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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA1372
Jefferson County District Court Case No. 16CR3708

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

BRITTANY PAGE HARRISON,

Respondent.

▲COURT USE ONLY▲

Case No. 19SC448

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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 8,348 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 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).

☒It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

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/ Trina K. Taylor

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STATEMENT OF THE ISSUES

(1) [REFRAMED] Whether the court of appeals correctly interpreted the requirement in the drug overdose immunity statute, section 18-1-711(1)(a), C.R.S. (2019), that a person "report[] in good faith an emergency drug or alcohol overdose event."

(2) [REFRAMED] Whether the court of appeals correctly concluded that the defendant's convictions were not supported by sufficient evidence.

INTRODUCTION

Colorado law provides limited immunity from certain drug or alcohol-related crimes for a person who reports in good faith an emergency drug or alcohol overdose event and for the person who is the subject of the reported overdose. Defendant Brittany Harrison was convicted of possession of controlled substances and drug paraphernalia after a manager at a Burger King restaurant reported to 911 that Harrison was sleeping in the lobby. Police woke up Harrison, who

consented to a search of her backpack and purse, which contained drugs and paraphernalia.

Although the manager did not suspect she was reporting a drug overdose and Harrison was not, in fact, suffering a drug overdose, the court of appeals found that Harrison was immune from prosecution under the overdose immunity statute and vacated her convictions. The court of appeals' interpretation is contrary to the purpose and language of the statute and should be reversed. Regardless, under any interpretation of the statute, the evidence was sufficient to sustain her convictions.

STATEMENT OF THE CASE AND FACTS

Harrison and a teen friend ordered food at a Burger King on the morning of November 3, 2016. (TR 4/12/17, pp 144-45.) The manager noticed they looked tired; the transaction otherwise seemed ordinary. (TR 4/12/17, p 152:9-10.) After a while, an employee alerted the manager that two people were "sleeping in the lobby" in a booth. (TR 4/12/17, pp 144:21-25, 146:1-14.) An employee tried to wake them. He "just barely

touch[ed] their shoulders, shak[ing] them," and he "bang[ed] on the table with his hand." (TR 4/12/17, p 147:18-21.) They did not rouse. (TR 4/12/17, p 147:18-21.)

The manager waited awhile and then "called 911 and explained that [two people] came in and ordered and they were sleeping." (TR 4/12/17, p 148:7-8.) The manager felt concerned about the two individuals' well-being, but, on the other hand, she also expected the police to just wake them and instruct, "You can't sleep here. Go ahead and go...." (TR 4/12/17, pp 148-49.) It "never crossed [the manager's] mind" that either person might have been suffering from a drug overdose. (TR 4/12/17, pp 153-54.) She did not see Harrison with anything that looked like drugs or paraphernalia or observe any signs of intoxication or impairment. (TR 4/12/17, pp 149:13-22, 154:14-19.)

Emergency services dispatched two police officers. (TR 4/12/17, pp 208:3-14, 244:17-24.) The first officer to respond found Harrison and her friend asleep. (TR 4/12/17, pp 245-46.) He shook Harrison, and she awoke. (TR 4/12/17, pp 245-46.) By the time the second officer arrived a

few minutes later, Harrison was awake and eating a hamburger; the officer thought she appeared to be "under the influence of some substance." (TR 4/12/17, p 209:3-6.) Harrison did not, however, require medical assistance. (TR 4/12/17, pp 246-47.)

One of the officers asked if he could search Harrison's purse. (TR 4/12/17, p 250:12-20.) She consented, and the officer found heroin, a used syringe, a piece of tinfoil with burn marks on it, a spoon, and a butane torch. (TR 4/12/17, pp 250-51; TR 4/13/17, p 60:18-22.) The other officer asked Harrison if a backpack under the table belonged to her, and she said yes and consented to its search as well. (TR 4/12/17, p 212:7-17.) Inside, the officer found a cell phone box that contained methamphetamine and two glass pipes with residue on them. (TR 4/12/17, p 213:2-9; TR 4/13/17, p 60:2-11.) Harrison was arrested and charged with possession of methamphetamine, heroin, and drug paraphernalia. (CF, pp 13-14.)

Harrison filed a pretrial motion to dismiss, asserting overdose immunity under section 18-1-711. (CF, pp 51-56.) The trial court held

an evidentiary hearing and ruled that Harrison was not immune from prosecution because, among other things, the evidence did not show she had suffered from an "acute condition" or "emergency drug or alcohol overdose event." (TR 2/9/17, pp 1-138; TR 2/14/17, pp 87-88.)

At trial, the court instructed the jury on overdose immunity as an affirmative defense, based upon the procedure used with the make-my-day statute that this Court approved in *People v. Guenther*, 740 P.2d 971 (Colo. 1987). A jury found Harrison guilty on all three charges. (CF pp 249-51.) The court sentenced her to at least 24 months in Jefferson County's Drug Treatment Court. (TR 6/16/17, pp 5-6.) The court of appeals vacated her convictions based on the overdose immunity statute, section 18-1-711.

SUMMARY OF THE ARGUMENT

The overdose immunity statute requires that a person report in good faith an "emergency drug or alcohol overdose event." This provision is reasonably susceptible to two interpretations. One, an inquiry with *actual* and *objective* components: the statute provides

immunity to a person who reports in good faith an acute condition (i) that is actually caused by the consumption or use of drugs or alcohol and (ii) that a reasonable layperson would objectively believe to be a drug overdose that requires medical assistance. Or, two, an inquiry with *subjective* and *objective* components: it provides immunity to a person who reports in good faith (i) what is, in her perception, an acute condition caused by the consumption or use of drugs or alcohol and (ii) that a reasonable layperson would believe to be a drug overdose that requires medical assistance.

