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| SUPREME COURT<br>STATE OF COLORADO<br><br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: September 17, 2019 3:18 PM<br>FILING ID: 6EB679D51082B<br>CASE NUMBER: 2018SC708 |
| On Certiorari to the Colorado Court of Appeals, 2013CA1604<br>District Court, City and County of Denver, 2011CR4258<br><br>Petitioner,<br><br>THE PEOPLE OF THE STATE OF COLORADO,<br><br>v.<br><br>Respondent,<br><br>SHEILA RENEE MONROE. | ▲**COURT USE ONLY**▲<br>Case No. 2018SC708 |
| PHILIP J. WEISER, Attorney General<br>MATTHEW S. HOLMAN,<br>First Assistant Attorney General*<br>Ralph L. Carr Colorado Judicial Center<br>1300 Broadway, 9th Floor<br>Denver, CO 80203<br>Telephone: 720-508-6000<br>E-Mail: matt.holman@coag.gov<br>Registration Number: 17846<br>*Counsel of Record | |

# PEOPLE'S OPENING 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 9,901 words.

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

**For each issue raised by the appellant,** the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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

/s/Matthew S. Holman

Signature of attorney or party

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**CASES**

**STATUTES**

The People respectfully submit the opening brief in the above-captioned matter.

## ISSUES ACCEPTED FOR REVIEW

1. Whether the prosecution properly argued that the defendant's ability to leave an encounter was relevant to whether she feared for her safety and, therefore, whether she acted in self-defense.

2. Whether the court of appeals erred in holding that the prosecution's argument concerning the defendant's ability to leave an encounter improperly injected a duty to retreat, contrary to Colorado's self-defense law, despite the prosecution's clarification of the argument and the trial court's oral and written jury instructions.

## STATEMENT OF THE CASE

The defendant, Sheila Renee Monroe, was convicted of Attempted First Degree Murder, First Degree Assault, and Crime of Violence. She was subsequently found to be an habitual criminal based on five habitual criminal counts (CF, pp 229-230). The defendant was sentenced to concurrent sentences of ninety-six years for Attempted

Murder and forty-eight years for First Degree Assault (CF, pp 229-230; TR 7/19/13, p 44).

The defendant appealed to the court of appeals. The court of appeals reversed the convictions and remanded the case for a new trial. *People v. Monroe*, 2018 COA 110. The court held that the prosecution improperly argued that the defendant had an ability to leave in support of its assertion that the defendant was not in fear of the imminent use of physical force and acted out of aggression rather than self-defense. The court held that, in doing so, the prosecution injected a duty to retreat into the issue of self-defense.

This was so even though the prosecution repeatedly informed the jury that there was no duty to retreat and that the argument was focused on whether the defendant was in fear for her safety. Further, the court of appeals held, the trial court's written and oral instructions were insufficient to instruct the jury that there was no duty to retreat and of the limited purpose of the prosecution's argument. *Monroe*, at ¶30.

The People petitioned this Court for certiorari review, and this Court granted the People's petition.

## STATEMENT OF THE FACTS

**The stabbing of James Faulkenberry.**

On October 10, 2011, James Faulkenberry boarded an RTD[1] bus in Golden, Colorado headed to downtown Denver. He sat in the middle of the back row of the bus. When a woman subsequently boarded the bus and walked toward the back, he moved over a seat to the left so that she could sit down. The woman, later identified as the defendant, was with two or three other people (TR 3/19/13, pp 49-50-88-90).

As he moved over, Mr. Faulkenberry said hello to the defendant. The defendant seemed very upset. She responded, "Excuse me. I don't know you peckerwood. Don't talk to me fucking white boy," and sat down. Mr. Faulkenberry replied that if he had known that she was going to be so rude, he would not have moved over for her (TR 3/19/13, pp 90-91).

[1] "RTD" stands for Regional Transportation District.

The interaction between the defendant and Mr. Faulkenberry continued for several more minutes. The defendant was "just being very rude and smacking her gum, so [Mr. Faulkenberry] started mocking her, making the same noise." The defendant called him a "crackhead." She told her friend to "take the safety off the gun so we can cap this white boy." Her friend lifted up his shirt, like he had a gun, to intimidate Mr. Faulkenberry. Mr. Faulkenberry was unable to see whether her friend actually had a gun (TR 3/19/13, pp 91-92).

Mr. Faulkenberry tried to diffuse the situation by changing the subject. He asked the defendant's friend if he wanted to buy a laptop. The friend asked how much, and Faulkenberry said "twenty bucks." The defendant cut in – "you don't want no damn laptop." She continued to be rude and smacked her gum (TR 3/19/13, p 92).

At some point, the defendant took out a pocketknife with a three-inch blade, and she played with the open knife for several minutes while she argued with Mr. Faulkenberry. Mr. Faulkenberry felt nervous – the defendant had a knife out and she had already threatened him with a gun. Knowing there was surveillance on the bus,

he told the defendant that she was being recorded on audio and video. The defendant told him that "she didn't give a fuck if she was on audio or video, [and] for [him] to shut up" (TR, 3/19/13, pp 92-93).

Mr. Faulkenberry told the defendant that he was going to call the police. He took his phone out, flipped it open, and started to enter the number and "that's when she got up and stabbed [him] twice in the neck." (TR 3/13/19, p. 94). At this point, everyone on the bus was in "panic mode." The defendant moved toward the bus doors and said, "I told you. I told you." She was smiling at this point – "the look in her face was pretty much gratification of what she had done" (TR 3/19/13, p 167). When the bus stopped, the defendant got off the bus and ran (TR 3/19/13, p 94).

Mr. Faulkenberry had remained seated throughout the entire encounter with the defendant, and he was still seated when she got up, stood over him, and stabbed him in the neck. At first he thought that the defendant had punched him. Then he felt blood coming out, and he realized that he had been stabbed (TR 3/19/13, pp 94-95).

A couple of people on the bus saw that Mr. Faulkenberry was injured and they went to his aid. When Mr. Faulkenberry got off the bus, they told him to sit down and wait for an ambulance. The defendant had cut a main artery and a gland in Mr. Faulkenberry's neck and people from the bus helped hold his neck in order to stop the bleeding (TR 3/19/13, pp 95-96).

Several people who were on the bus testified at trial.

