outlined above, makes any supposed error far from the "obviousness" plain error requires.

2. The trial court did not obviously err in letting the prosecution suggest that defendant's refusal to open the door for lawfully-present officers, but instead eating drugs in order to destroy evidence, might negate his claim to have acted in "good faith."

Elsewhere in closing argument, the prosecutor restated, verbatim, the statutory requirement that one must "report[] in good faith an emergency drug or alcohol overdose" before qualifying for the overdose defense. 8/29/2017, p 73:2-5. The prosecutor then suggested why "good faith" was not established in this case:

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are forbidden to cite them. *Woods v. Delgar Ltd.,* 226 P.3d 1178, 1181 n.1 (Colo. App. 2009)

> [The defendant] told the officer that he took the drugs to keep them from finding it. . . . It's that simple. Right? Both parole officers testified that he said he took the pills. And when asked why he said he took them so you wouldn't find them . . . [w]as it reported in good faith? Well, no. When you take something to hide evidence, that's not good faith.

Id. at 73:18-12, 23-25.

The text and purpose of the "good faith" provision make the prosecutor's implied reading of § 711 a reasonable one. Thus, the trial court did not obviously err in permitting the statement. And in any case, such error did not so undermine the trial's fundamental fairness as to constitute plain error. *Weinreich*, 119 P.3d at 1078.

Once again, statutory interpretation begins from the text. *Aryee*, ¶8. If there is ambiguity on the face of the statute, a reviewing court "may rely on other factors such as legislative history, the consequences of a given construction and the goal of the statutory scheme to determine a statute's meaning." *People v. Summers*, 208 P.3d 251, 245 (Colo. 2009) (citation omitted).

Here, the statutory language is at least somewhat ambiguous: although § 711 sets out a "good faith" requirement, it never defines this phrase. Nor, as noted, has any citable Colorado court opinion interpreted this provision.

On appeal, the defendant suggests that "report in good faith" should be read merely as "reports accurately," or "reports truthfully." In this view, so long as the defendant's report of an overdose was factually accurate (that is, that an overdose event was actually occurring), "good faith" is satisfied. *See* Pet. Br. at 11 ("To report in good faith, the reporter must simply have had a genuine belief that an overdose event was in progress.").

The defendant is correct that "good faith" can, in some contexts, encompass accuracy of reporting. But "good faith" is also a broader term, one subject to many competing definitions. *See Seaward Yacht Sales, Ltd. v. Murray Chris-Craft Cruisers, Inc.*, 701 F. Supp. 766, 772 (D. Or. 1988) ("'good faith' eludes precise definition because the doctrine must be applied in many different contexts."); *Black's Law*

Dictionary 623 (5th ed. 1979) ("Good faith is an intangible and abstract quality with no technical meaning or statutory definition").[6]

A different definition of "good faith," and one widely endorsed in analogous cases, is that "good faith" encompasses more than mere accuracy, but instead requires "honesty in . . . *purpose*, faithfulness to one's duty or obligation . . . [and] *absence of intent to defraud or seek unconscionable advantage*." *Black's Law Dictionary* 713 (8th ed. 2004) (emphases added, internal numerals omitted); *see also Credit Serv. Co. v. Dauwe*, 134 P.3d 444, 447 (Colo. App. 2005) (one who "intend[s] to seek unconscionable advantage" does not act in "good faith"); *Hill v. Giani*, 296 P.3d 14, 26 (Alaska 2013) (even where a child-abuse report is accurate, it still might not be in "good faith" if reporter "acted maliciously, corruptly, or in bad faith."); *Myers v. Lashley*, 44 P.3d 553,

[6] *See also* Jason D. Topp, International Minerals & Mining Corp. v. Citicorp North America, Inc.*: A Contractual Relationship Between Loan Applicant and Lender*, 76 Minn. L. Rev. 131, 135-39 (1991) ("[C]ourts and scholars disagree about what constitutes good faith . . . . This uncertainty imposes a difficult burden on courts interpreting the duty").

563 (Okla. 2002) (good faith is the "honest intention to abstain from taking any unconscientious advantage.").