The court of appeals adopted a third interpretation: an objective-only inquiry. In this interpretation, the court rearranged the statutory language—moving the objective "reasonable layperson" standard from the final phrase of the definition to modify the entire substantive provision. This interpretation is contrary to the plain language of the statute and undermines the statute's limited purpose and the general assembly's intent.

Under any of these interpretations of the statute, however, the court of appeals should not have vacated Harrison's convictions. The prosecution presented sufficient evidence to disprove the applicability of the overdose immunity statute under the circumstances. The jury heard sufficient evidence to conclude that Harrison was not suffering "an acute condition" and that a reasonable person would not conclude she was suffering "a drug overdose that required medical assistance." The court of appeals should not have substituted its judgment for the jury's.

ARGUMENT

I. The overdose immunity statute does not apply where the reporting person did not suspect a drug overdose and the subject of the report did not experience one.

A. Preservation and standard of review

This Court reviews questions of statutory interpretation de novo. *McCoy v. People*, 442 P.3d 379, 389 (Colo. 2019).

This issue has been preserved. (CF, pp 51-56 (defendant's motion to dismiss based on immunity); TR 2/9/17, pp 1-138 (evidentiary hearing on immunity); TR 2/14/17, pp 87-88 (pretrial immunity ruling); TR

4/13/17, pp 71:5-15, 77-82, 96:4-8 (motion for judgment of acquittal, discussion of immunity jury instruction); COA Opening Br., pp 8-17; COA Answer Br., pp 8-13.)

B. The overdose statute grants immunity under limited circumstances.

Section 18-1-711 grants immunity from arrest and prosecution to a person who reports an emergency drug or alcohol overdose; the statute applies only under limited conditions to a few specific drug or alcohol-related crimes, including the charges against Harrison: possession of controlled substances and drug paraphernalia. *See generally* § 18-1-711.

Specifically, a person is immune from arrest and prosecution if four conditions are met:

> (a) The person reports in good faith an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider;
>
> (b) The person remains at the scene of the event until a law enforcement officer or an emergency medical responder arrives or the person remains

> at the facilities of the medical provider until a law enforcement officer arrives;
>
> (c) The person identifies himself or herself to, and cooperates with, the law enforcement officer, emergency medical responder, or medical provider; and
>
> (d) The offense arises from the same course of events from which the emergency drug or alcohol overdose event arose.

§ 18-1-711(1).

An "emergency drug or alcohol overdose event" means:

> an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, *and* that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.

§ 18-1-711(5) (emphasis added).

If the reporting person satisfies the conditions in section 18-1-711(1), immunity "also extends to the person who *suffered* the emergency drug or alcohol overdose event." § 18-1-711(2) (emphasis added).

C. The plain language of the statute is reasonably susceptible to two interpretations—but not the interpretation adopted by the court of appeals.

The immunity statute's first condition, and its related definition, were at issue in the appeal: did the manager "report[] in good faith an emergency drug or alcohol overdose event?" If she did, then Harrison, the person who allegedly "suffered the emergency drug or alcohol overdose event," was immune from prosecution for possession of controlled substances and drug paraphernalia.

In construing a statute, a court's "primary purpose is to ascertain and give effect to the legislature's intent." *McCoy*, 442 P.3d at 389. The court looks first to the language of the statute, giving its words and phrases their plain and ordinary meanings. *Id.* The court reads statutory words and phrases in context and construes them according to the rules of grammar and common usage. *Id.*; *see also* § 2-4-101, C.R.S. (2019). The court "construe[s] the statute as a whole to give consistent, harmonious, and sensible effect to all its parts." *Martinez v. People,* 2020 CO 3, ¶ 9.

If a statute is unambiguous, the court looks no further. *People v. Iannicelli*, 449 P.3d 387, 392 (Colo. 2019). If a statute is ambiguous, then the court considers "other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history." *Id.* A statute is ambiguous when it is reasonably susceptible of multiple interpretations. *Id.*

An "emergency drug or alcohol overdose event" is defined as "an acute condition" with two components linked by the conjunction "and": "resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, *and* that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance." § 18-1-711(5) (emphasis added).

Subsection (1)(a) sets forth the requirement that immunity applies where a person "reports in good faith an emergency drug or alcohol overdose event." One possible interpretation would require proof of an actual and objective component as to what the person reported.

Under the actual-objective inquiry, the person must:

- Report in good faith;
- An acute condition:
    - Resulting from consumption or use of drugs or alcohol; and
    - That a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.
- To a law enforcement officer, to the 911 system, or to a medical provider.

Under the "actual" component of this interpretation, the individual must be experiencing an actual acute condition that resulted from the consumption or use of drugs or alcohol. Under the "objective" component, a layperson must reasonably believe the acute condition to be a drug overdose that requires medical assistance.

However, this is not the only possible interpretation according to ordinary rules of grammar. Another possible interpretation would require proof of a subjective and objective component as to what the person reported.

The subjective component arises from the "good faith"

requirement. "Report" is a transitive verb, which requires a direct object[1]; its direct object is "an emergency drug or alcohol overdose event." Both this Court and the United States Supreme Court have recognized that "[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb … that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Flores–Figueroa v. United States*, 556 U.S. 646, 650 (2009); *see also People v. Perez*, 367 P.3d 695, 699 (Colo. 2016) (quoting *Flores–Figueroa,* 556 U.S. at 650). Otherwise, the sentence would "leave[] the hearer gravely uncertain about the subject's state of mind in respect to the full object of the transitive verb in the sentence." *Flores–Figueroa*, 556 U.S. at 652.

