DATE FILED: August 23, 2021 3:31 PM
FILING ID: 6819C18961BD2
CASE NUMBER: 2020CA2145

COURT OF APPEALS,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

Appeal; Arapahoe District Court;
Honorable Darren Vahle; and
Case Number 2019CR2273

Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
LUIS TORO-OSPINA

Megan A. Ring
Colorado State Public Defender
JEANNE SEGIL
1300 Broadway, Suite 300
Denver, CO 80203

Phone Number: (303) 764-1400
Fax Number: (303) 764-1479
Email: PDApp.Service@coloradodefenders.us
Atty. Reg. #50898

Case Number: 2020CA2145

**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:

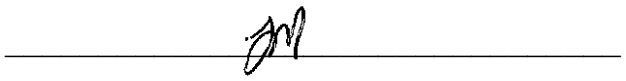
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,471 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.



## TABLE OF CONTENTS


Page

ISSUES PRESENTED ..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS ..... 2

SUMMARY OF THE ARGUMENT ..... 4

ARGUMENTS ..... 6

I. The trial court violated Toro-Ospina's equal protection rights and reversibly erred by denying his *Batson* challenge. ..... 6

A. Standard of Review ..... 6

B. Applicable Facts ..... 6

C. Argument ..... 9

1. The trial court erred in denying the prima facie challenge and did not conduct a proper *Batson* analysis. ..... 11

2. The prosecutor failed to give a race-neutral reason for its strike of Robertson. ..... 14

3. The prosecutor's proffered reason for striking Villegas was pretextual. ..... 15

II. The trial court reversibly erred and denied Toro-Ospina's constitutional rights when it denied the defense's request to inquire about race on the juror questionnaires. ..... 18

A. Standard of Review ..... 18

B. Argument ..... 19

III. The trial court reversibly erred in denying the defense-tendered implicit bias instruction. ..... 26

A. Standard of Review ..... 26

B. Argument ..... 26

IV. The prosecutor denigrated the defense, misstated the law, and misstated the evidence, requiring reversal. ..... 31

A. Standard of Review ..... 31

B. Argument ..... 31

1. The prosecutor impermissibly denigrated Toro-Ospina. ..... 32

2. The prosecution misstated the law. ..... 33

3. The prosecution misstated the evidence in the case. ..... 34

4. Reversal is required. ..... 35

V. The trial court violated Toro-Ospina's right to present a defense by precluding evidence that the victim dealt drugs around the building. ..... 37

A. Standard of Review ..... 37

B. Applicable Facts ..... 37

C. Argument ..... 38

D. Reversal is required. ..... 41

VI. Assuming arguendo the above errors do not individually require reversal, cumulatively they deprived Toro-Ospina of his right to a fair trial and require reversal. ..... 42

A. Standard of Review ..... 42

B. Argument ..... 42

CONCLUSION ..... 43

CERTIFICATE OF SERVICE ..... 44

## TABLE OF CASES

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *en passim*

Berger v. U.S., 295 U.S. 78 (1935) ..... 36

Bernal v. People, 44 P.3d 184 (Colo. 2002) ..... 37

Chambers v. People, 682 P.2d 1173 (Colo. 1984)..... 26

Chin v. Runnels, 343 F.Supp.2d 891 (N. D. Cal. 2004)..... 27

Com. v. Arriaga, 781 N.E.2d 1253 (Mass. 2003).....20-21

Craig v. Carlson, 161 P.3d 648 (Colo. 2007) ..... 11

Crane v. Kentucky, 476 U.S. 683 (1986)..... 38

Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005)..... 31,36

Duncan v. Louisiana, 391 U.S. 145 (1968) ..... 31,35

Fields v. People, 732 P.2d 1145 (Colo. 1987)..... 9

Flowers v. Mississippi, 139 S. Ct. 2228 (2019).....10,15-16

Foster v. Chatman, 136 S. Ct. 1737 (2016) ..... 16

Harris v. People, 888 P.2d 259 (Colo. 1995)..... 31,35

Hernandez v. New York, 500 U.S. 352 (1991)..... 14

Hoang v. People, 323 P.3d 780 (Colo. 2014) ..... 18

Howard-Walker v. People, 2019 CO 69 ..... 42

In re Winship, 397 U.S. 358 (1970)..... 26

Irvin v. Dowd, 366 U.S. 717 (1961) ..... 19

James v. People, 2018 CO 72 ..... 41

Johnson v. California, 545 U.S. 162 (2005) ..... 20

Krutsinger v. People, 219 P.3d 1054 (Colo. 2009)..... 39

McDaniels v. Kirkland, 839 F.3d 806 (9th Cir. 2016) ..... 22

McKnight v. State, No. 03-08-00105-CR, 2009 WL 722261, at *1 (Tex. App. Mar. 20, 2009) ..... 21

