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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; El Paso 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, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #47181	Case Number: 2019CA2194

REPLY 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 and formatting requirements set forth in C.A.R. 28(g).

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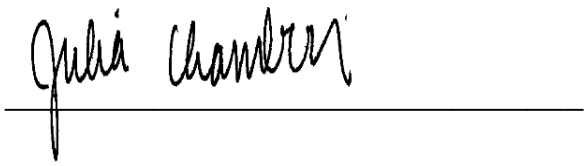

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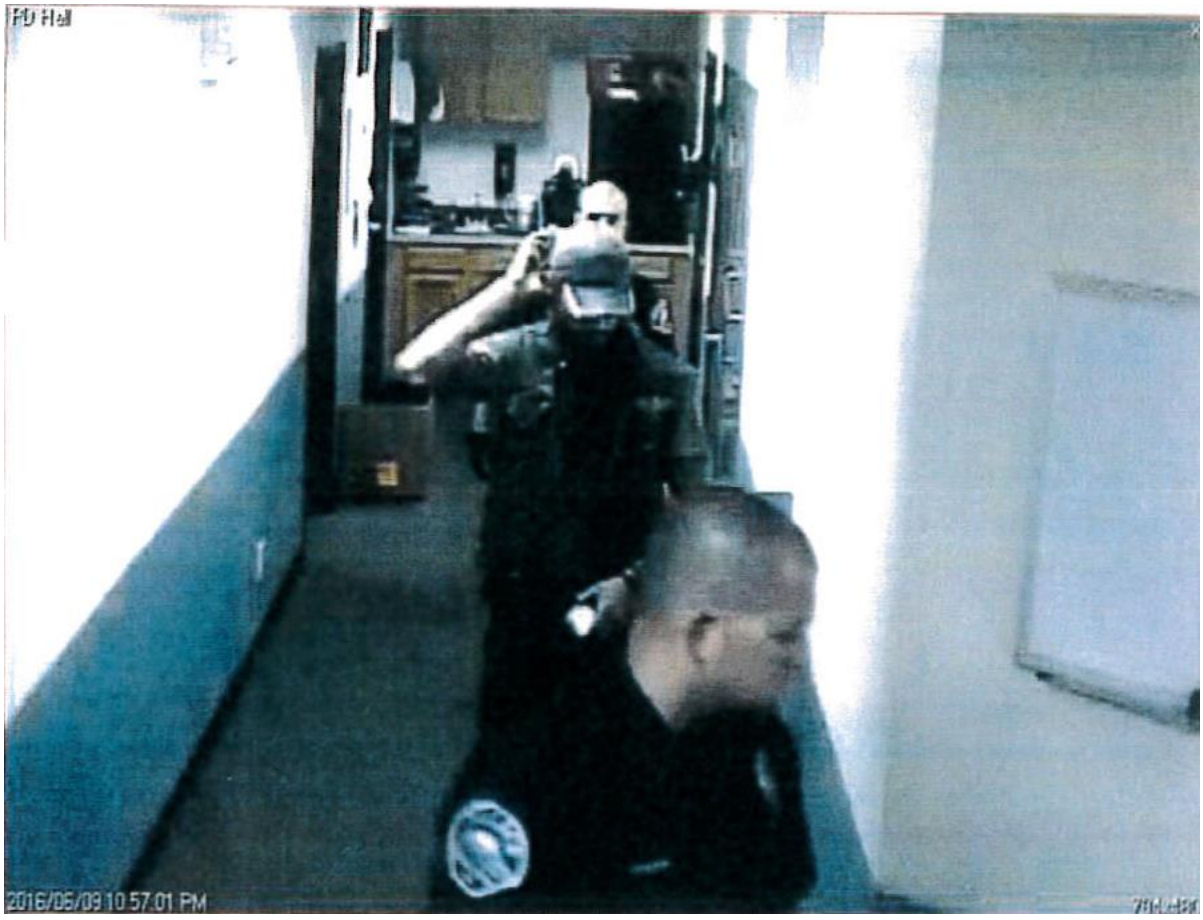
STATEMENT OF THE FACTS AND CASE

The victim, Alan Mitcheff, initially identified another man—who "just would not leave" him alone—as the perpetrator of the assault. (TR 7/17/18, p 115:14-15; 7/18/18, pp 38-39). He only accused Turner of the attack one-and-a-half years later after he looked up news articles about the incident and Turner's arrest. (TR 7/17/18, pp 130-35). The sole testifying eyewitness recanted his accusation against Turner because he admitted "people" from Manitou "pressured" him into implicating Turner. (*Id*. at 145-46).