Therefore, under this second possible interpretation, the statute would require a person to have "good faith" not just with respect to the making of *some sort of report* but with respect to making *a report of an*

[1] *See* The Chicago Manual of Style ¶ 5.98 (15th ed. 2003).

emergency drug or alcohol overdose event. In this context, what makes the report be "in good faith" is both an honesty in motivation and a *subjective* belief in the thing she is reporting. Thus, under the subjective-objective inquiry, the person must:

- Report with an honest motive;
    - What the reporting person subjectively believes to be an acute condition resulting from consumption or use of drugs or alcohol;
    - And that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.
- To a law enforcement officer, to the 911 system, or to a medical provider.

The court of appeals opted for a third interpretation, however, which does not take the statute's words and phrases in context or construe them according to the rules of grammar and common usage. The court determined that "emergency drug or alcohol overdose event" is defined "objectively." It effectively moved the final phrase of subsection (5) so that it modified the entire definition: there must be a report of what a reasonable layperson would believe to be a drug or

alcohol overdose event. Thus, it concluded with respect to Harrison that "a layperson would have reasonably concluded that [she] was suffering an acute condition caused by a drug or alcohol overdose." *People v. Harrison*, 2019 COA 63, ¶ 26. And "the evidence at trial was insufficient to disprove that a reasonable person in the manager's position would have believed that an 'emergency drug or alcohol overdose event' may be occurring." *Id.* at ¶ 28.

In other words, the court of appeals' objective-only inquiry assesses whether a person has:

- Reported in good faith;
- What a layperson would reasonably believe to be a drug overdose event;
- To a law enforcement officer, to the 911 system, or to a medical provider.

This interpretation rearranges and omits words used in the statute, violating canons of statutory construction.

The court of appeals reasoned that section 18-1-711 must be objective because the next section, 18-1-712, is subjective, in that it refers to a reporting person's "belie[f]." *Harrison*, ¶ 23 (citing § 18-1-712,

C.R.S. (2019)). But section 18-1-712 has interpretive challenges of its own. It provides immunity to "a person who acts in good faith to furnish or administer an opiate antagonist to an individual the person believes to be suffering an opiate-related drug overdose event" with respect to a stolen opiate antagonist. The court did not consider the *definition* of "opiate-related drug overdose event," which itself could potentially be interpreted to include both objective and actual components:

> "Opiate-related drug overdose event" means an acute condition … that:
>
> (I) Results from the consumption or use of a controlled substance or another substance with which a controlled substance was combined;
>
> (II) A layperson would reasonably believe to be an opiate-related drug overdose event; and
>
> (III) Requires medical assistance.

§ 18-1-712. The court of appeals erred in overlooking the definition to conclude that section 18-1-712 is wholly subjective. Because section 18-

1-712 is itself ambiguous, it is not instructive in interpreting section 18-1-711.[2]

D. Language used in other states' overdose immunity statutes aids in the interpretation of Colorado's law.

Most other states have enacted some version of a drug overdose immunity statute. Some states explicitly structured their laws to convey immunity where *either* an actual overdose occurred *or* the reporting person had an objectively reasonable belief that an individual was experiencing an overdose. But the language of these statutes differs from Colorado's statute (which does not contain either/or language).

For example, Delaware's law provides immunity to a person "who is experiencing an overdose or other life-threatening medical emergency and anyone … seeking medical attention for that person." 16 Del. C. § 4769(b). It defines "overdose" as an acute condition resulting from consumption or use of drugs but also provides that the person's

[2] And although the two provisions are in contiguous sections, they were enacted in different legislative sessions. 2012 Colo. Sess. Laws, ch. 225 (§ 18-1-711); 2013 Colo. Sess. Laws., ch 178 (§ 18-1-712).

condition "shall be *deemed* an overdose if a layperson could reasonably believe that the condition is in fact an overdose and requires medical assistance." 16 Del. C. § 4769(a)(2) (emphasis added). Likewise, Hawaii's law provides immunity to a person "who, in good faith, seek[s] medical assistance for someone who is experiencing a drug or alcohol overdose." Ha. Rev. Stat. § 329-43.6(b). "Drug or alcohol overdose" is defined as:

> (1) A condition, including but not limited to extreme physical illness, decreased level of consciousness, respiratory depression, coma, mania, or death, that is the result of consumption or use of a controlled substance or alcohol or a substance with which the controlled substance or alcohol was combined; *or*
>
> (2) A condition that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.

Ha. Rev. Stat. § 329-43.6(a) (emphasis added). In both the Delaware and Hawaii statutes, therefore, a person can obtain immunity by satisfying *either* the existence of an actual overdose *or* a condition that a "reasonable layperson" would believe to be an overdose.

But other statutes—like Colorado's—are not written in the alternative. For example, North Carolina provides immunity to a person who reports or is the subject of a report of "a drug-related overdose," which is defined as:

> an acute condition, including mania, hysteria, extreme physical illness, coma, or death resulting from the consumption or use of a controlled substance, or another substance with which a controlled substance was combined, *and* that a layperson would reasonably believe to be a drug overdose that requires medical assistance.

N.C. Gen. Stat. § 90-96.2(a) (emphasis added); *see also* Ky. Rev. Stat. § 218A.133(1)(a) (2019); S.C. Code § 44-53-1910 (2019). These statutes require *more* than just a reasonable layperson's belief.

Only a few states' appellate courts have interpreted their immunity statutes in published cases, and the distinct language used in the statutes leads to varying interpretations. Some courts have interpreted their statutes to preclude immunity if the person's condition is not sufficiently "acute," as the jury may have reasonably concluded in this case.

