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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; El Paso County District Court Honorable Larry E. Schwartz Case Number 2016CR3058	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JOSHUA P. TURNER	
Megan A. Ring, Colorado State Public Defender JULIA CHAMBERLIN 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #47181	Case Number: 2019CA2194

OPENING 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 9,486 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

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

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

Julia Chambers

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2. Whether the court abused its discretion, violated Turner's right to due process, and reversibly erred when it permitted an expert witness to testify about whether an unconscious person "might eventually regain some of that short-term memory loss" even though the prosecution failed to disclose any reports or physician examinations to the defense and this testimony fell outside the scope of the witness's expertise.
3. Whether the prosecution engaged in misconduct, violated Turner's right to due process, and reversibly erred when it misstated the facts of his case.

STATEMENT OF THE FACTS AND CASE

Someone tragically assaulted Alan Mitcheff.

The prosecution alleged Joshua Turner perpetrated this attack. However, Mitcheff initially identified another man as his attacker. (TR 7/18/18, pp 38-39). The only testifying eyewitness recanted his accusation against Turner. (TR 7/17/18, pp 145-46). No physical evidence tied Turner to the attack. (TR 7/18/18, pp 39-40). And officers never located the weapon purportedly used during the attack. (*Id*. at

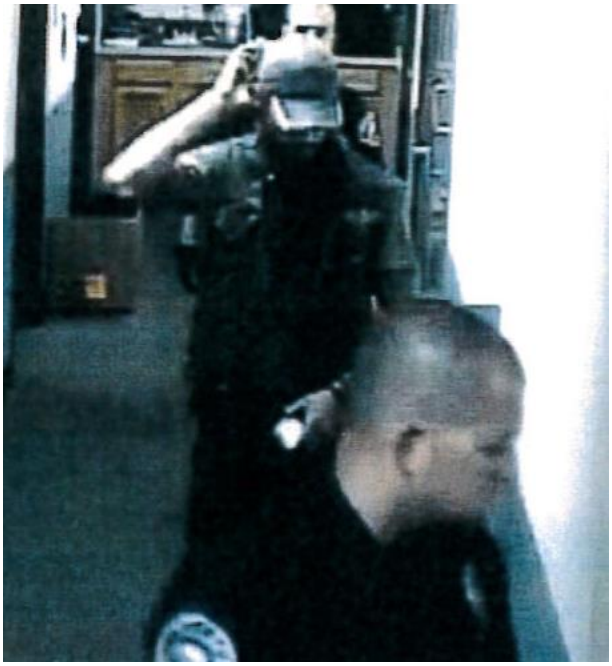
50:3-6). The prosecution's case therefore primarily rested on out-of-court statements made by unknown declarants identifying Turner as the attacker and Mitcheff's accusation against Turner one-and-a-half years later after reading about this incident online.

Mitcheff met Turner on June 8, 2016, on the outskirts of Manitou Springs while playing his guitar for money. (TR 7/17/18, pp 112-13). Turner, who introduced himself as "Dirty Dog," and his brother, Ash, had just arrived in town. (*Id*. at 112-13, 131:21-25). They "hung out" for a "little while" drinking, smoking, and exchanging stories. (*Id*. at 113:9-17). Turner purportedly showed Mitcheff a black and metal weapon. (*Id*. at 113-14).

"[T]he catalyst that sprung everything off" occurred the next day. (*Id*. 114:7-22). Mitcheff was playing music in the pavilion of Soda Springs Park when a man named Journey "started really laying into [Mitcheff] about stealing his dog, which never happened." (*Id*. at 114-15). For a "couple weeks," Journey had been "punchin' people in the back of the head[.]" (*Id*. at 115-16). Officers knew Journey "was starting to get in altercations." (TR 7/18/18, p 27:19-23). Journey "just would not leave [Mitcheff] alone." (TR 7/17/18, p 115:14-15). Mitcheff then recalled getting hit from behind and collapsing. (*Id*. at 116:13-14). When officers arrived, he lay bloody and unconscious. (TR 7/18/18, pp 28-29). He had a cut on his upper lip,

injuries on his neck, and blood in his ears, mouth, hair, and head. (*Id*. at 29:8-21). The attack rendered him a quadriplegic. (TR 7/17/18, p 111:1-14).

Unknown bystanders identified the attacker as a male with a "baseball cap on with metal clips around the bill from lighters" and a confederate flag on his chest. (TR 7/18/18, p 11:2-25). They claimed the male left and walked northeast. (*Id*. at 11-12). Performing a "hasty search of the area," Officer Gary Johnson found Turner "hiding underneath the bush in that park" with another man. (*Id*. at 13-14). Turner purportedly matched the bystanders' description. (*Id*. at 16-17). But the confederate flag was not visible in a still-image capturing Turner that day:



(EX A, p 15; TR 7/18/18, pp 47-48). Turner cooperated with officers. (TR 7/18/18, pp 32:2-3). Additionally, no physical evidence corroborated Turner attacked

Mitcheff; he had no abrasions on his hands, no blood on his body/clothing, and no marks on his boots. (*Id*. at 39-40).

Medical personnel reported that Mitcheff was "highly intoxicated." (*Id*. at 34:7-11). When Johnson believed Mitcheff could answer questions, Johnson asked him whether the person who "assaulted him was the male wearing the Confederate flag." (*Id*. at 38:12-25). Mitcheff responded: "No, it was Journey." (*Id*. at 39:3-4).

The next day, a man named Joshua Mahoney entered the police station. (*Id*. at 40-41). Mahoney felt "pressured by the people around [him] in Manitou to go say something because" there were "no other witnesses." (TR 7/17/18, p 146:1-3). He felt "obligat[ed]" to speak with police because people were "just kinda comin' down on [him] hard[.]" (*Id*. at 146:3-4). When an officer mentioned Turner's name, Mahoney "just kinda went with it" and implicated him in the attack. (*Id*. at 146:4-7). He admitted lying to officers. (*Id*. at 151:11-12). Mahoney—who was high on acid and drunk—only recalled a fight breaking out and "it was a blur." (*Id*. at 145-49, 151:21).

Johnson then spoke with Mitcheff at the hospital. (TR 7/18/18, p 41:9-11). Mitcheff recalled quarreling with Journey about his dog before verbally arguing with someone wearing a confederate flag named Dirty Dog. (*Id*. at 41-44). Mitcheff, however, did not accuse Dirty Dog of assaulting him. (*Id*. at 43-44). After speaking

with Mahoney and Mitcheff, Johnson issued a warrant for Turner's arrest. (*Id*. at 45:6-9).

One-and-a-half years later, on February 8, 2018, Mitcheff spoke with the prosecution about this incident. (TR 7/17/18, p 130:22-25). Between the attack and February 8, 2018, Mitcheff looked up news articles about the assault and Turner's arrest online. (*Id*. at 135:2-18). He saw Turner's picture. (*Id*. at 135:19-21). And he spoke with people from the community. (*Id*. at 132-33). This time, he alleged "this whole thing started" because Journey abused his animal. (*Id*. at 136:1-7). He claimed Journey attacked him along with Turner, Ash, and Journey's friend, Icarus. (*Id*. at 136:9-21).

Similar to his statement on February 8, 2018, Mitcheff testified that he fought with Journey "and other people jumped in." (*Id*. at 116:5-6). Turner "didn't say a word" to him. (*Id*. at 116:9-11). While fighting with Journey, someone hit him from behind, he fell to the ground, and he had "flashes of different people hitting" him. (*Id*. at 116:13-17). For the first time, he claimed that Turner hit him with a weapon. (*Id*. at 116:18-20). He allegedly retained consciousness but lay immobile. (*Id*. at 117:5).

