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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Logan County District Court
Honorable Charles M. Hobbs, Judge
Case No. 15CR228

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JOSHUA S. UNREIN,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 17CA217

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

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

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/s/ Elizabeth Ford Milani

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INTRODUCTION

A jury convicted defendant, Joshua S. Unrein, of vehicular homicide and vehicular assault. The convictions stemmed from a rollover crash in which defendant's friend died and another friend was injured.

Defendant now challenges the admission of evidence at trial. His claims fail, and this Court should affirm.

STATEMENT OF THE CASE AND FACTS

A woman called 911 to report that she had been in a car crash, that her boyfriend was dead, and that her friend was unconscious. *See* Supp Env, EX 1, Unrein1, 0:27-0:34; TR 10/4/16, pp 37-39. The woman, JJ, said her "little brother" had been driving and the car had rolled. Supp Env, EX 1, Unrein1, 0:56-1:00, 3:32-3:39, Unrein2, 0:12-0:15; *see also* TR 10/4/16, p 38:10-11 (identifying caller as "[J]"). JJ testified at trial that she called defendant her brother. *See* TR 10/6/16, p 74:2-7.

JJ's boyfriend, BB, was lying in a field off a county road when law enforcement arrived. *See* TR 10/4/16, pp 45-47. BB was not moving or

breathing, and he did not have a pulse. TR 10/4/16, p 48:2-10. BB was pronounced dead at the scene; he had died of blunt force injuries to the head and neck. *See* TR 10/4/16, pp 48-49; TR 10/6/16, p 13:4-6. BB's autopsy revealed that he had alcohol, marijuana, and prescription medication in his system. *See* TR 10/6/16, pp 17-18.

Defendant was lying on the ground closer to the car. *See* TR 10/4/16, pp 46-47. He was unconscious, but he regained consciousness briefly when medical personnel prepared to load him into a helicopter, and a deputy noticed a strong odor of alcohol coming from defendant. *See* TR 10/4/16, pp 63-64, 86:4-5. Defendant's blood-alcohol content level was .145 about 90 minutes after the crash, and he had THC and prescription medication in his system. TR 10/6/16, pp 28-29, 31:5-1.

JJ indicated to officers at the scene that defendant had been driving the car. *See* TR 10/4/16, pp 63:1-18, 76:15-25. An expert accident reconstructionist testified at trial that he was "very certain" defendant had been in the driver's seat at the time of the crash. TR 10/4/16, pp 215-17. Defendant's grandmother had purchased the car;

before the crash, defendant, BB, and JJ had been living with her. *See* TR 10/4/16, pp 122-23, 126:9-12.

But at trial, JJ said she believed that BB was driving when the car crashed. *See* TR 10/6/16, pp 48:18-22, 50-51, 65:21-25. And defendant's theory at trial was that BB had been driving the car. *See, e.g.*, TR 10/4/16, p 31:5-7 (opening statement); TR 10/6/16, p 154:21-23 (closing argument).

The jury rejected defendant's theory and convicted him of vehicular homicide and vehicular assault. TR 10/6/16, p 171:14-19; CF, pp 228-29. The trial court sentenced defendant to an aggregate six years in prison. *See* TR 12/2/16, p 25:12-16; CF, p 301.

SUMMARY OF THE ARGUMENT

The accident reconstructionist's expert opinions complied with CRE 702, CRE 403, and *People v. Shreck*, 22 P.3d 68 (Colo. 2001), so they were properly admitted. The trooper had extensive training in accident reconstruction, and he explained how he reached his opinions. The record supports the trial court's finding that his opinion was rooted

in reliable principles, and that his opinions were not so speculative as to render them inadmissible. Because the testimony was rooted in reliable principles, it did not unduly risk misleading the jury.

The trial court also properly admitted evidence that the accident reconstructionist found black pants in the car after the crash. The discovery of the black jeans, at least inferentially, supported the prosecution's theory that defendant had been driving the car, and this evidence did not unduly risk misleading the jury. While no evidence explained how the pants got into the car, the chain of custody for the car after the crash was established.

Any errors in the admission of the testimony discussed above was harmless in light of the other evidence establishing that defendant drove the car at the time of the crash. And any errors do not collectively warrant reversal under the doctrine of cumulative error.

This Court should affirm.

ARGUMENT

I. The expert accident reconstructionist's opinions were properly admitted.

A. Preservation and Standard of Review

The People agree that defendant preserved this claim. *See* CF, pp 100-02; TR 10/4/16, p 138:18-19.

But the People disagree with defendant's proposed standard of review. *See* Opening Br. at 15. While the application of a legal standard is reviewed de novo, a trial court's decision to admit expert testimony is reviewed for abuse of discretion. *Kutzly v. People*, 2019 CO 55, ¶ 8. A trial court's discretion in this regard is broad. *See People v. Martinez*, 74 P.3d 316, 322 (Colo. 2003). "A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair." *Campbell v. People*, 2019 CO 66, ¶ 21.

The People also disagree that any error is subject to constitutional harmless error review. *See* Opening Br. at 28-30. "Only those errors 'that specifically and directly offend a defendant's constitutional rights are constitutional in nature.'" *People v. Flockhart*, 2013 CO 42, ¶ 20 (citations and internal quotation marks omitted). Aside from generally

asserting that defendant's due process rights were impinged, defendant does not explain how the admission of erroneous expert evidence specifically and directly offended his constitutional rights. Even where an error "affected the impartiality of the jury," if it "did not directly impact [the defendant's] constitutional rights," constitutional harmless error is not implicated. *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010).

Instead, Colorado courts have applied the nonconstitutional harmless error standard to the erroneous admission of expert testimony. *See, e.g.*, *Ruibal v. People*, 2018 CO 93, ¶¶ 17-22 (reviewing erroneous admission of expert testimony regarding "overkill" for nonconstitutional harmless error); *People v. McFee*, 2016 COA 97, ¶¶ 87, 90-92 (same); *People v. Marks*, 2015 COA 173, ¶¶ 43-49 (erroneous admission of expert testimony pertaining to "no conclusion" in DNA analysis was harmless).

An error is harmless if it "did not substantially influence the verdict or affect the fairness of the trial proceedings." *Ruibal*, ¶ 17. The strength of the evidence is one consideration in the analysis. *See*

id. "Another important consideration 'is the specific nature of the error committed and the nature of the prejudice or risk of prejudice associated with it.'" *Zapata v. People*, 2018 CO 82, ¶ 62 (quoting *Crider v. People*, 186 P.3d 39, 43 (Colo. 2008)).