Under this broader definition, even if a defendant offered an *accurate* report of an overdose, he still might not have manifested "good faith" if he made his report in service of a corrupt, malicious, or bad faith purpose, such as intentionally destroying criminal evidence.

There are compelling reasons to prefer this broader reading. First, apart from the "good faith" clause, § 711(5) states a defendant may only claim the affirmative defense if he reports what a "layperson would *reasonably believe to be* a drug or alcohol overdose." (Emphasis added). This provision, alone, would seem sufficient to ensure *accurate* reporting. Thus, the defendant's narrow reading, under which "good faith" merely means "accurate," would make the "good faith" requirement redundant, a construction this Court should avoid. *See Allstate Ins. Co. v. Avis Rent-A-Car Sys., Inc.*, 947 P.2d 341, 345 (Colo. 1997) ("We must give effect to every word of a statute, if possible.").

Moreover, a broad reading of "good faith" advances the statute's

purposes while precluding a deeply perverse outcome. *See People v. Sorrendino*, 37 P.3d 501, 503 (Colo. App. 2001) (statute should be interpreted to avoid pernicious "consequences of a particular construction"). On one hand, a broad "good faith" requirement still protects those whose reporting stems from the sorts of "good faith" purposes the legislature had in mind in enacting § 711, such as calling 9-1-1 to aid an overdosing companion.

At the same time, a broader definition of "good faith" avoids the perverse possibility that a suspect, realizing police are closing in, will intentionally eat some of his drugs to destroy evidence, then self-report his (self-created) overdose to escape punishment for the rest.[7] *See* § 18-1-102(e), C.R.S. (criminal code should be construed to promote

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[7] Nor is the instant case a unique one – suspects eating drugs just before apprehension in order to destroy evidence is, unfortunately, common. *See, e.g.*, *People v. Carr*, 2016 COA 168, ¶ 8 (suspect attempted to eat drugs stash when apprehended, "both destroying potential evidence and possibly harming himself"); *People v. Smith*, 123 A.D.3d 1233, 1234 (N.Y. 2014) (same); *State v. Williams*, 703 S.E.2d 905, 915 (N.C. App. 2011) (same); *State v. Alverez*, 111 P.3d 808, 814 (Utah App. 2005) (same); *Buck v. Commonwealth*, 456 S.E.2d 534, 537 (Va. App. 1995) (same).

acceptance of responsibility and accountability by offenders).

Further support for this broader reading of "good faith" can be found from those jurisdictions that have adopted overdose defense statutes akin to Colorado's. *See Colantuno v. A. Tenenbaum & Co., Inc.*, 23 P.3d 708, 712 (Colo. 2001) (where a Colorado statute does not define term, definitions from "statutes in other jurisdictions similar to the Act" provide persuasive authority). Specifically, many such jurisdictions clarify that someone does not "report in good faith" if he only does so while being lawfully searched, which is precisely what happened here. *See, e.g.*, Conn. Gen. Stat. Ann. § 21a-267(e) ("'[G]ood faith' does not include seeking medical assistance during . . . a lawful search.").[8]

Likewise, at least one court, construing an almost-identical statute, has adopted the broad reading of "good faith" suggested here. In *People v. Taylor*, a New York court considered a defendant who thought his girlfriend had overdosed on heroin. 57 Misc. 3d 272 (N.Y.

[8] *Accord* D.C. Code Ann. § 7-403(i)(1); Ky. Rev. Stat. Ann. § 218A.133(1)(b); Minn. Stat. Ann. § 604A.05, subd. 1.

Co. Ct. 2017). The defendant called 9-1-1 to seek help, but he first took several minutes to hide drug paraphernalia. *Id.* at 280-81. New York, like Colorado, limits the overdose defense to those who in seek assistance in "good faith."[9] Interpreting this language, the court found that while the defendant had *accurately* reported an overdose, the minutes he spent concealing evidence negated his "good faith," precluding the affirmative defense. *Id.*

Just so here. In this case, evidence suggested: (1) when the defendant learned officers were at the door, he chose not to let them in, (2) instead, rather than immediately report a medical emergency, he *created one* by eating drugs to intentionally destroy evidence, and (3) only once officers were lawfully searching his room, a search sure to uncover contraband, did the defendant choose to "report" his situation. Under these facts, the trial court did not err in permitting the

[9] N.Y. Penal Law § 220.78(1) (limiting defense to one who "in good faith, seeks health care for someone who is experiencing a drug or alcohol overdose").

prosecution to suggest the defendant's report was not made with "good faith."

