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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 17CA1372	
Petitioner BRITTANY PAGE HARRISON v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
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ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

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

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,487 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

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

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

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INTRODUCTION

The purpose of the 911 Good Samaritan statute is to save lives by preventing drug overdoses. To do that, the statue provides immunity from prosecution for minor drug offenses to a person who suffers a drug overdose when someone reported that overdose in good faith and cooperates with law enforcement.

The State suggests narrowing this statute to only apply where the reporter has a subjective belief that an overdose occurred, despite no statutory language to support this limitation. Not only is this interpretation not supported by the plain language of the statute, but it would undermine the clear intent of the legislature to prioritize saving lives over the prosecution of minor drug offenses.

Instead, where, as here, someone calls 911 to get help for two unresponsive young people, and that person cooperates with law enforcement, the 911 Good Samaritan statute dictates that the person who suffered the overdose is immune from prosecution for possession of drugs and drug paraphernalia. Thus, the court of appeals properly vacated Ms. Harrison's convictions and this Court should affirm.

ISSUES ANNOUNCED BY THE COURT

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."

Whether the court of appeals correctly concluded that the defendant's convictions were not supported by sufficient evidence.

STATEMENT OF THE CASE

Brittany Page Harrison was charged with two counts of possession of a controlled substance, a level four drug felony, §18-18-403.5(1), C.R.S., and one count of possession of drug paraphernalia, a petty drug offense, §18-18-428(1), C.R.S, after she was found passed out in a fast food restaurant on November 3, 2016. CF, p 10, 14.

Prior to trial, she moved to dismiss the charges pursuant to the 911 Good Samaritan statute, §18-1-711, C.R.S., which provides immunity from prosecution for possession of a controlled substance for a person suffering a drug overdose event when that event is reported in good faith. CF, p 51, 75. The court denied the motion but instructed the jury on the required elements of immunity as an affirmative defense. CF, p 115, 272.

A jury convicted Ms. Harrison as charged. The trial court referred her to recovery court for sentencing, where she was sentenced to a minimum of twenty-four months in the program. CF, p 298. Ms. Harrison ultimately did not succeed in drug court and was subsequently sentenced to an effective term of three years in the Department of Corrections.[1]

STATEMENT OF THE FACTS

Virginia Roberts manages a Burger King. TR 4/12/2017, p 143:20-23. One morning, after serving two young people, an employee alerted her that the pair was slumped over each other and passed out with their unopened bags of food still on the table. *Id.* at 146:1-147:14; 152:16-18. The employee tried to wake them—he shook them, yelled, and banged on the table—but neither responded. *Id.* at 146:24-147:25; 152:24-153:9. They did not even flinch. *Id*. at 153:5-9. Ms. Roberts decided to let them be for some time before trying to rouse them again. After a second attempt to wake them, however, they remained unresponsive. *Id.* at 147:22-25.

[1] The court sentenced Ms. Harrison to consecutive sentences of two years on count 1, one year on count 2, and a $100 fine on count 3. This was imposed after the record on appeal was filed, but it appears on the mittimus issued on February 2, 2018, available on Colorado Courts E-Filing. Counsel respectfully requests that this court take judicial notice of this fact pursuant to CRE 201. *See Doyle v. People*, 2015 CO 10, ¶12.

At this point, Ms. Roberts became concerned that something was "seriously wrong" because, typically, "teenagers wake up like that." *Id.* at 148:1-5; 153:13-19. So, at around 10 am, she called 911 for help, explaining that the young people "came in and ordered and they were sleeping. We could not wake them up and I was concerned for their well-being." *Id.* at 148:7-9; 244:17-24.

Ms. Roberts testified that she did not know if the two young people were experiencing an overdose. She explained that "[i]t could be a possibility, but it never really crossed [her] mind. It was really seeing what was wrong and help was at the forefront." *Id.* at 153:20-154:2. Although she initially did not recall telling a defense investigator that "they may have taken too [much] of something," she later confirmed making that statement. *Id.* at 154:3-5; 159:22-25. However, she also testified that she had never seen people under the influence of drugs or alcohol. *Id.* at 148:10-13.

Corporal Payne responded to the 911 call and attempted to wake the teens. He announced himself and shook them, but neither responded. *Id.* at 246:5-8. After shaking harder, he was able to wake one of them, Ms. Harrison, but not the other, her friend A.M. Corporal Payne then called paramedics for A.M. *Id.* at 246:9-16; 248:20-23.

When Ms. Harrison came to, Corporal Payne asked her what drugs they had used and, with her consent, searched her purse, where he found drug paraphernalia and 0.171 grams of heroin. *Id.* at 250:12-20; 251:11-16; TR 4/13/2017, p 60:18-22.

Officer Gonzales arrived as Corporal Payne was talking to Ms. Harrison. TR 4/12/2017, p 209:1-6. With Ms. Harrison's consent, he searched her backpack and found additional drug paraphernalia and 0.14 grams of methamphetamine. *Id.* at 212:7-213:-25; TR 4/13/2017, p 60:2-11. Corporal Payne then arrested Ms. Harrison. TR 4/12/2017, p 259:6-11.

A.M. was not arrested. He was taken to the hospital by paramedics because he was "not coming to consciousness." *Id.* at 223:10-14; 248:20-23.

Both officers testified that Ms. Harrison and A.M. appeared to be under the influence of drugs. *Id.* at 247:20-248:9; 209:3-16. Corporal Payne described Ms. Harrison as "strung out," while Officer Gonzales explained that she was "drowsy-looking [and] real sluggish." *Id.* at 209:10-16; TR 4/13/2017, p 52:10-11.

Ms. Roberts testified that after Ms. Harrison woke up, she was "very out of it," "very shaky," and "didn't know what was going on." *Id*. at 156:20-158:12. She further testified that Ms. Harrison could not even sit up or stand on her own, *id*. at 157:7-11, although the officers disputed this account. *Id*. at 216:13-17; 259:12-16.

The jury was instructed on the affirmative defense of immunity for reporting an emergency drug or alcohol overdose event under the 911 Good Samaritan statute, but it convicted Ms. Harrison on all charges. CF, p 249-251, 272.