John Ozier witnessed the incident and identified the defendant for the police. Mr. Ozier saw the defendant and Mr. Faulkenberry arguing back and forth. Mr. Faulkenberry was trying to sell her a laptop, but she "didn't look like she wanted to be bothered at all." The defendant said something to the effect that Mr. Faulkenberry was using crack cocaine (TR 3/19/13, pp 65-67).

Mr. Ozier saw the defendant get up and make a striking motion towards Mr. Faulkenberry. She had something in her hand. Mr. Ozier saw that Faulkenberry was bleeding. Right before the attack, the argument between the two had been loud. However, Mr. Faulkenberry

never did anything that was physically aggressive (TR 3/19/13, pp 67-68).

The defendant's swing of the knife seemed deliberate, and not accidental. The thrust of the knife was fairly hard and quick. Based on his observations, Mr. Ozier testified that the defendant had been the aggressor and not Mr. Faulkenberry (3/19/13, pp. 72-75).

Someone alerted the bus driver to the incident, and the driver stopped the bus and opened all the doors. People ran off the bus, but Mr. Ozier stayed to help Mr. Faulkenberry. Immediately after the incident, the police spoke to Mr. Ozier and he gave them a description of the defendant. A few minutes later, police took him to a location where they had a suspect in custody. Mr. Ozier identified the woman, who was the defendant, as the person who stabbed Mr. Faulkenberry (TR 3/19/13, pp 69-71).

Luis Arceo, one of the defendant's coworkers, was also riding the bus. He observed the interaction between the defendant and Mr. Faulkenberry, which, he said, became "hectic." Mr. Arceo tried to deescalate the situation by telling the defendant to "chill out" and "calm

down" (TR 3/19/13, pp 116-117, 121-122). Although he sensed some tension from the defendant, the defendant did not appear to be scared. Mr. Arceo saw the defendant get up and punch Mr. Faulkenberry. Mr. Faulkenberry looked scared, and Arceo saw that Faulkenberry was bleeding (TR 3/19/13, pp 122-125).

Another coworker, Desiree Velarde, got on the bus with the defendant, and she saw some of the argument between the defendant and Mr. Faulkenberry. Ms. Velarde did not sit with the defendant, she sat forward of the defendant with her back to the defendant. She had her headphones in and she was listening to music. Later, she heard the defendant arguing with someone, and Ms. Velarde told her to "cut it out" and "chill out." The defendant did not stop, and Ms. Velarde put her headphones back in and turned back around (TR 3/19/13, pp 146-148).

Ms. Velarde heard them arguing again. She took off her headphones, turned around, and told the defendant to "stop" and "chill out." This time, the defendant told Ms. Velarde to "mind [her] own

business." Ms. Velarde put on her headphones and turned back around (TR 3/19/13, pp 147-148).

As the bus was nearing a bus stop, Ms. Velarde heard a commotion and she saw people running past her. She took off her headphones. Ms. Velarde heard people say "she stabbed him." The defendant got off the bus. Ms. Velarde did not see the stabbing, but she saw Mr. Faulkenberry holding his neck (TR 3/19/13, pp. 150-151).

Ryan Esperas was also a passenger on the bus. He sat in the very back row of the bus next to Mr. Faulkenberry, who was trying to sell a laptop. Mr. Faulkenberry asked if Mr. Esperas would like to buy a laptop, Mr. Esperas said no, and the bus continued on its way. At about Wadsworth, the defendant got on the bus and sat in the back row. Mr. Faulkenberry asked if she would like to buy a laptop. She said no, "crackhead" (TR 3/19/13, pp 159-160).

Mr. Esperas described the interaction between the defendant and Mr. Faulkenberry:

> So, then they started to exchange hateful words to each other. She had pulled out a little knife, little pocketknife, and start cleaning her nails,

and asked, I believe an acquaintance she knew on the bus to come over. A younger Hispanic boy came over. She says, you know, you don't want to mess with me. He's got a gun. And that gentleman tried to calm Ms. Monroe down, because she seemed pretty -- pretty upset about asking to be -- to purchase a laptop.

Shortly later, the gentleman who was selling the laptop kind of, you know, was mocking her maybe a little bit with the chewing of gum. He started smacking his lips together, you know, pretending to chew gum, as if Ms. Monroe was chewing gum as well. She -- it started escalating, getting louder, more hateful words to each other.

Eventually she -- she was playing with the knife constantly, and the gentleman said if you touch me, I will call the police, and it looked like he went to reach for his phone. She went over -- I'm sitting on the back row. The gentleman's next to me. She's next to the gentleman.

She took the knife over to the gentleman on this side of his neck past my eyeballs, and popped him in the neck. Everybody got up, went running to the front of the bus. The bus came to a stop. It was super packed. I'm not sure if the bus driver knew what was going on. He opened up the door like it was his next stop. She went running. I went up to the bus driver, told him to put it in park and call the police.

(TR 3/19/13, pp 161-162).

Mr. Esperas considered the displaying of the knife by the defendant to be an intimidating motion. Although the defendant mocked the defendant, he did not show any physical aggression. "He barely moved. Most he was moving was his lips" (TR 3/19/13, p 163). Right before the stabbing, Mr. Faulkenberry said, "I will call the police so fast if you touch me." Then, Mr. Faulkenberry got his phone out of his jacket and, almost simultaneously, she stabbed him in the neck (TR 3/19/13, p 163).

At trial, Mr. Esperas recounted the events of the stabbing as he watched the surveillance recording from the bus. He testified that the recording showed the defendant getting up and "popp[ing] him in the neck." Then the defendant moved toward the bus door, and said, "I told you. I told you." She was smiling and the look on her face was "pretty much gratification of what she had done" (TR 3/19/13, p 167).

Detective Adam Lucero interviewed the defendant on October 10, 2011 (TR 3/13/19, pp 192-194; People's Exhibit 38). During the interview, the defendant denied attacking Mr. Faulkenberry and claimed some other woman was on the bus who was involved in the

altercation. The defendant also claimed that she would not have attacked Mr. Faulkenberry because he was a "joke" and was "older than Louis" (People's Ex. 38, 40:01). She also said that that she knew how to avoid an altercation. She knew how to run, to get away, and she knew how to walk away from such a situation (People's Ex. 38, 37:32-41:50).

**The Jury Instructions.**

The jury was instructed on the charged offense of First Degree Assault along with the lesser included offense of Second Degree Assault and the charged offense of Attempted First Degree Murder (CF, pp 208, 209 and 212). Both the First Degree Assault instruction and the Attempted Murder instruction referred to Instruction 18 – the self-defense instruction. The jury was also instructed on provoked passion (CF, p 210).