No physical evidence tied Turner to the attack. (TR 7/18/18, p 39:20-25). Officers never located the weapon purportedly used during the assault. (*Id*. at 50:3-6). They performed no identification procedures. (*Id*. at 45-46). They conducted no follow-up interviews with bystanders. (*Id*. at 46:3-6). They never photographed Mitcheff's injuries. (*Id*. at 46:7-11). They never documented Turner's clothing or body. (*Id*. at 46-49). They didn't search for surveillance footage. (*Id*. at 46-47). And, although bystanders claimed the man who assaulted Mitcheff had a confederate flag on his vest, an image capturing Turner that day doesn't show this flag:



(EX A, p 15; TR 7/18/18, pp 47-48).

None of this evidence is mentioned by the state in its "Statement of the Case and of the Facts" section. Answer Brief ("AB"), pp 1-2.

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

The state agrees with Turner's standard of review. AB, p 5.

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

"An excited utterance by definition is one made before the declarant has had an opportunity to reflect on the event." *People v. King*, 121 P.3d 234, 240 (Colo. App. 2005). "Reflective thought is the antithesis of the excited utterance, which requires as its root, spontaneity." *State v. Post*, 901 S.W.2d 231, 235 (Mo. Ct. App. 1995). Spontaneity underpins the reliability of this statement:

> Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or at least as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony of those facts.

Lancaster v. People, 615 P.2d 720, 722 (Colo. 1980) (internal quotation omitted).

Even where a declarant makes a statement soon after an exciting event, the content of the statement may reflect that the declarant engaged in reflective thought.

For instance, in *People v. Ramirez*, 50 Cal. Rptr. 3d 110, 116 (Cal. Ct. App. 2006), the prosecution sought to admit the victim's following statements to a hotel clerk: "'It hurts, it hurts' while holding her crotch, and 'I only live with my brother and if I go home now he is probably going to kill me.'" When the clerk asked the victim what happened, she explained that a man raped her. *Id*. The clerk offered to call the police, but the victim declined because "she was afraid of her brother and what he would do if he found out what had happened to her." *Id*. Over objection, the court admitted these statements as excited utterances. *Id*. at 116-17.

The California Court of Appeal disagreed, "conclud[ing] that there is not substantial evidence to support the trial court's factual determination that [the victim's] mental state was not consistent with 'detached reflection or deliberation' with respect to her statements concerning the sexual assault[.]" *Id*. at 118. Although recognizing the victim "was clearly in pain and distraught as a result of the sexual assault[,]" her physical condition didn't inhibit her deliberation. *Id*. at 119. Additionally, "the evidence indicates not only that [the victim] was *able* to deliberate or reflect on what had occurred, but that she in fact did so." *Id*. at 120 (emphasis in original). Because the victim repeatedly voiced concern about what her brother would do if he discovered the sexual assault, "[t]hese statements demonstrate that [the victim] in fact engaged in a deliberative or reflective process as to the subject

matter of the statements at issue, and thus establish that her reflective powers were not '*yet* in abeyance.'" *Id*. (emphasis in original).

Similarly, the Arizona Supreme Court rejected the state's position that the victim's statements to a nurse after an attack should have been admitted as excited utterances. *State v. Jeffers*, 661 P.2d 1105 (Ariz. 1983). At the hospital, the nurse asked the victim what happened and the victim responded "'that she had been drugged by her boyfriend, that friends were coming to help kill her and she had jumped [from a window] to get away.'" *Id*. at 1119. The victim, however, refused to divulge the type of drug her boyfriend gave her because she didn't "'want him to get in trouble.'" *Id*. The court found 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." *Id*. at 1122. *See Atencio v. City of Albuquerque*, 911 F. Supp. 1433, 1442 (D.N.M. 1995) (finding that the victim's statement didn't qualify as an excited utterance, in part, because the declarant "told [her friend] that she feared [the friend] would never be her friend again[,]" which "indicates that [the declarant] had, indeed, reflected upon both the incident and the statements that she made to [her friend].").