On appeal, Ms. Harrison argued that the prosecution failed to disprove this affirmative defense beyond a reasonable doubt because Ms. Roberts reported in good faith an emergency drug overdose event. The State contended that this requirement was not met because Ms. Roberts did not subjectively believe Ms. Harrison was experiencing an overdose and that her inability to wake up did not meet the statutory definition of a drug overdose. The court of appeals agreed with Ms. Harrison, concluding that the 911 Good Samaritan Act did not require the reporter to subjectively believe that there was an overdose. *People v. Harrison*, 2019 COA 63, ¶¶22-23. The division further concluded that the event was a drug overdose according to the statutory definition because Ms. Harrison was unconscious, and when "two young people sitting together…lapse into unconsciousness simultaneously, at mid-morning, in a public place," a lay person would reasonably believe that those people were experiencing a drug overdose. *Id.* at ¶27.

SUMMARY OF THE ARGUMENT

The 911 Good Samaritan statute is clear and unambiguous. According to the plain language, the statute's immunity applies where a person "reports in good faith" an event which meets the statute's definition of an overdose. Relying on the generally accepted meaning of good faith, this requirement can only mean that a report must be made for a proper purpose—to get help.

The statute cannot reasonably be interpreted to require the reporter to subjectively believe that an overdose has occurred. The statute specifically defines a drug or alcohol overdose event using an objective standard. Had the legislature intended to include both a subjective and an objective test, as the State suggests, it would have said so directly, as it did in the opiate antagonist immunity statute.

This interpretation of the statute is supported by looking at other states' 911 Good Samaritan statutes. Numerous states have construed the good faith elements of their statutes in accordance with the ordinary meaning of this phrase to refer to the reporter's intent or integrity when making the report, not his or her subjective belief.

And this interpretation is consistent with the legislature's purpose to save lives from drug overdoses and encourage drug users to seek treatment. Limiting immunity to cases in which the reporter subjectively believes a person is overdosing

would fail to encourage prompt reporting in all cases, and therefore undermine the legislative intent.

Because the statute only requires a report for a proper purpose, the State failed to disprove this affirmative defense beyond a reasonable doubt. No evidence disproved that Ms. Harrison was suffering from an overdose event as defined by the statute, as she was suffering from an acute condition and a lay person would have reasonably believed this condition to be a drug overdose requiring medical attention. Ms. Harrison and A.M. were unconscious, which the State concedes is an acute condition. That Ms. Harrison later woke up does not mean that her condition was not acute at the time of report. And a layperson would reasonably believe that two young people who simultaneously passed out at mid-morning were suffering from a drug overdose. That it never crossed Ms. Roberts' mind is irrelevant to whether an objectively reasonable person would have this belief.

Accordingly, the prosecution failed to disprove the 911 Good Samaritan affirmative defense beyond a reasonable doubt, and the court of appeals properly vacated Ms. Harrisons' convictions. This Court should affirm.

ARGUMENT

I. The 911 Good Samaritan statute is clear and unambiguous. The reporter must report the event for a proper purpose, but he or she need not subjectively understand the event to be a drug overdose.

A. Standard of Review and Preservation

Ms. Harrison agrees that questions of statutory interpretation are reviewed de novo. *McCoy v. People*, 2019 CO 44, ¶37. Issues of statutory interpretation presented by sufficiency claims are not subject to plain error review, regardless of preservation. *Id.* at ¶¶27, 34.

B. The 911 Good Samaritan Act

In 2012, the legislature enacted the 911 Good Samaritan Act to provide immunity from criminal prosecution for certain low-level drug offenses when someone reports an overdose event in good faith and subsequently cooperates with law enforcement.[2] Ch. 225, sec. 1-2, §18-11-711, 2012 Colo. Sess. Laws 986, 986-88. The Act provides immunity to both the reporter and the person who suffered the overdose event if the following conditions are met:

> (a) The person reports in good faith an emergency drug or alcohol overdose event to a law enforcement officer, or the 911 system, or to a medical provider;

[2] The statute was amended in 2016 to provide immunity from both arrest and prosecution. Ch. 184, sec. 1, 2016 Colo. Sess. Law 649, 649.

> (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).

The statute defines an emergency drug or alcohol overdose event as:

> [A]n 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).

C. According to the statute's plain language, "good faith" refers to the reporter's intent, not subjective belief.

When construing a statute, the court's primary goal is to discern the General Assembly's intent. *Romero v. People*, 179 P.3d 984, 986 (Colo. 2007). To do so, the court first looks to the plain language of the statute, giving words and phrases their commonly accepted and understood meanings. *People v. Graves*, 2016 CO 15,

¶27. In addition, the court must "examine particular statutory language in the context of the statute as a whole," *id.*, and "avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *McCoy*, ¶38. It cannot "add or subtract statutory words that contravene the legislature's obvious intent." *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006).

If the meaning of the statute is clear from the language alone, no further analysis is required, and the court applies the statute as written. *Romero*, 179 P.3d at 986. "Only if the statutory language, considered in context, is susceptible of more than one reasonable interpretation will [the court] turn to other rules of statutory construction." *People v. Berry*, 2020 CO 14, ¶12.

It is undisputed that Ms. Roberts remained at the scene, cooperated with law enforcement, and that the offenses arose out of the same course of events as the overdose event. The only question presented in this case is whether, under subsection 1(a), she "report[ed] in good faith an emergency drug or alcohol overdose event," as that event is defined in subsection 5. §18-1-711(1)(a).

The plain language of this subsection is reasonably susceptible to only one interpretation: a person must report, for a proper purpose and without the intent to defraud or seek an unconscionable advantage, an event which meets the definition in subsection 5. And subsection 5 tells us that a qualifying event is an acute

condition that is caused by drugs or alcohol which a lay person would reasonably believe to be an overdose that requires medical assistance. §18-1-711(5). The reporter need not know or believe that the reported event meets this definition.

Ms. Harrison essentially agrees with the interpretation the State terms the "actual-objective inquiry," although she disagrees that no "actual" overdose occurred here. *See infra,* Section II.B. However, this is the only reasonable interpretation of the statute. The crux of the dispute in this case centers on the meaning of the phrase "reports in good faith." The action of "report[ing] in good faith" refers to the reporter's motivation for making the report. According to the common and ordinary meaning of this phrase, one acts in "good faith" by "[b]ehaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage." *Acting in Good Faith,* BLACK'S LAW DICTIONARY 33 (11th ed. 2019); *see also Good Faith*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/good%20faith ("honesty or lawfulness of purpose"); *Credit Serv. Co., Inc. v. Dauwe*, 134 P.3d 444, 447 (Colo. App. 2005) (relying on BLACK'S LAW DICTIONARY definition of "good faith"); *Berry*, ¶14 (relying on the BLACK'S LAW DICTIONARY and Merriam-Webster to determine the plain and ordinary meaning of statutory phrases).