Miller-El v. Cockrell, 537 U.S. 322 (2003) ..... 10,13,18

Miller-El II v. Dretke, 545 U.S. 231 (2005) ..... 13,16,20

Morrison v. People, 19 P.3d 668 (Colo. 2000) ..... 19

Oaks v. People, 371 P.2d 443 (Colo. 1962) ..... 42

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) ..... 19,25,27

People v. Anderson, 991 P.2d 319 (Colo. App. 1999) ..... 34

People v. Asberry, 172 P.3d 927 (Colo. App. 2007) ..... 33

People v. Atencio, 878 P.2d 147 (Colo. App. 1994) ..... 40

People v. Baker, 924 P.2d 1186 (Colo. App. 1996) ..... 11

People v. Beauvais, 2017 CO 34 ..... 20

People v. Clark, 214 P.3d 531 (Colo. App. 2009) ..... 35

People v. Collins, 187 P.3d 1178 (Colo. App. 2008) ..... 10,13,16,20

People v. Dunham, 2016 COA 73 ..... 42

People v. Farbes, 973 P.2d 704 (Colo. App. 1998) ..... 11

People v. Gibbens, 905 P.2d 604 (Colo. 1995) ..... 40

People v. Hampton, 696 P.2d 765 (Colo. 1985) ..... 39

People v. Jones, 675 P.2d 9 (Colo. 1984) ..... 39-40

People v. Jones, 832 P.2d 1036 (Colo. App. 1991) ..... 36

People v. Madrid, 2021 COA 70 ..... 22

People v. McBride, 228 P.3d 216 (Colo. App. 2009)..... 33,36

People v. Mendoza, 876 P.2d 98 (Colo. App. 1994) ..... 13

People v. Miller, 113 P.3d 743 (Colo. 2005)..... 30

People v. Morales, 2014 COA 129 ..... 22

People v. Nardine, 2016 COA 85 .....32-33,36

People v. Ojeda, 2019 COA 137M .....14-15

People v. Ratcliff, 778 P.2d 1371 (Colo. 1989)..... 39

People v. Reeves, 252 P.3d 1137 (Colo. App. 2010) ..... 33

People v. Rodriguez, 794 P.2d 965 (Colo. 1990) ..... 33,36

People v. Rodriguez, 2015 CO 55 .....9,12-13

People v. Serra, 2015 COA 130.....32-33

People v. Smith, 848 P.2d 365 (Colo. 1993) ..... 39

People v. Stewart, 55 P.3d 107 (Colo. 2002)..... 37

People v. Trujillo, 433 P.3d 78 (Colo. App. 2018)..... 26

People v. Vasquez, 148 P.3d 326 (Colo. App. 2006) ..... 39

People v. Vialpando, 2020 COA 42 ..... 34,36

People v. Wilson, 2012 COA 163M ..... 18

People v. Wilson, 2015 CO 54M, ..... 11,18

Powers v. Ohio, 499 U.S. 400 (1991) ..... 9,18,25

Riley v. People, 266 P.3d 1089 (Colo. 2011) ..... 26

Snyder v. Louisiana, 552 U.S. 472 (2008)..... *en passim*

State v. Berhe, 444 P.3d 1172 (Wash. 2019) ..... 27-28,30

State v. Edwards, 102 A.3d 52 (Conn. 2014) ..... 21

State v. Fleming, 239 A.3d 648 (Me. 2020) ..... 28

State v. Holmes, 221 A.3d 407 (Conn. 2019) ..... 29

State v. Raynor, 221 A.3d 401 (Conn. 2019) ..... 22

Turner v. Murray, 476 U.S. 28 (1986) ..... 19

United States v. Barnette, No. 3:97CR-23, 2010 WL 2085312 (W.D.N.C. May 20, 2010) ..... 20

United States v. Hernandez-Estrada, 749 F.3d 1154 (9th Cir. 2014) ..... 21

United States v. Osorio, 801 F. Supp. 966 (D. Conn. 1992) ..... 21

Valdez v. People, 966 P.2d 587 (Colo. 1998)..... 6,9-10,14

Vega v. People, 893 P.2d 107 (Colo. 1995) ..... 41

Wend v. People, 235 P.3d 1089 (Colo. 2010) ..... 31

Wilson v. People, 743 P.2d 415 (Colo. 1987) ..... 32-33,36

Yusem v. People, 210 P.3d 458 (Colo. 2009)..... 35,41

## TABLE OF STATUTES AND RULES

Colorado Revised Statutes
Section 13-71-104(3)(a) ..... 9,19
Section 18-3-206(1)(a)/(b) ..... 1
Section 18-18-407(d) ..... 40

Colorado Rules of Criminal Procedure
Rule 24(a) ..... 24

Colorado Rules of Evidence
Rule 403 ..... 38,40,41
Rule 405(b) ..... 39
Rule 606(b) ..... 25

Colorado Jury Instructions
Crim E:03 (2018) ..... 33

## CONSTITUTIONAL AUTHORITIES

United States Constitution
Amendment V ..... *en passim*
Amendment VI ..... *en passim*
Amendment XIV ..... *en passim*

Colorado Constitution
Article II, Section 16 ..... *en passim*
Article II, Section 23 ..... *en passim*
Article II, Section 25 ..... *en passim*

## OTHER AUTHORITIES

American Bar Association Standards for Criminal Justice,
Standard 3-6.8(b) ..... 32

Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 Hastings Women's L.J. (2020) ..... 28

Federal Jury Practice and Instructions
Section 3:4 (6th ed.) ..... 21

Richard Seltzer et. al., Fair Cross-Section Challenges in Maryland: An Analysis and Proposal, 25 U. Balt. L. Rev. 127, 147–48 (1996) ..... 21

Judge Mark W. Bennett, "*Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*," 4 Harv. L. & Pol'y Rev. 149 (2010) ..... 27-28

The American Bar Association Principles for Juries and Jury Trials (revised 2016), Principle 6 – Courts Should Educate Jurors Regarding The Essential Aspects Of A Fair Trial, Subsection C ..... 28

United States Code
Section 1869(h)..... 21

https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf ..... 29

https://www.washingtonpost.com/context/read-judge-s-instructions-to-derek-chauvin-trial-jurors/5b3517cb-bfa2-4dad-957e-11acfb2783f2/ ..... 29

https://northerndistrictpracticeprogram.org/wp-content/uploads/2017/09/Bennett-Conduct-of-Jury-Instructions.pdf ..... 29

https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/6_11_20_Letter.pdf ..... 29

## ISSUES PRESENTED

I. Whether the trial court violated Toro-Ospina's equal protection rights and reversibly erred by denying his *Batson* challenge.

II. Whether the trial court reversibly erred and denied Toro-Ospina's constitutional rights when it denied the defense's request to inquire about race on the juror questionnaires.

III. Whether the trial court reversibly erred in denying the defense-tendered implicit bias instruction.

IV. Whether the prosecutor denigrated the defense, misstated the law, and misstated the evidence in closing argument, requiring reversal.

V. Whether the trial court violated Toro-Ospina's right to present a defense by precluding evidence that the victim dealt drugs around the building.

VI. Assuming arguendo the above errors do not individually require reversal, whether cumulatively they deprived Toro-Ospina of his right to a fair trial and require reversal.

## STATEMENT OF THE CASE

The prosecution charged Toro-Ospina with two counts of felony menacing.[1] CF, pp 9-10. The jury convicted Toro-Ospina as charged and the court sentenced him to a one-year prison sentence. CF, pp 374-77, 394; TR 9/23/20, pp 62-65; TR 11/12/20, p 13:6-11.

## STATEMENT OF THE FACTS

Luis Toro-Ospina emigrated from Colombia and lived with his wife and three children in a one-bedroom apartment in a complex on Colfax Street in Arapahoe. TR 9/22/20, pp 177-80. The neighborhood was extremely dangerous and Toro-Ospina lived in constant fear that his family could get hurt. Id., pp 179-80. He made sure that he always had his gun on him in case he needed to protect his children. Id., pp 179, 186. 207. Toro-Ospina had received firearms training in Colombia and had a firearm owner's card and receipt. Id., pp 104, 177.

On the morning of July 19, 2019**,** Toro-Ospina returned home after working all night and went to bed. Id., p 185:6-11. He woke up to the apartment door to the back slamming multiple times. Id., p 185:12-15. Toro-Ospina explained that those doors kept breaking and created a security problem for the tenants. Id., pp 180-81.

[1] § 18-3-206(1)(a)/(b), C.R.S. (F5). The prosecution also charged Toro-Ospina with one count of prohibited use of a weapon, but dismissed the count prior to trial. CF, pp 9-10, 230; TR 9/21/20, p 5:1-11.

People would break the doors so that they could get inside to sell drugs. Id. Toro-Ospina investigated the matter that morning and walked into the yard. Id., pp 186, 191-92.

At that time, Jose Granados and Mitchell Oliver, the maintenance workers at the complex, were picking up trash in the backyard. TR 9/21/20, pp 183-84; TR 9/22/20, p 24:22-24. They also attempted to fix the door and were responsible for slamming it and waking up Toro-Ospina. TR 9/22/20, pp 19-20, 36-37. While picking up the trash, Oliver held a metal pole attached to a claw in one hand, and a bucket in the other hand. TR 9/21/20, pp 206-07; TR 9/22/20, pp 34-35.