Moreover, even if this Court believes the defendant's reading of "good faith" was ultimately correct, reaching a different result was not "obvious" error. *Hagos*, ¶ 14. Plain error requires error "so-clear-cut, so obvious, a competent trial judge should be able to avoid it without benefit of objection." *People v. Taylor,* 159 P.3d 730, 738-39 (Colo. App. 2006). But "good faith," as noted, is an extremely broad term. Section 711 does not define it, and no citable Colorado case has interpreted it in this context. *See Kadell*, ¶ 26. As outlined, there are cogent legal and policy reasons for adopting a broad definition of "good faith" reporting, reasons that have persuaded legislatures and courts nationwide. Under such circumstances, this Court should not find "obvious" error.

3. Even if the trial court committed obvious error, such error did not undermine the trial's fundamental fairness.

Finally, even if the court "obviously" erred in permitting one or both of these comments, reversal is only appropriate if the alleged

prosecutorial misconduct was "not only . . . flagrant or glaringly or tremendously improper, but also . . . undermine[d] the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *People v. Salyer*, 80 P.3d 831, 839 (Colo. App. 2003).

To determine if misconduct meets this bar, courts "focus on the cumulative effect of the prosecutor's statements using factors including the exact language used, the nature of the misconduct, the degree of prejudice associated with the misconduct, the surrounding context, and the strength of the other evidence of guilt." *Garner*, ¶¶ 57-58 (citation omitted). In particular, "[p]rosecutorial misconduct in closing argument rarely constitutes plain error." *Liggett v. People,* 135 P.3d 725, 735 (Colo. 2006).

The alleged misconduct falls well short of this standard. In a closing argument lasting 160 lines, the "good faith" comment at issue constituted six lines; the "course of events" comments used 13. *See People v. Kessler*, 2018 COA 60, ¶ 49 (no plain error when alleged

prosecutorial misconduct was "a small part of . . . twenty pages of testimony."). Indeed, these isolated comments are far from the "pervasive" misconduct found to justify plain error reversal in other cases. *Cf. People v. McBride*, 228 P.3d 216, 221-26 (Colo. App. 2009) (closing argument replete with "flagrant prosecutorial improprieties" including (1) repeatedly calling defendant a "liar" and "coward," (2) making personal attacks against defense experts, (3) telling jurors the presumption of innocence no longer applied, and (4) distorting key elements of the charged offense, could constitute the "rare case" in which plain error merited reversal). Moreover, it is undisputed that the prosecution's closing argument included an accurate recitation of the statutory elements at issue, as did the trial court in its instructions, reducing any risk the jury misunderstood the law. *See* TR 8/29/2017, pp 68-69 (jury instructions); *id.* at 73:2-5, 15-17.

At the same time, this alleged misconduct must be set against the other overwhelming evidence of the defendant's guilt. As noted, overwhelming evidence suggests the defendant committed the

underlying possession offense. Moreover, the defendant's evidence he qualified for the affirmative defense was starkly limited, namely:

- The defendant's own assertion, contradicted by two officers, that he asked to be taken to the hospital. *Compare* TR 8/29/2017, pp 35:24-36:2 (defendant asserting he asked to go to the hospital); *with id.* pp 49:10-13; 49:14-19 (officers could not recall such a request).

- The defendant's uncorroborated assertion that he requested medical assistance prior to the officers reaching this determination on their own. *See* TR 8/29/2017, p 49:14-19 (officer stating that if defendant did ask to go to hospital, it was after he was already being taken there).

- A failure to produce any evidence that the physical symptoms the defendant experienced "arose" from the methamphetamine found in his underwear, a statutory requirement to claim the defense. *See, e.g.,* TR 8/29/2017, p 31:10-15, 37:21-38:15, 40-12:16.