This generally accepted meaning has been applied numerous times in Colorado. For example, in determining whether a report was made in good faith, Colorado law looks to whether the reporter had an improper motive when making the report and whether there was a factual basis for the report. *See Dauwe*, 134 P.3d at 447 (report of child abuse is not made in good faith if it was made with an "evil motive" and without a factual basis); §8-2-123(1)(b), C.R.S. (statute barring retaliation against a healthcare worker who makes a "good faith report" defines "good faith report or disclosure" as a report "made without malice or consideration of personal benefit and that the health care worker making the report has reasonable cause to believe is true"); *see also Montoya v. Bebensee*, 761 P.2d 285, 289 (Colo. App. 1988) (report of child abuse would not be in good faith if the report was made "willfully and in wanton and reckless disregard of [a parent's] rights and feelings").

And in other situations, courts have previously defined good faith by a lack of bad faith, or a lack of ill-intent. *See, e.g., Georg v. Metro Fixtures Contractors, Inc.*, 178 P.3d 1209, 1215 (Colo. 2008) (holder in due course acted in good faith because he lacked bad faith, defined as "guilty knowledge or willful ignorance"*)*; *In re Marriage of Swing*, 194 P.3d 498, 501 (Colo. App. 2008) (obligor's request to modify spousal maintenance obligations was based on good faith decision to retire early because the decision was not motivated by a desire to eliminate or decrease

maintenance). Good faith is also used to connote acting honestly and fairly. *See West v. Roberts*, 143 P.3d 1037, 1041 (Colo. 2006) (adopting the UCC definition of "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing"). While the precise application of the phrase can turn on the context in which it is used, in all of these different scenarios Colorado courts have consistently interpreted "good faith" according to its ordinary meaning to refer to an actor's intent and motive, or the integrity of his actions.

The phrase "good faith" cannot be construed to require the reporter to subjectively believe that the acute condition is caused by drugs or that it is a drug overdose, as the State suggests. OB at 12-14. The State cites no authority for the proposition that the phrase "good faith" equates to a subjective belief. True, the commonly accepted meaning of "good faith" includes an element of honesty. But honesty does not suggest any particular subjective knowledge. For example, here, Ms. Roberts *honestly* reported the situation to 911—she accurately explained that there were two teenagers passed out in her restaurant and she could not wake them up. That she did not know to categorize their condition as an overdose does not make her report dishonest or lacking in a factual basis.

Moreover, the statutory context demonstrates that an overdose is determined objectively, not subjectively. *See Berry*, ¶¶15-17 (considering the statutory context

in determining that a statutory phrase unambiguously retains its generally accepted meaning). By using the phrase "that a lay person would reasonably believe to be a drug or alcohol overdose" in subsection 5, the legislature demonstrated that it was concerned about whether an acute condition objectively presented as an overdose, not whether a reporter subjectively perceived one. *See Cross*, 127 P.3d at 76 (statutory phraseology of a "reasonable person" unambiguously referred to an objective standard); *Standard*, BLACK'S LAW DICTIONARY 1694 (11th ed. 2019) ("the reasonable-person standard is considered an objective standard"); *see also State v. W.S.B.*, 180 A.3d 1168, 1181 (N.J. Super. Ct. App. Div. 2018) (interpreting identical definition of drug overdose event and concluding that the "phrasing invokes the well-established legal notion of the objective 'reasonable person' embodied in tort law and other contexts").

Had the legislature intended to create both a subjective and objective standard, it would have "said so directly." *People v. Griffin*, 397 P.3d 1086, 1089 (Colo. App. 2011). Indeed, it did say so directly in a related statute. Section 18-1-712, C.R.S., provides immunity for persons who administer an opiate antagonist during an opiate-related drug overdose. That statute provides immunity to someone 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*," and further defines

"opiate-related drug overdose event" as an acute condition that results from drugs which a lay person would reasonably believe to be a drug overdose and requires medical assistance. §18-1-712(2)(a); 5(e) (emphasis added). This statute explicitly creates both a subjective and objective requirement—the person administering the drug must believe the recipient is experiencing a drug overdose, and the event must be one that a reasonable person would believe is an overdose. In contrast, the 911 Good Samaritan statute only explicitly refers to the objective requirement that a layperson would reasonably believe the condition to be a drug overdose.

As the opiate antagonist immunity statute demonstrates, if the legislature wanted to require the reporter to subjectively believe that the subject of the report was experiencing a drug overdose, it knew how to say that. *See People v. Rojas*, 2019 CO 86M, ¶¶15-16 (where legislature uses similar, but more specific language in other statutes, it demonstrates that the legislature "clearly knows how" to create a certain outcome when it intends to do so); *accord Pineda-Liberato v. People*, 2017 CO 95, ¶63. But it did not use those words. Reading a subjective belief requirement into the statute requires adding words that simply are not there. *See Cross*, 127 P.3d at 73 (courts cannot add words to a statute).

The State's suggested meaning of "good faith" does not make sense when the opiate antagonist immunity statute and the 911 Good Samaritan statute are

considered together. If the phrase "good faith" connotes subjective knowledge or belief in an overdose, then the phrase "the person believes to be suffering an opiate-related drug overdose event," in the opiate antagonist immunity statute would be superfluous. Thus, "good faith" cannot mean "subjective belief," as the State suggests. *See McCoy*, ¶38 (courts construe the plain language of a statute to avoid surplusage).

The State disregards this obvious conclusion by arguing that the opiate antagonist immunity statute "has interpretative challenges of its own," and therefore it is "not instructive" in interpreting the 911 Good Samaritan statute. OB at 16. But the State fails to offer any explanation to reconcile the opiate antagonist immunity statute's explicit requirement that the actor "believes [an individual] to be suffering an opiate-related drug overdose event[]" with the 911 Good Samaritan statute's silence on this issue.