Instruction 18, the self-defense instruction read as follows:

> (1) Except as provided in paragraph (2) of this Instruction, it is an affirmative defense to the crimes of Assault in the First Degree and Attempt to Commit Murder in the First Degree that the Defendant used physical force upon another person:

> (a) in order to defend herself or a third person from what she reasonably believed to be the use or imminent use of physical force by the other person, and
>
> (b) she used a degree of force which she reasonably believed to be necessary for that purpose. The Defendant was not required to retreat to a position of no escape in order to claim the right to employ force in her own defense.
>
> (2) It is not an affirmative defense that the Defendant used physical force upon another person as set out in paragraph (1) of this Instruction if the Defendant was the initial aggressor, unless:
>
> (a) the Defendant withdrew from the encounter, and
>
> (b) effectively communicated to the other person her intent to do so, and
>
> (c) the other person nevertheless continued or threatened the use of unlawful physical force.

(CF, p 214).

Instruction 19 informed the jury that self-defense under Instruction 18 was not a defense to Second Degree Assault, but the jury could consider evidence of self-defense in determining whether the defendant acted recklessly (CF, p 215).

Instruction 20 provided a definition of several terms including "initial aggressor":

> "Initial aggressor" means a person who initiated a physical conflict by using or threatening the imminent use of physical force. Uttering insults or engaging in arguments is not sufficient to make a person an initial aggressor.

(CF, p 216).

**The People's Closing Argument.**

After the trial court read the jury instructions to the jury, Deputy District Attorney Jonathan Long presented the People's initial closing argument.

D.A. Long addressed the elements of each offense and identified the evidence supporting each element. He discussed Assault and then the issue of provoked passion, arguing that the evidence did not support a finding of provoked passion. Next he discussed Attempted Murder and the evidence that supported this offense (TR 3/20/13, pp 75-85, 85-87, 87-92).

During this part of the argument, D.A. Long discussed the evidence that showed that the defendant was acting aggressively

toward Mr. Faulkenberry, and her intent to intimidate him. Two minutes into an eight to ten minute argument she pulled out a knife to intimidate him, and she had already threatened him by saying her friend had a gun. She had opened the knife and started waving it around and cleaning her nails with it. She stabbed Mr. Faulkenberry in the throat, and then said to him "I told you," and she smiled (TR 3/13/19, pp 81-82, 88-89).

D.A. Long then turned to the issue of self-defense.

He first explained that self-defense was an affirmative defense to Attempted Murder and First Degree Assault, but not an affirmative defense to Second Degree Assault. Instead, as stated in Instruction 19, evidence of self-defense could be considered in determining whether the defendant committed Second Degree Assault (TR 3/20/13, pp 92-93).

The prosecutor stated the standard for self-defense:

> In order to defend herself from what she reasonably believed to be the use or imminent use of unlawful physical force by the other person she would have to be acting in order to defend herself.

(TR 3/20/13, p 93).

The prosecutor submitted that the defendant was not acting in self-defense. Relying on the surveillance video and the witnesses, the prosecutor asserted that the defendant was being aggressive, she was not afraid, and she was not acting to defend herself. Further, the victim never threatened or suggested the use of violence. And three witnesses said they were surprised by the defendant's action, it came out of nowhere, and they didn't see a need for her to defend herself (TR 3/20/19, p 93).

The prosecutor argued that the evidence did not support a contention that the defendant reasonably believed that there was an imminent use of unlawful physical force (TR 3/20/13, p. 94). Next, the prosecutor argued that the defendant would have to use a degree of force which she reasonably believed necessary for that purpose:

> We're talking about an unarmed stranger in the back of the bus that might be making fun of the way that she's chewing gum. Didn't need to stab him in the throat. That was not reasonable. That's not acceptable.

(TR 3/20/13, pp 94-95).

The prosecutor then reviewed the contents of the surveillance video and photographs.

> As a few witnesses have pointed out to you, she's in the center of the bus at the back wearing a light-colored shirt. Right here. And if you could focus your attention on her for a second, you'll see that first of all her face is facing to her left, our right as we look at it. And you can tell that because the darker part of her head is facing our left – that would be her hair -- her face is facing the victim, and her attention stays on the victim.
>
> As I'm flipping through these you'll see that she goes forward a little bit, she's showing some aggression, we know she's talking to him. She didn't have any duty to retreat, but she does have a clear line of retreat, if she's actually scared for her safety.

(TR 3/20/13, pp 95-96).

At this point, the defense counsel objected:

> [Defense counsel:] Objection, Your Honor; that's misstating the state of the law. She has no duty, whatsoever, to retreat.

(TR 3/20/13, p 96). The trial court overruled the objection:

> THE COURT: I'm going to overrule the objection.
>
> Ladies and gentleman, as the instruction tells you – and read that instruction – there's not a duty or an obligation to retreat. You can look at the evidence to decide whether or not what has

> been proven under the circumstances, but you cannot find that she has a duty or obligation to retreat.
>
> But this is an argument as to whether or not she reasonably believed there was an imminent use of force. I'll allow it for that purpose only.
>
> You may continue.

(TR 3/20/13, p 96).

The prosecutor continued without further objection.

> [The prosecutor:] Thank you.
>
> Again, she did not have a duty to retreat but could have backed away, if she wanted to, if she was actually afraid.

(TR 3/20/13, p. 96).

The prosecutor continued to describe what could be seen in the surveillance. The defendant stood up, and is looking downward. The victim is not showing any aggression; the defendant is showing aggression. The defendant is looking at the seated victim, and she is engaged in the argument. She sat back down, still engaged in the argument. The victim was not moving forward at all, and he does not put his finger in her face. There are moments when the defendant puts her hand up and she is pointing in the victim's face – she is showing

aggression. "This is not somebody who's scared. Leaning towards him" (TR 3/20/13, p 97).

The prosecutor continued. People on the bus were turning around to see what is going on because it's noisy because the defendant is making a lot of noise. "[S]he's showing aggression towards him, she is not concerned, she is leaning forward, and you can see her here" (TR 3/20/13, p 97).

> [The prosecutor:] I'm backing up. You can see how from frame to frame down at the bottom left we got 2:47:03, she's got the knife behind her back about to swing it forward, still 2:47:03, and she's leaning forward, has the knife in front of her. That's how quickly she's swinging at him. And she's doing a roundhouse blow with the knife. Stabs him.