When Toro-Ospina walked into the yard, Oliver was just a few feet away carrying the large metal pole. TR 9/22/20, pp 191-92. According to Toro-Ospina, he and Oliver began arguing with each other. Id., p 193:23-25. Toro-Ospina testified that Oliver then raised his arm with the metal pole and Toro-Ospina believed that Oliver was about to hit him. Id., pp 193-95, 200-01. In order to defend himself, Toro-Ospina fired three shots from his gun into the air. Id., pp 194-95, 200. All witnesses—Toro-Ospina, Oliver, and Granados—testified that Toro-Ospina shot up into the air and did not aim at anyone. TR 9/21/20, p 191, 196; TR 9/22/20, pp 50, 194. Toro-Ospina explained that he learned to shoot into the air in Colombia in order to diffuse situations and reestablish peace. Id., p 194:14-17.

Granados and Oliver offered differing testimony about the incident in question. Granados testified that Toro-Ospina never pointed the gun at either one of them. TR 9/21/20, pp 196, 210-11. According to Oliver, Toro-Ospina had the gun pointed directly at him when he initially walked into the yard. TR 9/21/20, pp 196, 210-11; TR 9/22/20, p 28:6-9.

After the incident, Toro-Ospina spoke for a few minutes to Granados. TR 9/21/20, pp 198-99, 201; TR 9/22/20, p 196:5-23. Oliver ran away and called the police. TR 9/21/20, p 198:22-25; TR 9/22/20, pp 51-53. When the police arrived, Toro-Ospina presented the officers with this firearm owner's card and receipt. TR 9/22/20, pp 82, 198. The police never obtained surveillance footage nor did they photograph the scene that day. TR 9/22/20, pp 98-99, 168-70, 174.

Oliver had a prior conviction for felony menacing. TR 9/22/20, pp 11-12. Toro-Ospina had no prior criminal history. TR 9/22/20, pp 146-47. The defense argued that Toro-Ospina acted in self-defense. TR 9/23/20, pp 31-32, 43-51.

## SUMMARY OF THE ARGUMENT

I. The trial court erroneously denied Toro-Ospina's *Batson* challenge. First, the trial court misapprehended *Batson* when it did not find a prima facie case based on a finding that people of color remained on the jury and the court did not notice a pattern. Second, the prosecutor struck a Black man

based on his views of the police, which was not a race-neutral reason. Third, the proffered reason for striking a Latina woman was pretextual. Reversal is required.

II. The trial court reversibly erred when it denied the defense's request to ask about race on the jury questionnaires. Such practice is commonplace throughout the United States and is necessary to raise effective *Batson* challenges. Without knowing the race of the venire, the trial court could not uphold its duty to protect Toro-Ospina's constitutional rights, nor could it protect the rights of the veniremembers and the community at large.

III. The trial court reversibly erred by denying the defense-requested instruction on implicit bias. Such an instruction was necessary to ensure that the jury was impartial during deliberation and did not rely on stereotypes or other implicit biases.

IV. Prosecutorial misconduct occurred when the prosecutor denigrated Toro-Ospina, misstated the law by telling the jury that it was not to consider lack of evidence, and misstated the evidence introduced at trial. Such pervasive misconduct requires reversal.

V. The trial court denied Toro-Ospina the right to present a defense when it excluded evidence that Toro-Ospina was aware that Oliver participated in

drug deals around the building. Because drug-dealing is linked to violence, the evidence was relevant to the reasonableness of Toro-Ospina's belief that Oliver would use imminent unlawful physical force against him. Reversal is required.

VI. The individual errors in this case, while requiring reversal on their own, also require reversal in the aggregate.

## ARGUMENTS

### I. The trial court violated Toro-Ospina's equal protection rights and reversibly erred by denying his *Batson* challenge.

#### A. Standard of Review

The standard of review for a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge depends upon which step of the analysis is being reviewed. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998). The first and second steps under *Batson*, are subject to de novo review. *Id*. at 590-91. The third step of the *Batson* analysis is reviewed for clear error. *Id.* at 590. This issue was preserved. TR 9/21/19, pp 149-52.

#### B. Applicable Facts

During voir dire, the prosecutor questioned veniremembers about when it could be appropriate to "pull a gun on another human being." TR 9/21/20, p 85:13-15. Juror Villegas said, "Definitely the first thing that comes to mind is when

someone enters our house, and my daughter's sleeping and someone tries to harm us, I think that would be acceptable." TR 9/21/20, p 85:13-22. The prosecutor responded, "Sure." Id., p 85:23. Many other veniremembers also said that it is appropriate to use a gun in self-defense if oneself or one's family was threatened. Id., pp 85-92.

During voir dire, Juror Robertson said that he had a bad experience in the past year with law enforcement and was not "real comfortable listening to the officers from my standpoint." Id., p 83:18-25. He said that he would discount officer's credibility, especially if there were a lot of police officers testifying. Id., p 84:4-13. The prosecution challenged Robertson for cause and the trial court questioned him further. Id., pp 93-94. Robertson said that it could be hard for him to believe certain witnesses, including officers, but he could find someone guilty or not guilty based on the evidence presented. Id., pp 95-97.

The prosecutor used its first peremptory strike on Robertson. Id., pp 145-46. The prosecutor used its third peremptory strike on Villegas. Id., p 147:4-5. The defense raised a *Batson* challenge and explained that Robertson "appears African American and Villegas appears Hispanic." Id., p 149:9-15. The defense argued that Robertson said he could follow the law and Villegas did not say anything that would

be bad for the prosecution. Id., p 149:16-25. The defense argued that it met the first prong of a *Batson* challenge. Id., p 150:1.

The court did not consider this prima facie case before the prosecutor began stating its reasons. Id., p 150:1-3. The prosecutor argued that Robertson had a bad experience with law enforcement within the last year and was not trusting of law enforcement. Id., p 150:4-15.

Regarding Villegas, the prosecutor argued that Villegas made a comment that self-defense was "more warranted regarding someone attempting to enter the home where her kids were sleeping." Id., p 151:4-7. Because Toro-Ospina lived with his children and was sleeping in their apartment, the prosecutor argued that Villegas would be more likely to side with the self-defense argument. Id., p 151:7-14.

The court denied the *Batson* challenge. In so doing, it explained the following:

> This is a somewhat diverse pool of jurors. We have a number of people who are people of color, both remaining on the jury and have been excused by both sides. And the Court does not find either a pattern or some evidence that this is a discriminatory practice by the Prosecution that exercised four challenges, and left open two. Those two challenges -- there are still people who are of color who could be challenged by the People, and they waived two of their challenges, and two of their challenges were exercised on what appeared to be Caucasian individuals.

Id., pp 151-52. The court then addressed the reasons raised by the prosecutor:

> With regard to the two, the gentleman, who is African-American and the young woman, who appears to be Hispanic by name and

> appearance, the Court finds that there are race-neutral reasons given by the Prosecution. So that even if the Court had made the first step of Batson and found some sort of discriminatory appearance, the Court does find that these are race-neutral reasons for which a reasonable lawyer can strike someone that doesn't have anything to do with race. And so the Court will deny the *Batson* challenge.

Id., p 152:3-13.