Journey died soon thereafter. (*Id*. at 150-51). Officers never found the weapon supposedly used during the attack, performed any identification procedures,

conducted any follow-up interviews with bystanders, photographed Mitcheff's injuries, documented Turner's clothing or body, collected Turner's clothing, or searched for surveillance footage. (TR 7/18/18, pp 45-50). Rather, their investigation concluded when they arrested Turner. (*Id*. at 45:13-15).

The prosecution charged Turner with first-degree assault[1] (Count 1), second-degree assault[2] (Count 4), and three sentence enhancers[3] (Counts 2-3, 5). (CF, pp 59-61). The jury acquitted Turner of first-degree assault, but convicted him of second-degree assault and the serious bodily injury sentence enhancer. (*Id*. at 89-92). The court sentenced him to thirteen-years in prison. (*Id*. at 234).

SUMMARY OF THE ARGUMENT

1. The Confrontation Clause bars the admission of testimonial hearsay of an unavailable witness who the accused had no opportunity to cross-examine. Here, the court erred in admitting witnesses' out-of-court statements identifying Turner as Mitcheff's attacker because the circumstances objectively indicated the primary purpose of the witnesses' statements was to establish past events potentially relevant to later prosecution. Additionally, the court abused its discretion in admitting these

[1] §18-3-202(1)(a), C.R.S.
[2] §18-3-203(1)(g), C.R.S.
[3] Count 2- §18-1.3-406(2)(a)(I)(A), C.R.S.; Counts 3/5- §18-1.3-406(2)(a)(I)(B), C.R.S.

statements as excited utterances because witnesses had an opportunity for reflective thought. Reversal is required.

2. The prosecution must provide the defendant with any reports or statements of experts made in connection with the particular case, including results of physical examinations. It failed to do so here. Where the prosecution willfully violated Crim. P. 16 and the expert's testimony exceeded the scope of his endorsement, the court abused its discretion in failing to preclude him from testifying about short-term memory loss. Because the prosecution used the expert's testimony to bolster Mitcheff's later accounts of the attack, this error was not harmless.

3. A prosecutor may not misstate the evidence or refer to facts not in evidence. Here, the prosecution committed misconduct when it repeatedly argued that Journey "enlisted" Turner's help in attacking Mitcheff. No evidence, however, supported this argument. Because the evidence against Turner was weak, the jury likely relied upon this misconduct to convict Turner under a complicity theory. Reversal is required.

ARGUMENT

I. THE COURT ABUSED ITS DISCRETION, VIOLATED TURNER'S RIGHT TO CONFRONTATION, AND REVERSIBLY ERRED WHEN IT ALLOWED AN OFFICER TO TESTIFY ABOUT OUT-OF-COURT STATEMENTS IDENTIFYING TURNER AS THE ATTACKER.

A. Standard of Review

Defense counsel objected on hearsay and Confrontation Clause grounds. (TR 7/17/18, p 10:12-17). The court overruled these objections. (TR 7/18/18, pp 8-10, 108-09). This Court reviews a trial court's evidentiary decision for an abuse of discretion. *People v. Phillips*, 2012 COA 176, ¶63. But whether the court violated a defendant's Confrontation Clause rights is reviewed de novo. *Id*. ¶85.

B. Relevant Facts

According to Johnson's incident report, he arrived at Soda Springs Park at 7:37 p.m. and saw a group of people huddled around Mitcheff on the ground. Johnson notified dispatch of Mitcheff's location before asking bystanders "what had happened." An unidentified man explained that Mitcheff and another male got into a verbal altercation. The male hit Mitcheff in the head, Mitcheff fell, and the male kicked and hit Mitcheff. The male then walked northeast, exiting the park. (CF, p 1).

Fire fighters arrived at 7:40 p.m. and began treating Mitcheff. "[S]everal more unidentified parties" informed Johnson that "the suspect was a white male party with a street name of 'Dirty Dog', who was wearing a dark colored hat with lighter clips

along the edge of the bill and a vest with confederate flag on the right side of the chest." Johnson asked these unidentified parties whether they would provide "identification and/or a witness statement," but "a majority of witnesses refused to provide [him] with any information for fear [of] becoming victimized by the suspect or associates of the suspect." (CF, p 1).[4]

Only two witnesses—Drew Sommer and Matthew Postler—gave a "verbal statement." Sommer and Postler claimed they heard a loud crash and saw Mitcheff fall. A white male wearing a dark hat with lighter clips along the bill and a confederate flag on his right chest purportedly kicked Mitcheff, straddled him, and punched him multiple times in his face. While medical personnel prepared Mitchell for transport, an unidentified party informed Johnson that the suspect was near the post office. Johnson found Turner "hiding behind a bush" wearing a vest with a confederate flag on his right chest and "Dirty Dog" written on the back, and a hat with lighter clips along the bill. (CF, p 1).

On the first morning of trial, defense counsel argued that the "very minimal" police investigation included "alleged statements by witnesses that they did not get names of and a couple of brief statements allegedly made by witnesses who are

[4] At the preliminary hearing, Officer Dillon Settle testified that the witnesses refused to identify themselves or provide written statements because they feared retaliation for cooperating with the police. (TR 2/5/18, pp 15-16).

apparently not able to be found[.]" (TR 7/17/18, p 10:7-11). She insisted these statements constituted inadmissible hearsay and violated Turner's "confrontation clause rights." (*Id*. at 10:12-17).

The prosecution, however, alleged these out-of-court statements were excited utterances "made spontaneously by witnesses." (*Id*. at 10-11). Citing *Michigan v. Bryant*, 562 U.S. 344 (2011), the prosecution claimed the out-of-court statements satisfied the Confrontation Clause because "there was an ongoing emergency where the suspect or the defendant was still at large." (*Id*. at 11-12). Defense counsel disagreed, arguing the witnesses made these statements during an interview and "initial investigation done by officers." (*Id*. at 12:8-16). The court deferred ruling. (*Id*. at 13:22-24).

Johnson testified that he arrived at Soda Springs Park "less than a minute" after being dispatched. (TR 7/18/18, p 7:14-18). Upon his arrival, he saw a group of people huddled around Mitcheff. (*Id*. at 5-6). He described the scene as "pretty chaotic, had a lot of people comin' up to [him], pointing fingers[.]" (*Id*. at 7:1-4). Five people approached him with information about five-to-ten minutes after he arrived. (*Id*. at 7:8-13, 12:12-16). The prosecution asked Johnson: "And did anybody on the scene talk to you at that time regarding who an attacker might have been?" (*Id*. at 7:19-20). He replied, "[y]es." (*Id*. at 7:21).

Defense counsel objected on hearsay and confrontation grounds. (*Id*. at 8:4-11). She argued *Bryant* was distinguishable and the witnesses' statements were unreliable. (*Id*. at 8:12-20). The prosecution contended that the out-of-court statements fell "squarely within the hearsay exception for excited utterances." (*Id*. at 8:23-25). It again analogized the facts here to the "ongoing emergency situation" in *Bryant*. (*Id*. at 9:5-11).

The court determined that the prosecution had not yet established whether the declarants were excited when they made the statements. (*Id*. at 9:19-24). Defense counsel asked the court to conduct an objective inquiry about the purpose of the declarants' statements under *Bryant*. (*Id*. at 10:4-9). The court responded: "No, we still have the need for a foundation that the person talking was excited." (*Id*. at 10:12-13). The prosecution asked whether it could elicit the witnesses' out-of-court statements once it laid adequate foundation, and the court agreed. (*Id*. at 10:14-16).

