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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Larimer County District Court
Honorable Stephen E. Howard, Judge
Case No. 16CR2686

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

MICHAEL FRANK MAESTAS,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 17CA2202

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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

☒It contains **9456** words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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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.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

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Michael Frank Maestas (Defendant) directly appeals his conviction of Driving While Ability Impaired ("DWAI"). The trial court found he had three prior convictions for DWAI, elevating the instant DWAI offense to a class four felony offense.

On appeal, Defendant asserts: 1) proof of his prior 1983 DWAI conviction was not supported by sufficient evidence and the trial court erred by conducting additional research regarding proof of that conviction; 2) evidence of Defendant's refusal to submit to a blood-drug test should have been excluded under CRE 403; 3) admission of the forensic laboratory report violated his constitutional right of confrontation and section 16-3-309(5), C.R.S. (2019); and 4) the jury should have determined beyond a reasonable doubt the existence of his prior convictions used to elevate his offense to a felony DWAI offense.

Defendant's contentions fail.

STATEMENT OF THE CASE AND THE FACTS

Around midnight one evening in December 2016, Fort Collins law enforcement received a "Report Every Drunk Driving Immediately" ("REDDI") call indicating that the occupants of an SUV appeared intoxicated. (CF, p 11 (affidavit in support of warrantless arrest)). A police officer responded and observed the SUV weaving in and out of the traffic lane. (*Id.*).

The officer stopped the vehicle and made contact with Defendant, the driver of the SUV. (CF, p 11). Defendant said he had not had any alcohol to drink but he had taken two five milligram pills of Oxycodone around 11:00 a.m. the day before. (*Id.*). The officer noticed Defendant's eyes were bloodshot and watery, his movements were slow, and his speech was mumbled. (*Id.*).

Defendant agreed to perform roadside maneuvers which he performed poorly because he was so unsteady on his feet. (CF, p 11). He further agreed to do a preliminary breath test, which resulted in 0.000. Based on all of the information he had gathered, the officer believed Defendant was under the influence of an unknown drug and

arrested Defendant. (CF, p 11). The officer read Defendant Colorado's Expressed Consent law and asked if Defendant would submit to a blood test. Defendant refused. (*Id.*). The officer ultimately obtained a search warrant for a blood test. (*Id.* at pp 221-228). The results indicated Defendant had a level of 190 nanograms per milliliter of blood of the drug Zolpidem in his system. (*Id.* at p 228).

As a result of Defendant's conduct, the People charged Defendant with one count of felony DUI – fourth or subsequent offense[1] and one count of driving under restraint – alcohol related offense[2]. (CF, pp 16-17). The complaint identified Defendant's three prior DWAI convictions by case number and the respective counties of conviction. (*Id.* at p 17).

After a felony jury trial in Larimer County District Court, and in which the arresting officer testified, the jury found Defendant guilty of the lesser included offense of DWAI, and on the People's motion, the

[1] § 42-4-1301(1)(a), C.R.S. (2019); (F4).

[2] § 42-2-138(1)(d), C.R.S. (2019); (M).

trial court dismissed the driving under restraint charge. (CF, pp 191, 273; TR 8/16/17, pp 32:2-34:2).

Afterwards, in a separate sentencing proceeding before the trial court, the People presented evidence regarding Defendant's three prior DWAI convictions. (TR 8/17/17, pp 3:22-18:23, 27:19-15; EX #'s 5-9 (bench trial), pp 5-10). The court determined Defendant's prior convictions had been proven by a preponderance of the evidence and qualified his DWAI offense for elevation to a class four felony. (TR 8/17/17, pp 34:25-37:22, 39:17-40:20).

The trial court sentenced Defendant to a four-year term of probation and a 120-day jail term to be served through a work-release program. (CF, p 229; TR 10/16/17, p 9:3-23).

This appeal now follows.

SUMMARY OF THE ARGUMENT

1. The prosecution sufficiently proved, by a preponderance of the evidence, Defendant's 1983 DWAI conviction.

2. The trial court did not err in admitting evidence that Defendant refused to submit to chemical testing of his blood-drug content as such admission is statutorily permitted under § 42-4-1301(6)(d), C.R.S. (2019). Nor was the evidence so unfairly prejudicial as to warrant exclusion under CRE 403. Any error was harmless.

3. The trial court did not err in admitting, without objection, the forensic laboratory report evidencing Defendant's blood-drug content. Testimony by the forensic toxicologist who personally conducted the confirmation screen test did not violate Defendant's right to confrontation or the requirements of § 16-3-309(5).

4. Defendant was not entitled to a jury determination of his prior DWAI convictions because a prior conviction is a *Blakely*-exempt aggravating factor. Accordingly, his prior convictions were not elements of the felony DWAI offense but rather sentence enhancers that were appropriately determined by the trial court. Further, the trial court applied the correct standard of proof, by a preponderance of the evidence, to those convictions.

ARGUMENT

I. Defendant's prior 1983 DWAI conviction was sufficiently proven by a preponderance of the evidence to qualify its use for purposes of enhancing Defendant's DWAI offense to a felony offense.

A. Issue Preservation and Standard of Review

The People agree that while preservation of the instant sufficiency of the evidence challenge was not required, Defendant preserved this claim for appellate review. *See McCoy v. People*, 442 P.3d 379, 387 (Colo. 2019) (holding that "sufficiency of the evidence claims may be raised for the first time on appeal and are not subject to plain error review"); (*See* TR 8/17/17, pp 31:18-33:12; Opening Brief, p 6);

The People also agree de novo review applies to this claim. ***S****ee McCoy*, 442 P.3d at 387; (Opening Brief, p 6).

B. Additional Facts

At the bench trial to establish Defendant's prior DWAI convictions for purposes of sentence enhancement, the prosecution presented evidence regarding the following convictions:

- 1983 DWAI conviction in Larimer County Case No. F83 T 2970; (*see* EX #7, p 8);

- 1988 DWAI conviction in Larimer County Case No. T.88.102609; (*see* EX #8, p 9);

- 2012 DWAI (with two or more priors) conviction in Larimer County Case No. 2012T001968; (*see* EX #9, p 10).

The prosecution's evidence included testimony from a Larimer County District Attorney's Office law enforcement investigator, who conducted the pertinent database searches to access Defendant's driving history and criminal history; a report of Defendant's driving history which was generated from the Colorado Crime Information Center ("CCIC") database; and certified copies of Defendant's three prior DWAI convictions. (*See, e.g.*, TR 8/17/17, pp 3:24-19:1; EX #'s 5-9, pp 5-10).