The State's primary argument in support of its position that the 911 Good Samaritan statute requires the reporter to subjectively believe that there is an overdose hinges on the fact that "report" is a transitive verb for which "good faith" is an adverbial phrase. OB at 13. True enough, but this does not explain what good faith means. Accepting that the reporter must have "'good faith'…with respect to making *a report of an emergency drug or alcohol overdose event*," OB at 13-14

(emphasis in original), the question remains, what does it *mean* to report such an event in good faith? The State argues that it means that the reporter subjectively believes there to be an acute condition resulting from the consumption of drugs, but it offers no authority for the proposition that "good faith" signifies this subjective belief. Simply put, the grammar might elucidate to what "good faith" applies, but it does not explain what "good faith" means.

In addition to the grammatical argument, the State points to the statute's cooperation requirements as evidence that the reporter must subjectively understand there to be an overdose because it suggests that the reporter knows what the sufferer of the overdose took and when. OB at 24. While cooperation from a witness who knows what the overdosing person took might be the most helpful, that does not mean that a bystander's cooperation is "meaningless," as the State argues. OB at 32. A bystander such as Ms. Roberts could let police and paramedics know how long the overdosing person had been in the current condition and alert them to any changes that occurred between the report and response. By remaining on the scene, the reporter could also monitor and assist the sufferer of the acute condition if the condition worsens. Thus, the cooperation elements of the statute do not imply a subjective belief requirement.

The common, ordinary meaning of good faith refers to a person's motivations, not their subjective knowledge. Indeed, the State concedes that to report in good faith means to "[r]eport with an honest motive." OB at 14. Reading subsection 1(a) to require the reporter to subjectively believe that a person is experiencing an acute condition caused by drugs is not a reasonable interpretation of the statute. Rather, the statute clearly, unambiguously only requires that a person report that condition for a proper purpose and without the intent to defraud or seek an unconscionable advantage.

D. To the extent the statute could be considered ambiguous, other interpretative aids demonstrate that "good faith" means a proper motive, not a subjective belief in an overdose.

Even if this Court concludes that this statute is ambiguous, similar statutes from other states, the legislative history and declaration, and the rule of lenity support reading the "good faith" phrase to refer to the reporter's motive, not subjective belief. *See* §2-4-203, C.R.S. (in construing an ambiguous statute, courts may consider the legislative history, the legislative declaration or purpose, and other interpretative aids).

1. Other states' 911 Good Samaritan laws use the phrase "good faith" to refer to the reporter's intent or integrity, not subjective belief.

As of July 1, 2018, 46 jurisdictions have some sort of 911 Good Samaritan law.[3] Like Colorado's law, many of these statutes impose a "good faith" requirement.

Some states' statutes do require the reporter to subjectively believe that the subject of the report is suffering from an overdose. But these statutes do so explicitly, referring—like Colorado's opiate antagonist immunity statute—to what the reporter believed or perceived to be an overdose, in addition to a good faith requirement. *See, e.g.*, Conn. Gen. Stat. §21a-279(d) (providing immunity for a person "who in good faith, seeks medical assistance for another person *who such person reasonably believes is experiencing an overdose*"); *accord* Alaska Stat. §11.71.311(a)(1); D.C. Code §7-403(a)(1); 35 Pa. Cons. Stat. §780-113.7(2)(i); Utah Code §58-37-8(16)(a)(i-ii). That Colorado's 911 Good Samaritan statute does not include this explicit language, when numerous other states' statutes do, demonstrates that Colorado's statute does not contain this requirement. *See Roup v. Commercial Research, LLC*, 2015 CO 38, ¶22 (that numerous states' garnishment exemption

[3] The Prescription Drug Abuse Policy System, Good Samaritan Overdose Prevention Laws Page, http://pdaps.org/datasets/good-samaritan-overdose-laws-1501695153 (last visited March 8, 2020).

statutes specifically exempt HSAs but Colorado's does not lead to the conclusion that Colorado's statute did not exempt HSAs).

Moreover, where statutory definitions and interpretative case law exists, the good faith requirement of other state's 911 Good Samaritan statutes has been construed to refer to the reporters' intent when reporting the overdose. *See Colantuno v. A. Tenenbaum & Co., Inc*., 23 P.3d 708, 712 (Colo. 2001) (where a Colorado statute is ambiguous, "statutes in other jurisdictions similar to the Act" provide persuasive authority).

For example, a number of statutes specify that "good faith does not include seeking medical assistance during the course of the execution of an arrest warrant or search warrant or a lawful search." *See, e.g.*, Conn. Gen. Stat. §21a-279(d); Minn. Stat. §604A.05(1); Ky. Rev. Stat. §218A.133(1)(b); N.D. Cent. Code §19-03.1-23.4. Presumably, these statutes define good faith in this way to carve out situations in which a person attempts to use the immunity statute as an end-run around a separate, already occurring investigation. By defining a good faith report as one not made during a lawful search, these definitions codify the generally accepted meaning of good faith by excluding one specific situation in which the reporter has an intent to defraud or seek an unconscionable advantage.

Similarly, New Jersey's 911 Good Samaritan statute provides immunity for persons "who, in good faith, seek[] medical assistance." N.J. Stat. 2C:35-30(a). New Jersey courts have construed this requirement to prohibit "a 'bad faith' pretextual attempt to exploit the [statute's] immunity by taking an illegal drug possessor who is fearful of being prosecuted to a hospital emergency room, even though he or she does not genuinely appear to be acutely ill." *State v. W.S.B.*, 180 A.3d 1168, 1181 (N.J. Super. Ct. App. Div. 2018). Like the statutes that specifically exclude reports made during a lawful search from the ambit of a good faith report, *W.S.B.* found that a good faith report is not one made to take advantage of the statute's immunity.

Florida's 911 Good Samaritan statute, which provides immunity for someone "acting in good faith who seeks medical assistance for an individual experiencing a drug-related overdose," Fla. Stat. §893.21(1), has also been interpreted to require a report made for a proper purpose. In *Pope v. State*, the court found that the defendant acted in good faith even though he hid his drugs and was uncooperative with first responders when they arrived.[4] 246 So. 3d 1282, 1283-84 (Fla. Dist. Ct. App. 2018). The court determined that whether the reporter acted in good faith turned on whether

[4] Unlike Colorado, Florida's 911 Good Samaritan statute does not have a cooperation requirement. *See* Fla. Stat. §893.21.

the person had a "good-faith purpose" when seeking medical assistance. *Id.* at 1284 ("[H]is purpose in contacting 911 was to save his friend. That was a good-faith purpose. Under a plain reading of the 911 Good Samaritan Act, we conclude Pope was '[a] person acting in good faith who [sought] medical assistance.'").