The prosecution then asked Johnson whether someone approached him and identified the attacker. (*Id*. at 10:19-22). Johnson responded affirmatively. (*Id*. at 10:23). The prosecution asked whether that person "appear[ed] to be under stress of some kind?" (*Id*. at 11:6-7). Johnson replied: "No, not, like, stress or–or threatened or anything like that, but just the stress of the chaotic situation[.]" (*Id*. at 11:8-10). He agreed that the witnesses appeared excited. (*Id*. at 11:11-19). The witnesses

identified the attacker as a man wearing a baseball cap with metal lighter clips around the bill and a confederate flag on his chest. (*Id*. at 11-12). The witnesses claimed the attacker left the scene and traveled northeast. (*Id*. at 12:1-2).

During closing argument, the prosecution relied upon the out-of-court statements as evidence of Turner's guilt:

> [P]olice find Dirty Dog hiding in the bushes a hundred yards away, after witnesses on scene say the person who did this is wearing a baseball cap with metal clips on it, a vest with the Confederate flag, and the name "Dirty Dog" on the vest. Mr. Turner is found in the bushes less than a minute's walk away, hiding underneath those bushes within five minutes of the attack, matching that description.

(*Id*. at 80-81). In rebuttal, the prosecution similarly argued:

> why on earth would the witnesses make up this grand story about seeing this happen and watching him run over to the bushes by the police station when he was brand-new to town? That doesn't make sense.

(*Id*. at 100:19-22). And the prosecution asked the jury to use their "reason and common sense" because the

> witnesses on scene say it was Dirty Dog; he just ran over to those bushes. Police go over there. They find Dirty Dog over there, hiding underneath some bushes. And as soon as the victim comes back and regains full consciousness, he tells the police it was Dirty Dog, it was the man with the Confederate flag patch on his vest and Dirty Dog written on the back of it.

(*Id*. at 101:13-19).

Afterwards, defense counsel re-raised her Confrontation Clause objection. (*Id*. at 107-08). She argued that witnesses feared "retaliation…which clearly shows that they knew that these statements were being made for purposes of prosecution and not for an ongoing threat." (*Id*. at 107:20-23). She further contended that the prosecution's closing argument prejudiced Turner because it "relied heavily on this inadmissible, unconstitutional testimony by Officer Johnson." (*Id*. at 108:3-6).

The court described this situation as "the classic *Crawford*[5] issue" because the witnesses "spontaneously gave that type of information and basically pointed to a location where somebody could be found." (*Id*. at 108:7-15). It further found these statements admissible as excited utterances and "established why the officer took the steps he did next[.]" (*Id*. at 108-09).

After trial, defense counsel moved for a new trial based on the erroneous admission of the witnesses' out-of-court statements identifying Turner as Mitcheff's attacker. (CF, pp 101-04). The court "reaffirm[ed]" its evidentiary rulings "and they are now appellate issues." (TR 10/15/19, p 5:17-25).

[5] *Crawford v. Washington*, 541 U.S. 36 (2004).

C. Law and Analysis

As explained above, the court found the witnesses' statements constituted excited utterances and—after trial—admissible to explain Johnson's investigatory steps. It also rejected Turner's Confrontation Clause challenge in a post-hoc ruling.

Even if this Court agrees with the court's hearsay or non-hearsay rulings, this does not end the analysis. Notwithstanding the concern over trustworthiness underlying all exceptions to the hearsay rule, including excited utterances, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62. Assuming, arguendo, the out-of-court statements constituted excited utterances, these statements nonetheless could have been made in circumstances in which the witnesses would have appreciated that they would have legal consequences, including the arrest and prosecution of Turner.

Further, "there is a questionable need for presenting out-of-court statements [to explain an officer's actions] because the additional context is often unnecessary, and such statements can be highly prejudicial." *U.S. v. Kizzee*, 877 F.3d 650, 659 (5th Cir. 2017). "Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment—where a nontestifying witness

specifically links a defendant to the crime, testimony becomes inadmissible hearsay." *Id*.

Each ruling will be addressed in turn.

i. The court abused its discretion in admitting the out-of-court statements as excited utterances.

Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). "Hearsay statements are presumptively unreliable since the declarant is not present to explain the statement in context." *Blecha v. People*, 962 P.2d 931, 937 (Colo.1998). Hearsay statements are inadmissible unless it falls within an exception. CRE 802. The proponent of the evidence must establish the statement falls within a hearsay exception. *People v. Garcia*, 826 P.2d 1259, 1264 (Colo.1992).

One such exception—an excited utterance—is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." CRE 803(2). A statement qualifies under this exception if

> (1) the occurrence or event was sufficiently startling to render inoperative the normal reflective thought processes of an observer; (2) the declarant's statement was a spontaneous reaction to the event; and (3) direct or circumstantial evidence supports an inference that the declarant had the opportunity to observe the startling event.

People v. King, 121 P.3d 234, 237-38 (Colo.App. 2005). It thus "applies to statements relating to a startling act or event made spontaneously and without reflection while the declarant was under the stress of excitement, and offered to prove the truth of the matter asserted." *Lancaster v. People*, 615 P.2d 720, 721-22 (Colo.1980). The statement must be made "during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection[.]" *Id*. at 722 (internal quotation omitted).

When determining admissibility under this exception, courts should consider: the lapse of time between the startling event and the statement, whether the statement was responsive, whether it was accompanied by outward signs of excitement or emotional distress, and the choice of words used to describe the startling event. *Compan v. People*, 121 P.3d 876, 882 (Colo.2005), *overruled on other grounds by Nicholls v. People*, 2017 CO 71, ¶15. Although there is no bright-line time limitation for an excited utterance, the statement must be spontaneous. *People v. Abdulla*, 2020 COA 109M, ¶65.

While unknown bystanders to an event "may in certain circumstances be sufficiently affected by its excitement[,]" their statements are only admissible "when the circumstances which surround it would affect the declarant in a way that assures it spontaneity[.]" *People v. Mares*, 705 P.2d 1013, 1016 (Colo.App. 1985).

Here, the prosecution failed to show that the witnesses' statements fell within the excited utterance exception. These statements occurred five-to-ten minutes after Johnson arrived. Some courts have determined this amount of time is "sufficient time for reflective thought and fabrication." *See State v. Hansen*, 986 P.2d 346, 349 (Idaho Ct. App. 1999); *but see People v. Lagunas*, 710 P.2d 1145, 1148 (Colo.App. 1985). Witnesses had an opportunity for reflective thought because they refused to provide identification information or witness statements out of fear they would face retaliation. Two witnesses who provided identification also declined to give a written statement for this same reason. *See State v. Jeffers*, 661 P.2d 1105, 1122 (Ariz. 1983)(finding the victim's "reflective capabilities, as illustrated by her refusal to disclose what drug was used, remove the statement from the excited utterance category because the declarant's ability to fabricate is apparent."). And concerns of fabrication were amplified here because Mahoney, another bystander, admitted lying to police because people "pressured" him to implicate Turner. (TR 7/17/18, p 146:1-3).

The witnesses' statements were not spontaneous; rather, they were made in response to Johnson's question regarding "what had happened." (CF, p 1). Johnson also characterized two witnesses' statements as formal "verbal statement[s]," which belies any claim of spontaneity. (*Id*.) Additionally, while Johnson described the

witnesses as excited, he disagreed that they experienced stress from being "threatened or anything like that[.]" (TR 7/18/18, p 11:8-10). Because of the witnesses' reflective capabilities—as illustrated by their considerations of self-interest when speaking with Johnson—the court abused its discretion in admitting their statements as excited utterances.

ii. The court abused its discretion in admitting the out-of-court statements to explain Johnson's investigatory steps.