Here, the bystanders explained to Officer Gary Johnson what occurred during the attack. (CF, p 1). When Johnson "asked witnesses if they [would] provide [him]

with identification and/or a witness statement[,] a majority of witnesses refused to provide [him] with any information for fear [of] becoming victimized by the suspect or associates of the suspect." (*Id*.) Only two bystanders provided Johnson with their names. (*Id*.) These witnesses, however, "were only willing to provide a verbal statement." (*Id*.) And, at the preliminary hearing, Officer Dillon Settle testified that the bystanders refused to identify themselves or provide written statements because they "were fearful that something may happen to them" if they cooperated with the police. (TR 2/5/18, pp 15-16).

Similar to *Ramirez* and *Jeffers*, the content of the bystanders' statements demonstrates that they had an opportunity to reflect on what had occurred, and did in fact do so. The bystanders had enough wherewithal to refuse to provide their names or written statements to police out of fear of retaliation. If a witness can reflect on his/her self-interests (*i.e.*, potential ramifications of speaking with officers), then a witness can fabricate or misrepresent the events observed. *People v. Franklin*, 683 P.2d 775, 782 n.13 (Colo. 1984). Because the statements lacked spontaneity, they were untrustworthy and didn't qualify as excited utterances.

Conversely, the state claims that the bystanders' refusal to provide written statements and/or identification information actually supports that their statements fall within the excited utterance exception. AB, p 16. According to the state, "any

reluctance to offer more detailed information later suggests the initial 'excitement' waned with the passage of time, allowing the witnesses to consider the possible risks of any continued involvement." *Id*. But the bystanders made one uninterrupted statement to Johnson. (CF p 1). No evidence supports that enough time passed between when the bystanders first spoke with Johnson and when they refused to provide him with written statements and/or identification information so that they could reflectively deliberate. The proponent of the evidence must establish the statement falls within a hearsay exception. *People v. Garcia*, 826 P.2d 1259, 1264 (Colo. 1992). And here, the prosecution failed to show why the bystanders' statements should be artificially segregated into multiple parts (*i.e.*, part excited utterance and part reflective deliberation).

Other factors support Turner's position. The state points out Johnson asked no "leading questions[,]" AB, p 15; however, the bystanders' statements were made in response to Johnson's question about "what had happened." (CF, p 1). While the fact that the bystanders made statements in response to a question doesn't preclude them from being an excited utterance, *King*, 121 P.3d at 238, this fact doesn't support that the statements were spontaneously made. "As a rule, it takes a certain amount of reflection to compose an answer to a question." *Statement in response to a question*, 4 Jones on Evidence § 28:18 (7th ed.)

The bystanders also provided long narrative statements. One bystander, for instance, stated:

> An unidentified male party holding the victims [sic] head stated he witnessed the victim and another male party having a verbal altercation. When the victim was hit in the head by the suspects closed fist, which caused the victim to lose consciousness and fall to the ground. After the victim fell to the ground the suspect kicked the victim in the head, then straddled the victim who was lying face up. Once on top of the victim the suspect kicked the victim in the head, then straddled victim who was lying face up. Once on top of the victim the suspect began hitting the unconscious victim in the face approximately four times. The suspect then got off the suspect [sic] and walked out of the park traveling north east towards the intersection of Canon Avenue and Park Avenue.

(CF, p 1). Two other bystanders—who only provided their names and "verbal statement[s]"—explained they

> were under the Pavilion and heard a crash like a bottle breaking; they turned to look and witnessed the victim unconscious while falling to the ground. While the victim was lying on the ground a white male party with a confederate flag on his right chest and a dark colored hat with lighter clips along the bill, kick [sic] the victim in the face, then straddled the victim and began punching the victim in the face approximately four to five times before getting off of the victim and walking off towards the intersection of Canon Avenue and Park Avenue. I asked if they knew the victims [sic] or the suspect's information to help indentifying [sic] them. Postler stated that all he knew was the victims [sic] first name was Allen.

(*Id*.)

Where a "statement t[akes] the form of a narrative of the events," this "in and of itself indicates that the [witness] is reflecting upon the events of the evening." *Mariano v. State*, 933 So. 2d 111, 117 (Fla. Dist. Ct. App. 2006). *See Gabramadhin v. U.S.*, 137 A.3d 178, 183-85 (D.C. 2016) (recognizing that lengthy detailed statements reflect a lack of spontaneity). Because the bystanders recounted the attack in lengthy, narrative detail, their statements lacked spontaneity.