(TR 3/20/13, pp 97-98).

The prosecutor next addressed whether there had been two strikes with the knife, and that it was possible. After the stabbing, the surveillance showed that the defendant stayed facing the victim for a moment. The prosecutor noted that there was evidence that, at some point, the defendant turned around, smiled at the victim, and "said

something to the effect of 'I told you so.'" The prosecutor pointed to the place in the surveillance where this would have occurred (TR 3/20/13, p 98).

The surveillance showed that the defendant turned her back to the victim and retrieved her belongings. Then she walked straight up to where the surveillance camera was located. The prosecutor noted that the defendant got rid of her belongings in the six minutes between the time she got off the bus and when she was apprehended by the police (TR, 3/20/13, p 98).

Finally, the prosecutor noted that photographs were taken of the defendant after she was apprehended and the jury could compare those with the surveillance images. He asserted that the evidence showed that "[w]e have the correct person" (TR 3/20/13, pp 98-99).

**The Defense's Closing Argument.**

Defense counsel Blake Renner then presented the defense's closing argument.

Counsel Renner asserted that the defendant wanted to be left alone. She told the victim not to talk to her, she did not know him. The

defendant called her coworker, Mr. Arceo, to sit with her because she was the only woman in the back of the bus, and, perhaps, if he sat with her, the victim would leave her alone. But the victim persisted. She asked Mr. Arceo to show his gun, and maybe that would make the victim back off, but it did not. Then she took out her knife, that she used as protection, and cleaned her nails with it. Maybe this would make the victim back off, but it did not (TR 3/20/13, 99-101).

Defense counsel noted that when the defendant got on the bus, it was crowded, and the seat that was available was in the back next to the victim. And she is "the only one back there." Defense counsel then offered a description of the setting on the bus:

> [Defense counsel:] This argument goes on for 8 to 10 minutes. No one steps in to try to stop it, and you wouldn't really expect them to on the Colfax bus because this is that kind of bus where you get on, you put on your headphones, you get on, you start looking at your phone, you get on, you look out the window, you don't make eye contact, you just kind of mind your own business and hope you don't get into any of this mess. And that's kind of what everyone was doing here.
>
> ....

> Goes on for 8 to 10 minutes but you don't ever really get the play by play of what's being said for 8 to 10 minutes because everyone is just trying to mind their own business, trying to stay out of this.
>
> And there's no one back there kind of stepping in saying, "Let me help this lady from this drunk guy who's bugging her."

(TR 3/20/13, pp 102-104).

Defense counsel asserted that the defendant found herself in this situation "back there," where the victim kept "egging her on." The defendant did not back down:

> [Defense counsel:] [The defendant] didn't grow up on Cherry Hill; she's used to this kind of situation, the Colfax bus. And you don't show weakness. You don't back down. That's one of the most dangerous things you can do.
>
> ....
>
> She's called her friend back there to try to get them to leave her alone; it doesn't work. He just keeps egging her on.
>
> And that's the situation she's in in the back of that bus.
>
> It's not a situation where she's just, you know, out in the suburbs, riding along, no problems. This is the Colfax bus.

> And what does Mr. Esperas say? That after 8 to 10 minutes' of this argument then he sees Mr. Faulkenberry reach inside his coat. And he described it on the stand, basically reaches inside.
>
> And if there had been no argument between Ms. Monroe and Mr. Faulkenberry, if she had been sitting next to him and she did that and she got up and stabbed him, you'd say that's not reasonable. But under these circumstances -- you know, we talked about in voir dire she doesn't have to wait to get hurt to act in self defense. That's not what self defense is, when you wait and let the person hurt you and then you can protect yourself.
>
> She doesn't have to wait to see if he's going to pull out a phone. She doesn't have to wait to see if he's going to pull out a knife, a gun. She doesn't have to wait for that. They've had this heated argument for 10 minutes. Ms. Valardes described she saw him with his finger in her face, yelling at her. She said she would have felt threatened, she would have felt defensive. And that's the situation that Ms. Monroe was in.
>
> And when she saw him reach into his pocket, she acted, and she acted in self defense.

(TR 3/20/13, pp 104-105).

Defense counsel addressed the defendant's ability to move from the situation:

> And that's another situational situation. Mr. Long said, "Well, you know, she's in the back of

> the bus; she could have moved." She's in a moving bus. She didn't have a lot of places to go. Not that she had to go anywhere, but it's a crowded, moving bus. And as soon as the bus stopped, she got out the door, and the first person after her was Mr. Faulkenberry.
>
> And that kind of tells you something, also, about the character of this argument. Is he so afraid of her that he's following her right outside the bus, as soon as she gets off, he's out the door right behind her?
>
> If he had just been stabbed by someone whose intent and goal was to kill him he would have stayed on the bus, he wouldn't be following her out the door.

(TR 3/20/13, p 109).

Defense counsel concluded by describing the situation on the bus:

> But what she said to Detective Lucero doesn't change what happened on that bus. She was there by herself. Mr. Arceo, her co-worker, wasn't really doing anything to help her. Mr. Faulkenberry, who's bigger than her, probably drunk or on something, has been going at her for 10 minutes and won't leave her alone. And it got to the point where she felt so intimidated that she felt the need to protect herself. And she did that with that one strike to Mr. Faulkenberry and then she left the situation. And she is not guilty of these crimes.
>
> Thank you.

(TR 3/20/13, pp 112-113).

**The People's Rebuttal Argument.**

Deputy D.A. Daniel Rosenberg presented the People's rebuttal argument.

D.A. Rosenberg asserted that this was not a case about fear, it was about anger borne out of the defendant's pride. She did not want to be talked to by a guy who looked homeless and might have alcohol on his breath. "And her pride definitely wasn't going to allow someone like that to make fun of the way she chewed gum" (TR 3/20/13, pp 113-114).

D.A. Rosenberg pointed out that for self-defense one has to believe that someone is going to use imminent force against you. He asserted that the defendant was not afraid of the victim. Although he was bigger than her, he was older, and he was homeless-looking. The D.A. pointed out the defendant's statement during her police interview, "I don't need to stab James Faulkenberry, he is a joke." She said that they did not need to assault him, "he's older than Louis" (TR 3/20/13, pp 114-115).