### C. Argument

The prosecution cannot discriminate in the jury selection process on account of race, color, national origin, religion, or gender. U.S. Const. amend. XIV; Colo. Const. art. II, §§ 16, 25; *Batson*, 476 U.S. at 85-87; *Fields v. People*, 732 P.2d 1145 (Colo. 1987); § 13-71-104(3)(a), C.R.S. The test announced in *Batson* serves not only to protect individual defendants from discrimination in jury selection but also to prevent the harm to the excluded jurors and the community at large that results from the discriminatory use of peremptory challenges. *Batson*, 476 U.S. at 87; *Powers v. Ohio*, 499 U.S. 400, 406-411 (1991). The exclusion of even a single prospective juror because of race violates equal protection. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *People v. Rodriguez*, 2015 CO 55, ¶10.

The first step in *Batson* requires the defense to establish a prima facie showing of discrimination. 476 U.S. at 96. This standard is not high; rather, the defense must present evidence that raises an inference of purposeful discrimination. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998); *Batson*, 476 U.S. at 96-98. Under the

second step, the burden shifts to the prosecutor to establish a race-neutral reason for the peremptory strike. *Valdez*, 966 P.2d at 590; *Batson*, 476 U.S. at 97. At the third step, the court must determine whether the opponent of the strike proved purposeful racial discrimination. *Valdez*, 966 P.2d at 590; *Batson*, 476 U.S. at 98.

Before the court makes its determination, the defense can rebut the prosecution's race-neutral reason by demonstrating the proffered reason was pretextual. *Valdez*, 966 P.2d at 590. The court then considers, based on all the evidence, whether the defendant established by a preponderance of the evidence that one or more jurors were excluded on account of race. *Id*. At this step, the "critical question" is the "persuasiveness of the prosecutor's justification for his [or her] peremptory strike," which "comes down to whether the trial court finds the prosecutor's race-neutral explanation to be credible." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) ("*Miller-El I*"); *People v. Collins*, 187 P.3d_1178, 1182-83 (Colo. App. 2008).

Deference to the trial court on the third step "does not imply abandonment or abdication of judicial review." *Miller-El I*, 537 U.S. at 340. The reviewing court must find that the trial court clearly erred where the relevant facts and circumstances taken together establish that the prosecution's strikes were motivated in substantial part by discriminatory intent. *Id*.; *see also Flowers v. Mississippi*, 139 S. Ct. 2228,

2235, 2251 (2019). In addition, a trial court's findings "based on an incorrect legal standard need not be accorded any deference." *People v. Baker*, 924 P.2d 1186, 1190 (Colo. App. 1996), *disapproved of on other grounds by Craig v. Carlson*, 161 P.3d 648 (Colo. 2007).

Typically, where the trial court has "heard the prosecutor's race-neutral explanation and ruled on the ultimate issue," the step one challenge is moot. *People v. Wilson*, 2015 CO 54M, ¶12. However, here, the trial court first denied the prima facie case, and then covered its bases by also denying the step-three *Batson* challenge. If this Court concludes the first step is not moot, this Court should review the trial court's decision at each stage. First, the trial court erred at step one in finding that the defense had not met its prima facie case. Second, the court erred at step two in finding that the proffered reason for striking Robertson was race-neutral. Third, the court erred at step three because the proffered reason for striking Villegas was pretextual. Thus, the trial court reversibly erred in denying the *Batson* challenge.

### 1. The trial court erred in denying the prima facie challenge and did not conduct a proper *Batson* analysis.

If this Court does not find that the step one error is moot, then the court erred at step one. *See People v. Farbes*, 973 P.2d 704, 706 (Colo. App. 1998) ("permitting the prosecutor to put her explanations on the record did not render the prima facie showing issue moot, since the trial court at that point had already ruled that defendant

had failed to make the requisite prima facie showing."). Here, the court said, "even if the Court had made the first step of *Batson*…" thereby indicating that the court already ruled against the defense at step one. TR 9/21/20, p 152:7-9. Because the court denied the step one challenge, this Court should review its erroneous denial.

The court denied the step one challenge because there was no pattern and people of color remained on the jury.[2] Id, p 151-52. In addition, the prosecutor waived two of its preemptory challenges and used two of their challenges on "what appeared to be Caucasian individuals." Id., pp 151-52.[3]

It is well established that "a pattern is not essential to a prima facie showing." *Rodriguez*, ¶10. A pattern of strikes may be a factor in a prima facie analysis but it is not a necessary predicate to establishing a *Batson* violation. *Batson*, 476 U.S. at 95-97. A pattern is not required because "[f]or evidentiary requirements to dictate that several must suffer discrimination before one could object would be inconsistent with the promise of equal protection to all." *Id.*, at 95-96; *see also Snyder*, 552 U.S. at 478. The trial court denied Toro-Ospina's *Batson* challenge because of a lack of

[2] There was no record of the race of veniremembers or members of the jury, *infra* Argument II.

[3] Again, the court could not be certain whether those two veniremembers were white. *Infra*, Argument II.

pattern, in clear violation of federal and state law. *See Rodriguez*, ¶10; *Batson*, 476 U.S. at 95-97; *Snyder*, 552 U.S. at 478.

In addition, any seated jurors of the same race do not remedy a discriminatory strike as "the refusal to strike one potential juror does not foreclose the possibility of a discriminatory motive in striking another similar juror." *Collins*, 187 P.3d at 1183-84; *see also Miller-El II v. Dretke*, 545 U.S. 231, 249-50 (2005). Moreover, here, the court made broad findings that "people of color" remained on the jury, without even knowing their race and without indicating that they were of the same race as the two people struck. *Infra*, Argument II.

The court misapprehended the law when it ruled that there was no prima facie case because the prosecutor did not strike all the people of color and the defense did not establish a pattern. The court also did not give the defense an opportunity to rebut the reasons proffered by the prosecutor. *See People v. Mendoza*, 876 P.2d 98, 101-02 (Colo. App. 1994) (remanding for district court to conduct third step of *Batson* analysis where court gave the defense no opportunity to rebut prosecutor's reasons).

Under *Rodriguez*, this Court may remand the case to the trial court with directions for it to conduct a complete *Batson* analysis and make the required findings. *Id.*, ¶21. However, in *Snyder*, our Supreme Court held that a reversal for a new trial is required where the trial court could not meaningfully conduct a three-

step *Batson* analysis due to passage of time or inability to make requisite findings. *Snyder*, 552 U.S. at 486. Because there is no record regarding the race of the veniremembers, *infra* Argument II, and the race of veniremembers was critical to the analysis, the court cannot conduct a meaningful *Batson* analysis and this Court should reverse and remand for a new trial. *Snyder*, *supra*.