Accordingly, even had the court obviously erred, the error was not egregious enough to require reversal.

III. The trial court did not err in declining to instruct the jury that in certain circumstances, not present in this case, an overdose victim who does not report an overdose might still claim an affirmative defense.

A. Standard of Review and Issue Preservation

The defendant preserved this objection. TR 8/28/2017, p 193:8-23; TR 8/29/2017, p 54:5-24; 57:13-24. The People agree "it is the duty of the trial court to instruct the jury properly on all matters of law." *People v. Hardin*, 607 P.2d 1291, 1294-95 (Colo. 1980). However, a trial court "has substantial discretion in formulating the jury instructions, so long as they are correct statements of the law and fairly and adequately cover the issues presented." *People v. Gallegos*, 226 P.3d 1112, 1115 (Colo. App. 2009). Finally, "[a] trial court should not instruct on an abstract principle of law unrelated to issues in controversy." *People v. Jones*, 2018 COA 112, ¶ 84 (citation omitted). Whether a particular jury instruction should have been given is reviewed for abuse of discretion. *People v. Paglione*, 2014 COA 54, ¶ 45.

If the trial court erred in denying the proposed instruction, such error should be reviewed for "non-constitutional" harmless error, meaning "reversal is required only if the alleged instructional error "substantially influenced the verdict or affected the fairness of the trial proceedings." *People v. Riley*, 2015 COA 152, ¶ 25 (citation omitted).

B. Discussion

The trial court did not err in omitting the defendant's proposed "overdose victim" instruction. Even if it had, such error was harmless.

The trial court's overdose defense instruction directly tracked both the statutory language of § 711 and the relevant model instruction. § 711(1); COLJI-Crim. H:32 (2017); *see also People v. Ramos*, 2017 COA 100, ¶ 20 ("While [a court is] not bound by the model jury instructions, they are persuasive."); *People v. Felgar*, 58 P.3d 1122, 1124 (Colo. App. 2002) ("An instruction that tracks the language of a statute is ordinarily sufficient").

The defendant admits this, but suggests that additional instruction was necessary because the model jury instruction might

lead jurors to incorrectly assume that an overdose victim, such as the defendant, cannot be eligible for § 711(1)'s defense.

The trial court's instructions, however, belie this argument. In instructing the jury, the court explained:

> The evidence presented *in this case* has raised the affirmative defense of reporting an emergency drug or alcohol overdose event as a defense to possession of a controlled substance. *The defendant's* conduct is legally authorized if 1, *he reported* in good faith an emergency drug or alcohol overdose event to a law enforcement officer to the 911 system, or to a medical provider; and 2, *he remained* at the scene of the event until a law enforcement officer or an emergency medical provider arrived; . . . ; and 3, *he identified himself* to and cooperated with the law enforcement officer, emergency medical responder, or medical provider; and 4, the offense for which *the defendant is charged* arose from the same course of events from emergency drug or alcohol overdose event arose.

TR 08/29/17, p 68:20-69:8 (emphases added). Contrary to the defendant's assertions, these instructions in no way suggest a defense that would "only apply to third party reporters." Pet. Br. at 24-25. Rather, they make clear that the defense might well apply "in this

case," and to "the defendant," who is identified throughout the instruction as the singular "he."

By contrast, the defendant's proposed additional instruction refers specifically to those cases where an overdose victim *does not report* an overdose, yet stills avoid punishment because *another* person qualified as a § 711(1) reporter:

> The immunity described in subsection (1) . . . *also* extends to the person who suffered the emergency drug or alcohol overdose event *if all of the conditions of subsection (1) . . . are satisfied*.

§ 711(2) (emphases added). As this language shows, subsection (2) extends the affirmative defense to overdose sufferers who do *not* report an overdose, provided that *another* person satisfies all of § 711(1) requirements.

That scenario is inapplicable here: the defendant's consistent testimony, and his theory of the case, was that he, himself, served as the § 711(1) reporter. *See, e.g.*, *See,* TR 8/29/2017, p 30:16-17 (". . . I wanted help. And I asked for medical attention."); *id.* p 35:21-22 ("I had made the statement, 'Please, get me to the hospital' twice").