Additionally, Johnson described two bystanders' statements as "verbal statement[s]." (CF, p 1). The formality of a "verbal statement" undercuts its spontaneity. Indeed, Johnson collected information from these bystanders: "Two of the witnesses, who were willing to provide information and were identified as **Drew Sommer D.O.B. 12-21-95, Matthew Postler D.O.B. 4-13-95** both, [sic] were only willing to provide a verbal statement." (CF, p 1) (emphasis in original). And he asked "if they knew the victims [sic] or the suspect's information to help indentifying [sic] them." (*Id*.)

Johnson also agreed the bystanders appeared excited. (TR 7/18/18, p 11:11-19). "But a startling event is not enough; the offering party must establish that the declarant spoke while still suffering the 'stress of excitement' from the event, before regaining the ability to reflect and fabricate." *The "event or condition"; effect on declarant*, 4 Jones on Evidence § 28:12 (7th ed.). When the prosecution first asked

Johnson whether the bystanders "appear[ed] to be under stress of some kind?" he responded, "[n]o, not, like, stress or – or threatened or anything like that, but just the stress of the chaotic situation[.]" (TR 7/18/18, p 11:6-10). Johnson's testimony doesn't support that the attack "was sufficiently startling to render inoperative the normal reflective thought processes of an observer[.]" *King*, 121 P.3d at 237-38.

And finally, the state stresses that the statements "occurred only a few minutes after the eyewitnesses observed the violent assault[.]" AB, p.15. The statements occurred five-to-ten minutes after Johnson arrived. (TR 7/18/18, p 12:12-16). No bright-line time limitation exists for an excited utterance. *People v. Abdulla*, 2020 COA 109M, ¶65. But where the bystanders expressed self-interest, responded to police questions, provided detailed and narrative statements, and two statements were "verbal statements," their statements weren't spontaneously uttered. Because the bystanders' statements weren't sufficiently reliable to qualify as excited utterances, the court abused its discretion in admitting them under this exception.

Moreover, additional evidence reveals the unreliability of the bystanders' statements. The sole testifying bystander recanted his accusation against Turner because he 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). When police first questioned Mitcheff about whether a man wearing a confederate flag

attacked him, he replied: "No, it was Journey." (TR 7/18/18, pp 38-39). And a picture of Turner doesn't show a confederate flag on his vest. (EX A, p 15).

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

The state alleges the court properly admitted the bystander's out-of-court statements for the non-hearsay purpose "to explain the court [sic] of the officers' investigation." AB, p 17. But the state—like the prosecution below—uses the out-of-court hearsay statements to prove Turner attacked Mitcheff: "Eyewitnesses provided responding officers with a description of the main attacker—the defendant, and the eyewitnesses pointed officers in the direction that he fled[.]" *Id*. at 1.

The prosecution, for instance, similarly contended in rebuttal argument:

> *And 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 if you take all of the evidence and you look at it in a fair and rational light, you will come to the conclusion that *the Defendant, Dirty Dog, Josh Turner, is guilty of Assault in both the First Degree and the Second Degree.*

(TR 7/18/18, pp 101-02) (emphasis added).

Not only did the prosecution use the bystanders' statements to identify Turner, but the court admitted these statements for their truth. (TR 7/18/18, pp 9-10); *Lancaster,* 615 P.2d at 721 (statements admitted as excited utterances are admissible "to prove the truth of the matter asserted.").

Only after Turner's trial concluded did the court find these statements admissible to "establish[] why the officer took the steps he did next[.]" (TR 7/18/18, pp 108-09). By that time, defense counsel couldn't request a limiting instruction under CRE 105. Nothing prevented the jury from relying upon these statements for the truth of the matter asserted. The prosecution didn't limit its use of the evidence to this non-hearsay purpose. *People v. Smalley*, 2015 COA 140, ¶38 ("[W]here the court admits evidence for a limited purpose, the prosecutor must restrict the use of that evidence to the purpose for which it was admitted."). And, based on the court's ruling and how the prosecution used the statements, the jury likely relied upon these out-of-court statements to find Turner attacked Mitcheff. They had no reason not to.