**2. The prosecutor failed to give a race-neutral reason for its strike of Robertson.**

The issue at step two is the facial validity of the prosecutor's reasons. *Valdez*, 966 P.2d at 590; *see also Batson*, 476 U.S. at 97. While the second step does not require that the explanation be persuasive or even plausible, it does require that the explanation be race neutral. *Hernandez v. New York*, 500 U.S. 352, 360 (1991). If a discriminatory purpose is "inherent in the prosecutor's proffered explanation," the reason offered is not race neutral. *Id.*

Robertson, a Black man, said that he had a bad experience in the past year with the police and did not feel comfortable listening to police officers. TR 9/21/20, pp 83-84. However, he did indicate that he could follow the law and render a verdict based on the evidence presented. Id., pp 85-97. In this country, views on policing are inextricably connected to race. *See People v. Ojeda*, 2019 COA 137M, ¶26, *cert granted* No. 19SC763, 2020 WL 4915894, (Colo. Aug. 17, 2020) (veniremember's views about the criminal justice system "were inextricably linked to being a Hispanic

male who had experienced racial profiling"). Additionally, in *Ojeda*, this Court found it relevant that the trial court denied the prosecutor's challenge-for-cause because the veniremember stated he would listen to the evidence. *Id.*, ¶28. Similarly, here, Robertson indicated that he could listen to the evidence and render a verdict based upon it. Given the linkage between experience with police and race, a discriminatory purpose was inherent in the prosecutor's proffered reason. Because the prosecutor's reasons were not race neutral, this Court must reverse Toro-Ospina's convictions and remand for a new trial.

**3. The prosecutor's proffered reason for striking Villegas was pretextual.**

In a step-three analysis, the court considers, based on all the evidence, whether the defendant established by a preponderance of the evidence that one or more jurors were excluded on account of race. *Id*. A court should consider any relevant circumstances in evaluating the prosecutor's reasons for discriminatory intent. *Flowers*, 139 S.Ct. at 2243.

Here, the prosecutor's proffered reason for striking Villegas was her comment that self-defense could be warranted if someone entered her home, her children were sleeping, and the person attempted to harm them. TR 9/21/20, p 151:4-7. The prosecutor argued that this example mirrored the facts of this case. Id. However, when Villegas gave this example, the prosecutor simply responded "Sure," and

moved along to ask the same question to other veniremembers. Id., p 95:13-23. The prosecutor's failure to engage in meaningful voir dire examination on its reasons for concern is evidence that these explanations are "a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246; *see also Collins*, 187 P.3d at 1183. If the prosecution was concerned about Villegas's views on self-defense, all the prosecutor had to do was inquire further. It failed to do so.

In addition, the prosecutor argued that Villegas's example mirrored the facts of the case. TR 9/21/20, p 151:4-7. However, under the facts of the case, Oliver never entered the home where Toro-Ospina's children were sleeping. Rather, the confrontation occurred outside on a yard where Oliver worked. Thus, the prosecutor's reason was refuted by the record. *See Foster v. Chatman*, 136 S. Ct. 1737, 1749 (2016) (finding reason pretextual where "independent examination of the record" reveals that much of the reasoning "has no grounding in fact").

Finally, if the prosecution's stated reasons for striking a juror apply equally well to jurors of other races whom it does not strike, this also may indicate purposeful discrimination ("comparative juror analysis"). *Miller-El II*, 545 U.S. at 248, 255; *Flowers*, 139 S.Ct. at 2248-49.

Here, many veniremembers, likely including many white veniremembers,[4] gave similar answers that it would be appropriate to pull a gun if someone threatened them or their families. TR 9/21/20, pp 85-92. Mr. Davis said that it would be appropriate to pull a gun if it was in self-defense, explaining that self-defense encompasses when one's life or one's family is threatened. Id., pp 85-86. Mr. Kopacz also said that it is appropriate to pull a firearm if he was "fearful for my life or for any of my family's life." Id., p 87:17-20. Mr. Prost also said that it could be appropriate if "their lives are being threatened or someone they love very much." Id., p 89:10-11. Mr. Drake said that it would be appropriate "when your life is threatened or your family is threatened." Id., p 91:14-15.

Each of these answers communicated the same principle as Villegas's answer did: self-defense is warranted when a person or that person's family is threatened. The additional detail provided in Villegas's answer, regarding sleeping in her house, was simply an example used to illustrate the broader principle. Because other veniremembers provided substantially the same answer, the reason provided was pretextual.

[4] Again, counsel cannot verify the race of the veniremembers. *Infra*, Argument II.

Finally, Villegas appeared to share the same racial or ethnic identity as Toro-Ospina. *Infra*, Argument II. This shared racial identity may indicate discriminatory intent in striking the African American veniremember. *Powers*, 499 U.S. at 416.

Under the relevant facts and circumstances here, the district court clearly erred and violated equal protection when it concluded that the prosecutor's strike was not substantially motivated by a discriminatory intent and denied Toro-Ospina's *Batson* challenge. Therefore, this Court must reverse Toro-Ospina's convictions and remand for a new trial. *See, e.g., Snyder*, 552 U.S. at 472; *People v. Wilson*, 2012 COA 163M, ¶22, *rev'd on other grounds*, 6 2015 CO 54M, ¶22.

## II. The trial court reversibly erred and denied Toro-Ospina's constitutional rights when it denied the defense's request to inquire about race on the juror questionnaires.

### A. Standard of Review

This court reviews de novo whether it lacks a sufficient record to conduct appellate review, and whether a particular item should be included in the record. *Hoang v. People*, 323 P.3d 780, 787 (Colo. 2014). The refusal to consider all relevant circumstances in a *Batson* challenge constitutes a misapplication of controlling law, to be reviewed de novo. *Miller-El I,* 537 U.S. at 339. This issue was preserved. CF, pp 222-229, 257.

## B. Argument

The prosecution cannot discriminate in the jury selection process on account of race, color, national origin, religion, or gender. U.S. Const. amend. XIV; Colo. Const. art. II, §§ 16, 25; *Batson*, 476 U.S. at 85-87; § 13-71-104(3)(a), C.R.S. (2018). In addition, due process under the United States and Colorado Constitutions entitles criminal defendants to an impartial judge and to a fair trial. *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25.

The "unmistakable principle" underlying Supreme Court precedent is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (internal citations omitted). This Court has a duty to confront racial animus in the justice system as this duty "is not the legislature's alone." *Id.* at 867; *c.f.*, *Turner v. Murray*, 476 U.S. 28, 36 (1986) ("By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.").

In *Batson*, the United States Supreme Court created a process to root out the insidious practice of discrimination in jury selection. "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination

may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172 (2005). Because "the central inquiry in reviewing a *Batson* ruling [is] whether that ruling is supported by the record," *People v. Beauvais*, 2017 CO 34, ¶42, jury questionnaires are very often, if not always, crucial to this review, *see Miller-El II*, 545 U.S. at 241-53 (consulting questionnaires in reviewing *Batson* claim); *Collins*, 187 P.3d at 1183.