The investigating officer testified that since she was a post-certified peace officer in Colorado she had access to specific State databases, including the CCIC database. It was from this database that she requested and obtained a report of Defendant's Colorado driving

history (hereinafter "CCIC Report"), which the trial court admitted into evidence. (*See* TR 8/17/17, p 8:1-21; EX #5, pp 5-6).

The officer explained that the CCIC Report contained information associated with Defendant's personal identification number ("PIN") – which she testified was a "specific unique identifier number that's assigned to individuals who reside in Colorado" and is also the same number as a person's Colorado driver's license number. (TR 8/17/17, pp 7:17-20, 10:14-19; EX #5, p 5). That information included personal identifying information such as Defendant's full name[3], his date of birth – identified as 6/26/1963 – his height, weight, hair color, and eye color, his residential addresses, and the current status of his driver's license. (*See* TR 8/17/17, p 7:5-25; EX #5, p 5). A copy of Defendant's driver's license, which the officer confirmed had the same PIN as the CCIC

[3] The CCIC Report identified Defendant as "Michel Frank Maestas" with a date of birth as 6/26/1963; it also identified an alias of "Michel Maestas" with the same date of birth. (*See* EX #5, p 5).

Report, was admitted into evidence.[4] (*See* TR 8/17/17, p 11:1-24; EX #6, p 7).

The CCIC Report also contained information regarding Defendant's driving history. The investigating officer confirmed that the information contained in the certified copies of Defendant's three prior convictions was consistent with both Defendant's driving history and the associated criminal convictions information that were represented in the CCIC Report. (*See, e.g.*, TR 8/17/17, pp 12:5-17:22). And the certified copies of Defendant's three prior convictions were admitted into evidence. (*See, e.g.*, TR 8/17/17, pp 15:1-18:12; EX #'s 7-9, pp 8-10).

After the presentation of its evidence, the prosecution requested that the trial court take judicial notice under CRE 201(d) of the three prior convictions. (*See* TR 8/17/17, p 19:2-12). Defendant did not object to the court's taking of judicial notice of the 1988 and 2012 DWAI convictions.

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[4] The driver's license listed the name as "Michel Frank Maestas" and had a date of birth as 6/26/1963. (*See* EX #6, p 7).

However, Defendant did object to the court's doing so for the 1983 DWAI conviction because it had not been shown he was the same individual who, in fact, had been convicted of that crime. (*See* TR 8/17/17, p 19:15-25). The court took judicial notice of the two uncontested prior convictions as requested but kept the third prior conviction "under advisement." (TR 8/17/17, p 20:1-3).

And so, at issue now on appeal is the sufficiency of the evidence regarding Defendant's 1983 DWAI conviction.

Regarding that conviction specifically, on direct examination the prosecution questioned the investigative officer concerning "a citation date of 9-3-83" identified in the CCIC Report. (TR 8/17/17, p 13:4-12; EX #5, pp 5-6). The officer confirmed there was a conviction for DWAI resulting from that case and she testified "it appear[ed] from the [CCIC Report] that the conviction was on 10-25 of 1983." (TR 8/17/17, p 13:4-20; EX #5, p 6). She explained generally that her practice was to verify the information by "pull[ing] up the register of action" on the "CoCourts" database and requesting a certified copy of conviction, which she did here. (TR 8/17/17, pp 13:19-14:9). The officer testified that the

certified copy of conviction was for Larimer County Case No. F83-T-2970, in which a "defendant by the name of Michael Frank Maestas" was convicted on October 25, 1983, for DWAI. (TR 8/17/17, p 15:1-24; EX #7, p 8). And when asked whether "the conviction date and all of the information on that certified conviction matches . . . [D]efendant's driving record through CCIC, correct?" she replied, "[t]hat's correct." (TR 8/17/17, p 15:21-24).

On cross-examination of the investigative officer, Defendant first elicited the fact that the certified copy of the 1983 DWAI conviction did not contain various information, such as: the statute number of conviction; the elements of the offense of DWAI; identifying information for the convicted defendant such as a date of birth, or a social security number, or a Colorado PIN; and Defendant's signature. (*See* TR 8/17/17, pp 20:9-21:23, 27:2-6). Defendant then questioned the officer concerning a query of his pertinent records that was different from the CCIC Report and which was obtained from the Colorado Bureau of Investigation (hereinafter "CBI Report"). (*See*, Def. EX A, pp 11-12).

The officer referred to the CBI Report as a "query rap sheet." (TR 8/17/17, p 22:11-19).

The officer testified that the CBI Report contained information such as a number of different names used by Defendant, a date of birth of October 26, 1963, and two different social security numbers. But she agreed that the CBI Report did not contain any notation for a conviction for DWAI in 1983. (TR 8/17/17, pp 23:13-24:22).

On redirect examination, the officer agreed that when investigating a prior conviction, the best practice is to go to the courthouse and review the court file for "thoroughness[,] . . . accuracy and cross comparison of details." (TR 8/17/17, p 28:1-6). She confirmed that in the instant case she obtained the certified conviction for the 1983 conviction from "that specific case file" at the Larimer County courthouse. (*Id.* p 28:7-10). And she affirmed that the information contained in that case file was consistent with the CCIC's history for Defendant. (*Id.* p 28:11-15).

After hearing argument from the parties, (*see, e.g.*, TR 8/17/17, pp 29:8-30:1, 31:18-32:19), the trial court determined, first, that the

applicable burden of proof was the preponderance of the evidence standard. (*See* TR 8/17/17, pp 34:25-36:5). And it noted its belief that the "[c]ourt records are the most reliable evidence." (TR 8/17/17, p 36:15-16). But it still found the absence of the 1983 conviction from Defendant's query, the CBI Report, puzzling as the court commented "why it came back no record is beyond me." But immediately after that the court observed that "[i]t d[id] appear because [the 1983 conviction was] cross-referenced in the driver's history [that that conviction] [was] a case of Mr. Maestas, the defendant, in this case." (*Id.* p 37:2-4).

With that, the court then found:

> Based on what I currently have in front of me, I would find by a preponderance of the evidence that all of these convictions are prior convictions of . . . [D]efendant.

In the next breath, the court then stated:

> I am not, however - - frankly, I would like to get more evidence if possible of the 1983 conviction. Because what bothers me is it does not appear when I go into our index system here, [Defendant's] other offenses appear, but the 1983 offense does not. And the case number does not appear. So that troubles me somewhat. And I am not going to make a final ruling until I have a

> chance to look and see. It seems to me since this is a Larimer County case it shouldn't be very difficult to determine once and for all whether that conviction is, in fact, [Defendant].
>
> So I am going to take a recess and take a look at that.

(TR 8/17/17, p 37:5-22).