For instance, when a Florida business owner called police to request that a patron be given a trespass warning and be escorted from the property, a Florida appellate court concluded that its overdose immunity statute did not apply because the defendant "[q]uite simply … was high" and was not entitled to immunity for an "overdose." *State v. Silliman*, 168 So.3d 245, 247 (Fla. Dist. Ct. App. 2015); *see also State v. W.S.B.*, 180 A.3d 1168, 1181 (N.J. Super. Ct. App. Div. 2018) (noting the applicability of the statute might depend on evidence of the "degree of severity (i.e. acuteness)" of the person's condition); *State v. Osborn*, 8 Wash.App.2d 1030 (Wash. Ct. App. 2019) (unpublished) (a person reported as unconscious in a car was not entitled to immunity because there was no evidence that he had been using drugs or required medical assistance when emergency personnel responded); *State v. Jago*, 209 So.3d 1078, 1083 (La. Ct. App. 2016) (the subject of a 911 call described as "passed out high sitting in the car not even moving" was not suffering a drug overdose under the immunity statute).

Although Georgia has interpreted its statute in a way that

superficially supports the defendant's position here, the language used in the statute dictates a different result. In *State v. Mercier*, 826 S.E.2d 422, 423 (Ga. Ct. App. 2019), passersby called 911 to report a man lying in the street who appeared to be the victim of a hit and run; the man was actually experiencing an overdose. *Id.* at 425. Georgia's statute protects from arrest and prosecution "any person who is experiencing a drug overdose and, in good faith, *seeks medical assistance* for himself or herself or is the subject of such a request." *Id.* at 424 (citing Ga. Stat. § 16-13-5(b) (emphasis added)). Georgia's statute also defines "drug overdose" in either/or fashion: it is an acute condition resulting from either the consumption or use of a controlled substance *or* that a reasonable person would believe to be resulting from the consumption or use of a controlled substance. Ga. Stat. § 16-13-5(a)(1). Accordingly, the Georgia statute protected the defendant in *Mercier* because he was *actually* suffering a drug overdose and was the subject of a good faith

request for medical assistance. *Mercier*, 826 S.E.2d at 425.[3]

Colorado law, on the other hand, is written in terms of reporting a drug overdose, not "seeking medical assistance," and it has more definitional requirements for "drug overdose" than Georgia's law has. And, factually, the Georgia defendant was experiencing an actual drug overdose while Harrison was not. For these reasons, *Mercier* is not persuasive in interpreting Colorado's statute.

Colorado's statute is reasonably susceptible to two different interpretations: immunity either applies to a person who reported an actual acute condition caused by the consumption of drugs that a reasonable layperson would believe is a drug overdose; or to a person who reported what she perceived to be an acute condition caused by the consumption of drugs that a reasonable layperson would believe is a drug overdose.

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[3] The concurrence questioned whether Georgia's ambiguous statute should apply where the report is made by a "casual bystander." *Id.* at 426 (Hodges, J., concurring).

E. Because the statute is ambiguous, this Court should consider other interpretive aids.

Because Colorado's statute is reasonably susceptible to the two interpretations described by the People, this Court can "employ aids of statutory construction to discern the legislature's intent," including "legislative history, the consequences of a particular construction, and the end to be achieved by the statute." *Martinez*, 2020 CO 3, ¶ 9; *see also* § 2-4-203, C.R.S. (2019).

1. The statute's purpose is to provide limited immunity to a person who witnesses or experiences a drug or alcohol overdose.

The general assembly enacted a legislative statement describing the purpose of the statute. It includes "encourag[ing] … [p]ersons who otherwise would be reluctant to report such an event due to a fear of criminal prosecution to do so without delay." 2012 Colo. Sess. Laws, ch. 225, legislative declaration to § 18-1-711 at 986. The statute seeks to accomplish its purpose by creating immunity for certain low-level drug offenses, so that people would feel less reluctant to call for help when they are with someone who is experiencing a drug overdose. But the

general assembly did not seek to immunize *all* offenses in the event of a drug overdose—or even all drug possession offenses. The general assembly created numerous limitations around the offenses immunized and the actions the reporting person must take to qualify for immunity (for herself and the subject of her report). § 18-1-711(1), (3).

The court of appeals' interpretation does not fit the statutory purpose because a disinterested bystander faces no threat of prosecution herself and has no inherent reluctance to seek help for a stranger suffering from a drug overdose. In other words, in situations where the reporting party does not suspect an overdose, the law does not serve the purpose of encouraging people to report overdoses.

The other statutory requirements reinforce the interpretation that the reporting person should have some reason to believe she is reporting a drug overdose. Having a bystander remain at the scene and cooperate with first responders, *see* § 18-1-711(1)(b), (c), does not serve the purpose of the statute if the bystander is unaware of what caused the subject's condition.

Within the same enrolled act, the general assembly "encouraged" the Colorado Commission on Criminal and Juvenile Justice "to create and make publicly available a document describing" the drug overdose immunity statute. 2012 Colo. Sess. Laws, ch. 225, at 988 (codified at § 16-11.3-103(6), C.R.S. (2019)).[4] Thus, the general assembly expected the law to apply in situations where the reporting person had reason to believe she was reporting a drug overdose, and it determined that the person might be less hesitant to make a report if she had knowledge of the law's existence due to publicity.

2. The legislative history indicates the reporting person should have knowledge of the subject's consumption of drugs or alcohol.

Few amendments during the legislative process relate to the provisions at issue in this case. The definition of "emergency drug or alcohol overdose event" was left unchanged from the time the bill was

[4] The commission did subsequently create and make publicly available a document describing the statute. *See* Colorado Commission on Criminal and Juvenile Justice, Reports, *Factsheet* and *Resources* (Dec. 2012), https://www.colorado.gov/pacific/ccjj/ccjj-reports (last visited Feb. 10, 2020).

introduced to its enactment. *Compare* SB 12-020 (introduced Jan. 11, 2012) *with* 2012 Colo. Sess. Laws, at 987-88. The language of subsection (1)(a) changed slightly from explicitly granting immunity to the person reporting a drug or alcohol overdose *and* one or two other persons acting in concert with the reporting person, to the present language mentioning only the reporting person. *Compare* SB 12-020 (introduced Jan. 11, 2012) *with* 2012 Colo. Sess. Laws, at 987-88.