In order for *Batson* litigation to be successful in combating racism, the race of each prospective juror must be in the record. *See United States v. Barnette*, No. 3:97CR-23, 2010 WL 2085312, at *22 (W.D.N.C. May 20, 2010), *aff'd*, 644 F.3d 192 (4th Cir. 2011) ("Furthermore, the fact that the questionnaire itself asked for jurors' race and gender demonstrates that both parties believed the information was relevant to jury selection. Indeed, **neither party could have raised a Batson objection without knowing the race of the juror who was struck**."). The *Barnette* Court explained that "a person's race and gender are among the most obvious identifying characteristics, and there is nothing constitutionally suspect about noting them provided that it is for identification purposes and not exclusionary ones." *Id.*

Federal courts "require potential jurors to provide information on race, informing jurors that the information is required solely to enforce nondiscrimination in jury selection." *Com. v. Arriaga*, 781 N.E.2d 1253, 1268 (Mass. 2003) (citing 28

U.S.C. § 1869(h)); Fed. Jury Prac. & Instr. § 3:4 (6th ed.) (Juror questionnaires ask about race and then "voir dire examination can be conducted in a more focused manner. Attorneys have better information upon which to make challenges for cause and to exercise their peremptory strikes.").

In order to adopt more "proactive measures" to "confront issues of racial and ethnic prejudice in the courts, both actual and perceived," many jurisdictions ask for the "disclosure of racial and ethnic background of potential jurors on the juror confirmation form." *Arriaga, supra; See also State v. Edwards*, 102 A.3d 52, 76 (Conn. 2014) (the optional race question in the juror questionnaire is used "to enforce nondiscrimination in jury selection....'"); *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1169-70 (9th Cir. 2014) (referring to the questionnaires that ask about "race and ethnicity questions"); *United States v. Osorio*, 801 F. Supp. 966, 980–83 (D. Conn. 1992) (appendix attached of questionnaire that asks about race); *McKnight v. State*, No. 03-08-00105-CR, 2009 WL 722261, at *1 (Tex. App. Mar. 20, 2009) (relying on juror questionnaire answers about race in a *Batson* challenge); Richard Seltzer et. al., Fair Cross-Section Challenges in Maryland: An Analysis and Proposal, 25 U. Balt. L. Rev. 127, 147–48 (1996) (explaining that Maryland uses a juror questionnaire requesting information on age, race, religion, and national origin, although making answers optional).

Parties cannot effectively mount *Batson* challenges without knowing the race of veniremembers. *See, e.g., People v. Morales*, 2014 COA 129, ¶12, 21 (denying the accused's *Batson* challenge, in pertinent part, because while the parties and the court argued about whether they believed the race of the prospective juror was "Middle Eastern" or "Hispanic," neither the "juror questionnaires" nor the "voir dire transcript" reflected "the ethnicity of any of the jurors"); *People v. Madrid*, 2021 COA 70, ¶2 n.1 (Assuming that the veniremember was African American because the prosecution and defense referred to him that way, but recognizing that "[t]he prospective juror did not disclose his race or ethnicity, so we cannot determine if he identified as African-American or Black or with another racial group."). For example, the Connecticut Supreme Court affirmed a trial court's denial of a *Batson* claim where there was nothing in the record demonstrating veniremember's "race or ethnicity," and thus the defense could not prove any comparative juror analyses. *State v. Raynor*, 221 A.3d 401, 404 (Conn. 2019).

Without knowing the race of veniremembers, the parties are forced to make assumptions based upon the color of one's skin or a last name, but both of these are problematic proxies. *See McDaniels v. Kirkland*, 839 F.3d 806, 812 (9th Cir. 2016) ("As a preliminary matter, the prosecutor observed that 'the only way we would even know that she's African–American is because she put on her questionnaire that she's

of Caucasian race, African–American, [and] I think American Indian [sic]. But physically to look at her, you would not be able to tell she's any parts African–American."). It is axiomatic that the color of a person's skin or a last name cannot serve as reliable indicators of a person's race. And a *Batson* analysis cannot occur without knowing a person's race. The solution to this problem is clear: ask about a juror's race in a questionnaire.

Here, the defense requested to ask about race in the questionnaire and the court refused. CF, pp 222-29, 257. This decision prevented the defense from mounting the strongest *Batson* challenge that it could. The defense raised a *Batson* challenge based on the prosecutor striking Robertson and Villegas, arguing that "Robertson appears African-American and Villegas appears Hispanic." TR 9/21/20, p 149:14-15. The defense should not have had to rely on appearance alone. More importantly, in denying the *Batson* challenge, the court relied on its impression that "[t]his is a somewhat diverse pool of jurors. We have a number of people who are people of color, both remaining on the jury and have been excused by both sides." TR 9/21/20, p 151:15-18. The court also relied on the fact that the prosecutor exercised two challenges on "what appeared to be Caucasian individuals." Id., pp 151-52. Without actual information about the race of jurors, the court had to base this conclusion on its interpretation of veniremember's appearance and their last names. Such

assumptions are not necessarily accurate. Without the accurate information, the defense could not rebut such conclusions during this conference, nor could defense counsel on appeal effectively counter the court's conclusions.

On appeal, defense counsel also mounts a comparative juror analysis because multiple veniremembers gave similar answers to Villegas regarding when it would be warranted to use a gun. *Supra*, p 17. It appears likely that many of these veniremembers are white, but defense counsel cannot assert such a fact without actual records. Each of these examples demonstrates why it is so important for all involved in the trial and on appeal to know the race of veniremembers. *Batson* was meant to be a critical tool to prevent discrimination. Yet, *Batson* is meaningless if the defense is deprived of the necessary tools to raise an effective *Batson* challenge.

In addition, the denial of the request to ask about race violates Colorado Rule of Criminal Procedure, 24(a), which provides that an orientation and examination of jurors should occur "to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges." Such critical information about prospective jurors necessarily includes race. Without knowing the race of veniremembers, the court cannot protect the right of veniremembers not to be struck on account of their race.

In *Peña–Rodriguez*, the United States Supreme Court held that the no-impeachment rule, as articulated in CRE 606(b), must give way to permit the trial court to consider evidence of a juror's statement that a juror relied on racial stereotypes or animus. *Id.* at 869. This monumental ruling stemmed from the fact that "racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial." *Id.* at 867. The Court continued:

> This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

*Id.* at 868. Under the same logic as *Peña–Rodriguez*, parties must know the race of veniremembers in order to expose purposeful discrimination.

This Court must ensure that the defense can access all the information that it requires when it raises a *Batson* challenge. Anything less violates the equal protection rights of Toro-Ospina, veniremembers Robertson and Villegas, and the rights of the community at large. *Batson*, 476 U.S. at 87; *Powers v. Ohio*, 499 U.S. 400, 406-411 (1991); U.S. Const. amend. XIV; Colo. Const. art. II, §§ 16, 25.

Because the defense could not mount an effective *Batson* challenge without these records, the only way to remedy the error here and in the *Batson* claim above

is to reverse and remand for a new trial. *Supra* Argument I. The failure to obtain information about the race of veniremembers prevents the trial court from making requisite findings on remand. *Snyder*, 552 U.S. at 486.

## III. The trial court reversibly erred in denying the defense-tendered implicit bias instruction.

### A. Standard of Review

Appellate courts review jury instructions de novo to determine whether the instructions accurately informed the jury of the governing law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). If the instructions properly inform the jury, then courts review instructions for an abuse of discretion. *People v. Trujillo*, 433 P.3d 78, 83 (Colo. App. 2018). This issue was preserved. CF, pp 320; TR 9/22/20, pp 148-50.