Also, the defendant was not alone. She called to her coworker, Mr. Acero, and he came over to help her. And the defendant tells him to

take the safety off of his gun – she was telling him to use his gun on the victim (TR 3/20/13, p 115). Additionally, the video does not show the victim being aggressive at all. One witness, Mr. Esperas, was shocked by the defendant's attack. That is because the victim did not do anything to put someone in fear for their life. Mr. Ozier was also shocked by the defendant's actions (TR 3/20/13, p 117).

Further, the defendant's actions were not reasonable because the most aggressive act allegedly committed was finger wagging. Additionally, the victim got out his phone after he said that he would call the police if the defendant touched him (TR 3/20/13, pp 117-118).

The prosecutor argued that the defendant's actions were inconsistent with being afraid of the victim. The first words she said to the victim were insults. She takes out a knife and she brandishes it. Then she stabs him in the neck when he says that he is going to call the police. If she were afraid of him and he said that he was going to call the police, that would "be a benefit to you, not a reason to slam a knife into their throat" (TR 3/20/19, p 119).

The prosecutor then argued:

You have no duty to retreat. No one in Colorado has to run away from someone endangering them. But let's be clear. When you do not remove yourself from a situation when you easily can, that contradicts that you were in fear of being hurt.

[Defense counsel:] Objection, Your Honor. Mischaracterizing the state of the law.

THE COURT: I'll be clear, again, members of the jury. You have that instruction in terms of whether there's a duty to withdraw, and under the law there is no duty to withdraw. I think the instruction is very clear. You can use it as evidence in considering whether or not an individual believed there was -- reasonably believed there was a imminent use of physical violence as set forth in instruction No. 18, but you may not use it to contradict to say she didn't withdraw, therefore she cannot use that as a defense.

I'll have you read those instructions.

I'll otherwise overrule the argument, consider that to be an argument to you as to what was reasonably believed or not believed, and I'll let you continue.

[The prosecutor:] There is a clear path down that aisle. You can see it on the video. If you're scared of someone, if you're caught in an interaction with them for 8 to 10 minutes, a reasonable person would move from it, if they have a direct line to go away. There is an open aisle --

[Defense counsel:] Objection, Your Honor. The reasonableness standard dose [sic] not require a person to retreat.

THE COURT: I'm going to overrule the objection. I'll consider it a continuing objection.

Once again, members of the jury, I want you to rely on what it says in instruction No. 18 in that regard.

(TR 3/20/13, pp 119-120).

[The prosecutor:] All right.

There was, in fact, an open seat, the one that Mr. Arceo had left and made available for her. She's not scared.

She even says in her interview, "I wouldn't get into this. If I were scared, I would have run away. That's what I would do. I'm not going to get into trouble."

She knows that's the appropriate thing to do. She doesn't do that, ladies and gentlemen, because she's not acting in self defense.

But here's --

[Defense counsel:] Objection, Your Honor. Same grounds.

THE COURT: Objection's overruled. You may continue.

(TR 3/20/13, p 121).

D.A. Rosenberg then argued that the defendant could not claim self-defense because she was the initial aggressor. She calls the victim names, she tells him that her friend has a gun, and she takes out a knife. Even if the jury were to believe that the victim was going into his pocket for something other than his cell phone, the defendant could not claim self-defense because she had already threatened to have the victim shot and she was threatening him with a knife. Additionally, the defendant's conduct showed that she was not acting in self-defense or in heat of passion (TR 3/20/13, pp 121-122).

The jury returned guilty verdicts, and this appeal followed.

## STANDARDS OF REVIEW

Whether a prosecutor's statements in closing argument constitute misconduct is generally a matter left to the discretion of the trial court. *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). A trial court's rulings thereon will not be disturbed by an appellate court in the absence of a gross abuse of discretion resulting in prejudice and a denial of justice. *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984).

Final argument may properly include the facts in evidence and any reasonable inferences drawn therefrom. Advocates may point to different pieces of evidence and explain their significance within the case. And counsel may touch upon the instructions of law submitted to the jury. *Domingo-Gomez*, 125 P.3d 1048.

The scope of closing argument should not be unduly restricted due to the nature of our adversarial system. Advocates must be able to present their best cases to achieve just results. For this reason, a prosecutor has wide latitude in the language and presentation style used to obtain justice. *Domingo-Gomez*, 125 P.3d at 1048.

Absent evidence to the contrary, it is presumed that a jury follows the trial court's instructions. *Domingo-Gomez*, 125 P.3d at 1053-1054; *People v. Harlan*, 8 P.3d 448, 473 (Colo. 2005). This includes limiting and cautionary instructions. *People v. District Court*, 953 P.3d 184, 190-191 (Colo. 1998). "Were we to presume that the jury instead ignored the trial court's remedial instruction we would deprive that court of its ability to correct improper argument as it occurs. Such a result would deprive the trial court of the ability to prevent a mistrial

caused by counsel's improper remarks." *Domingo-Gomez*, 125 P.3d at 1054.

## SUMMARY OF THE ARGUMENT

Under Colorado's self-defense law, a defendant has no duty to retreat before being permitted to act in self-defense. Retreat is not a condition-precedent to self-defense in Colorado. However, an ability to leave, or the availability of an avenue of egress, is properly considered when determining whether a defendant reasonably acted in self-defense. Colorado case law and case law from other "no duty to retreat" jurisdictions recognize the continued relevance of such evidence.

Indeed, under the totality of the circumstances analysis for determining self-defense, the physical setting and surroundings of the encounter are relevant to whether a defendant reasonably believed she was faced with an imminent use of unlawful physical force. Such encounters do not take place in a vacuum. And a defendant's decision to leave, remain, or pursue the victim, when considered in context, is relevant to the issues underlying a claim of self-defense.

In this case, the prosecution argued that the defendant's actions toward the victim from the beginning were aggressive and threatening, while the victim remained seated and did not threaten the defendant. In this context, the prosecution argued that, if the defendant were scared, she had a means of leaving the encounter – an open aisle on the bus. This was proper argument.

Further, the prosecutor made clear that there was no duty to retreat before acting in self-defense; and the trial court repeatedly instructed the jury that there was no such duty and that the prosecutor's argument could only be considered for the issue of whether the defendant reasonably believed that she was faced with imminent unlawful physical force. Under these circumstances, the prosecution's arguments were entirely proper.