After a short recess, the trial court had apparently gone "down to the records department" and "print[ed] out the complete file." (TR 8/17/17, p 39:16-19). In that file, the court stated, was the "summons and complaint in this case [which] list[ed] Michael Frank Maestas, date of birth 6-26-63, as the defendant." (*Id.* p 39:17-20). The court stated that those documents did not have a driver's license number but noted that it said "State of Wyoming", and so the court surmised that "maybe they didn't keep track of numbers when there's an out-of-state plate." The court then took "judicial notice of that." (TR 8/17/17, p 39:20-24).

Defendant declined the trial court's invitation to review the paperwork. (*See* TR 8/17/17, pp 39:24-40:3). And he "object[ed] to the Court looking for additional information beyond what was presented during today's hearing." To that the court responded:

> And my response is I am entitled to take judicial notice. In fact, I was asked to take judicial notice. And I thought it was appropriate to do so. And, in fact, as I indicated previously, I thought there was enough evidence. And then I went to look because I thought it might possibly help [Defendant].
>
> Based on the Court's findings, the Court will enter judgment of conviction of driving while ability impaired as a fourth or subsequent offense.

(TR 8/17/17, p 40:4-20).

C. Law and Analysis

1. Reviewing this sufficiency of the evidence challenge de novo, the prosecution presented sufficient evidence to prove Defendant's 1983 conviction by a preponderance of the evidence.

Because the DUI statute does not set forth a burden of proof, application of the preponderance of the evidence standard to proof of Defendant's prior alcohol-related convictions was, and is, appropriate. *See People v. Gwinn*, 428 P.3d 727, 738 (Colo. App. 2018)[5]; *see also*

[5] This precise issue of the applicable burden of proof for prior convictions in a felony DUI prosecution is currently pending before the

People v. Schreiber, 226 P.3d 1221, 1223-24 (Colo. App. 2009) (holding that because the indecent exposure statute did "not establish the burden of proof, in a trial to the court the prosecution need only prove the existence of prior conviction facts by a preponderance of the evidence"). "A fact is established by a preponderance of the evidence when, upon consideration of all the evidence, the existence of that fact is more probable than its nonexistence." *People v. Garner*, 806 P.2d 366, 370 (Colo. 1991). The prosecution met that burden here.

That is, the prosecution presented the trial court a certified copy of the judgment of conviction for Defendant's 1983 DWAI conviction, obtained from the Larimer County Court, and that certified copy was a proper means of satisfying its burden of proof. *See, e.g.*, *People v. Martinez*, 83 P.3d 1174, 1179-80 (Colo. App. 2003) (stating that in a habitual criminal proceeding, the prosecution may carry its burden of proof regarding prior convictions by using certified copies of public records); (*See* TR 8/17/17, pp 15:1-24, 18:12; EX #7, p 8). Additionally,

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Colorado Supreme Court in *Linnebur v. People*, 2019 WL3934483 (No. 18SC884, Aug. 19, 2019).

the prosecution presented testimony from the officer who conducted the search of Defendant's criminal history and driving record through the CCIC database and testified concerning the CCIC Report that demonstrated Defendant had a prior DWAI conviction in 1983. (*See* TR 8/17/17, pp 7:8-13:20).

Importantly, in addition to the certified copy of the 1983 conviction, the CCIC Report – which was generated from the CCIC state agency database and reflected Defendant's driving history in Colorado – was admitted into evidence and the officer testified regarding its contents. (*See* TR 8/17/17, pp 7:5-8:21). The officer testified that the information in the certified copy of judgment of conviction for the 1983 DWAI conviction matched Defendant's driving record through CCIC. (*See* TR 8/17/17, p 15:7-24; EX #5, pp 5-6).

And while not testifying specifically as to the instant case, the officer explained that the CCIC database is able to minimize discrepancies in information, resulting from human error or false reporting, by the comparison of fingerprint data. That is, the CCIC

database compares fingerprint files and will merge the data for that specific offender. (*See, e.g.*, TR 8/17/17, pp 9:5-10:4).

The foregoing evidence sufficiently established, by a preponderance of the evidence, the fact of Defendant's prior 1983 DWAI conviction. *See, e.g.*, *People v. Young*, 923 P.2d 145, 148 (Colo. App. 1995) (concluding, for habitual criminal purposes, that a prior conviction was established by a certified copy of the judgment of conviction and official photographic and fingerprint documents).

Defendant's argument, reliant on the standard for proof of identity in the habitual criminal context, that the prosecution failed to establish identity – i.e., that he is the person who was convicted of DWAI in the 1983 case – does not change the conclusion that Defendant's three prior convictions were proven by a *preponderance of the evidence*. (*See* Opening Brief, pp 10-11). Unlike in the habitual criminal context, *see* § 18-1.3-803(5)(b), C.R.S. (2019), in which "the prosecution must prove beyond a reasonable doubt that the accused is the person named in the prior convictions," *People v. Cooper*, 104 P.3d 307, 310 (Colo. App. 2004), currently there is no legal authority requiring the same burden of proof

for prior convictions in the felony DUI/DWAI context.[6] *Cf.* § 18-1.3-803(5)(b). Therefore, while proof in a habitual criminal proceeding that a defendant has the same name as the person previously convicted does not satisfy the higher beyond a reasonable doubt standard, *see De Gesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961), such proof may nevertheless satisfy the lower preponderance of the evidence standard for proof of a prior conviction in the DUI/DWAI context. *See, e.g.*, *People v. Marx*, 2019 COA 138, ¶ 39 (stating that a preponderance of the evidence standard "is not an especially high degree of proof" (internal quotation marks omitted)).

And so here, taking together evidence of the certified copy of the judgment of conviction in the 1983 case, the CCIC Report linking Defendant to the 1983 DWAI conviction, and the investigating officer's testimony, the prosecution sufficiently proved that it is "more probable" than not that Defendant is the person who was convicted of DWAI in 1983 in Larimer County Case No. F83 T 2970. *See Garner*, 806 P.2d at

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[6] As noted, *supra* n.4, this precise question is currently before the Colorado Supreme Court.

370 (providing that a fact is established by a preponderance of the evidence where "the existence of that fact is more probable than its nonexistence").

2. The prosecution's evidence sufficiently established proof of Defendant's 1983 DWAI conviction even without the trial court's taking judicial notice, *sua sponte*, of additional facts.

Even assuming, *arguendo*, as Defendant contends that the trial court impermissibly conducted "its own investigation [of the 1983 conviction]," (Opening Brief, pp 12-16), any such error does nothing to devalue the preponderance of the evidentiary proof the prosecution had already submitted to the court. *See Marx*, ¶ 39 (providing that a preponderance of the evidence standard merely "requires that the evidence must preponderate over, or outweigh, evidence to the contrary" (internal quotation marks omitted)). In other words, this Court can appropriately conclude the prosecution met its evidentiary burden even without the facts that were allegedly noticed by the court improperly.