Despite few changes made to the text of the bill, testimony by the bill's sponsors and questions posed by other members provide substantial interpretive guidance. Though not "conclusive, the testimony of a bill's sponsor concerning its purpose and anticipated effect can be powerful evidence of legislative intent." *Vensor v. People*, 151 P.3d 1274, 1279 (Colo. 2007). Legislative history can provide "strong indications of not only what the legislature intended but, as importantly, what it did not intend." *Id.*

The bill's sponsors in the Senate and House spoke in terms of the reporting person *knowing* the subject of the report and *being present* at

the time of overdose. For instance, the bill's Senate sponsor, Senator Aguilar, described the bill's goal "to save lives by encouraging people who *witness* a drug overdose to call 911." Hearing on S.B. 12-020 before the Senate Subcommittee on the Judiciary, 68th General Assembly, Second Session (Feb. 1, 2012) at 05:48 (emphasis added). She explained that "most overdoses actually occur in the presence of other people, and they take several hours to cause death." *Id.* at 03:05. And "the most common reason given for not calling 911 and for delaying help is that the person is afraid of arrest and prosecution." *Id.* at 03:35. Therefore, she summarized,

> [I]f we can get this information [in the bill] to people who are using, as well as people around them who … see people using prescription or nonprescription drugs, and [] they understand that by helping someone who overdoses they're not going to get arrested, we have the potential to save lives.

Id. at 5:48. Senator Aguilar testified about a study completed after enactment of Washington's drug overdose immunity statute which found that "[drug] *abusers* … stated that knowing there was limited

immunity increased the likelihood that they would call for help if they witnessed an overdose." Hearing on S.B. 12-020 before the Senate, 68th General Assembly, Second Session (Mar. 13, 2012) at 1:16:46 (emphasis added).

Similarly, the bill's House sponsor, Representative Summers, described the bill as "an attempt to get individuals who are with somebody that experiences a drug overdose to get immediate medical attention so that that [person's] life is saved…." Hearing on S.B. 12-020 before the House of Representatives, 68th General Assembly, Second Session (Mar. 9, 2012) at 28:38. Representative Summers emphasized that the reporting person's cooperation would help medical personnel "know exactly what he took and how long ago he took it." *Id.* at 32:48. He explained that a House amendment to the Senate bill added immunity for persons who take people directly to medical facilities rather than just those who make 911 calls in order to address a common situation in which a person drops off a friend at a hospital and flees. *Id.* 33:37. "We need to make sure the individuals that are helping them

really follow through with the cooperation that is needed to make sure that attention to that individual's particular needs are given in a timely and effective [manner]." *Id.* at 34:05.

To the bill sponsors, as well as the members who posed questions or made comments and witnesses who testified, the hypothetical "reporting persons" were fellow drug users, friends, partygoers, and family members—all scenarios in which the reporting person would have actual knowledge or strong contextual circumstances to suspect the subject of the report had consumed drugs or alcohol and was likely experiencing an overdose. *See also* Hearing on S.B. 12-020 before the Senate Subcommittee on the Judiciary, 68th General Assembly Second Session (Feb. 1, 2012) at 04:45 (bill's sponsor discussing "drug users" being reluctant to report), at 25:52 (witness testifying about benefit of giving immunity information to parents whose children are drug users), at 58:20 (college dean testifying on positive impact the bill would have on college student overdose reporting); Hearing on S.B. 12-020 before the House Subcommittee on the Judiciary, 68th General Assembly,

Second Session (Mar. 1, 2012) at 10:27 (representative posing a question about "a group of buddies" "hanging out" and using drugs together) & 19:23 (paramedic witness discussing "pharm parties"[5] and how witnesses giving first responders information about the substances consumed by an individual is critical to a fast, effective response); Hearing on S.B. 12-020 before the House of Representatives, 68th General Assembly, Second Session (Mar. 9, 2012) at 28:40 (bill's sponsor discussing reports by persons who are "with somebody that experiences a drug overdose").

3. The general assembly intended that overdose immunity would be narrow in scope.

The general assembly intended overdose immunity to be "focused and limited." Hearing on S.B. 12-020 before the House Subcommittee on the Judiciary (Mar. 1, 2012) at 2:24; *see also* Hearing on S.B. 12-020 before the Senate Subcommittee on the Judiciary (Feb. 1, 2012) at 5:02 (referring to the bill as creating "limited immunity").

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[5] Abusing prescription drugs recreationally at a party.

The bill's sponsors considered this a "public health" bill rather than one that changed drug policy for possession offenses. *See, e.g.*, Hearing on S.B. 12-020 before the Senate Subcommittee on the Judiciary (Feb. 1, 2012) at 1:06; Hearing on S.B. 12-020 before the House Subcommittee on the Judiciary (Mar. 1, 2012) at 2:15. Members of the general assembly expressed concerns about "unintended consequences," i.e. the statute granting immunity under circumstances the general assembly had not anticipated. *See, e.g.*, Hearing on S.B. 12-020 before the Senate Subcommittee on the Judiciary (Feb. 1, 2012) at 06:40, 09:28.

The bill's sponsors, along with senators, representatives, and witnesses who testified at the hearings, did *not* seem to contemplate immunity applying to a disinterested bystander who simply came across an unknown situation and, by virtue of calling 911, extended her immunity to the subject of the report.