Courts in New York have taken a different approach to good faith, finding that it requires a broader integrity of action. Like Florida's and New Jersey's statutes, New York's statute provides immunity to a "person who, in good faith, seeks health care for someone who is experiencing a drug or alcohol overdose." N.Y. Penal Law §220.78(1). In *People v. Taylor*, the defendant called 911 to report an overdose, but he did not do so immediately—he first asked his brother to dispose of additional drugs. 57 Misc.3d 272, 281 (N.Y. Co. Ct. 2017). Although he called to get help, the court found that the defendant's actions did not demonstrate good faith because he attempted to hide evidence first. *Id.*

While the courts in New York and Florida appear to have interpreted their good faith standards to require different behavior, both courts construed good faith to relate to the uprightness of the reporter's actions. The courts reached different conclusions, but in both cases the issue turned on whether the court believed the defendant acted with the required integrity.

Counsel has not found any cases, and the State cites to none, in which this good faith requirement has been interpreted to mean a subjective belief, as the State asserts it does here. Rather, in the scant case law available, courts consistently interpret good faith requirements to speak to the integrity of the reporters' call for help.

2. The legislative history and declaration make clear that the primary purpose of the statute is to save lives. It does not demonstrate an intent to require the reporter to subjectively believe there is an overdose, as this would defeat that purpose.

The legislative history of the 911 Good Samaritan Act is clear: the purpose of this statute is to save lives. When the Senate Sponsor first introduced this bill to the Senate Judiciary Committee, she summarized the bills' purpose as sending a "strong message to the general public and law enforcement that *saving lives is much more important than putting people into the criminal justice system*." Hearing on S.B. 12-020 before the S. Judiciary Comm., 68th Gen. Assemb., 2d Reg. Sess. (February 1, 2012) at 6:09 (statements of Senator. Aguilar); *see also Martinez v. People*, 2020 CO 3, ¶24 ("While by no means conclusive, the testimony of the bill's sponsor concerning its purpose and anticipated effect can be powerful evidence of legislative intent.") (quoting *Vensor v. People*, 151 P.3d 1274, 1279 (Colo. 2007)).

The Judiciary Committee's chairwoman elaborated when addressing the full Senate that it is a moral prerogative to choose saving lives over criminal prosecution:

> The fundamental moral, and legal, and policy choice we were making is this: is it more important to save someone's life? Or is it more important to prosecute someone criminally for drug possession? . . . Who are we as a society if we think it is more important to criminally prosecute possession?

Hearing on S.B. 12-020 before the S. Floor on Second Reading, 68th Gen. Assemb., 2d Reg. Sess. (Feb. 13, 2012) at 13:27 (statements of Senator Carroll).

In passing this act, the legislature also adopted an accompanying legislative declaration, stating unequivocally that "Colorado has a strong interest in preventing deaths that result from the use of drugs and alcohol." Ch. 225, sec. 1, 2012 Colo. Sess. Laws 986, 986. The legislature further declared that the immunity provided by the statute "serves the state's interests in preventing further deaths from the use of drugs and alcohol." *Id.*

By creating this immunity "the general assembly intend[ed] to encourage" two different actions. *Id.* First, the legislature intended the immunity to encourage "[p]ersons who otherwise would be reluctant to report…an [overdose] event due to fear of criminal prosecution to do so without delay." *Id.* Second, the immunity was

also intended to encourage "[p]ersons who abuse alcohol or drugs to seek treatment and assistance as necessary to obtain a safer, healthier lifestyle." *Id.*

This second stated goal—to encourage drug users to seek treatment—was specifically added by the House Sponsor of the bill, who noted that he wanted this memorialized in the declaration as the "motivation and desire and hopeful outcome" of the statute. Hearing on S.B. 12-020 before the H. Judiciary Comm., 68th Gen. Assemb., 2d Reg. Sess. (March 1, 2012) at 37:40 (statements of Rep. Summers); *see also* Hearing on S.B. 12-020 before the H. Floor on Second Reading, 68th Gen. Assemb., 2d Reg. Sess. (March 9, 2012) at 27:20 (statements of Rep. Summers) (noting this statement was included to "emphasize the fact that we are promoting treatment and recovery services for individuals who overdose").

Thus, according to the bill's sponsors and the enacted declaration, the explicit goal of this statute is to save lives. It sought to accomplish that goal by offering immunity to reporters and sufferers of overdoses as a means of encouraging people to report overdoses and obtain treatment. *See Cross*, 127 P.3d at 73 ("Often the best guide to legislative intent is the context in which the statutory provisions appear and any accompanying statement of legislative policy.").

Viewed in the lens, it makes no sense to read a subjective belief requirement into the statute. Whether or not the reporter knows that the situation he or she is

seeing is an overdose, the purposes of the statute are only served if that person promptly calls for help to save the person's life. If the subject of a report is denied immunity simply because the reporter did not know the situation was a drug overdose, this would thwart the statute's aim to use immunity as a bridge to "seek[ing] treatment and assistance as necessary to obtain a safer, healthier lifestyle." Ch. 225, sec. 1, 2012 Colo. Sess. Laws 986, 986.

The State suggests that the statute must contain a subjective element because "a disinterested bystander…has no inherent reluctance to seek help for a stranger suffering from a drug overdose," and therefore the bystander would not need the incentive of immunity to call for help. OB at 24. Contrary to this assumption, many people are wary of police involvement. A "disinterested bystander" may worry that, even if they don't *know* that the condition they observe is caused by drugs, that it *could* be related to drugs or that their report will somehow get the subject of their report in trouble. By knowing that the subject of the report will not face prosecution regardless of whether he or she has been using drugs, even a disinterested bystander would be more likely to promptly call for help.

To support its argument that the statute requires the reporter to subjectively believe there is an overdose, the State notes that the legislature specifically discussed the effects of the statute in scenarios when people were doing drugs together or when

a reporter would have "actual knowledge or strong contextual circumstances to suspect" that somebody was overdosing. *See* OB at 28-30. Although the legislature focused on these situations when discussing the bill, the State cites no legislative history evincing an intent to exclude situations in which a person may not know or be sure that an overdose was occurring.