3. Assuming, *arguendo*, Defendant's 1983 DWAI conviction was not

sufficiently proven, Defendant's 2012 conviction for DWAI with two prior alcohol-related driving offenses necessarily establishes three predicate offenses supporting enhancement.

Finally, while Defendant makes much ado about the alleged insufficiency of proof regarding his 1983 DWAI conviction, in the end any such insufficiency is moot given that Defendant's 2012 DWAI conviction – which he did not challenge below and does not now challenge here – was a conviction resulting from a guilty plea to DWAI *with two or more prior convictions of DUI or DWAI*, and Defendant was sentenced as such. *See* § 42-4-1301(1)(b), C.R.S. (2019); § 42-4-1307(6), C.R.S. (2019) (providing mandatory sentencing requirements for third and subsequent offenses of DUI, DWAI, or DUI per se); (*see, e.g.*, EX #9, p 10). Accordingly, the instant offense here constituted Defendant's fourth or subsequent alcohol-related driving offense.

Of this fact there can be no doubt. Indeed, at the bench trial, the officer testified that the certified copy of the judgment of conviction in Defendant's 2012 DWAI case indicated the "conviction was for driving

while ability impaired, DWAI, *with two or more prior convictions*." (TR 8/17/17, p 17:6-22 (emphasis added)). Defendant did not object to the representation of these facts. Nor did Defendant object to the trial court taking judicial notice of Defendant's prior 2012 DWAI (with two or more priors) conviction. *See People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004) ("A court may take judicial notice of the contents of court records in a related proceeding."); CRE 201(d).

Accordingly, though the prosecution sufficiently established proof of Defendant's prior 1983 DWAI conviction, even without that conviction the record supports a reasonable conclusion that Defendant had three or more predicate DWAI offenses to support enhancement of his instant DWAI offense to a felony DWAI offense. *See, e.g.*, *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (providing that a party may defend the trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court); *see also People v. Sullivan*, 680 P.2d 851, 852 (Colo. App. 1984) (providing that reviewing court may "make an independent [legal] determination

of [an] issue [where] the facts are not disputed on appeal and the evidence is before [the reviewing court]").

This Court should therefore affirm the trial court's determination that Defendant's three prior convictions for alcohol-related driving offenses were sufficiently proven by a preponderance of the evidence to enhance the instant DUI offense to a felony level.

II. The trial court did not err in admitting evidence of Defendant's refusal to submit to a blood test to determine his blood-drug content.

A. Issue Preservation and Standard of Review

The People disagree somewhat with Defendant's statement of issue preservation. Although Defendant argued below that the refusal evidence was not *relevant,* and cited CRE 403 for that objection, (*see* TR 8/15/17, p 6:1-18), he now argues on appeal that the evidence should have been excluded under CRE 403 because it had little probative value. (Opening Brief, pp 20-22). Nonetheless, the People will treat Defendant's CRE 403 challenge as sufficiently preserved for appellate review.

The People agree that a trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v. Elmarr*, 351 P.3d 431, 437 (Colo. 2015); (Opening Brief, p 17). To constitute an abuse of discretion, a trial court's ruling must be "manifestly arbitrary, unreasonable, or unfair, or . . . based on an erroneous view of the law." *Elmarr*, 351 P.3d at 438 (citation omitted) (internal quotation marks omitted).

The People disagree that the constitutional harmless error standard of reversal applies. (Opening Brief, p 23). Evidentiary errors have consistently been reviewed under the nonconstitutional harmless error standard. *See, e.g.*, *Yusem v. People*, 210 P.3d 458, 469-70 (Colo. 2009); *Crider v. People*, 186 P.3d 39, 42-42 (Colo. 2008).

Under the appropriate nonconstitutional harmless error standard, "reversal is required only if the error affects the substantial rights of the parties." *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012). That is, reversal is required "if the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.* (internal quotation marks omitted). "If a reviewing court can say with fair assurance that, in light of the entire record of the trial, the error did not substantially

influence the verdict or impair the fairness of the trial, the error may properly be deemed harmless." *Masters v. People*, 58 P.3d 979, 1003 (Colo. 2002).

B. Additional Facts

Before the prosecution presented its evidence, Defendant objected "under Rule 403" to the evidence that he refused to take a chemical test because such evidence was not relevant given that he ultimately submitted to a chemical test and the jury would therefore hear that evidence. (TR 8/15/17, p 6:1-18). The prosecution argued that the refusal evidence was admissible under § 42-4-1301(6)(d). Further, in the prosecution's view, the fact that it was able to obtain a search warrant for a blood draw, due to Defendant's prior convictions, and ultimately obtained a blood test, did not affect the admissibility of Defendant's refusal evidence under § 42-4-1301(6)(d). (*See* TR 8/15/17, pp 8:21-10:5). The trial court determined, relying largely on *People v.*

Cox[7], that the refusal evidence was admissible because it was relevant to evidence of consciousness of guilt. (*See* TR 8/15/17, pp 13:25-14:16).

At trial during the prosecution's examination of the arresting officer, the prosecution elicited testimony concerning Defendant's refusal to submit to a blood test:

[Prosecution]:	And what do you do next?
[Officer]:	I advise [Defendant] at this point that he was under arrest for driving under the influence.
[Prosecution]:	And do you advise him of Colorado Express Consent?
[Officer]:	I do.
	. . .
[Prosecution]:	And at this point did you request a blood test?
[Officer]:	I requested a blood test.
[Prosecution]:	Why was that?
[Officer]:	I believed he was under the influence of drugs.

[7] 735 P.2d 153 (Colo. 1987).

[Prosecution]:	And did he agree to take a blood test for you?
[Officer]:	No, he refused.
[Prosecution]:	Now, upon him refusing to take a blood test, what do you do?
[Officer]:	I then applied for a blood draw search warrant.

(TR 8/15/17, pp 171:22-172:16).

C. Law and Analysis

1. The admission of Defendant's refusal to submit to a blood test was expressly authorized by Colorado's Expressed Consent Statute.

In Colorado, a person who chooses to drive a vehicle in this State is deemed to have consented to the terms of Colorado's Expressed Consent Statute by virtue of his driving. *See, e.g.*, *People v. Hyde*, 393 P.3d 962, 966-69 (Colo. 2017); *Fitzgerald v. People*, 394 P.3d 671, 673-74 (Colo. 2017); § 42-4-1301.1(1), C.R.S. (2019).