B. Additional Background

Preliminary Hearing and Expert Endorsement

At the preliminary hearing, fewer than three months after the crash, Trooper Seth Soukup explained that he was a Level 4 Certified Traffic Reconstructionist—the top level of accident reconstruction certification—and that he had been accredited through the Accreditation Commission for Traffic Accident Reconstruction (ACTAR). *See* TR 12/15/15, pp 5:4-10, 36:5-12. He had investigated about fifty crashes involving serious bodily injuries. *See* TR 12/15/15, p 26:2-8.

Trooper Soukup said that no mathematical formula could show when the occupants left the vehicle; nor did the occupants' injuries reveal who had been driving. *See* TR 12/15/15, pp 18-19, 25:12-15. He said that accident reconstructionists would rarely, if ever, be able to state that an occupant was ejected "halfway through or 60 percent of

the way through the second roll," the person reached a particular height, and the person traveled a particular distance; too many variables and unknowns were involved. TR 12/15/15, pp 31-32.

Defense counsel asked the trooper whether he could determine who was driving based on the person's location after ejection:

> A. I wouldn't say never. Um, what I would say is not in this case.
>
> Q. When would you be able to, based on what --
>
> A. Just the evidence that is available to me. There's -- there have been crashes that I have had where I was able to say which window somebody came out of, the occupant, as it will show exactly where they came out, and I could tell you exactly why they came out that window at that point in time with -- sustaining the injuries they did or did not receive.
>
> . . . .
>
> Q. In this case, it's impossible to do?
>
> A. In this case, it would be extremely difficult, if not impossible, to do.

TR 12/15/15, p 32:3-25.

The prosecution endorsed Trooper Soukup as an expert in accident reconstruction. CF, pp 43-47. The trooper's report included renderings of what he believed had occurred, as well as his conclusions that

defendant had been driving and BB was in the passenger seat when the car crashed. *See* CF, pp 123-58.

Defendant moved to exclude Trooper Soukup's testimony or for a hearing on its admissibility, arguing his conclusions were unreliable and they violated CRE 403. *See* CF, pp 98-102; *see also* CF, pp 116-20 (prosecution's response).

Expert Hearing

At the subsequent hearing, Trooper Soukup reiterated his training and certifications and said that he had twice been qualified as an expert. *See* TR 4/1/16, pp 66-68, 78-80.

He explained that, at the time of the preliminary hearing, he had not completed his investigation into this crash. *See* TR 4/1/16, pp 6-7. But since that hearing, Trooper Soukup had created a 3-D diagram of the crash. *See* TR 4/1/16, p 10:2-16. And based on his completed investigation—incorporating the occupants' final resting places, the vehicle's movements, evidence of impacts on the car and ground, his experience with similar crashes, and his 3-D diagram—he was able to more confidently explain how the occupants were ejected from the car.

See TR 4/1/16, pp 10-11, 22:19-24, 44:1-5 & 11-19. While he was not "100 percent certain" with respect to his opinions, he characterized his opinions as being "most likely." TR 4/1/16, p 21:2-17.

Trooper Soukup believed the car had flipped more than once in light of the impacts in the ground and damage to the car. *See* TR 4/1/16, pp 54-55. He believed that defendant was ejected from the driver's side window, whereas BB was ejected by a slingshot ejection from the passenger's side window. TR 4/1/16, pp 64-66.

The trial court rejected defendant's motion to exclude Trooper Soukup's testimony. *See generally* CF, p 179. As relevant here, while the court acknowledged that the trooper's opinions differed from his testimony at the preliminary hearing, Trooper Soukup had not completed his investigation at the time of the first hearing, and defendant's objections were areas for cross-examination. *See* TR 4/1/16, pp 128:5-18, 133:2-19. The court found that the scientific principles underlying Trooper Soukup's work had been accepted for decades, were based on physics, and were reliable. *See* TR 4/1/16, pp 130-32. The court concluded that if the proper foundation was provided, Trooper

Soukup could testify as to his opinions about what happened in the car crash. *See* TR 4/1/16, pp 133:20-25, 135-36, 138:10-14.

Trial

Trooper Soukup testified at trial that he was a Level 4 accident reconstructionist, that he had received four levels of training in this regard, and that he had been accredited by ACTAR as an accident reconstructionist. *See* TR 10/4/16, pp 129:3-25, 139-40. He underwent between 240 and 250 hours in training and had technically analyzed between 67 and 70 crashes. *See* TR 10/4/16, pp 131-32. Trooper Soukup said his work as a reconstructionist was based in large part on Newton's three laws and some mathematical formulas. *See* TR 10/4/16, pp 130-31.

Defense counsel objected to Trooper Soukup's qualification as an expert for "previous reasons." TR 10/4/16, p 138:18-19. The court rejected that objection and qualified the trooper as an expert in accident reconstruction. TR 10/4/16, p 138:20-22.

Trooper Soukup testified that he was dispatched to the crash scene about an hour after the crash. *See* TR 10/4/16, pp 140-41.

Another officer roughly sketched the scene using a measuring wheel, and Trooper Soukup took laser measurements to survey the scene, documenting the locations of marks, tracks, and the resting places of the car and occupants. *See* TR 10/4/16, pp 147-48, 151:1-4.

The trial court told the jury that Trooper Soukup had created a video animation, and it instructed the jury as follows:

> First, the animation is not a simulation of how these events occurred. This animation was not created using rigorously tested or peer-reviewed scientific principles.
>
> The animation is only a restatement of Trooper Soukup's version of these events and it is not an independent piece of substantive evidence about these events. It does not prove any material fact in the case.
>
> And I want to remind you that while you're taking this evidence from an expert witness, there's a particular instruction that you will receive at the end of the case regarding expert testimony. I'm going to give it to you right now to provide you some additional context.
>
> You are not bound by the testimony of a witness who has testified as an expert. The credibility of an expert's testimony is to be considered as that of any other witness. You may believe all of an expert witness's testimony, part of it, or none of it. The weight you give the testimony is entirely

> your decision. You should view this animation as part of Officer Soukup's expert's [sic] testimony.

TR 10/4/16, p 152:1-25.