Accordingly, § 711(2), which applies only to overdose victims who are *not* reporters, was inapplicable, and the court was right to omit it. *See People v. Jones*, 2018 COA 112, ¶ 84 ("[a] trial court should not instruct on an abstract principle of law unrelated to issues in controversy") (citation omitted).[10]

Moreover, even if the court erred, such error was harmless. As noted, other evidence of the defendant's guilt was overwhelming. Second, notwithstanding any alleged error, the defendant was free to

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[10] In a sidebar, the defendant briefly suggested one of the officers who searched his room might also be a "reporter" under § 711(1). On this theory, even if the defendant failed to report, he could still enjoy a defense under § 711(2) because (1) he suffered an overdose and (2) the parole officers who found him "reported" the situation. *See* TR 8/28/2017, p 193:24-194:4. The defendant never returned to this suggestion during the trial, he has not raised it in his opening brief, and he may not do so in his Reply. *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990). In any case, such a reading would immunize *any* overdose sufferer who law enforcement happens to discover (and, presumably, to "report,"), an absurd result that would vitiate the statutory scheme. *See Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004) (interpretations "leading to an illogical or absurd result will not be followed.").

argue, and did argue, that he was entitled to the defense precisely because he, personally, had reported the incident, mitigating any potential confusion. And finally, the prosecution's own closing argument acknowledged that an overdose victim could report under § 711(1), further mitigating any confusion around whether the defendant could qualify as a "reporter." *See, e.g.*, TR 8/29/2017, p 74:22-23; *see also id.* at 73:13-14. Thus, any alleged instructional error was harmless, for it did not substantially influence the fairness of trial proceedings. *Riley*, ¶ 25.

IV. The trial court did not abuse its discretion in finding the defendant's cross-examination questions and direct testimony "opened the door" for evidence clarifying and explaining the circumstances of the defendant's overdose.

A. Standard of Review and Issue Preservation

The defendant preserved this objection. TR 3/28/2017, pp 134:8-135:5, 136:19-137:9. However, a trial court enjoys "broad discretion in determining the admissibility of evidence based on its relevance, its probative value, and its prejudicial impact," *People v. Elmarr*, 2015 CO 53, ¶ 20, and a reviewing court may "reverse the trial court's

evidentiary rulings only for an abuse of discretion," a ruling so egregious that it is "manifestly arbitrary, unreasonable, or unfair" or one based on an erroneous reading of the law. *Id.* An evidentiary error is harmless where it did not substantially influence the verdict or impair the trial's fairness. *Liggett*, 135 P.3d at 733.

B. Discussion

The trial court did not abuse its discretion in finding the defendant's testimony about parole officer misconduct, the officers' basis for hospitalizing him, and his own motivations for overdosing created potentially misleading impressions, thus "opening the door" for corrective evidence.

"Opening the door" represents an effort by courts to prevent one party in a criminal trial from gaining an unfair advantage by the selective presentation of facts that, without being elaborated or placed in context, create incorrect or misleading impressions or inferences. *Golob v. People*, 180 P.3d 1006, 1012 (Colo. 2008). If a party opens the door to otherwise inadmissible evidence in this way, his opponent may

inquire into the previously barred matter. *Id.* at 1012. Notably, in addition to testimony, the door can be opened by a party's opening statement. *People v. Davis*, 312 P.3d 193, 196 (Colo. App. 2010).

In this case, multiple parole officers heard the defendant say he only ate his drugs once the officers arrived, and he did so for the express purpose of destroying evidence. TR 8/28/2017, p 48:24-25 (defendant said he ate pills "to prevent you guys from finding them."); TR 8/29/2017, p 138:25-139:1 (defendant said he ate drug stash "to avoid [officers] finding it."). If the trial court had not admitted this evidence, it would have left jurors with an inaccurate, misleading, and unfair set of impressions and inferences.