The Statute authorizes a law enforcement officer to request completion of a blood test for purposes of determining a driver's drug content. *See* § 42-4-1301.1(2)(b)(I). And as important here, another provision directs that a driver who refuses to submit to chemical testing is subject to the evidentiary consequence of admission of the refusal into evidence at the driver's trial. *See* § 42-4-1301(6)(d); *People v. Simpson*, 392 P.3d 1207, 1211 (Colo. 2017). The Statute states:

> [i]f a person refuses to take or to complete . . . any test or tests as provided in section 42-4-1301.1 and such person subsequently stands trial for DUI or DWAI, *the refusal to take or to complete . . . any test or tests shall be admissible into evidence at the trial…*

§ 42-4-1301(6)(d) (emphasis added).

That the Statute expressly authorizes the admission into evidence of a driver's refusal to submit to chemical testing is the end of the inquiry here as Defendant refused such testing, a fact he does not deny. Further, the effect of § 42-4-1301(6)(d) "is to allow admission of evidence of refusal in every case without a judicial determination of relevancy on a case-by-case basis." *Cox*, 735 P.2d at 159.

In the end, because admission of Defendant's refusal evidence was statutorily authorized the trial court did not err in admitting it.

2. The probative value of the refusal evidence was not substantially outweighed by the danger of unfair prejudice and, therefore, exclusion under CRE 403 was not warranted.

Defendant nevertheless contends that the refusal evidence should have been excluded under CRE 403 because the evidence had "minimal probative value" in light of the admission into evidence of Defendant's blood test results. (Opening Brief, pp 20-22). Defendant's contention fails.

CRE 403 provides that, though relevant, evidence may nevertheless be excluded "if its probative value is *substantially outweighed* by the danger of unfair prejudice…." CRE 403 (emphasis added). CRE 403 "strongly favors the admission of evidence." *Masters*, 58 P.3d at 1001.

Indeed,

> evidence is not 'unfairly prejudicial' simply because it damages the defendant's

> case...[P]roffered evidence which calls for exclusion as unfairly prejudicial is given a more specialized meaning of an undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror.

Masters, 58 P.3d at 1001 (citations omitted, internal quotation marks omitted).

In balancing the interests of CRE 403, a trial "court must assess the evidence's 'incremental' probative value: what weight the evidence adds to the prosecution's case." *People v. Shores*, 412 P.3d 894, 901 (Colo. App. 2016) (internal quotation marks omitted). In reviewing the refusal evidence at issue here, this Court should assume the maximum probative value a reasonable fact finder might give the evidence and the minimum unfair prejudice to be reasonably expected from its introduction. *Id.*

Defendant incorrectly argues that the refusal evidence had minimal probative value as the actual tests results which were also admitted "were far stronger evidence" of an inference of drug influence. (Opening Brief, p 21). But even if the blood test results were "stronger

evidence," the admission of those results did not render Defendant's refusal to submit to chemical testing meaningless in proving his guilt. Instead, the refusal evidence was just one piece of evidence that the jury could consider as evidence, or not, of Defendant's consciousness of guilt. *See Cox*, 735 P.2d at 158-59 (recognizing that the inference of intoxication from refusal evidence is rebuttable because a defendant may have reasons for refusing testing that are unrelated to consciousness of guilt). And "[t]he weight to be given the evidence of refusal [was] for the jury to determine." *Id.* at 159.

Even assuming that the refusal evidence had little probative value, exclusion under CRE 403 was still not warranted because Defendant has failed to show that the evidence was "unfairly prejudicial" by suggesting a decision on an improper basis. *See Masters*, 58 P.3d at 1001. And since the challenged evidence fails that test, there is no danger of that inherent prejudice *substantially* outweighing the evidence's probative value. *See id.*

In sum, the trial court did not err in failing to exclude the refusal evidence under CRE 403.

And even if it did, the error is not cause for reversal. While Defendant argues the refusal evidence "factored heavily in the prosecution's case," this is not so. (Opening Brief, p 18). Instead, in response to the prosecution's sole inquiry on whether Defendant "agree[d] to take a blood test," the officer testified briefly: "[n]o, he refused." (TR 8/17/15, p 172:12-13). And while Defendant bemoans the fact the prosecution referenced the refusal evidence in its closing and rebuttal arguments, the prosecution's commentary was not extensive and in any event does not constitute evidence. *See People v. Rodriguez*, 914 P.2d 230, 278 (Colo. 1996) ("The closing arguments of counsel are not evidence…."); (*see* TR 8/16/17, pp 11:1-3, 23:10-17, 26:12-13); Opening Brief, p 24). And notably, Defendant did not object to the prosecution's commentary. *See People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990) (The "lack of an objection may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging.").

Accordingly, in light of the entire record of the trial, any error in the admission of Defendant's refusal evidence was harmless as it did

not substantially influence the verdict or impair the fairness of the trial. *See Masters*, 58 P.3d at 1003; *see also Cox*, 735 P.2d at 157-59 (rejecting the defendant's argument that refusal evidence was unduly prejudicial under CRE 403).[8]

III. The trial court's admission of the forensic laboratory report did not violate Defendant's right of confrontation under the Sixth Amendment nor section 16-3-309(5).

Defendant contends that the trial court violated his confrontation rights and section 16-3-309(5) by admitting a forensic laboratory report, generated by ChemaTox, that contained his blood test results. Specifically, he argues that his confrontation right was violated because neither the person whose signature appeared on the laboratory report, Ms. Urfer, nor the "certifying scientist", Ms. Wiles, testified at trial and

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[8] Defendant also argues briefly that the officer's testimony that he obtained a search warrant to draw Defendant's blood violated CRE 403. (*See* Opening Brief, p 22). This issue is unpreserved. Unlike *People v. Mullins*, relied on by Defendant, the officer here did not discuss probable cause or the procedure to obtain a warrant from the judge. *Compare* 104 P.3d 299, 301 (Colo. App. 2004). And even if plain, the brief testimony did not cast serious doubt on the reliability of the judgment of conviction.

the document contained their testimonial statements. (Opening Brief, pp 26-28).

Defendant is mistaken.

A. Issue Preservation and Standard of Review

The People agree that Defendant's statutory and constitutional claims were raised by the filing of a pretrial notice under § 16-3-309(5) requesting the testimony of a laboratory employee or technician who accomplished the scientific testing, and by arguing that notice at a motions hearing. (*See* CF, p 52; TR 5/17/17, p 3:5-21); (Opening Brief, p 25).[9]

The People submit, however, that Defendant's statutory and confrontation challenges were later waived at trial, and this Court should not review these claims. This is because Defendant was well aware before trial, as the forensic laboratory report was provided to him in discovery, that the report contained the signature of Ms. Urfer, who

[9] Defendant did not, however, serve his notice on any witness so requested as is mandated by the statute. *See* § 16-3-309(5), C.R.S. (2019).