Trooper Soukup imported his laser measurements from the crash site into a computer program, creating a scale diagram of the scene and enabling him to measure distances between various points. *See* TR 10/4/16, pp 153-55. Using that scale diagram, Trooper Soukup calculated that the car was driving 69 miles per hour when it left the road. *See* TR 10/4/16, pp 159:14-18, 162-63, 168-70. He also superimposed a car over the diagram to determine what had occurred in the crash. *See, e.g.*, TR 10/4/16, p 163:18-23.

The court played for the jury Trooper Soukup's animation, representing his expert opinion on what happened. *See* TR 10/4/16, p 170:11. The animation showed that the car fishtailed, drove off the road, and rolled several times; two persons were ejected from the car, one traveling significantly farther than the other. *See* Supp Env, Oncoming Road View; Supp Env, Overhead View.

Trooper Soukup used a basketball analogy to discuss BB's path after he was ejected, explaining that a player will require more force, resulting in a different trajectory, depending on the player's proximity to the hoop. *See* TR 10/4/16, p 210:14-22. So BB must have had the requisite force, speed, and momentum to land as far away from the car as he did—more than 41 feet. *See* TR 10/4/16, pp 210-12. The distance that BB landed from the car indicated to Trooper Soukup that BB had been thrown from the car in a "slingshot type of ejection" during the "high side of the [car's] roll as opposed to the low side of the roll." TR 10/4/16, p 212:18-22.

On the other hand, defendant's resting place was more consistent with a "low side" ejection, where someone is "more or less . . . laid out on the ground." TR 10/4/16, p 213:3-25. Trooper Soukup explained that defendant was most likely ejected during the first half of the second roll, which was consistent with defendant's close proximity to the car, and the fact he was not crushed by the car. *See* TR 10/4/16, pp 214-15. Trooper Soukup was not sure where JJ had been seated in the car

because by the time officers arrived on the scene, she had already moved from her resting place. *See* TR 10/4/16, pp 218-19.

Given BB's and defendant's landing locations, Trooper Soukup was "very certain" that, at the time of the crash, defendant had been in the driver's seat and BB had been in the front passenger seat. TR 10/4/16, p 215:10-18. Trooper Soukup was able to determine when the windows in the car likely broke based on the marks on the ground, understood in the context of the rolls. *See* TR 10/4/16, pp 216:7-19. And windows typically hold occupants inside until they break. TR 10/5/16, p 38:9-13.

Bolstering Trooper Soukup's opinion that defendant was in the driver's seat, Trooper Soukup explained that if defendant had been the passenger, BB would have had to bypass him to be ejected out of the passenger window with sufficient speed and force. *See* TR 10/4/16, p 216:20-25. And if BB was ejected first while defendant remained inside the car, defendant

> most likely would have been run over by the vehicle because he would have actually had to come out of the vehicle from the passenger side of

> the vehicle as the vehicle entered that portion of the roll where he came out of the vehicle. He'd likely be in the path of the vehicle as it was rolling.

TR 10/4/16, p 217:8-16. The evidence showed that defendant had not been run over. *See* TR 10/4/16, pp 213-15. And while Trooper Soukup agreed it was possible for an occupant to be ejected from a window that was not adjacent to his or her seat, that was not likely the case here, especially because the gear shifter had not been bent or marked—features indicative of such an occurrence. *See* TR 10/5/16, pp 142:6-16, 164-65.

Trooper Soukup's cross-examination extended for more than 140 pages of transcript. *See* TR 10/5/16, pp 17-161. He agreed he had only used mathematical formulas to determine the speed of the car; while he had formulas to determine the direction of force on vehicle, he did not use them in this case. TR 10/5/16, pp 22-23, 92-93. Nor did Trooper Soukup determine the amount of force required to break glass or map where he had observed glass on the ground at the crash site. TR 10/5/16, pp 38-39.

Trooper Soukup agreed that his opinions on when defendant and BB were ejected from the car were educated guesses based on his training and experience. *See* TR 10/5/16, p 69:14-20. While a number of factors could impact the ejection points, Trooper Soukup said he did not require mathematical formulas to render those conclusions. *See* TR 10/5/16, pp 134-35. He reiterated that he was "very certain" defendant was the driver. TR 10/5/16, p 144:10-14.

Trooper Soukup also agreed on cross-examination that he had previously testified that he could not determine when the occupants were ejected from the car, yet he identified the approximate ejection points in his report. *See* TR 10/5/16, pp 136-41. On redirect, he clarified that the preliminary hearing testimony occurred before his investigation was complete. *See* TR 10/5/16, p 177:18-25.

In addition to the trial court's oral instruction, the court provided similar written instructions to the jury. CF, pp 238-39.

C. Law and Analysis

1. Trooper Soukup's testimony was sufficiently reliable to be admitted.

CRE 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In order to determine the admissibility of proffered expert testimony, the trial court must consider (1) the reliability of the scientific principles, (2) the qualifications of the witness, (3) the usefulness of the testimony to the jury, and (4) whether the testimony complies with CRE 403. *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001).

"Determining if expert testimony is reasonably reliable requires considering the totality of the circumstances surrounding the proposed expert testimony and is not contingent on any specific list of factors." *Kutzly*, ¶ 12. That inquiry is liberal, broad, and flexible, asking

whether the underlying scientific principles are reliable and whether the witness is qualified to opine on them. *See id.*; *Shreck*, 22 P.3d at 77.

Testimony that is so speculative as to be unreliable is that which "has no analytically sound basis[,]" and that is "connected to existing data only by a bare assertion resting on the authority of the expert." *People v. Ramirez*, 155 P.3d 371, 378-79 (Colo. 2007). But an expert need not be indisputably correct for that expert's opinion to be admissible, and testimony is not impermissibly speculative merely because it is "stated with less than certainty[.]" *Id.* at 378. Instead, admissibility depends on the reasonable reliability of the scientific principles and qualifications of the expert. *See id.* at 379 ("[T]he standard of admissibility under CRE 702 is reliability and relevance, not certainty.").

As an initial matter, defendant contends reversal is required because the trial court failed to make findings that Trooper Soukup's opinion was reliable. *See* Opening Br. at 25. The trial court must make findings with regard to the "reliability of the *scientific principles* upon which the expert testimony is based[,]" the qualifications of the expert,

the usefulness of the testimony, and whether the evidence complies with CRE 403. *Ruibal*, ¶ 12 (emphasis added); *see also Kutzly*, ¶ 12 ("Regarding a specific finding of reliability of expert testimony, a trial court should apply a liberal standard that only requires proof that *the underlying scientific principles are reasonably reliable*." (emphasis added in part)); *People v. Whitman*, 205 P.3d 371, 383 (Colo. App. 2007) ("*Shreck* requires the trial court to receive sufficient information to make specific findings about the reliability of the scientific principles involved and the expert's qualification to testify to such matters.").