The state doesn't respond to Turner's argument that the court admitted—and the prosecution used—the out-of-court statements for the truth of the matter asserted. AB, pp 17-19. Since the state fails to respond to this argument, this Court should "take such silence to be the People's implicit concession of the issue." *People v. Jackson*, 2020 CO 75, ¶60.

Because the out-of-court statements were admitted (and used) for their truth, the court abused its discretion in later admitting the bystanders' statements to explain Johnson's investigation. *See People v. Welsh*, 58 P.3d 1065, 1069 (Colo. App. 2002), *aff'd on other grounds*, 80 P.3d 296 (Colo. 2003) (rejecting the state's argument that

the defendant's silence was properly admitted for an impeachment purpose where the prosecution used the evidence as substantive evidence of guilt); *U.S. v. Becker*, 230 F.3d 1224, 1229 (10th Cir. 2000) (where the hearsay evidence "directly implicates the issue of guilt and the government clearly relied on the informant's statements as truthful[,]" the evidence "was used for more than the 'limited' purpose" of explaining the officers' investigation "and its admission constitutes an abuse of discretion.").

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

"If there is one theme that emerges from *Crawford* [*v. Washington*, 541 U.S. 36 (2004)], it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements." *U.S. v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004). The right to confrontation "does not evaporate when testimony happens to fall within some broad modern hearsay exception, even if the exception is sufficient in other circumstances." *Crawford*, 541 U.S. at 56, n.7. Distinct inquiries govern whether a statement constitutes an excited utterance and/or testimonial hearsay:

> While both inquiries look to the surrounding circumstances to make determinations about the declarant's mindset at the time of the statement, their focal points are different. The excited utterance inquiry focuses on whether the declarant was under the stress of a startling

> event. The testimonial hearsay inquiry focuses on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement.

U.S. v. Brito, 427 F.3d 53, 61 (1st Cir. 2005).

The state claims objective circumstances show the bystanders' primary purpose was to address an ongoing emergency: "eyewitnesses pointed officers to the defendant's location, so that he would be apprehended immediately." AB, p.21. Turner disagrees. As discussed in the Opening Brief ("OB"), pp 23-25, when Johnson arrived, the assault had ended and the emergency subsided. The attacker used his fists/feet rather than a more dangerous weapon such as a gun. The bystanders responded to Johnson's question about "what had happened." The bystanders weren't victims of the attack. Johnson attempted to memorialize the bystanders' statements in written/verbal statements. And Johnson, in fact, did take "verbal statement[s]" from two bystanders. The state doesn't respond to these points. AB, pp 20-21.

Instead, the state alleges Turner "hangs his hat on the fact that the eyewitnesses refused to give their names or written statements." *Id*. at 21 n.6. The state insists the bystanders' refusal "supports the conclusion that the eyewitnesses' initial statements, which were made in the heat of the moment, were

nontestimonial." *Id*. Turner disagrees for the reasons discussed in Subsection (B). And in so arguing, the state obfuscates the tests for determining whether a statement is an excited utterance and/or testimonial.

Settle testified that bystanders refused to identify themselves or provide written statements because they "were fearful that something may happen to them" if they cooperated with the police. (TR 2/5/18, pp 15-16). The bystanders' fear of cooperating with police demonstrates that they appreciated the legal ramifications of their statements, and the primary purpose of their statements was to establish or prove past events potentially relevant to later prosecution. If the bystanders didn't believe their statements would be used as evidence in a future criminal case, then they would have provided their names to officers because there would be no fear of witness retaliation.

Thus, the admission of these out-of-court statements violated Turner's right to confrontation.

E. Reversal is required.

The state must prove harmlessness. *James v. People,* 2018 CO 72, ¶18. In doing so, the state claims "any error was harmless and harmless beyond a reasonable doubt given the victim's testimony at trial that the defendant was one of his attackers." AB, p 22. But the state omits that Mitcheff was "highly intoxicated"

during the attack. (TR 7/18/18 p 34:7-11). Mitcheff initially identified Journey as his attacker. (*Id*. at 38-39). The following day, Mitcheff only claimed he verbally argued with "Dirty Dog." (*Id*. at 41-44). And Mitcheff didn't accuse Turner of attacking him until *a year-and-a-half later* after looking up news articles about the assault and Turner's arrest, observing Turner's picture, and speaking with people from his community. (TR 7/17/18, pp 130-35).