### B. Argument

The jury must be adequately instructed in order to assess whether every element of an offense has been proved beyond a reasonable doubt. *Chambers v. People*, 682 P.2d 1173, 1175 (Colo. 1984) (internal citations omitted); *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. Here, where a person of color was on trial and the defense requested an implicit-bias instruction, the court had the duty to provide it in order to protect due process rights and the right to an impartial jury. U.S. Const. amends. V, VI, XIV;

Colo. Const., art. II, §§ 16, 23, 25; *Pena-Rodriguez*, 137 S. Ct. at 868, 871 (declaring that racial bias is a "familiar and recurring evil that, if left un[checked], would risk systemic injury to the administration of justice," and identifying jury instructions as a safeguard that protects against racial bias.); *State v. Berhe*, 444 P.3d 1172, 1178 (Wash. 2019) ("when explicit or implicit racial bias is a factor in a jury's verdict, the defendant is deprived of the constitutional right to a fair trial by an impartial jury.").

Often, juror bias is implicit, a product of "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement." Judge Mark W. Bennett, "*Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*," 4 Harv. L. & Pol'y Rev. 149 (2010). Implicit biases are "much more difficult to ascertain, measure and study than explicit biases." *Id.* at 152. Nonetheless, they are "pervasive and powerful." *Id.; See Chin v. Runnels*, 343 F.Supp.2d 891, 906 (N. D. Cal. 2004) ("A growing body of social science recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias"). The research regarding implicit bias demonstrates how our "unconscious processes can lead to biased perceptions and decision-making even in the absence of conscious animus or prejudice against any particular group." *Id.*

"Implicit racial bias can therefore influence our decisions without our being aware of it because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus." *Berhe*, 444 P.3d at 1181 (internal citations omitted). Jurors may unknowingly harbor stereotypes and employ them during juror deliberations. Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 Hastings Women's L.J. (2020), p 84. "'Lawyers, judges, and other legal professionals need to heighten their awareness and understanding of implicit bias, its role in our civil and criminal justice system, and in particular, the problems that it creates with regard to juries.'" *State v. Fleming*, 239 A.3d 648, 655-56 (Me. 2020) (citing Bennett, *supra*, at 152.). As our understanding of implicit bias evolves, "so too must the way we confront them in our administration of justice." *Id.*

Hence, the American Bar Association explains that trial courts should "[i]nstruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it." The American Bar Association Principles for Juries and Jury Trials (revised 2016), Principle 6 – Courts Should Educate Jurors Regarding The Essential Aspects Of A Fair Trial, Subsection C, *see also* Su, *supra*, p 90 (encouraging courts to include an instruction defining implicit bias).

A committee of judges and attorneys in the Western District of Washington created a jury instruction on unconscious bias. *See* https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf (citing Model Ninth Circuit Criminal Instruction 1.1); *see also State v. Holmes*, 221 A.3d 407, 437-38 (Conn. 2019) (explaining that Jury Selection Task Force will draft model jury instructions about implicit bias); https://www.washingtonpost.com/context/read-judge-s-instructions-to-derek-chauvin-trial-jurors/5b3517cb-bfa2-4dad-957e-11acfb2783f2/, p 12 (instructions include implicit bias instruction); https://northerndistrictpracticeprogram.org/wp-content/uploads/2017/09/Bennett-Conduct-of-Jury-Instructions.pdf (instruction on implicit bias).

Here, the defense requested the same implicit bias instruction used in the Western District of Washington. CF, p 320; TR 9/22/20, pp 148-50. By denying the instruction, the court abdicated its duty to take all needed steps to eradicate racial bias from Toro-Ospina's trial. On June 11, 2020, the Supreme Court of Colorado wrote a letter in which it issued its commitment to redouble its "efforts to ensure that our decisions are free of bias." https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/6_11

_20_Letter.pdf. In order to fulfill this mission, Colorado trial courts should provide juries with an implicit-bias instruction when requested.

"[W]e should not throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping ... and rise to meet it." *Berhe*, 444 P.3d at 1181 (internal citations omitted). This Court has the opportunity to move the State further towards its mission of ensuring justice for all.

If preserved, instructional error is reversible unless the State proves the error harmless beyond a reasonable doubt. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005). Here, Toro-Ospina, a Latino man from Colombia, spoke Spanish and required a translator. The defense expressed fear that the language barrier and the implicit racial biases could affect how the jury viewed Toro-Ospina. TR 9/22/20, p 148:6-9. Toro-Ospina testified in his defense, and this case hinged on whether the jury believed his version of the events or the victims'. In a case revolving around credibility of witnesses, it is vital that a jury not rely on implicit biases. Reversal is required.

## IV. The prosecutor denigrated the defense, misstated the law, and misstated the evidence, requiring reversal.

### A. Standard of Review

In analyzing prosecutorial misconduct claims, a reviewing court engages in a two-step process: (1) a determination of whether the prosecution's questionable conduct was improper based on the totality of the circumstances, and if improper, (2) whether the prosecutorial misconduct requires reversal under the proper standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). This issue was preserved in part. TR 9/23/20, p 53.

### B. Argument

The accused has the right to a trial by a fair and impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Duncan v. Louisiana*, 391 U.S. 145, 149-50, 152-53 (1968); *Harris v. People*, 888 P.2d 259, 263 (Colo. 1995). This right requires that a jury decide a defendant's guilt or innocence based only on the evidence properly introduced at trial. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). Therefore, "[a] jury that has been misled by improper argument cannot be considered impartial." *See Harris*, 888 P.2d at 264; *see also Domingo-Gomez*, 125 P.3d at 1048.

### 1. The prosecutor impermissibly denigrated Toro-Ospina.

It is improper for prosecutors to make arguments designed to denigrate the defendant, his defense, or his attorneys. *People v. Nardine*, 2016 COA 85, ¶35; *People v. Serra*, 2015 COA 130, ¶¶85-89. It is also improper for prosecutors to imply that the defense is not being asserted in good faith. *See Nardine*, ¶¶42,55-56; *Serra*, ¶89. Prosecutors cannot give their personal opinions regarding the veracity of the defense's case or the defendant's testimony. *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987); Standard 3-6.8(b).

During the trial, Toro-Ospina testified that he did not know that Oliver was holding a trash hook; rather, he "just saw something made out of metal." TR 9/22/20, p 193:19-21. On cross-examination, Toro-Ospina reiterated, "I didn't know he was picking up trash with that. It was a metal object. It was like chrome." Id., p 212:24-25.

However, in closing argument, the prosecutor argued that Toro-Ospina "won't admit that the thing in Mitchell Oliver's hand is a trash claw because to do so would essentially thwart his claim that he believed he was in danger by this object…" TR 9/23/20, p 25:3-6. This argument improperly suggested to the jury that Toro-Ospina concocted his defense and was not asserted in good faith. The prosecutor impermissibly gave its personal opinion regarding the veracity of Toro-Ospina's

testimony and portrayed Toro-Ospina as lying to the jury. Such argument constitutes misconduct. *Nardine*, *supra*; *Serra*, *supra*; *Wilson, supra*.