F. This Court should adopt the People's "subjective-objective" interpretation.

Taking into consideration the statute's plain language, its context within the statutory scheme, the purpose to be achieved, and the legislative history, this Court should adopt the subjective-objective inquiry. This standard would afford immunity to a person who reports in good faith what the person perceives to be an acute condition caused by consumption or use of drugs or alcohol and that a reasonable layperson would believe to be an overdose requiring medical assistance.

This interpretation fits best with how readers of ordinary English would understand the "good faith" requirement—conveying how the person performed the entire action, including the verb and its direct object (the report of an emergency drug or alcohol overdose event). *Perez*, 367 P.3d at 701. The subjective-objective interpretation fits the rest of the statutory scheme, which provides immunity only if the reporting person stays and cooperates with first responders—a requirement that would be meaningless if the person had no information to provide the first responders. It also fits with the

statutory purpose: to encourage the reporting of drug or alcohol overdoses by witnesses who might otherwise be hesitant to report due to the subject's or their own possible criminal liability. And it fits the legislative history which indicated the expectation by the bill's sponsors, other members, and testifying witnesses that the law would apply to someone who witnessed a drug or alcohol overdose.

Alternatively, the actual-objective inquiry also fits the statute's plain language and provides immunity for an *actual* acute condition resulting from drugs that a reasonable person would believe to be an overdose. It fits the statutory scheme and purpose slightly less well because a bystander with no knowledge or hesitancy to report a drug overdose might be granted immunity along with the subject of the report; however, it still requires an actual acute condition caused by drugs or alcohol.

The court of appeals' objective-only interpretation does not fit the statute's plain language and purpose. It would grant immunity, as it did here, where a casual bystander reported something that she did not

suspect was a drug overdose and was not *actually* an acute condition caused by drugs or alcohol. This interpretation undermines the limited nature of the immunity provision and grants immunity under circumstances the general assembly did not intend.

The court of appeals' expansive interpretation also impacted the ability of prosecutors and courts to help rehabilitate nonviolent persons suffering from drug addictions through alternative sentencing methods—which requires prosecution—such as:

- Pretrial diversion, *see* § 18-1.3-101, C.R.S. (2019);
- Alternative programs to divert individuals with mental health conditions; *see* § 18-1.3-101.5, C.R.S. (2019);
- Deferred sentencing, *see* § 18-1.3-102, C.R.S. (2019);
- Vacating a felony and entering a misdemeanor upon successful completion of probation or a community corrections program, *see* § 18-1.3-103.5, C.R.S. (2019).

Harrison, for example, was sentenced to Jefferson County's Drug Treatment Court (TR 6/16/17, pp 5-6), which seeks to promote "offender rehabilitation through accountability, application of best practices in treatment, and enhanced supervision" to allow for the "opportunity to

recover from chemical dependence and to live life as productive, law-abiding citizens."[6] Colorado's sentencing scheme for substance abuse offenses focuses on rehabilitation and treatment. *See* §§ 16-11.5-101 *et seq*.; 18-18-401(c), C.R.S. (2019). Granting immunity where the legislature did not intend it undermines those rehabilitative goals and denies treatment opportunities to people in need of help.

II. The evidence was sufficient to support the jury's verdict.

A. Preservation and standard of review

This Court reviews sufficiency of the evidence claims de novo. *McCoy*, 442 P.3d at 389. This issue has been preserved. (TR 4/13/17, pp 71:5-15, 77-82, 96:4-8 (motion for judgment of acquittal, discussion of immunity jury instruction); COA Opening Br., pp 8-17; COA Answer Br., pp 8-13.)

[6] Drug Treatment Court, https://www.jeffco.us/2204/Drug-Treatment-Court (last visited Feb. 10, 2020).

B. The prosecution disproved the affirmative defense beyond a reasonable doubt.

Under any interpretation of the statute, the evidence was sufficient to support the jury's verdict because the manager did not report in good faith an emergency drug or alcohol overdose event.

The overdose immunity statute is silent on the procedure and timing of asserting immunity. The People do not challenge the procedure used in this case, to which the parties agreed (in the absence of appellate guidance), using the procedure approved by this Court in *Guenther* under the "make-my-day" immunity statute, § 18-1-704.5, C.R.S. (2019).

1. The allocation of the burden of proof depends upon the procedural context.

The People preface their argument on sufficiency of the evidence with a brief discussion of procedure because the court of appeals' opinion in *Harrison* did not discuss the procedural posture of the case and may have left the impression that, in future cases, immunity issues should be addressed at trial. Characterizing the statute as an

affirmative defense impacts pretrial procedure and allocation of the burden of proof.

This Court can conclude from the overdose statute's plain language—"a person is immune from arrest and prosecution"—that the general assembly intended "to create a bar to criminal prosecution" where the other statutory conditions are satisfied. *See Guenther*, 740 P.2d at 976 (construing the words "shall be immune" in § 18-1-704.5). Therefore, a defendant should be permitted to assert immunity under the overdose statute in a motion to dismiss, which the trial court should address prior to trial. Crim. P. 12(b)(2), (4); *Guenther*, 740 P.2d at 976.

In the pretrial hearing, the trial court should allocate the burden of proof to the defendant; under the overdose immunity statute, as in make-my-day immunity, a hearing to determine the statute's applicability "is not a criminal trial, but, rather, is an ancillary proceeding in the nature of a motion to dismiss a pending criminal prosecution on the basis of a statutory bar." *Id.* at 980.

Where, as here, the trial court *denies* a defendant's pretrial motion

to dismiss under the overdose immunity statute, it is not clear whether, if the defendant presents some credible evidence at trial that the statute should apply, the trial court should instruct the jury on immunity as an affirmative defense.