That the legislators' discussion of this bill focused on situations in which the reporter would actually know that the subject of the report had used drugs cannot be used as a justification to read words into the statute that simply are not there. Had the legislature intended to limit the application of the statute to this class of reporters, it could have done so explicitly, as the legislatures did in Connecticut, Alaska, D.C. and elsewhere. *See supra*, Section. I.D.1. But it did not. The illustrative examples invoked in the legislative discussion on this bill cannot be used to override the statutory language. *See Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1190 (Colo. 2010) (Legislative history cannot be used to "accomplish something the plain language does not suggest.") (quoting *Scoggins v. Unigard Ins. Co*., 869 P.2d 202, 205 (Colo. 1994)).

The State gives two reasons that the application of this statute should be limited to the circumstances that the legislature discussed when passing the bill. First, it argues that the legislature was concerned about the "unintended

consequences" of providing immunity. OB at 31. But the legislature was not concerned that Good Samaritans would call 911 to get help for unresponsive teenagers without actually knowing whether those teens were experiencing drug overdoses, as happened here. Instead, the legislators discussed the "unintended consequences" of providing immunity for drug dealers or other nefarious actors. *See* Hearing on S.B. 12-020 before the S. Floor on Second Reading, 68th Gen. Assemb., 2d Reg. Sess. (Feb. 13, 2012) at 1:15 (statements of Rep. King) ("I think that there is a fear of unintended consequences from the district attorney's counsel, the county sheriffs of Colorado, and the attorney general, and a worry that potentially we are setting up an alibi or a situation where a person has committed a felony and as a result of this legislation has immunity."); *see also* Hearing on S.B. 12-020 before the S. Judiciary Comm., 68th Gen. Assemb., 2d Reg. Sess. (February 1, 2012) at 9:20 (statements of Rep. King) (asking about the "unintended consequence of someone gaming the system" or "using that law to their benefit as a drug dealer"); *id.* at 1:18 (statements of Rep. King) (expressing hesitation about the bill due to "the possibility of passing a law that has the unintended consequence of allowing a drug dealer or someone that does not have the best interest of our citizens and their friends at heart and allowing them, in essence, a way of escaping justice").

Second, the State suggests that immunity must be narrowly applied in order to make sure that "prosecutors and courts [can] help rehabilitate nonviolent persons suffering from drug addictions" by prosecuting and subsequently sentencing drug users to deferred sentences and drug courts. OB at 34. But this does not fit with the legislative declaration. The legislature specifically chose *immunity*—not prosecution—as its desired method of encouraging users into treatment. *See* Ch. 225, sec. 1, 2012 Colo. Sess. Laws 986, 986 (noting that the safe haven was intended to encourage drug abusers to seek treatment). Limiting immunity on the premise that drug users could be better rehabilitated in the criminal justice system would flout the legislature's stated intent.[5]

As demonstrated by the legislative history and declaration, the purpose of this statute is to save lives and encourage drug users to get treatment. That the legislature discussed how this principle would apply in various situations where the reporter would have actual knowledge of the drug overdose is not a limitation on the broad design to prevent overdose deaths. Accordingly, the legislative history and declaration counsel against reading a subjective belief requirement into the statute.

[5] Ms. Harrison's case is reason enough to doubt the State's assumption that prosecution will lead to better rehabilitative outcomes. Although Ms. Harrison was originally sentenced to drug court, she failed out of the program for continued drug use and noncompliance with treatment. *See* CF, p 336-37, 353-57. She was thereafter sentenced to prison.

3. Under the rule of lenity, this Court should construe the statute in favor of Ms. Harrison.

To the extent that other statutes and the legislative history do not clarify the meaning of the 911 Good Samaritan Act, the rule of lenity dictates that this ambiguity must be interpreted in favor of Ms. Harrison. *See People v. Thoro Products Co., Inc.*, 70 P.3d 1188, 1198-99 (Colo. 2003). If the statute remains ambiguous, "it is not [this Court's] place to choose between two competing and viable alternatives in order to usurp the General Assembly's role in making the law." *People v. Summers*, 208 P.3d 251, 258 (Colo. 2009). Therefore, this Court should construe the statute to provide immunity to Ms. Harrison because she suffered from a drug overdose, as defined in subsection 5, and Ms. Roberts reported that event in order to get help, with no intent to defraud or seek an unconscionable advantage.

II. The evidence was insufficient to disprove beyond a reasonable doubt the 911 Good Samaritan affirmative defense.

A. Standard of Review and Preservation

This Court "review[s] the record de novo to determine whether the evidence presented was sufficient in both quantity and quality to sustain a defendant's conviction." *McCoy*, ¶63. While sufficiency claims need not be preserved, *id.* at ¶¶27, 34, Ms. Harrison moved for a judgment of acquittal based on the prosecution's failure to disprove the affirmative defense. TR 4/13/2017, p 77:8-80:1.

B. The prosecution failed to disprove beyond a reasonable doubt that Ms. Harrison was suffering from a drug overdose event as defined in subsection 5.

An affirmative defense is treated as though it is an element of the substantive offense. *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005).[6] Thus, the due process clauses of the United States and Colorado Constitutions require the prosecution to disprove the affirmative defense beyond a reasonable doubt. *Id.*; §18-1-407(2), C.R.S.; *see also Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25.

A reviewing court must determine whether the evidence, when viewed as a whole and in a light most favorable to the prosecution, is both substantial and sufficient to support a conclusion by a reasonable person that the prosecution disproved the defense beyond a reasonable doubt. *People v. Smith*, 623 P.2d 404, 406 (Colo. 1981); *People v. Quintana*, 665 P.2d 605, 608 (Colo. 1983). "[A]

[6] The State does not challenge, and has never challenged, the trial court's decision to instruct the jury on the affirmative defense of 911 Good Samaritan immunity. *See* OB at 36; COA AB at 10-11 (citing *People v. Guenther*, 740 P.2d 971, 981 (Colo. 1987) and recognizing that "the trial court properly instructed the jury on the affirmative defense of immunity"). Thus, this Court should reject the State's invitation to address whether this immunity can be raised as an affirmative defense. *See Luu v. People*, 841 P.2d 271, 272 n.1 (Colo. 1992) (this Court does not consider issues not raised in principal briefings in the court of appeals); OB at 36-39.

modicum of relevant evidence will not rationally support" this conclusion nor may "verdicts in criminal cases…be based on guessing, speculation, or conjecture." *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999).