Throughout the trial, the defendant asserted that parole officers were waging a long-running campaign of harassment and abuse against him. *E.g.*, TR 8/28/2017, p 97:20-22. His allegations included claims of officers misrepresenting GPS ankle-bracelet data, wrongfully reporting urine drug tests, intentionally delaying the filing of charges to prolong his imprisonment, unlawfully searching his home, and, in cooperation

with prosecutors, and maliciously prosecuting him on other drug charges. This campaign supposedly culminated in methamphetamine being placed on the defendant's person without his knowledge, presumably while he was hospitalized. *See* Pet. Br. at 34 (describing defendant's theory that "charge was fabricated").

In support of this theory, the defendant asserted this pattern of misconduct was so severe that it drove him to suicidal depression. This depression, the defendant claimed, was what motivated his overdose. TR 8/28/2017, p 98:7-11 ("So you guys could clearly understand how [the officers have] been treating me and how far they pushed me *to the point where I was medically overdosed*. I basically *tried to take my life, in other words, going through the ordeal with them*.) (emphasis added); TR 8/29/2017, p 78:4-8 ("I nearly took my life because of the pressure there [sic] are putting on me. They have took'n [sic] so much of my [sic] already.").

Left unchallenged, this account would leave jurors to infer the defendant had, in fact, been subject to serious abuse, so serious that it

drove him to self-harm. This inference could also lead jurors to discredit the officers' testimony, since it makes it seem more likely they were involved in a pattern of deception. Jurors might also infer the defendant was a sympathetic victim of harassment and addiction issues, lending him additional credibility. And independently, this account bolsters the inference that the defendant's request for help was made with the "good faith" purpose of seeking medical help for an overdose caused by depression.

The suppressed statements, however, reveal such inferences would be deeply misleading. As multiple officers testified, the defendant's overdose was caused not by the traumas of long-running official misconduct, but by a malfeasant desire to destroy evidence. Their testimony also severely undermines the defendant's credibility, for it shows that the defendant – not his parole officers – was the one involved in a pattern of deception and dishonesty.[11] And of course, if §

[11] Apparently, the defendant agrees: "Had there not been evidence [the defendant] attempted to hide other drugs from the parole officers, his theory that the charge was fabricated would have been more

711 is read to include a broader concept of "good faith," as discussed above, then the officer's testimony surely suggests a "bad faith" motive: the intentional destruction of evidence.

Where, as here, a defendant misleadingly claims he is the victim of a vindictive pattern of official misconduct, the door is open for evidence to correct this misperception. *See, e.g.*, *People v. Cohen*, 2019 COA 38, ¶ 28 (previously-suppressed "[e]vidence that . . . complaints existed and evidence of why they were filed was admissible to rebut the implication that OARC *had a vendetta* against defendant . . .") (emphasis added); *People v. Vecellio*, 2012 COA 40, ¶¶ 61-62 (where defendant elicited testimony he was victim of systematic "unfair" workplace treatment, door was open for previously-suppressed evidence of defendant's past disciplinary history); *People v. Dunlap*, 124 P.3d 780, 799 (Colo. App. 2004) (where "defendant's strategy" was to portray witnesses as untruthful because of "improper influence," door was open for

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persuasive." Pet Br. at 34. That is precisely right, and it is one of the reasons why the defendant's misleading testimony opened the door for corrective evidence.

previously-suppressed evidence to rebut this characterization); *see also United States v. Wynn*, 845 F.2d 1439, 1443 (7th Cir. 1988) ("By questioning [a government agent's] motives, [defendant] was attempting to further his own theory that [he] was framed . . . On redirect examination the government merely clarified the basis for [the agent's] suspicion of [the defendant].").

Likewise, at trial the defendant elicited testimony that he was generally cooperative with law enforcement. *E.g.*, TR 8/28/2017, p 131:19-25. If accepted, such an account would bolster the inference that the defendant had satisfied the cooperation requirement of § 711(1)(c). More generally, it creates the impression the defendant was a generally credible, trustworthy witness.

Here, once again, the officers' testimony corrects a misleading impression. Far from fully cooperating with law enforcement, the defendant had engaged in conduct aimed at thwarting and deceiving law enforcement, namely, destroying evidence. This misleading picture thus "opened the door" for corrective evidence. *See, e.g.*, *People v.*

Ujaama, 2012 COA 36, ¶ 45, 302 P.3d 296, 305 (where defendant testified he was generally cooperative with police and was not trying to conceal anything, door was open to testimony that defendant had, in fact, exercised *Miranda* right to remain silent).