The court also admitted the witnesses' statements to explain Johnson's investigatory steps. This post-hoc ruling, however, prevented defense counsel from requesting a timely limiting instruction. CRE 105. Because the court gave no limiting instruction, nothing prevented the jury from relying upon these statements for the truth of the matter asserted. The prosecution also sought to admit these statements for their truth. And it used these statements to prove Turner attacked Mitcheff. (*See* TR 7/18/18, p 100:19-22).

At bottom, the prosecution admitted the out-of-court statements for their truth, it used these statements for their truth, and the jury relied upon these statements for their truth. The court's post-hoc ruling admitting the witnesses' statements for a non-hearsay purpose was therefore an abuse of discretion. *See U.S. v. Becker*, 230 F.3d 1224, 1229 (10th Cir. 2000)(finding where "evidence was used for more than the 'limited' purpose," "its admission constitutes an abuse of discretion.").

"Out-of-court statements can be admitted as background for an investigation only if they provide information that is necessary to [the non-hearsay purpose] and it is not likely that the jury will consider the statement[s] for the truth of what was stated with significant resultant prejudice." *U.S. v. Hinson*, 585 F.3d 1328, 1336 (10th Cir. 2009)(internal quotation omitted). Here, as in *Hinson*, 585 F.3d at 1337, the witnesses' statements were "entirely unnecessary" to explain Johnson's investigation. The prosecution could have easily explained that Johnson found Turner hiding in the bushes after receiving information at the scene. *See* 2 McCormick on Evidence § 249 (8th ed. 2020)("The officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence and conduct. They should not, however, be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay.").

As the Statement of the Facts section illustrates, the prosecution's case was weak. It needed the witnesses' statements to prove the ultimate issue in Turner's case—identity. And "[w]here the government introduces evidence that bears on the ultimate issue in a case but that is not necessary to [the proffered purpose], the only reasonable conclusion [courts] can reach is that the evidence was offered, not as background, but as support for the government's case against the defendant."

Hinson, 585 F.3d at 1337; *but see People v. Robinson*, 226 P.3d 1145, 1152 (Colo.App. 2009)(affirming admission of out-of-court statement for non-hearsay purpose without considering CRE 403).

Where the need for this evidence was slight, and the likelihood of juror misuse great, the court abused its discretion in later admitting the witnesses' statements to explain Johnson's investigation. *Kizzee*, 877 F.3d at 659-60.

iii. The admission of the out-of-court statements violated the Confrontation Clause.

The United States and Colorado Constitutions guarantee an accused the right to confront witnesses against him. U.S. Const. VI,XIV; Colo. Const. art. II, §16; *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *People v. Fry*, 92 P.3d 970, 975 (Colo.2004). The Colorado Supreme Court has "long interpreted Colorado's Confrontation Clause as commensurate with the federal Confrontation Clause." *Nicholls*, ¶31. The right of confrontation ensures that defendants would not be convicted on the bases of *ex parte* testimony without the benefit of cross-examination. *Fry*, 92 P.3d at 975.

In *Crawford*, 541 U.S. at 53-56, the U.S. Supreme Court concluded that the Confrontation Clause bars the admission of testimonial hearsay of an unavailable witness who the accused had no opportunity to cross-examine. *See Fry*, 92 P.3d 970 (adopting the *Crawford* framework for the admission of testimonial hearsay under

Colorado's Confrontation Clause). Since *Crawford*, courts have attempted to clarify the test for classifying out-of-court statements by a nontestifying witness as testimonial or nontestimonial.

In *Davis v. Washington* and *Hammon v. Indiana* (decided together), the U.S. Supreme Court provided further guidance on when a police interrogation produces testimonial statements by developing the "primary purpose test." 547 U.S. 813, 822 (2006). Under this test, statements are (1) *nontestimonial* when made in a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, and (2) *testimonial* when the circumstances objectively indicate there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.*

Davis and *Hammon* both involved domestic violence. The statements in *Davis* were made by the victim to a 911 operator describing events as they occurred. *Id*. at 817-18. Whereas the statements in *Hammon* were made by the victim to responding officers at the scene after the events had occurred. *Id*. at 819-20. Officers separated the victim from her husband and questioned her about what happened. *Id*. at 819-20. After the victim gave her account, she filled out and signed an affidavit. *Id.* at 820.

In the affidavit, the victim described the defendant's violent conduct that evening. *Id.*

The court held that the victim's statements made on the 911 call in *Davis* were nontestimonial because the victim was speaking about events as they occurred, there was an ongoing emergency, the questions and answers revealed that the statements were necessary to address the present emergency, and the statements were informal. *Id.* at 827. By contrast, the court held that the statements in *Hammon* were testimonial because the circumstances reflected that the interrogation was part of an investigation into past criminal conduct, there was no emergency in progress, the officer who questioned the victim was trying to determine what happened, the interrogation was formal enough when conducted in a room separate from the defendant where the victim detailed past events in response to police questioning, and the victim's statements did not enable officers to "immediately…end a threatening situation." *Id.* at 831-32.

In *Bryant*, 562 U.S. at 360, another interrogation case, the U.S. Supreme Court explained that the primary purpose test requires an objective evaluation of "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." There, police responded to a gas station where they found the victim

bleeding from gunshot wounds to the stomach. *Id.* at 348-49. The court held that the victim's statements to police were nontestimonial. *Id.* at 370-78.

First, the court found there was an ongoing emergency because "an armed shooter, whose motive for and location after the shooting were unknown," had recently "mortally wounded" the victim. *Id.* at 372-74. Second, the victim's statements to police about the shooter—made while in pain and in between questions regarding when medical personnel would arrive—indicated that his primary purpose was not to establish past events potentially relevant to later criminal prosecution. *Id.* at 374-77. Third, the officer's questions were necessary to allow them to assess the threat and danger of the situation. *Id.* at 375-77. And fourth, the statements were made in an informal setting where the situation was fluid and somewhat confused. *Id.* at 377-78.

Unlike in *Bryant*, an objective evaluation of the circumstances here reveals that the primary purpose of the witnesses' statements was to establish past events potentially relevant to later prosecution. When Johnson arrived, the assault had ended and urgency had subsided. Witnesses reported that the suspect had "walked out of the park." (CF, p 1); *cf. Bryant*, 562 U.S. at 374 (finding an ongoing emergency where the shooter's location was "unknown"). Witnesses also alleged the attacker used his fists/feet rather than a more dangerous weapon such as a gun.

(CF, p 1); *cf. Bryant*, 562 U.S. at 359 (finding the threat of a gun "extends beyond an initial victim to a potential threat to the responding police and the public at large."). Where an attacker is "armed only with his fists," "removing" the victim to a separate location is "sufficient to end the emergency." *Bryant*, 562 U.S. at 364.

The witnesses' statements were not spontaneous; rather, Johnson asked them "what had happened." (CF, p 1); *see Davis*, 547 U.S. at 815 (finding the victim's statement testimonial where the officer sought to determine "what had happened."). Unlike in *Bryant*, the witnesses here were not victims of the charged crime and suffered from no medical emergency. *Cf. Bryant*, 562 U.S. at 364–65 (finding the medical condition of the victim "important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions"). Additionally, witnesses "refus[ed] to provide" Johnson "with identification and/or a witness statement" "for fear [of] becoming victimized by the suspect or associates of the suspect." (CF, p 1). Thus, witnesses knew the primary purpose of their statements was for later prosecution because they feared retaliation.