## ARGUMENT

### I. Colorado's "no duty to retreat" rule does not prohibit consideration of a defendant's ability to leave when evaluating a claim of self-defense under the totality of the circumstances.

The court of appeals held that the prosecution improperly argued that the defendant had an ability to leave, and this injected a duty to retreat into the issue of self-defense. Under Colorado's self-defense law, a defendant does not have a duty to retreat before acting in self-defense. The court of appeals understood the "no duty to retreat" rule as prohibiting such an argument, and opined that there was "undeniable appeal to ... a categorical prohibition against permitting the jury to consider whether there was an available avenue of retreat when assessing a defendant's belief in the need for the use of defensive force." *People v. Monroe*, 2018 COA 110 ¶18.

The court of appeals also found that there was little probative value to the decision to "fight, flight, or freeze." Consequently, "[w]e have significant concern that any use of the evidence of an unused avenue of retreat would unavoidably misdirect a jury into considering

the reasonableness of a defendant's response to a threat rather than the perception of the threat in the first place." *Monroe*, at ¶18.

The court of appeals is incorrect.

Colorado, like many jurisdictions, follows the "no duty to retreat" rule. But Colorado, like other "no retreat" jurisdictions, also recognizes the continued relevance of an ability to leave in determining whether a defendant acted in self-defense under the totality of the circumstances test. Those circumstances necessarily include the physical setting of the encounter – including the proximity of the parties, the location, and the character of the surroundings. Whether the physical setting presents an easy means of excising oneself from the encounter is a relevant factor in determining whether a defendant acted in self-defense. Indeed, both the defense and the prosecution may, as they did here, rely on the setting in supporting or challenging a claim of self-defense.

### A. Under Colorado's self-defense law, there is no duty to retreat before acting in self-defense, except where one is an initial aggressor.

Colorado's self-defense law is codified in section 18-1-704, C.R.S. (2018). Subsection (1) of the statute provides as follows:

> (1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

§18-1-704(1).

The English common law required a person to "retreat to the wall" before using deadly physical force in self-defense. Under this doctrine, a person is entitled to employ deadly physical force only if the person demonstrated that no reasonable means of escape existed at the time he killed the assailant. A substantial number of American jurisdictions still follow some form of this doctrine. *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000).

Colorado and many other American jurisdictions adopted the "no duty to retreat" rule. Under the "no duty to retreat" rule a person who is without fault does not have to retreat from an actual or threatened attack, even if he could safely do so, before the person may use physical force in self-defense. *Toler*, 9 P.3d at 347-348. "Our cases following *Boykin*[2] consistently stand for the proposition that, with the limited exceptions expressed in *Boykin*, Colorado does not impose a duty to retreat before a person may use physical force in self-defense. *Toler*, 9 P.3d at 348. Thus, there is no requirement that a defendant first retreat before acting in self-defense.

Section 18-1-704 reflects Colorado's common law "no retreat" rule, subject to one exception. Under subsection (3)(b), a person who is an "initial aggressor" must retreat before employing physical force in self-defense. §18-1-704(3)(b); *Toler*, 9 P.3d at 348-350; *Idrogo v. People*, 818 P.2d 752, 756 (Colo. 2001). An initial aggressor is justified in using physical force only if "he withdraws from the encounter and effectively

[2] *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896).

communicates to the other person his intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force." §18-1-704(3)(b).

### B. Although there is no duty to retreat, Colorado, like other "no retreat" jurisdictions, recognizes the relevance of an ability to leave in evaluating self-defense under the totality of the circumstances.

In evaluating the reasonableness of a defendant's belief in the necessity of defensive action, a jury is required to consider the totality of the circumstances. *Kaufman v. People*, 202 P.3d 542, 551 (Colo. 2009). As this Court held in *Riley v. People*,

> a jury must consider the totality of the circumstances ... (1) when evaluating the reasonableness of the defendant's belief that he needed to use self-defense in the given situation, and (2) when evaluating the reasonableness of the actual force used by the defendant to repel the apparent danger. [Citation omitted.] The purpose of this rule is to ensure that the jury understands that it may consider *all* relevant evidence when assessing the reasonableness of the defendant's actions.

*Riley v. People*, 266 P.3d 1089, 1094 (Colo. 2011) (emphasis in original), *citing People v. Jones*, 675 P.2d 9, 14 (Colo. 1984).

Evaluation under the totality of the circumstances test necessarily includes consideration of the physical setting in which the encounter took place, including the physical proximity of the involved parties, the location of the encounter, and the character of the surroundings. Put simply, there is a significant difference between a nighttime encounter in closed quarters at an isolated location and a daytime encounter where the involved parties are 150 yards apart at a crowded football game. Claimed acts of self-defense do not take place in a vacuum, and a jury properly considers all of these factors.

For example, in *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000) the court of appeals held that the defendant was not entitled to a self-defense instruction even though he was in close proximity when his friend was assaulted by the victims' group, and the defendant believed the victims' group might be armed. However, when the defendant drove up, most of the group ran away, and when he exited his vehicle, the last

member of the group ran, too. The defendant chased them and shot two of the members of the group in the back. *Laurson*, 15 P.3d at 794.

Although the defendant witnessed the assault and believed the group was armed, the evidence did "not establish a reasonable belief that the use of physical force against the defendant was actually about to occur." *Laurson*, at 795. "Rather, the fact that the victims fled upon the defendant's exit from the vehicle leads to the opposite conclusion." *Laurson*, at 795. Thus, because the victims' group left the encounter, there was not a reasonable belief that unlawful physical force was about to be used against the defendant.

In considering the physical setting of an encounter, whether the defendant has available means of egress or has an ability to leave is also relevant to the issues surrounding self-defense. The fact that there is no duty to retreat before acting in self-defense does not alter the relevance of evidence of an ability to leave. The United States Supreme Court, Colorado courts, and courts from other "no retreat" jurisdictions recognize the continued relevance of this type of evidence.

The leading case recognizing a distinction between the "no duty to retreat" rule and the relevance of a failure to retreat when one is able to do so is *Brown v. United States*, 256 U.S. 335 (1921). In *Brown*, the United States Supreme Court followed the "no duty to retreat" rule: "if a man reasonably believes that he in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not succeeded the bounds of lawful self defence." *Brown*, 256 U.S. at 343. However, the court distinguished between the "no duty to retreat" rule and evidence of an ability to leave.

> Rationally, the failure to retreat is a circumstance to be considered with all others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt.