"approved" the document, and it identified Ms. Wiles as the "certifying scientist." *See, e.g., Cropper v. People*, 251 P.3d 434, 438 (Colo. 2011) (recognizing that the prosecution is required under Crim. P. 16 to provide the defense with "any reports or statements of experts made in connection with the particular case, including results of scientific tests"); (*See* CF, p 228). Defendant was also aware, before trial, that the prosecution had endorsed three people from the forensic laboratory, ChemaTox, including Ms. Urfer, Mr. Avram, and Mr. Jackson. (*See* CF, pp 32, 228). Defendant was further aware, as it was discussed at a pretrial motions hearing, that the prosecution had represented that since the laboratory was a private organization then the availability of its employees to testify at trial was in part dependent on the organization's schedule. (*See, e.g.*, TR 5/15/17, pp 3:1-4:8).

Yet despite all this information, at trial Defendant did not object to the prosecution calling Mr. Avram, one of ChemaTox's forensic toxicologists, to testify – even though Mr. Avram was clearly neither Ms. Urfer, the person whose signature appeared on the report nor was

he Ms. Wiles, the "certifying scientist." (*See, e.g.*, TR 8/15/17, pp 191:25-198:22).

Nor did Defendant object to the admission of the forensic laboratory report containing his blood-drug content, which was admitted through Mr. Avram's testimony. In fact, Defendant stated he had "no objection" to the admission of the laboratory report which was testimonial. (*See* TR 8/15/17, pp 199:4-200:6).

So to the extent that Defendant now raises a confrontation challenge regarding alleged testimonial statements contained within the forensic laboratory report that are attributed to either Ms. Urfer or Ms. Wiles, he has waived that claim because it was evident to him at trial that neither of those persons was testifying and he did not challenge Mr. Avram's testimony nor the admission of the laboratory report. *See, e.g., People v. Rediger*, 416 P.3d 893, 902 (Colo. 2018) ("Waiver . . . is the intentional relinquishment of a known right or privilege." (intentional quotation marks omitted)); *see also Hawkins v. Hannigan*, 185 F.3d 1146, 1154 (10th Cir. 1999) (recognizing that a defendant may waive his right to confrontation); (*See* TR 8/15/17, pp

199:4-200:6). Therefore, his waiver precludes appellate review. *See Rediger*, 416 P.3d at 902 ("[W]aiver extinguishes error, and therefore appellate review.…").

Alternatively, if not waived then the confrontation claim is certainly forfeited. *See id.* (providing that a forfeiture is the "failure to make the timely assertion of a right" through neglect and, in contrast to waiver, does not extinguish appellate review).

The People agree with Defendant's articulation of the standard of review. Statutory interpretation of § 16-3-309(5) is a question of law reviewed de novo. *See People v. Williams*, 183 P.3d 577, 578 (Colo. App. 2007). Further, "whether the admission of evidence violates the [Sixth Amendment's] Confrontation Clause is [also] reviewed de novo." *People v. Barry*, 349 P.3d 1139, 1154 (Colo. App. 2015).

Should this Court determine there was constitutional error, then a plain error standard of reversal applies. *See Hagos*, 288 P.3d at 119; *see also People v. Vigil*, 127 P.3d 916, 929-30 (Colo. 2006) (applying plain error review to alleged constitutional violation of the Confrontation Clause). Under a plain error analysis, reversal is warranted only when

an error is "obvious and substantial . . . [and] so undermine[s] the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (internal quotation marks omitted).

B. Additional Facts

Pretrial, Defendant filed a timely notice, pursuant to § 16-3-309(5), requesting that "the employee or technician of the laboratory who accomplished each and every scientific analysis, comparison or identification i[n] this matter testify in person as to the procedure used and laboratory results received in evidence at the criminal trial of this case." (CF, p 52).

The testing of Defendant's blood sample to determine its blood-drug content was completed by ChemaTox, a private forensic toxicology laboratory. (*See* TR 8/15/17, pp 192:3-14, 199:4-200:6; EX (trial), p 4 (report)). At trial, Mr. Avram, a forensic toxicologist employed by ChemaTox and whose primary job was to do blood-alcohol analysis, blood-drug analysis and case review, was qualified (without objection)

as an expert witness in forensic toxicology. (TR 8/15/17, pp 192:2-195:6).

Mr. Avram first testified generally regarding the drug testing process that is done at ChemaTox, including how blood samples there are received, tested, and stored. (*See, e.g.*, TR 8/15/17, pp 195:7-197:17). He explained that the drug testing process involves an initial screen, that tests a broad class of drugs, and then that initial screen is followed by a more specific confirmation screen. (*See* TR 8/15/17, pp 195:7-197:11). Once the testing has been completed, he continued to explain, "there's a secondary scientist that will go through and review all that data, then that result is certified by a certifying scientist, and . . . all that information can be sent out on a report." (TR 8/15/17, p 197:12-16).

At this point in his testimony, the prosecution asked Mr. Avram about his personal involvement in the testing of Defendant's blood sample, and he testified that "[i]n this case, I did the confirmation testing for benzodiazepines and Zolpidem…." (TR 8/15/17, p 198:19-25). The prosecution then handed Mr. Avram an exhibit which he recognized as "the final report of analysis" of the drug screen that was requested

for Defendant and which ChemaTox had generated. (*See* TR 8/15/17, pp 199:1-200:1). Mr. Avram testified that the initial screen of eleven different drug classes was performed. At this point, he confirmed both that the prosecution's exhibit reflected the laboratory report that was generated for Defendant and represented the testing that was done. (*See* TR 8/15/17, pp 199:16-200:2).

The prosecution moved for admission of the laboratory report, to which defense counsel stated, "No objection." (TR 8/15/17, p 200:3-6).

After the laboratory report was admitted, Mr. Avram began to discuss the results of the testing more specifically. He testified that the initial screens detected the presence of oxycodone and Zolpidem. (*See* TR 8/15/17, p 200:9-22). Because those drugs were detected, a confirmation screen, which he stated was "much more specific," was done.

As to that confirmation testing, Mr. Avram testified that the "confirmation testing and analysis was done by me." (*See* TR 8/15/17, p 202:4-6). And he testified that the results of that testing showed that

190 nanograms per milliliter of the drug Zolpidem was detected. (*See* TR 8/15/17, p 202:7-21; *see also* EX (trial), p 4).

On cross-examination, Mr. Avram was questioned regarding the meaning of a column in the report indicating a "screen cutoff or confirmation LOD." (*See* TR 8/15/17, p 204:4-8). He explained that "that column which does extend down into the confirmation testing . . . indicat[es] the cutoff or limit of detection that those drugs can be seen at." (TR 8/15/17, p 204; *see also* EX (trial), p 4). For the drug oxycodone, for example, he testified that the cutoff for the initial screen was 40 nanograms per milliliter, whereas it was 50 nanograms per milliliter for the confirmation screen of that drug. (*See* TR 8/15/17, pp 204:21-205:21).