Further, Johnson attempted to establish past events potentially relevant to later criminal prosecution because he tried to memorialize these statements in formal written/verbal statements. Witnesses refused to do so because they feared

"something may happen to them" if they cooperated with police. (TR 2/5/18, pp 15-16). Johnson also categorized two witness statements as a "verbal statement[s]." (CF, p 1). His attempt to formalize statements from witnesses belies any notion he was resolving an ongoing emergency. *See Raile v. People*, 148 P.3d 126, 132 (Colo. 2006)(finding witness's statement was testimonial where officers asked her "to make a formal written statement.").

Thus, the primary purpose of the witnesses' statements, objectively viewed, was not to assist officers in resolving an ongoing emergency. Instead, these witnesses were "testifying" to Johnson as they would have testified in court. *Raile*, 148 P.3d at 132. The out-of-court statements were testimonial and their admission violated Turner's right to confrontation. *Id*. at 133.

D. Reversal is Required.

Because the admission of the witnesses' statements violated Turner's right to confrontation, the constitutional harmless error analysis applies. *Fry*, 92 P.3d at 980. The state must prove the error was harmless beyond a reasonable doubt. *Hagos v. People*, 2012 CO 63, ¶11. If this Court disagrees that a constitutional violation occurred, then the non-constitutional error analysis applies. *Id*. at ¶12. The state must also prove harmlessness under this standard. *James v. People*, 2018 CO 72, ¶18.

This error was not harmless under either standard. Identity was the critical issue in Turner's case. The out-of-court statements identifying Turner as the attacker constituted one of just two pieces of evidence against him. The only other evidence implicating Turner as Mitcheff's attacker was Mitcheff's testimony. And Mitcheff originally identified someone else as the perpetrator and only implicated after reading about his attack online.

Additionally, the prosecution "compounded" the error "by inviting the jury to rely upon" the witnesses' out-of-court statements in closing and rebuttal arguments. (TR 7/18/18, pp 80-81, 100-01); *Salcedo v. People*, 999 P.2d 833, 841 (Colo.2000). The prosecution's case was also weak: officers' investigation was sloppy, no physical evidence tied Turner to the crime, the only testifying bystander recanted, and Mitcheff was "highly intoxicated" during the assault. Reversal is required.

II. THE COURT ABUSED ITS DISCRETION, VIOLATED TURNER'S RIGHT TO DUE PROCESS, AND REVERSIBLY ERRED WHEN IT PERMITTED AN EXPERT WITNESS TO TESTIFY ABOUT WHETHER AN UNCONSCIOUS PERSON "MIGHT EVENTUALLY REGAIN SOME OF THAT SHORT-TERM MEMORY LOSS" EVEN THOUGH THE PROSECUTION FAILED TO DISCLOSE ANY REPORTS OR PHYSICIAN EXAMINATIONS TO THE DEFENSE AND THIS TESTIMONY FELL OUTSIDE THE SCOPE OF THE WITNESS'S EXPERTISE.

A. Standard of Review

Defense counsel objected to the expert witness's testimony as "outside the scope of the expert endorsement in this case and violation of Rule 16." (TR 7/17/18, pp 5-7, 164-66). The court overruled these objections. (*Id*. at 9:12, 166-67).

Interpretation of criminal rules of procedure presents a question of law, which this Court reviews de novo. *People v. Bueno,* 2013 COA 151, ¶18. If a discovery violation occurred, this Court reviews a trial court's decision to impose a sanction for an abuse of discretion. *People v. Lee*, 18 P.3d 192, 196 (Colo.2001). This Court also reviews a trial court's decision to admit expert testimony for an abuse of discretion. *People v. Jenkins,* 83 P.3d 1122, 1126 (Colo.App. 2003).

B. Relevant Facts

The prosecution endorsed Daniel Valentino as an expert in emergency medicine. (CF, p 54). Valentino—an emergency physician at Memorial Central

Hospital—treated Mitcheff after the attack. (TR 7/17/18, pp 159-61). He determined that Mitcheff suffered from serious bodily injury ("SBI"). (EX 2,[6] p 1).

On the first day of trial, the prosecution indicated that it would call Valentino as a witness. (TR 7/17/18, p 4:20-22). Defense counsel objected to Valentino's testimony because the prosecution did not disclose any medical records for Mitcheff beyond the SBI form. (*Id*. at 5:5-10). Although Mitcheff orally released his medical records to the prosecution and officers, defense counsel could not "us[e] that release." (*Id*. at 5:10-14). She attempted to obtain Mitcheff's medical records from Valentino, but he refused to speak with her. (*Id*. at 5:14-16). She also asked the prosecution for the medical records, but it did not have them. (*Id*. at 5:17-20). Based on this communication, defense counsel believed the prosecution was not "planning on calling" Valentino. (*Id*. at 5:19-20).

She alleged Mitcheff's medical records contained exculpatory information because he admitted drinking before the charged assault. (*Id*. at 6-7). "[T]hose records could potentially say how intoxicated he was" and therefore Turner could use these records to impeach Mitcheff's credibility. (*Id*.) Additionally, defense counsel alleged "there should be information in the medical records about Mr.

[6] The SBI form is mislabeled as Exhibit 2.

Mitcheff's head injuries from the assault he…suffered. And again, that goes to credibility or strength of memory[.]" (*Id*. at 7:9-12).

She asked the court to exclude Valentino's testimony as a sanction for violating "the expert rules under Rule 16." (*Id*. at 5-6). But, if the court permitted Valentino to testify, she insisted that his testimony should be limited to the SBI form. (*Id*. at 6:16-21).

The prosecution responded that Mitcheff's release was only valid for thirty days and "[n]o follow-up was conducted by the investigating agency to obtain those records." (*Id*. at 7:20-25). The prosecution acknowledged that it never possessed Mitcheff's medical records "and they've never been disclosed to Defense." (*Id*. at 7-8). The prosecution only planned on asking Valentino "what his findings were on this SBI form" and did not "intend to go into the background behind his findings[.]" (*Id*. at 8:4-13). The prosecution also acknowledged "sp[eaking] with the doctor." (*Id*. at 8:8-11). It never disclosed this conversation to the defense. (CF, p 99).

Finding a discovery violation, the court nonetheless determined that the defense only suffered "limited prejudice" because Mitcheff "can actually show the injuries based on the limited testimony that the Prosecution is offering." (TR 7/17/18, p 8:19-23). The court found excluding Valentino's testimony altogether would be "disproportionate," but it would grant a continuance for further

investigation. (*Id*. at 8-9). Turner declined a continuance because "speedy trial…[wa]s an issue in this case[.]" (*Id*. at 9:9-11). The court therefore denied Turner's motion for sanctions. (*Id*. at 9:12).

Valentino then testified about the SBI form and Mitcheff's injuries. (*Id*. at 160-64). The prosecution asked Valentino: "And would you expect somebody with these kinds of injuries to be knocked unconscious whenever they received those injuries?" (*Id*. at 164:11-13). Defense counsel objected because the question exceeded the prosecution's expert endorsement and violated Crim. P. 16. (*Id*. at 164:14-15). The prosecution responded that it was not "asking for anything that relates specifically to this case[.]" (*Id*. at 164:20-21). Defense counsel asserted: "Even if you had endorsed him as a blind expert, you would be required under the Rule 16 and U.S. and Colorado constitutions to give a summary of what he will testify to." (*Id*. at 166:4-7). Agreeing "that's generally true[,]" the court nonetheless found "[i]njury is not the issue in this case; it's a whodunit." (*Id*. at 166:8-9).