The trial court made the necessary findings here. It identified the prosecution's burden to show "the method employed by the expert in reaching the conclusion is scientifically sound . . . ." TR 4/1/16, p 127:18-19. The court continued that while Trooper Soukup's opinions could be challenged on cross-examination or by another expert, they were based on "scientific principles" that had been "accepted for decades" and "based upon [N]ewtonian physics[.]" TR 4/1/16, pp 130-31. The court found "the scientific principles to be reliable." TR 4/1/16, p

133:15-16. Thus, defendant's claim that the trial court's findings were inadequate fails.

More broadly, defendant asserts that Trooper Soukup's testimony was unreliable because he insufficiently explained the bases for his opinions on (1) when defendant and BB were ejected from the car, (2) how far defendant and BB traveled after they were ejected, and (3) whether defendant and BB were ejected from the same window. *See* Opening Br. at 23-26. Absent sufficient explanations on these points, according to defendant, Trooper Soukup's expert opinion was not rooted in science and was impermissibly speculative. *See id.*

Defendant's argument, then, appears to assert that alleged analytical holes in Trooper Soukup's testimony should have precluded its admission. But that claim presents one of weight, not admissibility. *See generally People v. Campbell*, 2018 COA 5, ¶ 42 (explaining that conflicting theories on the reliability of scientific principles go to the weight, not admissibility, of evidence, and those concerns are appropriately addressed by cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof).

In any event, Trooper Soukup *did* explain how he reached his opinions. Trooper Soukup diagrammed the crash scene, incorporating tire marks, impact points, the debris field, and the final resting places of the occupants and car; connected the data points; and then placed a car model over the diagram to determine the car's path. *See, e.g.*, TR 10/4/16, pp 145-48, 151:1-4, 153-57, 164-65. Trooper Soukup determined that the car rolled multiple times. *See, e.g.*, TR 10/5/16, p 169:11-14. The damage to the car was indicative of a rollover-type of crash, and the location of the damage on the car lined up "very well" with damage on the ground and Trooper Soukup's opinion on how the crash unfolded per the scale diagram. TR 10/4/16, pp 208-09.

Based on the marks on the ground, understood in the context of the rolls, Trooper Soukup was able to determine when the windows in the car likely broke, and windows typically hold occupants inside until they break. *See* TR 10/4/16, p 216:7-19; TR 10/5/16, p 38:9-13. So defendant and BB would not have been ejected until after the windows broke, narrowing down the point at which defendant and BB were ejected. *See generally* TR 10/5/16, p 134:18-20 (Trooper Soukup

agreeing that when in the roll sequence the window breaks can impact the ejection point).

Trooper Soukup also explained, in detail, how the landing positions of defendant and BB shed light on their ejection points. BB was still at the scene when Trooper Soukup arrived. *See* TR 10/4/16, p 144:15-17. Trooper Soukup explained that BB's landing spot showed that he was likely thrown from the car in a slingshot ejection when the car was on the high side of a roll, because BB's travel distance required a sufficient amount of force. *See* TR 10/4/16, pp 211-13.

Further narrowing down the ejection point, Trooper Soukup explained how defendant landed in the car's path, but was not crushed by the car. *See* TR 10/4/16, pp 213-15. Logically, in order for defendant to have landed in the car's path without being crushed, he could not have been ejected until the car passed defendant's landing spot. So Trooper Soukup's estimation that defendant was ejected on the "low side on the first half of the second roll" meant that "he would have come out behind the vehicle, which would mean he wouldn't be run over by the vehicle." TR 10/4/16, p 214:6-16. That defendant was ejected

during a low side roll also helped determine when, during the rolling process, defendant was ejected. *See* TR 10/4/16, p 214:2-9.

Thus, Trooper Soukup explained at length how he was able to pinpoint, "within a half a roll or so," TR 10/5/16, p 136:1, when defendant and BB were ejected. Trooper Soukup also explained that after he created his scale diagram, he was able to take measurements from the scene, *e.g.*, TR 10/4/16, pp 155-56, which explained how he would have known how far defendant and BB were ejected from the car.

Defendant complains that Trooper Soukup's opinion was unreliable because he did not know where defendant landed, yet Trooper Soukup was very certain that defendant was driving based on his landing position. *E.g.*, TR 10/5/16, p 144:10-14. Indeed, defendant was gone from the scene when Trooper Soukup arrived, *see* TR 10/5/16, p 19:17-19, and Trooper Soukup did not explicitly describe the basis for how he marked defendant's landing place.

But Trooper Soukup never testified that he did *not* know where defendant landed. And the record gave rise to the conclusion that he had that data. Trooper Soukup said that when he arrived on the scene,

other officers briefed him on what had learned. *See* TR 10/4/16, pp 144-45; TR 10/5/16, pp 80-81. Trooper Soukup walked the scene, looking for "anything that might be considered part of the scene." TR 10/4/16, p 145:11-15. Of course, Trooper Soukup included defendant's landing place on his diagram of the scene. *See, e.g.*, TR 10/4/16, p 213:11-13; TR 10/5/16, pp 40-41, 181:15-16.

Defendant is also incorrect that Trooper Soukup did not explain the basis for his opinion that defendant and BB were not ejected from the same window. Trooper Soukup testified that if defendant had been in the passenger seat, defendant would have likely tumbled out of the car into its path, being run over. *See* TR 10/4/16, pp 216-17. Further, if both BB and defendant had been ejected through the passenger window, the gear shifter would have likely been marked, bent, or burned, but it was not. *See* TR 10/5/16, pp 164-65.