The State asserts that the prosecution presented sufficient evidence to disprove beyond a reasonable that Ms. Roberts "report[ed] in good faith an emergency drug or alcohol overdose event." It concedes that the prosecution failed to disprove all other elements of the affirmative defense. OB at 10. Although the interpretive question in this case surrounds the meaning of "good faith," the State does not argue that the event was not reported in good faith. Rather, it asserts that no overdose event occurred because the prosecution presented sufficient evidence to disprove beyond a reasonable doubt that Ms. Harrison was suffering from an "acute condition" and that a lay person would have reasonably believed her condition to be a drug overdose.

1. The evidence was insufficient to disprove beyond a reasonable doubt that Ms. Harrison was suffering from an acute condition.

The evidence at trial established that Ms. Harrison and A.M. ordered food at Burger King, but passed out before they even touched it. TR 4/12/2017, p 146:1-147:14. According to Ms. Roberts' testimony, an employee alerted her that two young people were "sleeping in the lobby." *Id.* at 146:1-7. When she went to check,

she saw Ms. Harrison and A.M. "slumped over each other." *Id*. at 152:16-17. She asked an employee—"a relatively larger individual"—to wake them up, but he could not. *Id.* at 152:20-153:9. He "tried to shake them, just barely touch their shoulders, shake them a little bit saying, Hey, hey. He was banging on the table with his hand." *Id*. at 147:18-21. He yelled at them and pounded on the table. *Id.* at 152:24-153:4. The pair did not "mak[e] any type of movement at all…not even flinching." *Id.* at 153:5-9. Their recently-ordered food was still in the bags. *Id.* at 147:10-14.

Ms. Roberts then "went on a little bit," but Ms. Harrison and A.M. remained passed out. She decided to "try one more time" but the employee "still couldn't wake them up and they didn't even [f]linch." *Id.* at 146:22-25.

At this point, Ms. Roberts became concerned. She explained that "teenagers wake up like that," and because they did not, her "emergency bell" went off. *Id.* at 148:1-5; 153:10-19. She called 911 because she thought something "could be seriously wrong" and they needed medical help. *Id.* at 153:17-154:9; 159:17-21. On the call, she explained that "they came in and ordered and they were sleeping. We could not wake them up and I was concerned for their well-being." *Id.* at 148:7-9.

Police responded to the call to "check on two people passed out in a booth." *Id.* at 244:22-24. When Officer Payne arrived, he "announced [him]self as Officer Payne with the Wheat Ridge Police Department, there [wa]s no response. [He]

stepped in between the two tables and sho[o]k them, there was no response. [He] shook [Ms. Harrison] a little harder and she sat up." *Id.* at 246:5-10.

Ms. Harrison eventually came to. Ms. Roberts described her as "very out of it," "shaky," and "[s]he didn't know what was going on." *Id.* at 156:22-157:25. Both responding officers testified that Ms. Harrison appeared to be under the influence of some substance because she was "drowsy-looking [and] real sluggish." *Id.* at 209:10-16; 248:7-9. Corporal Payne described her as "strung out." TR 4/13/2017, p 52:10-11.

The officers could not wake A.M. Ultimately, they called for paramedics because he was "not coming to consciousness." TR 4/12/2017, p 248:20-23.

The State admits that unconsciousness is an acute condition under the statute, but it asserts that Ms. Harrison was merely sleeping—not unconscious. OB at 41-42. The evidence, however, showed that Ms. Harrison and A.M. were unresponsive to loud, repeated stimuli. They were "slumped over each other," not curled up and using a jacket as a pillow or blanket. As Officer Payne described, the two were "passed out." Slumped and unresponsive to repeated banging, shaking, and shouting is not just sleep. It is unconsciousness, or at a minimum, a decreased level of consciousness. *See* §18-1-712(5)(e) (defining an opiate-related drug overdose event to mean an acute condition, including a decreased level of consciousness).

Even if they were "asleep," they were sleeping *and could not be woken*. Whether this qualifies as "unconscious" is a semantic debate. Either way, the inability to wake up is an acute condition as it is a severe, dangerous state. *See W.S.B.*, 180 A.3d at 1180 (acute condition is severe, not "mild or inconsequential").

As the court of appeals correctly concluded, ¶¶24-25, it is irrelevant that Ms. Harrison eventually woke up and did not need medical assistance. Unlike other state's statutes, the 911 Good Samaritan Act does not require that the person ultimately needed medical attention. *Cf.* Wash. Rev. Code §69.50.315(2) ("A person who experiences a drug-related overdose *and is in need of medical assistance* shall not be charged or prosecuted…"); *see also* La. Stat. §14:403.10(B); Cal. Health & Safety Code §11376.5(b); Fla. Stat. §893.21(2).[7]

Instead, the act only requires a *report* of an acute condition caused by drugs that a layperson would reasonably believe to be an overdose. Thus, the question is whether there was an acute condition *at the time of the report.* This cannot be determined with the hindsight bias of whether that condition resolved without

[7] The State cites *State v. Osborn*, 8 Wash.App.2d 1030 (Wash. Ct. App. 2019); *State v. Silliman*, 168 So. 3d 245, 247 (Fla. Dist. Ct. App. 2015); and *State v. Jago*, 209 So. 3d 1078, 1081-82 (La. Ct. App. 2016) as examples of cases in which immunity was denied because the person ultimately did not need medical attention or "the person's condition [was] not sufficiently 'acute.'" AB at 19-20. But in all of these cases, the relevant statute requires medical attention to have been necessary.

medical attention. *See Commonwealth v. Lewis*, 180 A.3d 786, 791 (Pa. Super. Ct. 2018) (interpreting similar statute and concluding that "the subject of the report need not necessarily require immediate medical attention").

Not all acute conditions require medical attention. Indeed, "acute" connotes severe, but also "brief, intense, short-term." *See W.S.B.*, 180 A.3d at 1180. Accordingly, it is likely that an acute condition—one which is severe but also brief and short-term—will resolve without the need for medical treatment. That Ms. Harrison did not ultimately need medical treatment does not mean that her unconscious, unresponsive state was not an acute condition. It simply means that this condition resolved subsequent to the 911 call.