The prosecution continued:

> would you expect somebody who experiences paralysis quadriplegia to experience some level of unconsciousness associated with that symptom–or, with that condition?
>
> [Valentino]: It's very situational, dependent on the mechanism of injury that led to this, but it is very possible that somebody would have loss of consciousness with it.

> [The prosecution]: Is it possible that somebody would also experience some sort of memory loss with that condition?
>
> [Valentino]: Very possible.
>
> [The prosecution]: Would you expect whenever somebody suffers that condition that that person might eventually regain some of that short-term memory loss?
>
> [Defense counsel]: I'll object. Again, this is all outside this expert's endorsement. None of this was provided to Defense.
>
> [The court]: I'll permit the question. The objection is overruled.
>
> ….
>
> [The prosecution]: Would you generally expect somebody who suffers that short-term memory loss to eventually regain, even in pieces, some of that memory?
>
> [Valentino]: Again, very possible. It depends on why exactly they have short-term memory loss.

(*Id*. at 166-67).

In closing argument, the prosecution claimed it would be "much more suspicious" if Mitcheff told "the same exact story every time[.]" (TR 7/18/18, p 83:15-18). Instead, the prosecution asked the jury to

> use your reason and common sense and your own life experiences, and you know that sometimes those memories come back in patches, and sometimes you fill in the gaps a little bit. But since the night after his attack, whenever he was first fully conscious, the victim has

> always had one thing the same, and that is that Josh Turner was at least one of his attackers.

(*Id*. at 83:20-25).

Defense counsel moved for a new trial because the court erred in permitting Valentino to testify as an expert witness when the prosecution failed to disclose any medical records. (CF, pp 99-101). The court denied the motion, finding defense counsel could have subpoenaed the records and the prosecution had "no obligation to go out and get the medical records." (TR 10/15/19, p 5:8-16).

C. The Prosecution Violated the Discovery Rules When it Failed to Disclose any Reports or Physical Examinations to the Defense.

"Prosecutors have a constitutional and statutory obligation to disclose to the defense any material, exculpatory evidence that tends to negate the guilt of the accused." *People v. Lincoln*, 161 P.3d 1274, 1279-80 (Colo.2007). U.S. Const. amends. V,VI,XIV; Colo. Const. art. II §§16,25; *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963). "A prosecutor has a duty to disclose such evidence regardless of whether the accused requests disclosure[.]" *Lincoln*, 161 P.3d at 1280. "Failure to disclose information helpful to the accused is a due process violation only if the information is material to either guilt or punishment." *Id*.

The discovery rules enhance the truth-seeking process and promote fairness in the criminal process by reducing the risk of trial by ambush. *People v. Castro*,

854 P.2d 1262, 1264 (Colo.1993). "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry." *People v. Smith*, 524 P.2d 607, 611 (Colo.1974)(internal quotation omitted).

Under Colorado's discovery rules, the prosecution must provide the defendant with "[a]ny reports or statements of experts made in connection with the particular case, including results of physical or mental examinations" in its possession. Crim. P. 16(I)(a)(1)(III). Such disclosure must be made "not later than thirty days before trial." Crim. P. 16(I)(b)(3). The prosecution also must "ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged." Crim. P. 16(I)(b)(4).

Here, the court found the prosecution committed a discovery violation when it offered to grant Turner a continuance and otherwise denied his "motion for sanctions." (TR 7/17/18, pp 8-9). It also agreed that it's "generally true" the prosecution must provide a general summary of an expert witness's testimony. (*Id*. at 166:4-8). Despite conceding that it failed to disclose any physician examinations to the defense, the prosecution nonetheless faulted the defense for failing to subpoena these records. (TR 7/17/18, pp 7-8; 10/15/19, p 3:8-10). The defense's failure to subpoena these records, however, did not obviate the prosecution's

mandatory discovery obligations under Crim. P. 16(I)(a)(1)(III). *Lincoln*, *supra*. And, to the extent the court later determined the prosecution had "no obligation to go out and get the medical records," (TR 10/15/19, p 5:12-13), this was wrong under Crim. P. 16(I)(b)(4).

D. The Court Abused its Discretion in Failing to Limit Valentino's Testimony to Information Contained on the SBI Form.

"Rule 16 gives trial courts broad discretion in fashioning remedies for violations of its provisions." *Castro*, 854 P.2d at 1265. This rule provides that if a party fails to comply with the discovery rules:

> the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems just under the circumstances.

Crim. P. 16(III)(g). When fashioning an appropriate sanction, courts should consider: why disclosure was not made, the extent of the prejudice to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. *Castro*, 854 P.2d at 1265.

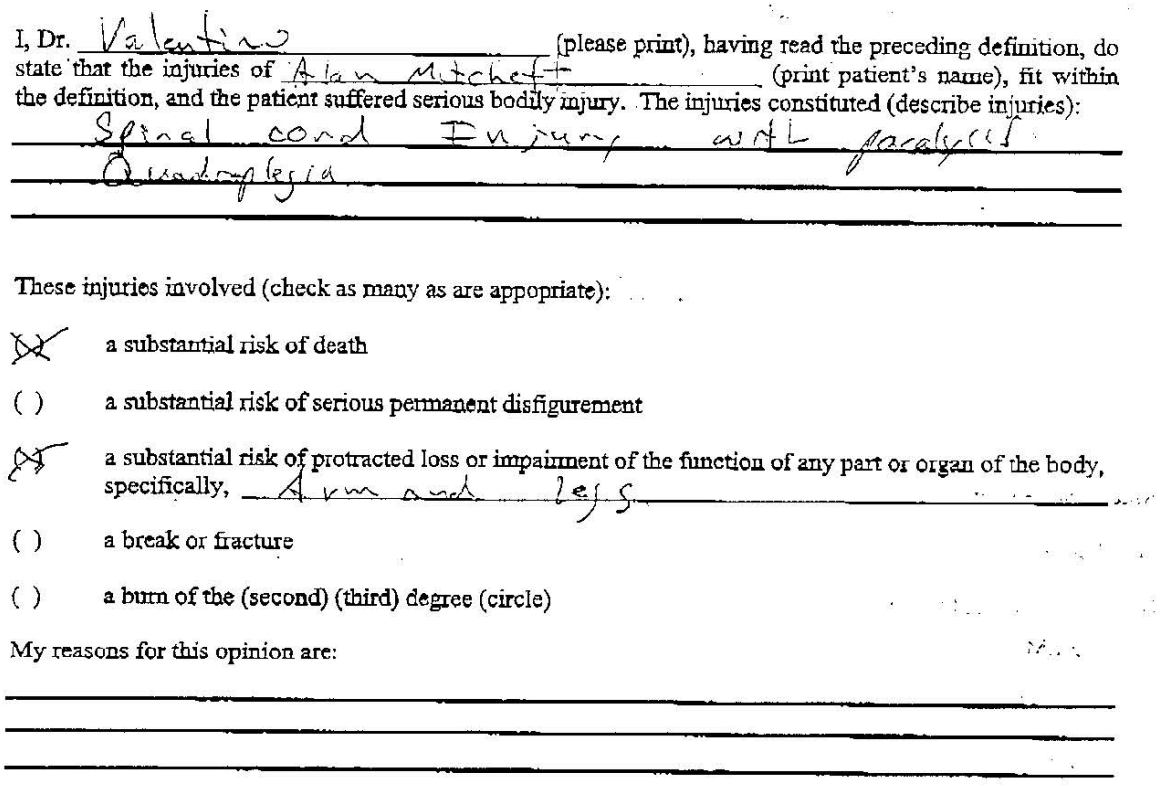
Here, the court abused its discretion when it failed to consider all of the *Castro* factors, including why the prosecution failed to disclose the physician examinations and whether a continuance would deter the prosecution or achieve anything for the defense. *See id*. The prosecution's only reason for non-disclosure was that the police

failed to "follow-up" with Mitcheff's medical records. (TR 7/17/18, p 7:23-25). When defense counsel requested these records before trial, the prosecution responded: "'We don't have them.'" (*Id*. at 5:19). Although Mitcheff released his medical records two-years before trial, the prosecution never attempted to obtain them. (*Id*. at 7-9). The prosecution therefore willfully violated Crim. P. 16.