Who attacked Mitcheff was the critical issue. Mitcheff's ability to identify his attacker was suspect, considering how drastically his account evolved and his highly intoxicated state. The bystanders' unreliable out-of-court statements bolstered Mitcheff's credibility and undercut Turner's defense. The prosecution relied upon the bystanders' out-of-court statements to prove Turner's guilt. (TR 7/18/18, pp 80-81, 100-02). The evidence against Turner was weak. And the officers' investigation was sloppy and incomplete.

While the state discounts the importance of the bystanders' statements, AB, pp 21-22, it nonetheless devotes one of only nine sentences it used to describe the facts in Turner's case to these hearsay statements. *Id*. at 1-2.

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

The prosecution endorsed Daniel Valentino as an expert in emergency medicine. (CF, p 54). The prosecution promised to limit Valentino's testimony to "introducing the SBI [serious bodily injury] form and in talking about the effects within the four corners of that form." (TR 7/17/18, p 8:15-18). The court acknowledged the "limited testimony that the Prosecution is offering[]" as a basis for denying any discovery violation sanctions beyond a continuance. (*Id*. at 8-9).

When Valentino later testified about "neurogenic shock" and unconsciousness as symptoms of paralysis quadriplegia, defense counsel objected: "I'm going to object to outside the scope of the expert endorsement in this case and violation of Rule 16." (*Id*. at 164:5-15). Overruling this objection, the court "permitt[ed]" the prosecution "some latitude" in questioning Valentino. (*Id*. at 166:8-10).

The prosecution and Valentino then had the following colloquy:

> [The prosecution]: …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]: Yes. 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) (emphasis added).

Turner argued on appeal that the court erred in permitting Valentino to testify about short-term memory loss because this testimony fell outside the scope of his field of expertise. OB, pp 39-41. The state, however, claims Turner didn't "adequately preserve[] his complaint that the testimony offered by Dr. Valentino

exceeded the scope of his expertise[.]" AB, p 23. Specifically, the state insists Turner used the words "outside the scope of the expert endorsement" instead of "outside the scope of his expertise." *Id*. at 37 n.9.

Parties aren't required to use "'talismanic language'" to preserve an argument for appeal. *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004). The contemporaneous objection rule "conserve[s] judicial resources by alerting the trial court to a particular issue in order to give the court an opportunity to correct any error[.]" *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). Turner's objections to the testimony at issue on the ground that it fell "outside the scope of the expert endorsement" sufficiently alerted the court to his appellate claim. His objection drew the court's attention to the asserted error, thus allowing the court "a meaningful chance to prevent or correct the error and create a record for appellate review." *Martinez v. People*, 2015 CO 16, ¶14.

B. <u>The prosecution violated the discovery rules when it failed to disclose any reports or physical examinations to the defense.</u>

The state claims Turner "operate[s]" on the false premise that the court found a discovery violation occurred. AB, p 29 n.7. But the court offered to impose a discovery sanction due to the prosecution's failure to disclose Mitcheff's medical records. (TR 7/17/18, pp 8-9). A court cannot fashion a remedy for a discovery

violation without first finding a discovery violation. Crim. P. 16(III)(g). So, the court at least implicitly found a discovery violation here.

If this Court disagrees, then the record supports that the prosecution violated Crim. P. 16(I)(a)(1)(III), which provides:

> The prosecuting attorney shall make available to the defense the following material and information which is within the possession or control of the prosecuting attorney, and shall provide duplicates upon request, and concerning the pending case:…Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons[.]

Notably, the prosecution admitted it spoke with Valentino before trial, and the prosecution never disclosed this conversation to the defense. (TR 7/17/18, p 8:5-11; (CF, p 99 n.3). This violated Crim. P. 16(I)(a)(1)(III).

Moreover, the prosecution's disclosure obligations "extend to material and information in the possession or control of members of his or her staff and *of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office*." Crim. P. 16(I)(a)(3) (emphasis added). "Simultaneously, Crim. P. 16(I)(b)(4) makes it incumbent on the prosecution to 'ensure' that information flows between the prosecutor's office and 'the various investigative personnel' so that the

prosecution will have 'all material and information relevant to the accused and the offense charged' in its possession." *People v. Grant*, 2021 COA 53, ¶22.