Finally, the defendant sought to have the parole officers testify that the reason they took him to the hospital was for an overdose, but to do so without offering any further context as to how or why they reached this conclusion. Thus, the defendant had the following exchange with a parole officer:

> Q. You said that you later transported me to the hospital. During that transportation, what was your understanding as far as was there a medical issue, an emergency, in other words, that needed to be addressed?
>
> A. It was our understanding, yes.

TR 8/28/2017, p 107:9-13.

The defendant later asked a second, more direct, question:

> Q. In your report you stated that you did the transportation for an overdose; is that correct?
>
> A. Yes.

Id. at 132:1-3.

Where a defendant selectively elicits part of a law enforcement response, without providing full context, it can create a misleading inference that nothing out-of-the-ordinary occurred. In turn, this creates a misleading impression that law enforcement did not suspect unusual or nefarious misconduct, opening the door for evidence to correct the misperception. *See, e.g.*, *State v. Guzman*, 892 N.W.2d 801, 815 (Minn. 2017) (where inmate had officer testify that part of a phone call involved a routine money request, implying entire call was unremarkable, door was open for testimony that other parts of the call suggested illegal weapons purchase); *People v. Estes*, 2012 COA 41, ¶ 18 (where defendant elicited testimony police had not found a gun on-site, implying nothing untoward occurred, "evidence that the police rarely recover a missing gun . . . was offered properly to rebut this inference"); *People v. Sams*, 685 P.2d 157, 164 (Colo. 1984) ("[O]nce the defendant opens the door by eliciting testimony about the suppressed [suspect] identifications, the prosecution should not be foreclosed from eliciting

additional testimony about these same procedures."); *People v. Tenorio*, 590 P.2d 952, 957-58 (Colo. 1979) (where defendant elicited testimony that officer had gun during encounter, door was open for officer to explain why he had a gun).

In sum, the testimony the defendant selectively presented and elicited created a chain of misleading inferences as to the conduct of the officers, both on-site and as part of their purported pattern of misconduct. As the defendant's own statements reveal, such inferences would have been deeply misleading. Thus, the court was right to find the door had been opened.

Hoping to avoid this conclusion, the defendant cites *People v. Murphy*, 919 P.2d 191 (Colo. 1996). *Murphy* involved a man accused of a sadistic same-sex sexual assault. The defendant claimed the encounter had been consensual. He also argued that prosecution testimony that the victim had a wife and daughter, and that the victim found the attack "sick and abnormal," created an inference the victim was heterosexual, making it seem unlikely he consented. This, the

defendant argued, opened the door to evidence that the victim had, in fact, had sex with men on other occasions.

Ultimately, the court disagreed, finding the door was not opened. But it did so because: (1) the victim never explicitly testified he was heterosexual, (2) the defendant was allowed to introduce extensive expert testimony that men married to women could still be homosexual and pursue homosexual acts, and (3) in context, the victim's statement that he found the encounter "abnormal" could have referred to the encounter's sadism, rather than its same-sex nature. *Id.* 196-97.

Here, by contrast, the defendant's assertions about why he was motivated to overdose were unambiguous: he repeatedly claimed he took the pills as a suicidal response to ongoing officer harassment. Nor was the prosecution allowed to introduce any other form of rebuttal evidence, expert or otherwise, to challenge or undermine this assertion. Thus, *Murphy* is inapposite.

In sum, the trial court did not abuse its discretion in finding the door to have been opened for the testimony presented. And even had the

court abused its discretion, for the reasons outlined above, any error was harmless and did not substantially influence the verdict or impair the trial's fairness.

CONCLUSION

The People respectfully request this Court affirm the conviction.

PHILIP J. WEISER
Attorney General

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **JESSICA SOMMER** and all parties herein via Colorado Courts E-filing System (CCES) on April 29, 2019.

/s/ Tiffiny Kallina