At bottom, Trooper Soukup explained the bases for his opinions at length. *See Kutzly*, ¶ 12 (describing the broad inquiry and liberal standard used in determining whether underlying scientific principles are reasonably reliable); *Shreck*, 22 P.3d at 77 (same). Trooper

Soukup's opinion was rooted in scientific and technical principles. *See Rhomer v. State*, 569 S.W.3d 664, 670-72 (Tex. Crim. App. 2019) (rejecting contention that "measuring and diagraming are not scientific methods," and explaining that the principles involved in accident reconstruction include examining the physical evidence in the context of the crash site); *see also Black's Law Dictionary* 19 (11th ed. 2019) (defining "accident reconstruction" as "[t]he *science* of examining all evidence, including physical evidence, that exists as a result of an accident and analyzing it in line with established principles of mathematics, chemistry, and physics in order to re-create or otherwise reenact the event") (emphasis added).[1]

[1] Defendant also alleges that Trooper Soukup was not qualified to provide his opinions because they were "not based on recognized principles of accident reconstruction." Opening Br. at 26. But defendant provides no analysis on how Trooper Soukup's opinion departed from accident reconstruction principles. Thus, this Court should not consider that claim. *See Phillips v. People*, 2019 CO 72, ¶ 12 ("[I]t is not enough merely to mention a possible argument in the most skeletal way . . . ." (citation omitted)).

2. Trooper Soukup's testimony complied with CRE 403.

As noted above, an expert's testimony must comply with CRE 403. *See Kutzly*, ¶ 10; *Shreck*, 22 P.3d at 70, 78-79. Under that rule, the trial court must "ensure that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence." *Shreck*, 22 P.3d at 78; CRE 403.

Defendant contends that Trooper Soukup's expert opinion had no probative value in light of its speculative basis and that it risked encouraging the jury to give it undue weight because the trooper was qualified as an expert. *See* Opening Br. at 26-27. He is wrong.

To the extent that defendant contends that Trooper Soukup's testimony lacked probative value because it was speculative and not rooted in science, for the reasons described above, he is incorrect. Trooper Soukup testified at length about how he derived his opinion that defendant was driving, and he explained the limits of that opinion. That Trooper Soukup's opinion was framed in terms of an educated

guess based on the most likely outcome, *e.g.*, TR 10/5/16, p 69:14-20, did not render it without probative value, *Estate of Ford v. Eicher*, 250 P.3d 262, 266 (Colo. 2011) ("Under CRE 702, the standard for admissibility is relevance and reliability, not certainty."); *Ramirez*, 155 P.3d at 378 (same). And Trooper Soukup's opinion was central to the key factual dispute at trial: who was driving when the crash occurred. Thus, his testimony was highly probative.

On the other hand, the risk of unfair prejudice was low. As discussed above, Trooper Soukup explained how he reached his conclusions; he also said that he did not have direct photo or video evidence showing what had occurred. *See* TR 10/5/16, pp 21-22. Defense counsel cross-examined Trooper Soukup at length with regard to his opinions. *See* TR 10/5/16, pp 17-161. Thus, the limits of Trooper Soukup's opinions were clear, so his testimony did not risk undue weight, speculation, or confusion. *Cf.* CRE 403.

Further mitigating any potential for unfair prejudice, the trial court instructed the jury orally and in writing how it could consider Trooper Soukup's testimony and animation: that the animation was not

evidence, that the animation was not subjected to peer-reviewed scientific principles, and that the jury was not bound by expert testimony. TR 10/4/16, pp 151-52; CF, pp 238-39. Absent record evidence to the contrary, reviewing courts presume that jurors follow the court's instructions. *See Zoll v. People*, 2018 CO 70, ¶ 29. The jury was also correctly instructed on the burden of proof. *See* CF, pp 230, 234.

In short, the probative value of Trooper Soukup's testimony was not substantially outweighed by the danger of unfair prejudice. Its admission complied with CRE 403.

3. Any error does not warrant reversal.

Any error here did not implicate defendant's substantial rights, so reversal is not warranted. *See Ruibal*, ¶ 17. Putting aside Trooper Soukup's testimony, other evidence established that defendant drove the car before the crash. JJ indicated to several law enforcement officers that defendant had been driving at the time of the crash, and her 911 call—played for the jury—relayed that JJ's brother had been

driving. *See* TR 10/4/16, pp 63:17-18, 76:15-25; TR 10/6/16, p 74:2-7; Supp Env, EX 1, Unrein1, 3:32-3:39. While she testified at trial that she did not remember telling dispatchers that defendant was driving, JJ also agreed she would not have lied to the dispatchers. *See* TR 10/6/16, pp 74:8-12, 77:12-18. And, as discussed below, a blue cotton fiber was found on the passenger side window. *See* EXs 37-39, pp 426-28; TR 10/4/16, pp 174:2-3, 182:7-14; TR 10/5/16, p 188:4-17. That discovery raised the inference that defendant had been driving at the time of the crash and was not ejected through the passenger window.

Further, the jury was instructed that Trooper Soukup's animation was not evidence and that the jury was not bound by his testimony. *See* TR 10/4/16, pp 151-52; CF, pp 238-39. Trooper Soukup's opinion was not left unchallenged; the defense cross-examination was extensive. *See* TR 10/5/16, pp 17-141.

And to the extent defendant argues that the prejudice to him was compounded because Trooper Soukup was an advisory witness, defendant did not object at trial. *See* Opening Br. at 29. Nor has defendant identified any Colorado authority for the proposition that

inadmissible testimony from an advisory witness heightens the prejudice to the defense. *Cf. People v. Fincham*, 799 P.2d 419, 424 (Colo. App. 1990) ("[W]e conclude that the two statements by the [advisory] witness did not amount to prejudice against defendant such as would warrant reversing the trial court's denial of her motion for a mistrial."). The People have not found any such authority.

Reversal is not warranted.

II. The trial court properly admitted evidence that black jeans were found in the car after the crash.

A. Preservation and Standard of Review

The People disagree that defendant preserved all of his appellate claims. At trial, defense counsel objected to the admission of the jeans because the witness through which they were being offered was not "qualified[,]" the chain of custody had not been established, and defendant's constitutional rights were implicated. TR 10/4/16, pp 191-93, 195-96, 199-200. Defendant did not argue, however, that admitting the jeans violated CRE 401, CRE 402, or CRE 403. *See People v. Ujaama*, 2012 COA 36, ¶ 37 (noting an issue is unpreserved where an

objection or request was made in the trial court but on grounds different from those raised on appeal).

The People also disagree that review is de novo. In general terms, due process contentions are reviewed de novo. *E.g.*, *People v. Burlingame*, 2019 COA 17, ¶ 11. But aside from briefly asserting that the admission of the jeans violated due process, defendant's claims center on the rules of evidence. *See* Opening Br. at 35-38. And the admission of evidence is reviewed for only abuse of discretion. *See, e.g.*, *People v. Clark*, 2015 COA 44, ¶¶ 14-18, 36; *People v. Moltrer*, 893 P.2d 1331, 1335 (Colo. App. 1994) (finding no abuse of discretion with respect to defendant's chain of custody contention).