*Brown*, 256 U.S. at 343. Thus, the "no duty to retreat" rule and consideration of a failure to leave are not mutually exclusive. *Josey v. United States*, 135 F.2d 809, 810 (D.C. Cir. 1943).

Colorado courts recognize and follow the *Brown* rule:

> The long-established rule in Colorado is that an innocent victim of assault need not retreat before using deadly force *if* the victim believes the use of

> such force is necessary for self-protection and the belief is based on reasonable grounds.

*Idrogo*, 818 P.2d at 756 (emphasis added), *citing Brown v. United States*; *accord People v. Willner*, 879 P.2d 19, 24 (Colo. 1994), *citing Brown*.

The vitality of this principle was reaffirmed by the court of appeals in two more recent cases.

In *People v. Martinez*, 224 P.3d 1026 (Colo. App. 2009)[3], the court of appeals held that consideration of an ability to leave does not implicate or intrude upon the "no duty to retreat" rule.

In *Martinez*, the defendant and his friend went to a bar where, on another occasion, the friend had flirted with a woman who worked there. The friend again flirted with the woman, and she pointed out her boyfriend, who was at the bar, and mentioned that he had a black belt in martial arts. At closing time, the defendant and his friend left the bar, but the boyfriend (hereinafter, the victim) and his friend left

[3] Affirmed on other grounds by *Martinez v. People*, 244 P.3d 135 (Colo. 2010).

shortly afterwards. The defendant and his friend saw them, stopped their car, and walked toward them. *Martinez*, 224 P.3d at 1029-1030.

There was disagreement about what happened next, but the defendant testified that (1) the victim and the victim's friend made threatening gestures; (2) the defendant hit the victim once with his fist, the victim went down, and the defendant stepped over him; (3) the victim's friend punched the defendant and those two fought; and (4) the defendant saw his friend "hammering away" at the victim. *Martinez*, at 1030.

In closing argument, the prosecutor said:

> Self-defense which is an affirmative defense to both of these? I don't think so. Ladies and gentlemen, right there it is. What could they have done? They could have left. They had the perfect opportunity if [defendant] was so scared and he was very nervous about this, about the fact that ... [the victim] had a black belt. And he told you he was really nervous about that. How could he have redeemed that? He could have left.

*Martinez*, at 1031.

On appeal, the court of appeals held that this argument did not implicate a duty to retreat:

> Unlike in *Cassels*[4] and *Idrogo,* defendant here did not request a no duty to retreat instruction nor did the prosecutor argue that he had a duty to retreat. During her closing argument, the prosecutor was simply rebutting defendant's claim that he acted in self-defense because he was "so scared and ... nervous" about the victim and the fact that he "had a black belt." It was only in this context that the prosecutor pointed out that defendant had chosen to remain and confront the victim and his friend. The issue of no duty to retreat was then raised by defense counsel who, while objecting, stated, "The Defendant has no duty to retreat."

*Martinez*, at 1033. Thus, the prosecutor had simply argued that, if the defendant were afraid, he could have left but chose to remain. This, in turn, was relevant to whether the defendant reasonably believed that he needed to act in self-defense. *Riley*, 266 P.3d at 1094.

In *People v. Castillo*, 2014 COA 140M[5], the court of appeals distinguished the argument there from the one made in *Martinez*. In *Martinez*, the statements made in closing "were simply rebutting the defendant's claim that he acted in self-defense because he was scared of

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[4] *Cassels v. People,* 92 P.3d 951 (Colo. 2004).

[5] Reversed on other grounds by *Castillo v. People*, 421 P.3d 1141 (Colo. 2018).

the victim." *Castillo*, at ¶76. However, in *Castillo*, the prosecutor's closing statements implicated the issue of a duty to retreat.

The *Castillo*, court acknowledged that some of the statements could be understood as impeachment of the defendant, but some suggested that it was unreasonable not to retreat under the circumstances. *Castillo*, at ¶77. However, the court of appeals held that any error was harmless because (1) the jury was specifically instructed that the defendant had no duty to retreat, (2) defense counsel emphasized this instruction in closing, and (3) the court repeatedly instructed the jury that attorney arguments were not the law. *Castillo*, ¶78.

As *Martinez* and *Castillo* demonstrate, the "no duty to retreat" rule, which provides that retreat is not a prerequisite to self-defense, does not eliminate consideration of an ability to leave under the totality of the circumstances analysis. Put another way, consideration of an ability to leave or the availability of a means of egress, does not intrude upon the "no retreat" rule or implicate a duty to retreat.

Courts in other jurisdictions that follow a "no duty to retreat" rule also recognize the continuing relevance of such evidence. *Josey*, 135 F.2d at 809; *United States v. Loman*, 551 F.2d 164 (7th Cir. 1977), *accord*, *United States v. Whalen*, 940 F.2d 1027 (7th Cir. 1991); *Gant v. United States*, 83 A.2d 439 (D.C. 1951); *People v. McGee*, 287 Ill. App. 3d 1049, 679 N.E.2d 796, 800 (Ill. App. Ct. 1997); *People v. DeSavieu*, 120 Ill. App. 3d 420, 458 N.E.2d 504 (Ill. App. Ct. 1983); *People v. Crow*, 128 Mich. App. 477, 340 N.W.2d 838 (Mich. Ct. App. 1983); *State v. Renner*, 912 S.W.2d 701 (Tenn. 1995).

Thus, a prosecutor may properly argue that the ability to easily avoid the situation undermines a claim that the defendant reasonably believed that she needed to act in self-defense:

> Although a defendant has no duty to retreat when attacked with deadly force, a prosecutor may properly argue a defendant's failure to easily extricate himself from a dangerous situation as a comment on the credibility of the defendant's testimony that he was afraid and that the use of deadly force was necessary.

*McGee*, 679 N.E.2d at 800. And a jury may be instructed on the relevance of the possibility of a safe retreat *Crow*, 340 N.W.2d at 844

(jury should be instructed that the possibility of a safe retreat is one of the circumstances which it could consider in determining whether the defendant acted in self-defense).

In this case, the prosecution properly argued that the jury should consider that the defendant had a path down the aisle in determining whether she acted in self-defense. The prosecution argued that the defendant was aggressive and threatening toward the victim from the beginning of their interaction. The defendant had called him names, asked her friend to unlock the safety on his gun, and played with an open knife while she argued with the victim. Her conduct evinced aggression not a fear of unlawful physical force.