The state claims Valentino—a hospital physician—doesn't "constitute 'investigative personnel' for purposes of Crim. P. 16(I)(b)(4)[.]" AB, p.31. A division of this Court, however, recently concluded that the Philadelphia police were part of the investigation of the defendant's case because "the out-of-state law enforcement agency track[ed] down a fugitive pursuant to an arrest warrant for a Colorado crime, place[d] the fugitive under arrest, searche[d] him, and ask[ed] him standard booking questions[.]" *Grant*, ¶35. *Grant* applied the following definition of "investigation" to Crim. P. 16(I)(a)(3): "An investigation is '[t]he activity of trying to find out the truth about something, such as a crime.'" *Id*. (quoting Black's Law Dictionary (11th ed. 2019)).

Here, although Valentino is a doctor and not an officer, he didn't simply treat Mitcheff for medical purposes. Rather, he investigated and/or evaluated[1] Turner's case when he determined that Mitcheff's injuries fell within the statutory definition of SBI under § 18-1-901(3)(p). Indeed, he filled out a SBI form, which contained the statutory definition of SBI and the arresting agency's case number (16-00481):

[1] "Evaluation" means the "determination of the value, nature, character, or quality of something or someone." *Evaluation*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/evaluation.

PHYSICIAN'S STATEMENT

CR# 16-004581

Date 6/10/16

The Colorado Revised Statutes define "Serious Bodily Injury" as follows:

> "Serious Bodily Injury means bodily injury which either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."

(EX 2, p 1; CF, p 10). Valentino disclosed this report to Johnson. (CF, p 2). And based on his evaluation, the jury convicted Turner of the SBI sentence enhancer. (*Id.* at 92). Because Valentino participated in the investigation or evaluation of Turner's case and reported to the police in reference to his particular case, the prosecution had an obligation to disclose Mitcheff's medical reports to the defense. Crim. P. 16(I)(a)(1)(III),(3); Crim. P. 16(I)(b)(4).[2]

[2] "The burden of establishing the applicability of the privilege rests with the claimant of the privilege." *Clark v. Dist. Ct.*, 668 P.2d 3, 8 (Colo. 1983). Mitcheff never asserted any privilege applied to his medical information. Regardless, the physician-patient privilege may be waived. *Id.* Any claim of privilege was waived here when the prosecution elicited Valentino's testimony about the seriousness and extent of Mitcheff's injuries. *Kelley v. Holmes*, 470 P.2d 590, 592 (Colo. App. 1970).

C. The court abused its discretion in failing to limit Valentino's testimony to information contained on the SBI form.

The state claims Turner asks for "a severe sanction" to be "imposed because the prosecution willfully violated Crim. P. 16[.]" AB, p 33. However, Turner only requests the remedy that the prosecution proposed: 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). Limiting Valentino's testimony to only the information on the SBI form was less drastic than continuing a trial that had already begun. And the state fails to address Turner's argument that Turner invoked his right to a speedy trial before trial, and the court's proposed sanction remedy placed him in the untenable position of choosing between two constitutional rights. OB, pp 37-38.

Turner relies upon his Opening Brief for the remainder of the state's contentions. *Id*. at 34-39.

D. The court abused its discretion in allowing Valentino to testify outside the scope of his expertise.

Nothing in the record supports that Valentino had specific training, education, or experience in brain functioning, memory loss, or behavioral neurology. Nonetheless, Valentino testified that someone experiencing paralysis quadriplegia would "very possibl[y]" lose consciousness/memory and would "very possibl[y]" regain some of their memory. (TR 7/17/18, pp 166-67).

"[C]ommon-sense[,]" the state argues, "dictates that any medical doctor would be qualified to offer the type of general testimony that Dr. Valentino offered—that is, that short-term memory loss might result from a serious brain injury and that such memory loss might be recovered later." AB, p 39. Turner disagrees.