Because it is preserved, any abuse of discretion with respect to defendant's chain of custody claim is reversible only if the error was not harmless. *See Hagos v. People*, 2012 CO 63, ¶ 12. An error is harmless so long as it did not substantially influence or affect the fairness of the trial. *Id.*

But any abuse of discretion with respect to CRE 401, CRE 402, or CRE 403 is reversible only in the event that plain error occurred. *See*

Hagos, ¶ 14. Plain errors are obvious and substantial. *Id.* Reversal is warranted only when the error "so undermined the fundamental fairness of the trial itself" that it "cast serious doubt on the reliability of the judgment of conviction." *Id.* (citations omitted).

B. Additional Background

Photos from the scene, admitted into evidence and published to the jury, showed BB on the ground wearing blue jeans with a hole in the right leg. *See* EXs 25-26, pp 433-34; TR 10/4/16, p 50:24-25. During the investigation, Trooper Soukup found a blue cotton fiber snagged on the broken passenger car window about five weeks after the crash during his mechanical inspection of the car. *See* EXs 37-39, pp 426-28; TR 10/4/16, pp 171-74, 182:7-14; TR 10/5/16, p 188:4-17. The car had been towed from the crash scene to a tow yard and stored in a locked facility. TR 10/4/16, pp 171-72. Again, Trooper Soukup's opinion was that BB was ejected from the car through the passenger window. *See* TR 10/5/16, p 141:15-18.

No photos in evidence showed defendant at the scene, and responding law enforcement officers equivocated on what he was

wearing. One deputy remembered that blood on defendant's legs contrasted with whatever he was wearing, and that his pants were perhaps faded; he agreed defendant may not have been wearing pants at all, and while he was not sure, he thought he had been wearing pants. *See* TR 10/4/16, pp 67-71. Another trooper said that defendant was wearing clothes, but he did not remember them, though he could have been wearing blue jeans. *See* TR 10/4/16, pp 85-86.

Photos of the car at the crash scene did not show any black pants inside the car. *See* EXs 11-15, pp 436-40; TR 10/4/16, 50:24-25.[2] Law enforcement officers said they did not put anything in the car or see anyone put anything in the car. *See* TR 10/4/16, pp 55:16-20, 69:1-20. While one trooper found miscellaneous clothing inside the car at the crash scene, he did not recall the specific items. *See* TR 10/4/16, pp 101-02.

[2] Exhibit 15 shows a black item on the front passenger seat, though its design suggests it was not pants. *Compare*, EX 15, p 440, *with* Supp Env, App'x B, pp 5-6.

Five weeks after the crash, while Trooper Soukup was performing the mechanical inspection on the car at a tow yard, he noticed black jeans on the front seat underneath a plastic bag full of medical wrappers. *See* TR 10/4/16, pp 173:12-15, 188:5-19, 205:2-4. Trooper Soukup said it was common for medical personnel to cut off or remove clothing from a patient, and then return those clothes to the car. *See* TR 10/4/16, p 191:3-7. Six months after that mechanical inspection, Trooper Soukup collected the pants, and he identified them at trial as those he collected from the car. *See* TR 10/4/16, pp 188-89.

Defendant objected that Trooper Soukup was not "qualified" and that the chain of custody had not been established for admission of the jeans. TR 10/4/16, pp 191-93, 195-96, 199-200. Outside the presence of the jury, Trooper Soukup explained that the car was towed to the facility and kept inside a locked garage, but not sealed. *See* TR 10/4/16, p 194:14-18. The prosecutor asserted that while no one knew who put the jeans in the car, the car had been behind a locked gate for months, the photos did not show jeans at the crash site, and the only logical

inference from this evidence was that defendant had been wearing the black jeans at the time of the crash. *See* TR 10/4/16, pp 196-99.

The trial court concluded that chain of custody for the jeans was not particularly pertinent to their admissibility because the prosecution was not attempting to prove, for example, a thumbprint existed on the jeans, and even if the jeans were not admitted, Trooper Soukup could testify that he saw the black jeans inside the car. *See* TR 10/4/16, pp 201-03. The trial court therefore overruled defendant's objection. *See* TR 10/4/16, p 203:15-16.

Trooper Soukup made clear during his subsequent testimony that he did not know who was wearing the jeans or how they got into the car, but he identified the jeans as those he observed in the car the month after the crash. *See* TR 10/4/16, p 205:1-12; TR 10/5/16, p 152:13-14. On cross-examination, Trooper Soukup said that he did not notice any black jeans during his walkthrough of the crash scene. *See* TR 10/5/16, p 81:23-25.

An analyst from the Colorado Bureau of investigation identified the blue fibers as cotton, but did not know their origin because the

police had not submitted any fabric for comparison. *See* TR 10/5/16, pp 187-90, 192:3-5. JJ testified that she did not wear the same brand of pants as the black jeans and she agreed that defendant sometimes wore black jeans. *See* TR 10/6/16, pp 70-71.

During closing, the prosecutor reminded the jury that photo exhibits showed BB wearing blue jeans, a blue cotton fiber was found in the passenger window frame, and defendant sometimes wore black jeans. *See* TR 10/6/16, p 134:6-17. The prosecutor continued that because the black jeans did not come from anyone else at the scene, they had to have belonged to defendant, and because they did not match the blue fiber on the window, BB had been in the passenger seat at the time of the crash, not defendant. *See* TR 10/6/16, pp 134-35.

Defense counsel pointed out that Trooper Soukup said it was possible for someone to be ejected from a window even if they had not been seated next to the window. *See* TR 10/6/16, p 143:7-14. Counsel pointed out that the Colorado Bureau of Investigation analyst did not know where the fibers had come from. *See* TR 10/6/16, pp 143-44.

C. Law and Analysis

1. The black jeans were relevant.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. Evidence must be relevant to be admissible. *See* CRE 402.

To be relevant, evidence "need not prove conclusively the proposition for which it is offered," so long as "in some degree [it] advance[s] the inquiry." *People v. Greenlee*, 200 P.3d 363, 366 (Colo. 2009) (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 401.04[2][b] (Joseph M. McLaughlin ed., 2d ed. 2008)). And evidence may still be relevant even if it has an equal tendency to make a different fact more probable. *See People v. Summitt*, 132 P.3d 320, 324 (Colo. 2006) (explaining that when deciding whether evidence is relevant, "it does not matter that other inferences may be equally probable"); *see also People v. Perryman*, 859 P.2d 263, 268 (Colo. App. 1993) ("Relevant circumstantial evidence is generally admissible in a criminal trial.").