After explaining the meaning of the cutoff indicators exhibited in the laboratory report, he again confirmed on cross-examination that the confirmation screen detected the presence of Zolpidem at a level of 190 nanograms per milliliter of blood. (*See* TR 8/15/17, pp 205:22-206:3; EX (trial), p 4).

C. Law and Analysis

1. Admission of the forensic laboratory report did not violate the Confrontation Clause.

Under the Confrontation Clause, the accused "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.; *see also* Colo. Const. art. II, § 16. The clause permits the admission of "[t]estimonial statements of witnesses [who are] absent from trial . . . only where the declarant is unavailable [to testify], and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). It is therefore implicated only when "testimonial" hearsay statements are at issue. *Cropper*, 251 P.3d at 435; *see also People v. Fry*, 92 P.3d 970, 976 (Colo. 2004) ("*Crawford* limits its holding to 'testimonial statements,' noting that the Confrontation Clause applies to 'witnesses' or those who 'bear testimony.'").

A forensic laboratory report prepared in connection with a criminal investigation or prosecution is "testimonial" hearsay and subject to the requirements of the Confrontation Clause. *Bullcoming v.*

New Mexico, 564 U.S. 647, 658-59 (2011); *Cropper*, 251 P.3d at 436; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (holding that certifications from forensic analysts are "testimonial" and the analysts are "witnesses" under the Sixth Amendment).

In *Bullcoming*, the U.S. Supreme Court held that the admission of a forensic laboratory report which contained both the computer-generated results of a blood-alcohol analysis as well as multiple testimonial statements regarding those results – certified by the analyst who performed the testing – and which contained that analyst's signature and the certification of a reviewing-analyst, violated the Confrontation Clause because the report was admitted through the in-court testimony of a surrogate analyst – in that case, a forensic "analyst who did not sign the certification *or personally perform* or observe the performance of the test reported in the certification." *Bullcoming*, 564 U.S. at 653-58 (emphasis added). *Bullcoming* held then that such surrogate testimony was not an adequate substitute because the surrogate analyst could not "convey what [the non-testifying analyst]

knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed." *Id.* at 657, 661.

Defendant contends here that "[b]ecause Avram did not certify or sign the final report, the trial court erred in admitting the report." (Opening Brief, p 28). He is wrong.

Bullcoming does not require that the person who *signed* the report be the person that testifies or stand for the proposition that only that person's testimony does not violate the confrontation clause. The admission of the forensic laboratory report in *Bullcoming* violated the confrontation clause because the *testimonial certifications* of one analyst were entered into evidence through another analyst who *neither personally performed* the testing or observed it nor signed the certification. Mr. Avram personally performed the drug confirmation testing that was done here and, therefore, his testimony did not constitute the surrogate-testimony prohibited by *Bullcoming*.

Additionally, as to the forensic laboratory report's documentation of the drug confirmation testing that was done and the results of that testing, the *Crawford*-Confrontation Clause concerns as to that

documented representation were not even implicated. Again, this is because Mr. Avram personally performed the drug confirmation testing and testified at trial concerning that testing, thereby giving Defendant an opportunity to cross-examine him. *See, e.g., People v. Argomaniz-Ramirez*, 102 P.3d 1015, 1018-19 (Colo. 2004) (recognizing that *Crawford* does not apply to the out-of-court testimonial statements of a witness who testifies at trial and is subject to cross-examination); *Barry*, 349 P.3d at 1155 ("[E]ven if a statement is testimonial, where the defendant is afforded an opportunity to cross-examine the witness at trial, the Confrontation Clause is not implicated."). Accordingly, Defendant's right of confrontation was not violated.

To the extent that the forensic laboratory report in the instant case also documented the signature of Ms. Urfer as "approv[ing" the contents of the document and that her signature constituted an out-of-court testimonial statement of that fact of approval, assuming *arguendo* the Confrontation Clause was violated in this regard because Ms. Urfer did not testify at trial, even if plain the error did not so undermine the

fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction. *See Miller*, 113 P.3d at 750.

2. Admission of the forensic laboratory report did not violate section 16-3-309(5).

Section 16-3-309(5) provides that a report or findings of the criminalistics laboratory shall be received in evidence in any court "in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person." § 16-3-309(5). It further states that "[a]ny party may request that such employee or technician testify in person at a criminal trial on behalf of the state . . . by notifying the witness and other party at least fourteen days" in advance of trial. *Id.*

Mr. Avram's testimony established that he "accomplished" the drug testing analysis conducted at ChemaTox, and therefore, the requirements of § 16-3-309(5) were met. Mr. Avram testified that he was the person who performed the drug "confirmation testing and analysis." Mr. Avram's personal involvement in the drug testing at

issue evidences that it was he who "accomplished the requested analysis," § 16-3-309(5). *See Marshall v. People*, 309 P.3d 943, 948 (Colo. 2013) (providing the definition of the term "accomplish" as "to execute fully: perform, achieve, fulfill" (internal quotation marks omitted)).

Defendant contends, however, that Mr. Avram did not "accomplish" the analysis within the meaning of § 16-3-309(5) because, under *Marshall*, "[i]n order to 'accomplish' the analysis, a person must 'perform the final and necessary step' in the testing process" – which was to certify and sign the report – and Mr. Avram did not do that. (Opening Brief, pp 28-29); *see Marshall*, 309 P.3d at 948.

Marshall does not stand for such a narrow proposition. That is, *Marshall* does not hold that a testifying technician or analyst who has *personally performed* all or part of the chemical testing at issue cannot also, in addition to a supervisor, qualify under § 16-3-309(5) as a person who "accomplished" the requested testing. *Marshall* simply held that, under the facts of that case, a forensic laboratory *supervisor who had not performed the testing* nevertheless qualified as the person who

"accomplished" the testing within the meaning of § 16-3-309(5). And in doing so, the court reasoned that the supervisor's certification of the laboratory results was required before the results could be submitted to the requesting agency and so, at least the supervisor's "expertise was required to generate the final report." *See Marshall*, 309 P3d. at 948.

This does not mean, however, that a person who "accomplishes" the requested testing is limited to someone, like a supervisor, whose certification is required to generate the final report. *See id.,* n.10 ("In this case we are only asked to consider whether [the supervisor] 'accomplished' the urinalysis, and conclude that she did. We express no opinion as to whether other analysts within the lab could accomplish the test within the meaning of section 16-3-309(5).").

Accordingly, the requirements of § 16-3-309(5) were met here.