Failure to disclose exculpatory evidence[7] is a more weighty violation which courts should seek to deter. *Cf. People v. Loggins*, 981 P.2d 630, 636 (Colo.App. 1998)(dismissal was not warranted because the evidence was "not exculpatory" and any prejudice could have been cured by a continuance). But dismissal or preclusion may be appropriate in the case of willful misconduct, even for non-exculpatory evidence. *Lee*, 18 P.3d at 196-97. Here, not only did the prosecution willfully withhold possible exculpatory evidence, but it promised not "to go into the background behind [Valentino's] findings, only what his findings were on this SBI form." (TR 7/17/18, p 8:11-13). It broke this promise when it asked Valentino about topics not contained on the SBI form, such as whether someone can "eventually

[7] Mitcheff's medical records likely contained exculpatory information about his intoxication and head injuries, which the defense could have used to impeach his credibility. (TR 7/17/18, pp 6-7); *People v. Bradley*, 25 P.3d 1271, 1276 (Colo.App. 2001)("Exculpatory evidence includes evidence that bears on the credibility of a prosecution witness.").

regain" "short-term memory loss" after being unconscious. (*Id*. at 166-67). The SBI form includes no findings related to memory:



I, Dr. Valentino (please print), having read the preceding definition, do state that the injuries of Alan Mitchell (print patient's name), fit within the definition, and the patient suffered serious bodily injury. The injuries constituted (describe injuries): Spinal cord Injury with paralysis Quadraplegia

These injuries involved (check as many as are appopriate):

XX a substantial risk of death

( ) a substantial risk of serious permanent disfigurement

XX a substantial risk of protracted loss or impairment of the function of any part or organ of the body, specifically, Arm and legs

( ) a break or fracture

( ) a burn of the (second) (third) degree (circle)

My reasons for this opinion are:

(EX 2, p 1).

Because of this willful violation, the court should have at least precluded Valentino from testifying about short-term memory loss. *See, e.g., People v. Shannon*, 683 P.2d 792, 794-95 (Colo.1984)(affirming preclusion of prosecution's witness who would have rebutted defendant's testimony about exculpatory evidence first disclosed at trial). Indeed, the court originally did so. (TR 7/17/18, p 8:23). The court later reneged on its ruling because "[i]njury is not the issue in this case; it's a

whodunit." (*Id*. at 166:8-9). Yet since the prosecution initially agreed to this remedy, precluding Valentino's testimony about memory would have been the least severe sanction to ensure compliance with the discovery rules. *Lee*, 18 P.3d at 197.

Moreover, the offered continuance would not have ensured compliance with the discovery rules, but rather would have rewarded the prosecution for misconduct. Before the court even offered to continue Turner's trial, defense counsel agreed "[t]he only thing that this doctor would be able to testify to…is simply the SBI form." (TR 7/17/18, p 6:16-19). The prosecution pledged to limit Valentino's testimony to "talk about the SBI form itself." (*Id*. at 8:9-10). Based on this record, there was no need for a continuance.

Turner also invoked his right to a speedy trial before trial. (CF, pp 35-36, 56-58). "The right to a speedy trial is an important constitutional right that may not be ignored by a trial judge." *Castro*, 854 P.2d at 1265. "Requiring a defendant to choose between constitutional rights may also create an untenable position because the defendant must exercise one right at the unnecessary expense of another." *People v. Campbell*, 58 P.3d 1148, 1157 (Colo.App. 2002). Here, the court forced Turner to choose between two constitutional rights: his right to a speedy trial and his due process right to possible exculpatory material. In doing so, the court sanctioned Turner—not the prosecution. And, far from punishment or deterrence, a defense

continuance is generally a boon to the prosecution, which is under pressure to comply with speedy trial mandates. (*See* TR 7/16/19, p 3:8-11)(the prosecution explained "a number of cases [were] ready for trial" on the same day as Turner's). Therefore, the court abused its discretion in granting a continuance as a sanction where the prosecution agreed to limit Valentino's testimony and the continuance would violate Turner's asserted right to a speedy trial. *Castro*, 854 P.2d at 1265.

Finally, the non-disclosure prejudiced Turner. The court determined he was not prejudiced because "[i]njury is not the issue in this case; it's a whodunit." (TR 7/17/18, p 166:8-9). Yet, the prosecution's questions went to Mitcheff's "ability to perceive and strength of memory during and after sustaining the injuries in this case." (CF, p 100). "Mitcheff's credibility and ability to perceive and remember the identity of his attackers was the central issue in the trial." (*Id*.) He was the only testifying witness who identified Turner as his attacker and his "statements changed significantly over time[.]" (*Id*.) And the prosecution used Valentino's testimony to bolster the credibility of Mitcheff's later statements. (TR 7/18/18, p 83:20-25).

Nor could defense counsel effectively rebut Valentino's testimony. She asked no questions on cross-examination. Because Turner "did not have the benefit of pretrial disclosure of [Valentino's] expert testimony and the bases of [his] opinions, he did not have the opportunity to evaluate the testimony in advance of trial or to

obtain his own expert witness." *People v. Veren*, 140 P.3d 131, 140 (Colo.App. 2005). Accordingly, the court abused its discretion by failing to limit Valentino's testimony to the SBI form.

E. The Court Abused its Discretion in Allowing Valentino to Testify Outside the Scope of His Expertise.

Under CRE 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

When determining whether expert testimony will assist the jury, the court should consider "the scope and content of the opinion itself." *People v. Ramirez*, 155 P.3d 371, 379 (Colo.2007). An expert witness cannot express opinions outside the scope of his field of expertise. *Compare People v. Wilkerson*, 114 P.3d 874, 877 (Colo.2005)(finding an expert's opinion that a shooting was accidental "was clearly beyond the scope of ergonomics" and, therefore, inadmissible) *with Jenkins*, 83 P.3d at 1126-27 (finding an expert qualified in critical care "having to do with burn care" did not exceed the scope of his field of expertise when he opined that the victim's burns contradicted a grease fire).

Here, the prosecution endorsed Valentino as an expert in emergency medicine. Valentino was board certified in general surgery and critical care and he

worked as an attending general and trauma surgeon in an emergency room where he evaluated and treated critically injured patients. (TR 7/17/18, pp 157-59). After discussing his general qualifications, the prosecution sought to qualify Valentino as an expert in emergency medicine. (*Id*. at 160:10-12). The court "allowed" him "to give testimony in that area." (*Id*. at 160:15-16).