In *Guenther*, this Court held that under the make-my-day immunity statute, a defendant who did not prevail in a pretrial motion could still assert immunity as an affirmative defense at trial. *Id.* at 981. This Court reasoned that the general assembly intended the statute to "operate as a complete immunity … under the conditions set forth in the statute[. I]t cannot plausibly be argued that the legislature thereby intended to deprive an accused of the lesser benefit of an affirmative defense at trial when those same statutory conditions are established under appropriate standards of proof applicable to the trial of a criminal case." *Id.; see also People v. Janes*, 982 P.2d 300, 303 (Colo. 1999) ("If the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may raise the 'make-my-day' statute at trial as an affirmative defense….")

The application of this procedure to the overdose immunity statute is less clear. The prior statutory section, 18-1-710, provides that "issues of justification or exemption from criminal liability under sections 18-1-701 to 18-1-709 are affirmative defenses." § 18-1-710, C.R.S. (2019). The make-my-day immunity statute falls within that range. The overdose immunity statute, section 18-1-711, does not. "Under the rule of [statutory] interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others." *Cain v. People*, 327 P.3d 249, 253 (Colo. 2014) (quoting *Meeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001)). This rule suggests that the general assembly did not intend for overdose immunity to be an affirmative defense.[7]

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[7] One state, New Jersey, has construed its overdose immunity statute to "afford[the defendant] a final opportunity at trial to persuade a jury" that immunity should apply. *W.S.B.*, 180 A.3d at 1187. However, the court focused on the statute's language immunizing a person from "prosecution *and conviction*" as providing for a procedure that gives the defendant a "second bite at the apple" at trial, *see id.*, whereas Colorado's statutory language differs, immunizing a person from "arrest and prosecution." New Jersey's law also differs because it does not

2. Where immunity is treated as an affirmative defense, the prosecution has the burden of disproving the defense beyond a reasonable doubt.

When assessing the sufficiency of the evidence supporting a conviction, this Court reviews the record de novo to determine whether the relevant evidence, viewed as a whole and in the light most favorable to the prosecution, was sufficient to support the conclusion by a reasonable juror that the defendant was guilty beyond a reasonable doubt. *Butler v. People*, 450 P.3d 714, 718 (Colo. 2019). This Court gives the prosecution the benefit of every reasonable inference that may be drawn from the evidence. *Id.*

In this case, the court treated the immunity statute at trial like an affirmative defense. "[W]hen the evidence presented properly raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element of the charged offense." *Roberts v. People*, 399 P.3d 702, 705 (Colo. 2017). The prosecution bears the

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contain the equivalent of section 18-1-710, setting forth which sections constitute affirmative defenses.

burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable. *Id.*

Harrison did not argue on appeal that the prosecution failed to prove the elements of possession but contended it failed to meet its burden of disproving the affirmative defense beyond a reasonable doubt.

C. The jury heard sufficient evidence to conclude that Harrison was not experiencing "an acute condition."

The definition of "emergency drug or alcohol overdose event" requires that the person be suffering "an acute condition." Under the various possible interpretations of the statute, the jury had to determine whether Harrison suffered an actual, subjective, or objective acute condition resulting from consumption or use of drugs or alcohol.

The court of appeals determined that Harrison was suffering from an acute condition: unconsciousness. *See, e.g. Harrison*, ¶¶ 3, 25, 27 ("defendant and A.M. were still unconscious"; "defendant had … then become unconscious"; "two young people … lapse[d] into unconsciousness"). The People do not dispute that unconsciousness would qualify as "an acute condition" under the statute, but no one—not

the witnesses or even Harrison's attorney—described Harrison at trial as "unconscious."

Instead, the jury heard witnesses testify that Harrison looked tired and fell "asleep." (TR 4/12/17, pp 144:21-25, 146:1-14, 148:7-8, 152:9-10, 164-65, 209:15-16.) The jury heard that Harrison had been out all night—first at a hotel using drugs, then walking around with her friend, and finally ordering food at Burger King. (TR 4/12/17, pp 163-65.) Although Harrison did not respond when Burger King employees tried to rouse her, she did awaken when the responding police officer shook her. (TR 4/12/17, pp 245-46.) By the time a second officer arrived, Harrison was eating a hamburger and answering questions. (TR 4/12/17 pp 209-10.) She did not require medical assistance. (TR 4/12/17, pp 246-47.) Thus, the evidence does not compel the conclusion that Harrison was unconscious and therefore suffering an acute condition.

The court of appeals reasoned that the jury could only consider the evidence of what occurred leading up to the 911 call (i.e. the jury could not consider that Harrison awoke and did not need medical assistance

when the police arrived). *Harrison*, ¶¶ 24-25 ("[T]he only relevant evidence to aid the jury … was that, at the time the manager called 911, defendant had entered the restaurant, ordered her food, and then become unconscious and unresponsive for a prolonged period.")

But even if the relevant evidence is constrained to the timeframe prior to the 911 call, the jury heard substantial and sufficient evidence to conclude that Harrison was not suffering from an acute condition based on eyewitness testimony:

- The manager testified that her employee told her that there were two people sleeping in the lobby (TR 4/12/17, p 146:1-7);
- Harrison's friend characterized her as "[falling] asleep" (TR 4/12/17, p 164:8-9);
- The manager said she reported to 911 that people were sleeping in the lobby (TR 4/12/17, p 148:7-9);
- 911 dispatched police officers and not paramedics in response to the manager's call (TR 4/12/17, p 248:19-23).

The jury reasonably could have concluded based on this evidence that Harrison was simply asleep and not suffering an acute condition.

Appellate courts should not "serve as the 'thirteenth juror' to weigh various pieces of evidence or resolve conflicts in the evidence." *Butler*, 450 P.3d at 718. The manager's testimony about her level of concern was inconsistent. But "[w]hen conflicting evidence exists, the jury must be allowed to perform its historic fact-finding function." *Perez*, 367 P.3d at 701. The prosecution disproved the affirmative defense by substantial and sufficient evidence, and the court of appeals should not have substituted its judgment for the jury's.