IV. The determination of the existence of Defendant's three prior DWAI convictions by the trial court, and not a jury, was appropriate because the prior convictions constitute

sentence enhancers and not elements of the underlying DWAI offense.

A. Issue Preservation and Standard of Review

The People agree this issue is preserved as Defendant raised it in a pretrial motion, which the trial court denied, as well as at the bench trial. (*See* CF, pp 41-47; TR 5/7/17, pp 4:10-11:4); (Opening Brief, p 32).

The People agree that this Court reviews de novo a trial court's determination whether a statutory provision is a sentence enhancer rather than an element of the offense. *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005); *Gwinn*, 428 P.3d at 736; *Schreiber*, 226 P.3d at 1223.

B. Law and Analysis

Section 42-4-1301 provides in pertinent part:

> A person who drives a motor vehicle or vehicle while impaired by . . . one or more drugs . . . , commits driving while ability impaired. Driving while ability impaired is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI….

§ 42-4-1301(1)(b).

"The term 'elements' refers to the legal components that are necessary to establish criminal liability." *People v. Hopkins*, 328 P.3d 253, 256 (Colo. App. 2013); *see Schreiber*, 226 P.3d at 1223. And so, "[a]ny fact that constitutes an element of a crime must be submitted to the jury for a determination based on proof beyond a reasonable doubt." *Hopkins*, 328 P.3d at 256.

On the other hand, "[s]tatutory provisions that increase the felony level of an offense are generally construed as sentence enhancers rather than essential elements of the offense." *People v. Vigil*, 328 P.3d 1066, 1070 (Colo. App. 2013); *see also Gwinn*, 423 P.3d at 736-37 (providing that "a statutory provision is a sentence enhancer when the defendant may be convicted of the underlying offense without any proof of the prior conviction").

In the end, it is clear that "any fact that increases the penalty for a crime beyond the statutory maximum, *except the fact of a prior conviction*, must be submitted to a jury and proven beyond a reasonable doubt." *People v. Montour*, 157 P.3d 489, 495 (Colo. 2007) (emphasis added); *see Blakely v. Washington*, 542 U.S. 296, 303 (2004); *Apprendi v.*

New Jersey, 530 U.S. 466, 490 (2000)). This premise has been "firmly established" by the U.S. Supreme Court. *People v. Misenhelter*, 234 P.3d 657, 660 (Colo. 2010). The fact of a prior conviction is, therefore, a *Blakely*-exempt fact. *Id.* at 660; *People v. Fiske*, 194 P.3d 495, 496 (Colo. App. 2008).

On appeal, Defendant contends the prior conviction provision for the felony DWAI statute must be construed as an element that must be proven to a jury beyond a reasonable doubt, rather than a sentence enhancer. (Opening Brief, pp 32-33). To justify this interpretation, Defendant attempts to distinguish the language and structure of § 42-4-1301(1)(b) from other statutes that elevate offense levels based on prior convictions (*e.g.* indecent exposure, child abuse). (*See,* Opening Brief, p 35 (arguing the prior conviction requirement in the DWAI statute must be an element because it appears in the same subsection rather than in a separate subsection as occurs in the indecent exposure and child abuse statutes)). But Defendant's argument is not persuasive.

As a preliminary matter, though the prior conviction provision in the DWAI statute appears in the same subsection as the enumerated

elemental components of a DWAI offense, it nevertheless not only appears in a separate sentence altogether but also appears *after* the definition of a DWAI offense. *See* § 42-4-1301(1)(b) (emphasis added). This demonstrates some intent that the two sentences comprising subsection (1)(b) are meant to be read separately.

More importantly, Defendant's argument ignores Colorado precedent analyzing whether a statutory provision is to be construed as an element of an offense or as a sentence enhancer. Again, when a defendant may be convicted of the underlying offense without proof of the prior convictions, the prior conviction provision is a sentence enhancer and not an element of the underlying offense. *See Schreiber*, 226 P.3d at 1223.

Here, the underlying offense, DWAI, makes it unlawful for a person to "drive a motor vehicle or vehicle while impaired by alcohol or one or more drugs, or a combination of alcohol and one or more drugs." § 42-4-1301(1)(b). Those are the only elements necessary to convict a person of DWAI.

Indeed, another division of this Court recently held that "[t]he plain language of the [DUI] statute convinces us that the General Assembly intended prior DUI convictions to constitute a sentence enhancer rather than an element of DUI" and further that the "DUI statute does not require that prior convictions be submitted to a jury." *Gwinn*, 428 P.3d at 737-38. The *Gwinn* court further determined that application of a preponderance of the evidence standard by the trial court to proof of the prior DUI convictions was appropriate because the DUI statute was silent as to a burden of proof. *Id.* at 738.

The People submit that *Gwinn* is in line with this Court's precedent holding, in other contexts, that enhancement from a misdemeanor to a felony does not constitute an element of the specific offense. *See Schreiber*, 226 P.3d at 1223 (holding that § 18-7-302(4), C.R.S. (2008), criminalizing indecent exposure and elevating the offense from a misdemeanor to a felony upon proof of two prior convictions, established a sentence enhancer, and one to be determined by the court); *see also People v. LePage*, 397 P.3d 1074, 1082-83 (Colo. App. 2011) (concluding that habitual criminal charges may be

constitutionally adjudicated by a judge and not a jury). This Court should follow *Gwinn*.

Furthermore, the question of Defendant's prior DWAI convictions was properly submitted to the trial court and doing so did not violate Defendant's right to a jury trial or due process of law. Again, as the law currently stands, "*other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added). While the vitality of the prior conviction exception has been called into question, the U.S. Supreme Court "has not overruled the prior conviction exception recognized in *Apprendi* and *Blakely*," *People v. Davis*, 2017 COA 40M, ¶ 38, and so this Court has no power to ignore this precedent, *see Lopez*, 113 P.3d at 723.

Accordingly, proof of Defendant's prior DWAI convictions could properly be determined by the trial court. Further, the trial court appropriately applied a preponderance of the evidence standard in

determining proof of Defendant's prior convictions. *See Gwinn*, 428 P.3d at 738; *Schreiber*, 226 P.3d at 1223.

In the end, the sentence enhancer at issue here, elevating Defendant's DWAI offense from a misdemeanor to a class four felony, did not require submission to a jury, and Defendant's claim on appeal fails.[10]

[10] This same issue is currently before the Colorado Supreme Court in *Linnebur v. People*, 2019WL3934483 (No. 18SC884, Aug. 19, 2019).

CONCLUSION

Based on the foregoing reasons and authorities, the People respectfully request that the judgment of conviction be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **JEANNE SEGIL** and all parties herein via Colorado Courts E-filing System (CCES) on September 30, 2019.

/s/ Tiffiny Kallina