The facts of this case demonstrate why an acute condition must be determined by the time of the report. Ms. Harrison and A.M. presented identical conditions when Ms. Roberts called 911—they were equally passed out and unresponsive. When help arrived, Ms. Harrison—but not A.M.—regained consciousness. A.M. was hospitalized. TR 4/12/2017, p 223:13. If whether a report was of an "acute condition" depended on the eventual medical outcome, then A.M. would be immune from prosecution while Ms. Harrison would not, even though they were in the exact same condition when Ms. Roberts called 911. Denying Ms. Harrison immunity because she was fortunate enough to regain consciousness does not make sense. Nor

does it fulfill the purpose of the statute, as, in order to effectively save lives, reporters must be encouraged to err on the side of caution and call when they believe medical attention is necessary. *See W.S.B.,* 180 A.3d at 1181 (interpreting identical definition of an overdose event and concluding that "[t]he statute aims to incentivize third parties…to err on the side of caution and get immediate medical help").

Finally, the State asserts that this is a jury question, and the court of appeals "substituted its judgment for the jury's." OB at 44. But a jury's job is to find disputed issues of fact. Here, the facts were undisputed. The dispute centers around the characterization of those facts—i.e, whether the fact that Ms. Harrison was not conscious and could not be woken is properly categorized as "unconsciousness" or "sleeping." To the extent Ms. Roberts was at all inconsistent about her "level of concern," as the State suggests, OB at 44, she was entirely consistent that Ms. Harrison and A.M. were unresponsive, and she was concerned enough to call 911 for help. *See* TR 4/12/2017, p 148:1-9; 153:5-154:9; 155:3-6; 159:13-21. The precise level of her concern has no bearing on whether this condition was acute.

Thus, there were no disputed facts for the jury to find, just the legal question of whether unresponsiveness qualifies as an acute condition. And the court of appeals correctly determined that it does.

2. The evidence was insufficient to disprove beyond a reasonable doubt that a layperson would have reasonably believed Ms. Harrison was suffering from a drug overdose.

The court of appeals correctly found that, when "two young people sitting together…lapse into unconsciousness simultaneously, at mid-morning, in a public place," a lay person would reasonably believe that those people were experiencing a drug overdose. *Harrison*, ¶27.

The State disputes this conclusion because there were no other indications of drug use such as visible paraphernalia. OB at 49.[8] But the prosecution had the burden to *disprove* this element. The argument that there was no additional, corroborating evidence of drug use cannot substitute for the State's burden to bring forth evidence disproving that this condition would appear to a reasonable lay person as a drug overdose.

The only evidence the State points to as disproving the fact that a lay person would reasonably believe this situation to be a drug overdose is the fact that Ms. Roberts did not *subjectively* believe the condition to be a drug overdose.

[8] Based on Ms. Roberts' testimony, the State argued that "[t]here was nothing visible in her appearance to suggest she was a drug user." OB at 49. Contrary to this assertion, Corporal Payne testified that she looked "strung out." TR 4/13/2017, p 52:10-11. Ms. Roberts' conclusion that she looked like an average customer is not informative given that she has had no experiences with drug users.

As an initial matter, even read in the light most favorable to the prosecution, Ms. Roberts did *not* express doubt that Ms. Harrison and A.M. were experiencing an overdose. Rather, when asked whether she thought they were overdosing, she said: "*It could be a possibility,* but it never really crossed my mind. It was really seeing what was wrong and help was at the forefront." TR 4/12/2017, p 153:20-154:2. In its full context, the statement that it never "crossed [her] mind" explains that she did not think about what was causing the young people to be unresponsive; she just wanted to get help. The fact that she gave no thought to what was causing the unresponsiveness does not demonstrate that a lay person would not reasonably believe an overdose occurred.

To the extent this testimony can be interpreted as expressing disbelief in the fact of an overdose, one person's subjective understanding is not determinative of whether this situation objectively appeared to be an overdose. In determining whether an objectively reasonable person would have had a certain belief, courts look to the surrounding facts and circumstances, not individual evaluations of those circumstances. *See, e.g., People v. Trujillo*, 785 P.2d 1290, 1293 (Colo. 1990) (whether a defendant is objectively in custody is determined by the totality of the circumstances; "[t]he defendant's subjective state of mind, however, is not a valid proxy for resolving whether a reasonable person in the defendant's situation would

have" believed he was in custody); *SG Interests I, Ltd. v. Kolbenschlag*, 2019 COA 115, ¶¶38-39 (in defamation case, litigant's subjective belief or intent was irrelevant to determining whether the statement was substantially true under an objective, reasonable person test); *City of Aurora v. 1405 Hotel, LLC*, 2016 COA 52, ¶25 ("The Hotels' actual belief was not relevant as to whether the Hotels' claims had a reasonable basis in law or fact, which is an objective inquiry."); *City & Cty. of Denver v. Gutierrez*, 2016 COA 77, ¶15 ("By definition, an objective standard does not permit consideration of the parties' intent; rather, under an objective standard, a fact finder evaluates conduct in light of how a reasonable person would act or respond in similar circumstance."); *Standard*, BLACK'S LAW DICTIONARY 1694 (11th ed. 2019) (an objective standard is "based on conduct and perceptions external to a particular person" and "does not require a determination of what the defendant was thinking").

Even if one person's subjective understanding could be relevant to determining whether a reasonable person would have had that understanding, the evidence demonstrated that Ms. Roberts did not have sufficient experience to opine on this matter. She testified that she had no experience in her personal life seeing people under the influence of drugs or alcohol. TR 4/12/2017, p 148:10-13. As a result, she had no knowledge of what an overdose would look like to an average

person. That Ms. Roberts—without personal experience to draw from—did not understand the situation as a drug overdose has no bearing on whether people who know what an overdose might look like would reach the same conclusion. *Cf. People v. Souva*, 141 P.3d 845, 850 (Colo. App. 2005) (lay opinion that a person is under the influence of drugs is admissible when the proper foundation is laid).

And as the court of appeals correctly found, a layperson would reasonably believe that a drug overdose occurred upon finding two young people simultaneously slumped over each other and unresponsive at mid-morning, in a public place. The State failed to produce any evidence to disprove this, and thus, there was insufficient evidence to disprove the affirmative defense of 911 Good Samaritan immunity.

CONCLUSION

For these reasons, Ms. Harrison respectfully requests that this Court affirm the court of appeals' decision vacating her convictions.

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CERTIFICATE OF SERVICE

I certify that, on March 11, 2020, a copy of this Answer Brief was electronically served through Colorado Courts E-Filing on Trina K. Taylor of the Attorney General's Office.

K. Root