D. The jury heard sufficient evidence to conclude that a reasonable person would not have believed Harrison to be suffering a drug overdose.

The definition also requires that a layperson reasonably believe the acute condition to be a drug overdose that requires medical assistance. § 18-1-711(5). The court of appeals again substituted its judgment for the jury's, concluding that "a layperson would have reasonably concluded that defendant was suffering an acute condition caused by a drug or alcohol overdose." *Harrison*, ¶ 26. It erred in two respects.

The manager testified that it "never crossed [her] mind" that Harrison was suffering from a drug overdose. (TR 4/12/17, pp 153-54.) Based on this, the court of appeals determined that the evidence, viewed in the light most favorable to the prosecution, showed that the manager did not *subjectively* believe an emergency overdose was occurring when she called 911. *Harrison*, ¶ 21. In order to conclude the opposite—that a reasonable layperson *would* have believed she was observing a drug overdose—the court of appeals deemed the evidence of the manager's belief irrelevant. *Harrison*, ¶ 13 ("Therefore, the manager's subjective knowledge or ignorance about the cause of defendant's condition is not relevant to the applicability of section 18-1-711(5).")

Thus, the court of appeals' first error was in deeming evidence of the manager's perception irrelevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. CRE 401. And a lay

witness may testify to "opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of CRE 702. *See* CRE 701.

Even if the drug overdose immunity statute is interpreted as setting forth a wholly objective standard, as the court of appeals concluded, an eyewitness's perception of Harrison's condition constitutes relevant and helpful lay opinion testimony. The jury could evaluate the manager's perception along with the rest of the circumstances and reject it, but the evidence is still *relevant*.

In holding that the manager's belief was irrelevant, the court of appeals cited to *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011), a case about custodial police interrogation. In that case, the United States Supreme Court cited the longstanding proposition that the subjective views of the officers and the interrogated suspect are irrelevant to the objective determination of whether a person is "in custody," i.e. whether

a reasonable person would have felt free to end the interrogation and leave. *Id.*

In the context of interrogation, an objective test "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind." *Id.* Likewise, it protects the interrogated individual from the necessity of "prob[ing] the officer's innermost thoughts" to determine whether he is "in custody." *Stansbury v. California*, 511 U.S. 318, 323-34 (1994). Therefore, constitutional safeguards for custodial interrogations are based on the objective circumstances and not either party's mental state.

Here, the context is quite different. This Court has found a witness's perception testimony relevant to a reasonableness determination in the context of other defenses. For instance, in *Kaufman v. People*, 202 P.3d 542, 551 (Colo. 2009), this Court found a defendant's testimony about his *perception* of his would-be attackers' intent was relevant to determining whether the defendant had a

reasonable belief that the men intended to cause him bodily injury. Similarly, in *People v. Collins*, 730 P.2d 293, 296 (Colo. 1986), an eyewitness to an altercation testified to his impression that it was not necessary for the defendant to use a weapon under the circumstances. *Id.* at 296, 305. This Court found the eyewitness's opinion relevant and admissible as to whether a reasonable person would find the defendant's actions necessary. *Id.* at 305-07. The testimony was helpful to the jury because it was "based on factual observations which conveyed information that a mere description of the participant's behavior could not." *Id.* at 307.

"Common experience strongly suggests that contemporaneous firsthand observation yields valuable impressions which cannot adequately be conveyed later by 'objective' descriptions of outward behavior." *People v. Rubanowitz*, 673 P.2d 45, 47 (Colo. App. 1983) (citing 3 D. Louisell & C. Mueller, Federal Evidence § 376 (1979)); *see also People v. Jones*, 907 P.2d 667, 669 (Colo. App. 1995) ("Summary characterizations and impressions as to what transpired … can be of

significant assistance to a fact finder.") Thus, the manager's perception of Harrison's condition was relevant in the jury's evaluation of an objective standard.

The second way in which the court of appeals erred was by determining that the only conclusion a reasonable person could have reached was that Harrison was experiencing a drug overdose because she and her friend were "young people … [who] lapse[d] into unconsciousness simultaneously, at mid-morning, and in a public place." *Harrison*, ¶ 27. But a person in the manager's position lacked any other contextual clue to suggest a drug overdose. The manager did not perceive Harrison to be intoxicated when she ordered, did not see her with any drugs or paraphernalia, did not see her ingest anything, and did not smell anything unusual. Harrison was not found passed out in the bathroom or holding a syringe. There was nothing visible in her appearance to suggest she was a drug user; when Harrison ordered her food, the manager had the impression that she was just a typical young person with a backpack—the sort of Burger King patron the manager

saw every day. (TR 4/12/17, p 145:17-22.) A jury could conclude that a reasonable person would assess the situation and believe two young people fell fast asleep in the booth of a restaurant after staying out all night.

The court of appeals also faulted the prosecution for not presenting expert evidence of alternative medical conditions Harrison could have been suffering. *Harrison*, ¶ 27. Expert testimony should not be necessary for the prosecution to prove beyond a reasonable doubt that a reasonable *layperson* would not believe she was witnessing a drug overdose—particularly when the prosecution's theory is that the subject of the report was asleep.

The court of appeals should not have substituted its view for the jury's. The evidence that Harrison was not suffering an emergency drug or alcohol overdose event was sufficient to support the jury's verdicts.

CONCLUSION

This Court should reverse the court of appeals' opinion and uphold the defendant's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S OPENING BRIEF** upon **JESSICA SOMMER** via Colorado Courts E-filing System (CCES) on February 10, 2020.

/s/ Michael Rapp