In light of the other evidence presented, that Trooper Soukup found black jeans in the damaged car underneath medical supplies had at least some tendency to show that defendant was wearing black jeans at the time of the crash. BB was wearing blue jeans at the time of the crash. *See* EXs 25-26, pp 433-34; TR 10/4/16, p 50:24-25. JJ did not wear the same brand of jeans as the black jeans, and she said that defendant sometimes wore black jeans. *See* TR 10/6/16, pp 70-71. Photos of the car at the scene did not show black pants inside the car. *See* EXs 11-15, pp 436-40; TR 10/4/16, p 50:24-25. Trooper Soukup explained that paramedics sometimes remove clothing from injured persons in order to medically treat them, and it is usually returned to the vehicle. *See* TR 10/4/16, p 191:3-7. Given all this, the presence of the black jeans in the car raised the inference that defendant was wearing the black jeans at the time of the crash.

That defendant was wearing the black jeans at the time of the accident made it more probable that defendant was driving—the key factual dispute at trial. Again, Trooper Soukup observed blue cotton fibers on the passenger window, and BB was wearing blue jeans, which

were ripped, after the crash. *See* EXs 25-26, 37-39, pp 426-28, 433-34; TR 10/4/16, pp 50:24-25, 174:2-3, 182:7-13; TR 10/5/16, p 188:4-17. Trooper Soukup explained that while a person may not always be ejected from the adjacent window, had defendant been ejected from the passenger window, he would have likely been crushed by the roll of the car. *See* TR 10/4/16, pp 216-17; TR 10/5/16, p 142:6-16.

Further, no evidence directly refuted the contention that defendant was wearing black jeans at the time of the crash. Indeed, the law enforcement officers at the scene were unsure or equivocal on what defendant had been wearing. *See* TR 10/4/16, pp 67-71, 85-86.

Defendant contends, nevertheless, that the black jeans were only relevant if someone had directly testified that he or she saw defendant wearing them. *See* Opening Br. at 36-37. Defendant's contention overlooks that evidence is relevant so long as it has *any* tendency to make a fact more probable, *see* CRE 401, and evidence need not conclusively prove a fact in order to be relevant, *see Greenlee*, 200 P.3d at 266.

Here, that Trooper Soukup discovered black jeans in the car after the crash had some tendency to make it more probable that defendant was driving at the time of the crash, thereby advancing that factual inquiry. Further, while the black jeans could have ended up on the driver's seat for reasons other than that defendant was wearing them at the time of the crash, that evidence could equally make a different fact more probable does not render evidence irrelevant. *See Summitt*, 132 P.3d at 324.

2. The black jeans were not unfairly prejudicial.

In addition to being relevant, the probative value of evidence may not be substantially outweighed by the danger of, among other things, unfair prejudice. *See* CRE 403. CRE 403 strongly favors admission of relevant evidence. *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995). "[E]vidence is only excludable under CRE 403 if it has 'some undue tendency to suggest a decision on an improper basis, commonly an emotional basis, such as bias, sympathy, hatred, contempt, retribution, or horror.'" *People v. Acosta*, 2014 COA 82, ¶ 57 (citation omitted).

When deciding whether evidence complies with CRE 403, "a reviewing court must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected." *People v. Elmarr*, 2015 CO 53, ¶ 44 (citation omitted).

Defendant contends that the admission of the jeans violated CRE 403 because the jeans had no probative value and risked a verdict based on speculation. *See* Opening Br. at 37-38. As already explained, the jeans, when considered with other evidence at trial, had at least some tendency to suggest defendant was driving at the time of the crash. By analogy, testifying about an item found at a crime scene—a weapon, for instance—may still be probative even if the witness through which that evidence is offered does not know how the item arrived at the crime scene.

And the admission of the jeans did not carry a substantial risk that the jury would have "engage[d] in undue speculation as to the probative value of that evidence." *People v. Welsh*, 80 P.3d 296, 307 (Colo. 2003). Trooper Soukup explained the circumstances under which

he found the jeans—in the impound lot more than a month after the crash—and that he did not know how jeans got into the car or who was wearing them at the time of the crash. *See* TR 10/4/16, pp 188-90, 205:1-12. Thus, the jury knew the limits of Trooper Soukup's knowledge with respect to the jeans, and the jury could therefore properly assign weight to that piece of evidence.

Further, the evidence did not suggest a decision on an emotional basis. *Cf. Acosta*, ¶ 57. In other words, the admission of the black jeans was not "of such a character that the jury would have overlooked its legitimate probative force due to an overmastering hostility toward defendant." *People v. Weeks*, 2015 COA 77, ¶ 36.

Affording the evidence the maximum probative value attributable by a reasonable fact finder, *see Elmarr*, ¶ 44, the CRE 403 balancing test was met.

3. The prosecution authenticated the black jeans and established the chain of custody.

The burden on the prosecution to authenticate evidence is not high. *People v. Gonzales*, 2019 COA 30, ¶ 13. "The requirement of

authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." CRE 901(a); *accord People v. Brown*, 313 P.3d 608, 614 (Colo. App. 2011); *People v. Lesslie*, 939 P.2d 443, 451 (Colo. App. 1996). And "[a]ny question as to the authenticity of evidence is properly decided by the jury." *Brown*, 313 P.3d at 614; *accord Lesslie*, 939 P.2d at 451 ("Once authenticity is established, defects in the physical evidence go to the weight of that evidence.").

The "chain of custody rule requires that the proponent of real evidence establish that the evidence was involved in the incident and that the condition of the evidence at trial is substantially unchanged." *People v. Herrera*, 1 P.3d 234, 240 (Colo. App. 1999). "Speculation of tampering is insufficient to establish a break in the chain of custody," so "absent any evidence of tampering or lack of authentication, the proponent of the evidence is not required to call each witness who may have handled the item." *People v. Valencia*, 257 P.3d 1203, 1206 (Colo. App. 2011). Further, even if some confusion exists with respect to the

chain of custody, if the evidence is accounted for at all times, the evidence is admissible. *Id.*

Here, Trooper Soukup identified the black jeans as those that he observed in the car underneath medical wrappers and collected later on. *See* TR 10/4/16, pp 188-89, 205:1-12; Supp Env, App'x B, pp 2-6.[3] This testimony satisfied the low bar to establish that the jeans were what Trooper Soukup contended that they were. *See* CRE 901(a); *Gonzales*, ¶ 13; *Brown*, 313 P.3d at 614; *Lesslie*, 939 P.2d at 451. Defendant does not identify any basis to doubt that the black jeans were collected from the car as Trooper Soukup described, and in light of Trooper Soukup's testimony about the jeans, any discrepancy in that regard would pose only a jury question. *See Brown*, 313 P.3d at 614. Importantly, Trooper Soukup did not state that the black jeans were worn by defendant at the time of the crash; he made clear he did not know who was wearing them that day or how they got in the car. *E.g.*, TR 10/4/16, p 205:7-9.