Valentino is board certified in general surgery and critical care and he works as an attending general and trauma surgeon in an emergency room where he evaluates and treats critically injured patients. (TR 7/17/18, pp 157-59). "Emergency medicine focuses on the immediate decision making and action necessary to prevent death or any further disability both in the pre-hospital setting by directing emergency medical technicians and in the emergency department." *Emergency Medicine*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, https://www.aamc.org/cim/explore-options/specialty-profiles/emergency-medicine. Whereas "[m]emory issues are treated in the neurology subspecialty called Behavioral Neurology." *Memory Disorder Clinic*, UNIVERSITY OF COLORADO ALZHEIMER'S AND COGNITION CENTER, https://medschool.cuanschutz.edu/alzheimer/clinic. "Neurology involves the treatment of disease or impaired function of the brain, spinal cord, peripheral nerves, muscles, and autonomic nervous system, as well as the blood vessels that relate to

these structures." *Neurology*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, https://www.aamc.org/cim/explore-options/specialty-profiles/neurology.

Because Valentino isn't a neurologist and didn't testify about his training and experience in this specialty, his expert testimony about short-term memory loss and recovery fell outside the scope of his field of expertise. OB, pp 39-41. Nor is it "commonsense" that an emergency medicine doctor would know about memory recovery after a serious head injury. Thus, the court abused its discretion in permitting Valentino to testify beyond the scope of his expertise. *Cf. Laughtman v. Long Island Jewish Valley Stream*, 192 A.D.3d 677, 678 (N.Y. App. Div. 2021) (finding the plaintiff expert's affirmation, who was an emergency medicine physician, "lacked probative value as it failed to specify that the expert had any specific training or expertise in neurology"); *Dengler v. State Farm Mut. Ins. Co.*, 354 N.W.2d 294, 296 (Mich. Ct. App. 1984) (finding the court didn't abuse its discretion in excluding the testimony of an expert in internal medicine because he wasn't an expert in neurology).

E. Reversal is required.

Because Turner adequately preserved his appellate claims, the state must prove harmlessness. *James*, ¶18. In Issue I, the state claims the most significant evidence was "the victim's testimony at trial that the defendant was one of his

attackers[.]" AB, p 22. Valentino's expert testimony bolstered Mitcheff's credibility because he originally couldn't recall Turner attacking him, but somehow remembered Turner's involvement in the assault one-and-a-half years later. 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

The state agrees with Turner's standard of review. AB, pp.40-41.

B. Law and analysis

One-and-a-half years after Mitcheff accused Journey of assaulting him, he suddenly recalled Journey attacked him along with Turner, Ash, and Journey's friend, Icarus. (TR 7/18/18, pp 38-39; 7/17/18, pp 130-36). During this time, Mitcheff viewed articles about his attack, looked at Turner's picture, and spoke with people from Manitou. (TR 7/17/18, pp 132-35).

In closing and rebuttal argument, the prosecution insisted Journey "enlisted" Turner to do "his dirty work" and attack Mitcheff. (TR 7/18/18, pp 80:15-23, 100:14-24). Without any evidence, the prosecution alleged Journey approached Turner and stated: "I need help with somethin'" and Turner "decided he'd go along with it." (*Id*. at 100:18-19). The prosecution also surmised that Turner told Journey: "'I'll help you out; I don't have anything else goin' on today.'" (*Id*. at 80:21-22)

Nothing in the record shows that Journey asked Turner to attack Mitcheff and Turner agreed. Nonetheless, the state claims: "the prosecution's argument relied on fair inferences drawn from the evidence at trial—that is, the evidence of verbal disagreements between many people, including the victim, 'Journey,' and 'Dirty Dog'—the defendant[.]" AB, p.46. Yet, this evidence, without employing an impermissible chain of inferences, doesn't support that Turner verbally agreed to attack Mitcheff. *See People v. Donald,* 2020 CO 24, ¶30.

That the prosecution made up a fake conversation between Turner and Journey only highlights the serious deficiencies in its case. The prosecution's argument lowered its burden of proving complicity. (CF, p 84). And the court's general instruction that the attorneys' arguments weren't evidence didn't adequately offset this error. AB, p.47; *Wilson v. People*, 743 P.2d 415, 421 (Colo.1987) ("Although jurors are obviously aware that the arguments of counsel are not evidence, we cannot ignore the fact that jurors do pay heed to the arguments of counsel in arriving at a result."). Reversal is required.

CONCLUSION

Turner asks for the relief requested in his Opening Brief.

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CERTIFICATE OF SERVICE

I certify that, on January 19, 2022, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Jacob R. Lofgren of the Attorney General's office.