In reviewing the surveillance video and still images, the prosecutor noted the defendant's physically aggressive movement towards the victim, and compared it with the victim's conduct – the victim remained seated and did not engage in any physically threatening conduct. The defendant, on the other hand, stood up and leaned in toward the victim before she stabbed him in the neck.

In reviewing the surveillance images and arguing that the defendant's behavior was aggressive rather than defensive, the prosecutor noted that she had a route away from the encounter:

> As I'm flipping through these you'll see that she goes forward a little bit, she's showing some aggression, we know she's talking to him. She didn't have any duty to retreat, but she does have a clear line of retreat, if she's actually scared for her safety.

(TR 3/20/13, p 96).

The prosecutor focused on, and directed the jury to, a proper purpose for considering the defendant's ability to excise herself from the situation if she was scared for her safety. *Martinez*; *Castillo*; *see McGee*. Here, under the totality of the circumstances, the defendant did not reasonably believe that she needed to act in self-defense, and her aggressive behavior toward the victim – leaning in before she stabbed him – even where there was an available avenue to extricate herself, undermined her claim of self-defense.

The prosecutor's next statement, following the trial court's limiting instruction, was equally proper:

> Again, she did not have a duty to retreat but could have backed away, if she wanted to, if she was actually afraid.

(TR 3/20/13, p. 96).

The focus again was on whether the defendant reasonably believed she was faced with the imminent use of unlawful physical force and, also, whether she reasonably believed that she needed to use the degree of force she used – stabbing the victim in the neck – to defend herself. §18-1-704(1); *Riley*; *Martinez*. The prosecutor did not argue, contrary to the "no retreat" rule, that because the defendant did not retreat, she could not claim self-defense.

During rebuttal argument, the prosecution continued to argue that the defendant was aggressive toward the victim, and was not in fear of unlawful physical force. The prosecutor pointed out that the defendant had said that she was not afraid of the victim, that he was "a joke," and he was "older than Louis" (TR 3/20/13, pp 114-115). He pointed out that she was not alone, and that she called over a coworker and told him take the safety off his gun. And that other witnesses were shocked when she attacked the victim, because the victim did not do

anything to place her in fear (TR 3/20/13, pp 115, 117). And the most aggressive things the victim did was wag his finger and say he was going to call the police (TR 3/20/13, pp 115, 117-118).

Then the prosecutor argued:

> You have no duty to retreat. No one in Colorado has to run away from someone endangering them. But let's be clear. When you do not remove yourself from a situation when you easily can, that contradicts that you were in fear of being hurt.

(TR 3/20/13, p 119). Again, both in isolation, and in the context of the preceding argument, the prosecutor's argument was squarely focused on whether the defendant reasonably believed that she was faced with the imminent use of unlawful physical force. This was proper. *Martinez*; *McGee*.

Following another limiting instruction from the trial court, the prosecutor argued:

> [The prosecutor:] There is a clear path down that aisle. You can see it on the video. If you're scared of someone, if you're caught in an interaction with them for 8 to 10 minutes, a reasonable person would move from it, if they have a direct line to go away. There is an open aisle –

(TR 3/20/13, p 120).

Here, again the prosecutor made a proper argument, that a reasonable person would have taken a clear path down the aisle if they were in fear of the imminent use of force during an 8 to 10 minute interaction. This was an entirely proper argument, and correctly focused on whether a person, in the defendant's circumstances, would reasonably believe that they needed to act in self-defense under the totality of the circumstances. *Riley*. The prosecutor, again, did not argue that, absent retreat, the defendant could not claim self-defense.

Following another limiting instruction, the prosecutor argued that, although Mr. Arceo made a seat available to her, the defendant did not move and was not scared. The prosecutor reminded the jury of the defendant's statements that she would not have gotten into this encounter, that if she were scared, she would have run away. Relying on these statements, the prosecutor said that the defendant knew the appropriate thing to do, but she did not do this because she was not acting in self-defense (TR 3/20/13, p 121). Again, the focus was properly

directed toward whether the defendant was in fear for her safety. This was proper.

Further, the trial court's instructions concerning the "no duty to retreat" rule and the limited purpose of the prosecution's argument clarified the scope of the prosecution's argument. Absent evidence to the contrary, it is presumed that a jury follows the trial court's instructions. *Domingo-Gomez*, 125 P.3d at 1053-1054; *Harlan*, 8 P.3d at. This includes limiting and cautionary instructions. *People v. District Court*, 953 P.3d at 190-191.

Here, the prosecution prefaced its arguments concerning the ability to leave with a statement that the defendant did not have a duty to retreat before acting in self-defense. (TR 3/20/13, pp 96, 119). And the trial court repeatedly instructed the jury on this point. First, in Instruction 18, the jury was instructed:

> The Defendant was not required to retreat to a position of no escape in order to claim a right to employ force in her own defense.

(CF, p. 214). This was a proper statement of the "no duty to retreat" rule. *Toler*, 9 P.3d at 347-348.

Then, during the prosecution's closing arguments, the court instructed the jury that the defendant did not have a duty to retreat and that the jury could not use the fact that she did not withdraw to find that she could not raise a defense of self-defense (TR 3/20/13, pp 96, 119-120). And the court referred the jury back to Instruction 18 (TR 3/20/13, pp 96, 119-120). Further, the court instructed the jury that the prosecution's argument could be considered for the limited purpose of whether or not the defendant reasonably believed there was an imminent use of force. (TR 3/20/13, pp 96, 120).

Even assuming, arguendo, that the prosecution's argument that the defendant had an avenue to leave if she were afraid somehow implicated a duty to retreat – which it did not – the prosecution's clarification of the scope of its argument and that the defendant had no duty to retreat, along with the trial court's instructions, cured any impropriety. Any possible error was harmless under these circumstances. *Vigil v. People*, 731 P.2d 713, 716 (Colo. 1987); *Castillo,* 2014 COA 140M, ¶78.

## CONCLUSION

For the foregoing reasons and authorities, the decision of the court of appeals should be reversed, and the judgment of conviction and sentence should be affirmed.

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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF** upon **ANNE T. AMICARELLA** via Colorado Courts E-filing System (CCES) on September 17, 2019.

*/s/ Tiffiny Kallina*

AG FILE: MONRO SHEILA 18SC708 FINAL OPENING BRIEF