[3] The jeans are labeled "black jeans." Supp Env, App'x B, pp 3-4. In some photos, however, the jeans appear blue. *See* Supp Env, App'x B, pp 5-6. Defendant does not challenge this fact on appeal.

Because the jeans were not proffered as the jeans defendant was wearing, the prosecution was not required to establish a chain of custody tying the jeans back to defendant at the time of the crash. The prosecution properly *argued* that other evidence circumstantially established this fact.

Even if the prosecution was required to establish the chain of custody for the jeans all the way back to the time of the accident, they sufficiently did so. After the crash, one officer explained that he stayed at the scene for "quite some time" until the vehicle was towed. TR 10/4/16, p 82:20-24.[4] Trooper Soukup said that the car was towed to an impound lot and "stored indoor in a locked storage facility." TR 10/4/16, p 171:21-25. The storage facility was still locked when the trooper arrived. *See* TR 10/4/16, p 172:1-3. The vehicle was in the same condition in which it had been in at the crash scene. *See* TR 10/4/16, p

[4] Outside the presence of the jury, Trooper Soukup said the vehicle was towed "[t]he day after" the crash, but then the prosecutor referred to the date of the crash as the tow date. TR 10/4/16, p 194:1-5; *see also People v. Herrera*, 1 P.3d 234, 240 (Colo. App. 1999) (upholding trial court's ruling that chain of custody was established "despite some minor discrepancies in testimony").

172:10-13. And, again, Trooper Soukup identified the pants as those he collected from the vehicle and said that it was common for medical personnel to cut off or remove clothing when treating a person and return the clothing to the vehicle. TR 10/4/16, pp 188-89, 191:3-7, 205:1-12.

Thus, the chain of custody was established. That the prosecution did not have direct evidence how the jeans got into the car impacted the weight of the evidence, not its admissibility. *See, e.g.*, *People v. Rodriguez*, 888 P.2d 278, 287 (Colo. App. 1994) (concluding that while no witnesses could testify that a gun was the one used in the shooting and the evidence on the origin of the gun was conflicting, there was no break in the chain of custody once the police obtained the gun, and the "lack of a positive identification of the gun affects the weight to be given the evidence, not the admissibility"); *see also Valencia*, 257 P.3d at 1206 (noting that any imperfections in the chain of custody go to its weight, not its admissibility).

4. Any error is not reversible.

Even if the trial court abused its discretion by admitting the black jeans, any error was either harmless or it did not so impair the fundamental fairness of the proceedings so as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos*, ¶¶ 12, 14.

While the black jeans made it more likely that defendant was driving at the time of the crash, other evidence on this point was far stronger. JJ indicated to several law enforcement officers, as well as the 911 dispatcher, that defendant had been driving the car at the time of the crash. *See* TR 10/4/16, pp 63:17-18, 76:15-25; TR 10/6/16, p 74:2-7; Supp Env, EX 1, Unrein1, 3:32-3:39. And Trooper Soukup provided his expert opinion that he was very certain defendant was seated in the driver's seat at the time of the crash. *E,g.*, TR 10/4/16, p 215:6-18.

Thus, because stronger evidence showed that defendant was the driver at the time of the crash, admission of evidence about the black jeans—which led to the same inference—did not affect defendant's substantial rights. *See, e.g.*, *Marks*, ¶ 45 (error in admitting evidence

was harmless, among other reasons, where it was not "the only evidence linking [defendant] to the crime").

Moreover, even if the trial court's chain of custody ruling was wrong, the prosecution did not need to admit the jeans into evidence at all. As the trial court observed, *see* TR 10/4/16, pp 202-03, Trooper Soukup could have merely testified about finding the jeans in the car, which he did, and that evidence would have had identical logical force compared to admitting the black jeans themselves, without any need for a chain of custody analysis. Because the admission of the black jeans themselves was not tied to their logical force, and because Trooper Soukup otherwise testified about how he found the jeans in the car, any error in admitting the black jeans themselves was harmless.

Reversal is not warranted.

III. The doctrine of cumulative error is inapplicable.

A. Preservation and Standard of Review

Defendant does not identify whether he preserved this contention. *See* Opening Br. at 39-40. While not articulating cumulative error, defendant moved for a new trial in light of his "constitutional rights to

due process and to a fair trial." CF, p 275. Thus, his claim appears to be preserved.

Nor has defendant identified a standard of review. *See* Opening Br. at 39-40. Due process claims are reviewed de novo. *Burlingame*, ¶ 11. And cumulative error is itself a standard of reversal. *See Hagos*, ¶ 9 n.2.

B. Law and Analysis

A defendant is entitled to a fair trial, not a perfect one. *See People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986). The doctrine of cumulative error recognizes, though, that "numerous formal irregularities, each of which might be deemed harmless, may in the aggregate show the absence of a fair trial[.]" *Oaks v. People*, 150 Colo. 64, 66-67, 371 P.2d 443, 446 (1962). In order for reversal to be warranted under the doctrine, "a reviewing court must identify multiple errors that collectively prejudice the substantial rights of the defendant, even if any single error does not." *Howard-Walker v. People*, 2019 CO 69, ¶ 25.

For the reasons described above, the trial court did not abuse its discretion. *See People v. Thomas*, 2014 COA 64, ¶ 61 ("To warrant

reversal of a conviction based on cumulative error, 'numerous errors [must] be committed, not merely alleged.'" (citation omitted)). And, as noted above, any errors were harmless, and they were also harmless collectively in light of the evidence that JJ indicated that defendant had been driving the car. *Cf. Howard-Walker*, ¶ 25. Defendant's cumulative error claim fails.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **RACHEL K. MERCER** and all parties herein via Colorado Courts E-filing System (CCES) on August 27, 2019.

/s/ Tiffiny Kallina