Valentino's testimony about short-term memory loss fell outside the scope of his field of expertise. He never testified about his experience or education in brain functioning, memory loss, or behavioral neurology.[8] Nor did he testify that he specialized in treating short-term memory loss after head trauma. Valentino's testimony also fell outside the scope of CRE 701 because it included conclusions that relied upon his specialized experience. *Venalonzo v. People*, 2017 CO 9, ¶29. Additionally, the prosecution pledged to limit Valentino's testimony to any conclusions in the SBI form, which included no mention of memory loss or cognitive functioning. And, due to the prosecution's discovery violation, the defense had no

[8] "Behavioral neurologists specialize in cognitive problems such as memory loss, and are very good at detecting subtle brain injuries such as a small stroke or an infection that may be causing the memory problems." *See* https://www.med.unc.edu/neurology/divisions/memory-and-cognitive-disorders-1/dementia-1/which-provider-is-best-for-me/#:~:text=Behavioral%20neurologists%20specialize%20in%20cognitive,thorough%20neurological%20and%20cognitive%20exams (last visited December 27, 2020).

way of knowing whether Valentino's endorsement as an expert in emergency medicine included behavioral neurology. Consequently, the court abused its discretion in permitting Valentino to testify outside the scope of his field of expertise. *Wilkerson*, *supra*.

F. Reversal is Required.

If this Court finds a due process violation occurred, then the constitutional harmless error analysis applies. *Hagos*, ¶11. Otherwise, the non-constitutional error analysis applies. *Id*. at ¶12. *See* Issue I(D). Under either standard, reversal is required. Mitcheff was the sole testifying witness to identify Turner as his attacker. His account of the attack changed dramatically over time: his story evolved from Journey attacking him to being "absolutely positive" that Turner was involved. (TR 7/17/18, p 140:6-10). His account only changed after he researched his attack online and spoke with people from his community.

Valentino's testimony that it was "very possible" for an unconscious person to experience memory loss and "eventually regain some of that short-term memory loss" bolstered Mitcheff's later statement and testimony. In effect, "[t]he prosecution elicited unendorsed expert testimony outside the scope of what the Court originally permitted, in order to bolster the victim's credibility and its theory that the victim's memory could have gotten better over time." (CF, p 100).

The discovery violation precluded the defense from evaluating Valentino's testimony before trial or obtaining their own expert witness. And the court exacerbated this error by failing to instruct the jury before closing argument that they "may believe all of an expert's witness' testimony, part of it, or none of it." COLJI-Crim E:06 (2019). Without this instruction, the jury may have afforded Valentino's testimony more weight simply due to his status as an expert witness. Because the evidence against Turner was weak and this error prejudiced him on the dispositive issue in his case, reversal is required.

III. THE PROSECUTION ENGAGED IN MISCONDUCT, VIOLATED TURNER'S RIGHT TO DUE PROCESS, AND REVERSIBLY ERRED WHEN IT MISSTATED THE FACTS OF HIS CASE.

A. Standard of Review

Defense counsel objected to the second instance of misconduct, but not the first. (TR 7/18/18, pp 80:15-23, 100-01). Where defense counsel did not object, the plain error standard of review applies. *Wend v. People*, 235 P.3d 1089, 1097 (Colo.2010). Whether the prosecution's statements qualify as misconduct is reviewed for an abuse of discretion. *People v. Monroe*, 2020 CO 67, ¶16.

B. Law and Analysis

Due process guarantees every defendant the right to a fair trial by an impartial jury. U.S. Const. amends. V,VI,XIV; Colo. Const. art. II, §§16,23,25; *Morgan v.*

Illinois, 504 U.S. 719, 727 (1992); *Oaks v. People*, 371 P.2d 443, 447 (Colo.1962). The prosecutor must safeguard those rights. *Berger v. U.S.*, 295 U.S. 78, 88 (1935). A prosecutor, while free to strike hard blows, "is not at liberty to strike foul ones." *Id*. "A jury that has been misled by improper argument cannot be considered impartial." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo.2005).

"A prosecutor has wide latitude to make arguments based on facts in evidence and reasonable inferences drawn from those facts." *People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010). However, a prosecutor may not misstate the evidence, *People v. Samson*, 2012 COA 167, ¶32, or refer to facts not in evidence, *People v. McMinn*, 2013 COA 94, ¶62. *See* ABA, *Standards for Criminal Justice*, Standard 3-6.8(a)(4th ed. 2017).

Here, the prosecution committed misconduct when it referenced facts not in evidence. For instance, it claimed that Journey "enlisted" Turner's help in attacking Mitcheff:

> I would argue that the evidence suggests, using your reason and common sense, that this was orchestrated, this was planned, that Journey had his fight with Mr. Mitcheff. He was so mad, he left.
>
> He wanted to really hurt Mr. Mitcheff as much as he possibly could, and he enlisted help. Dirty Dog, being new to town, "I'll help you out; I don't have anything else goin' on today." And they find Mr. Mitcheff under the pavilion, and that's where the attack takes place.

(TR 7/18/18, p 80:15-23). And it reiterated this argument in rebuttal:

> Perhaps Journey got Dirty Dog to do his dirty work for him. Journey needed help. He was not happy about that dog….Dirty Dog was new in town. Maybe he approached him, said, "I need help with somethin'" and he decided he'd go along with it. But why on earth would the witnesses make up this grand story about seeing this happen and watching him run over to the bushes by the police station when he was brand-new to town? That doesn't make sense. What makes sense is that Journey got help from somebody else to help him do his dirty work.

(*Id*. at 100:14-24). Defense counsel objected to "facts not in evidence," which the court overruled. (*Id*. at 100-01).

No evidence supported the prosecution's theory that Journey enlisted Turner's help in attacking Mitcheff beforehand. This misleading argument was apparently built by piling inference upon inference using the thin reed of Mitcheff's testimony where he recalled "flashes of different people hitting" him. (TR 7/17/18, p 116:15-16). In effect, the prosecution suggested the existence of a fact not in evidence and proposed the jury further conclude from this nonexistent "fact" that Turner and Mitcheff coordinated the attack.

A criminal conviction, however, cannot be based upon speculation, conjecture or guessing. *People v. Sprouse*, 983 P.2d 771, 778 (Colo.1999). "[A] chain of inferences can become so attenuated that reliance on it to sustain a conviction would be unreasonable and would amount to speculation." *People v. Donald*, 2020 CO 24,

¶30. The prosecution created such a chain of inferences here. Accordingly, the prosecution committed misconduct. *McMinn, supra*.

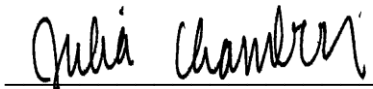
Moreover, the prosecution's misstatement of the facts warrants reversal under any standard—even plain error. "[N]ovelty does not provide a safe harbor for flagrantly improper arguments." *People v. McBride*, 228 P.3d 216, 222 (Colo.App. 2009). The prosecution's misconduct was obvious under Colorado case law and the well-established principle barring prosecutors from referring to facts not in evidence. *McMinn*, *supra*.

And the misconduct—individually and cumulatively—was substantial. The essence of the jury's function in a criminal trial is to find the facts, apply the law to those facts, and reach a verdict. Here, the prosecution's misconduct impeded the jury in performing that function on the only disputed issue in this case: whether Turner attacked Mitcheff. As discussed in Issue I(D), the evidence against Turner was weak and the officer's investigation was shoddy. The jury likely relied upon the prosecution's misleading argument to convict Turner under a complicity theory. (CF, p 84). Reversal is required.

CONCLUSION

In Arguments I-III, Turner requests this Court reverse his convictions and remand his case for a new trial.

MEGAN A. RING
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on January 13, 2021, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.