**2. The prosecution misstated the law.**

The prosecution cannot misstate the law. *People v. McBride*, 228 P.3d 216, 225 (Colo. App. 2009); *People v. Rodriguez*, 794 P.2d 965, 977 (Colo. 1990). In rebuttal closing argument, the prosecution misstated the law when it argued that the jury must focus only on the evidence that "came from that witness stand. It's not something that Defendant or Defense Counsel suggests could have possibly been gathered. Evidence is not a suggestion that there may have been other witnesses." TR 9/23/20, pp 52-53. The defense objected, arguing that the jury is able to consider the lack of evidence in the case. Id., p 53:2-4. The court overruled the objection, and the prosecution argued again that "[t]he evidence came from that witness stand." Id., p 53:5-7.

The law is clear that the jury can consider both the evidence and the lack of evidence in a case. *People v. Asberry*, 172 P.3d 927, 934 (Colo. App. 2007); *see also People v. Reeves*, 252 P.3d 1137, 1141 (Colo. App. 2010) (allowing comment on lack of evidence); COLJI-Crim. E:03 (2018) ("Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, **or the lack of evidence,** in the case.") (emphasis

added). Furthermore, "[w]hen a court, upon a proper objection, declines to direct the jury that the prosecutor's version of the instruction is incorrect, the court improperly permits the jury to adopt the prosecutor's version of the law." *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999).

Here, the defense argued that the prosecution did not take photographs of the scene, did not look for surveillance footage, nor did it canvas the area to seek out additional witness statements. TR 9/22/20, pp 98-99, 168-70, 174. The only witnesses who testified at trial were the two victims and Toro-Ospina. It could have been very helpful if there were other unbiased witnesses or surveillance footage. *See* TR 9/23/20, pp 38-39 (in closing, the defense argued that the prosecutor "didn't bring you other witnesses that were objective that weren't involved in this situation to see what actually happened."). This lack of evidence could have formed reasonable doubt in the case. However, the prosecution misstated the law and foreclosed the jury from considering this lack of evidence. As such, the prosecution lessened its burden of proof and precluded the defense's theory of the case.

**3. The prosecution misstated the evidence in the case.**

The prosecution also misstated the evidence, *People v. Vialpando*, 2020 COA 42, ¶60, *cert. granted*, No. 20SC343, (Colo. Oct. 12, 2020). In rebuttal closing, the prosecutor said that the jury must rely on its recollection, not the arguments of

counsel. TR 9/23/20, pp 53-54. The prosecutor then misstated the evidence when it said, "When you hear Defense Counsel stand up here and say that Jose Granados testified that he didn't feel threatened, and you know that's not true, you think about your recollection when you go back there." Id., p 54:16-20.

During cross-examination, defense counsel asked Granados, "although you were scared, you didn't feel threatened; is that correct?" TR 9/21/20, p 209:4-5. Granados answered, "Correct, yes." Id., p 209:6. Thus, the defense had every right to argue this fact that stemmed from evidence. The prosecution misstated the evidence when it argued that it was "not true" that Granados testified that he did not feel threatened.

**4. Reversal is required.**

The errors here violated Toro-Ospina's due process rights and right to an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Duncan*, 391 U.S. at 149-50; *Harris*, 888 P.2d at 263. Hence, the preserved error requires reversal unless the error was harmless beyond a reasonable doubt. *People v. Clark*, 214 P.3d 531, 540 (Colo. App. 2009). Even if the nonconstitutional standard of review applies, reversal is still required because "the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009).

Regarding the unpreserved errors, reversal is required under plain error review. *Wilson*, 743 P.2d at 420. The errors are obvious because it is well-established that a prosecutor cannot misstate the law, misstate the evidence, and denigrate the defense. *Rodriguez*, *supra*; *Vialpando*, *supra Nardine*, *supra*. The prosecutorial misconduct undermined the fundamental fairness of the trial itself and cast serious doubt on the reliability of the conviction because the misconduct went to the heart of the case.

The misconduct here was pervasive. *Berger v. U.S.*, 295 U.S. 78, 89 (1935); *see also McBride*, 228 P.3d at 225. Furthermore, a significant portion of the errors occurred in rebuttal closing. *See Domingo-Gomez*, 125 P.3d at 1052 ("[r]ebuttal closing is the last thing a juror hears from counsel before deliberating, and it is therefore foremost in their thoughts.").

As in *People v. Jones*, 832 P.2d 1036 (Colo. App. 1991), "this is not a case in which the evidence against the defendant may be characterized as overwhelming." *Id.* at 1040. Toro-Ospina testified that he shot into the air in self-defense. He testified that Oliver raised the metal pole at him and looked like he was going to hit him in the face. He explained that he never intended to hurt anyone and all parties agreed that he shot into the air, rather than aiming at any individual. There was conflicting testimony and no witnesses outside of those involved in the incident testified. The

defense tried to highlight this gap in the evidence, but the prosecutor improperly told the jury that it could not consider this lack of evidence.

In addition, this was a case that hinged on the credibility of the witnesses involved. The prosecutor's misconduct could have caused the jury to question Toro-Ospina's credibility and may have tipped the scales. Because the misconduct went to the heart of the defense's case, the misconduct undermined the fundamental fairness of the trial and reversal is required.

## V. The trial court violated Toro-Ospina's right to present a defense by precluding evidence that the victim dealt drugs around the building.

### A. Standard of Review

A trial court's evidentiary decisions are reviewed for abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). However, whether the trial court deprived Toro-Ospina of his constitutional right to present a defense are questions of law that this Court reviews de novo. *Bernal v. People*, 44 P.3d 184, 198 (Colo. 2002). This issue was preserved. TR 9/22/20, pp 180-84.

### B. Applicable Facts

During a bench conference, the prosecutor mentioned that it did not believe that the defense should be able to introduce evidence that Oliver had been intentionally letting drug dealers into the building. TR 9/22/20, pp 5-6. The court did not issue a ruling at that time, but mentioned that such evidence could be relevant if

it went to the mental state of Toro-Ospina as to whether he had a reasonable belief that he needed to use self-defense. Id., pp 7-8.

When Toro-Ospina testified, the defense attempted to elicit testimony that Toro-Ospina saw Oliver participate in drug deals. Id., pp 180-81. The court asked how this was relevant to self-defense, and defense counsel explained that the drug deals were dangerous events and thus was relevant to the reasonableness of his reaction that morning. Id., pp 181-82. The defense also intended to introduce evidence that Toro-Ospina and Oliver argued about those drug deals during the incident that morning. Id., p 182:1-14. The prosecutor argued that the evidence constituted improper character evidence and was irrelevant to self-defense because there was no evidence that a drug deal was actively occurring that morning. Id., p 183:5-21. The court ruled that this evidence was improper character evidence and was irrelevant without any additional evidence of prior violence. Id., pp 183-84. In addition, the court ruled that any potential relevance was outweighed by unfair prejudice under CRE 403. Id., p 184:20-22.

### C. Argument

The United States and Colorado Constitutions guarantee "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations omitted); U.S. Const. amends. V, VI, XIV; Colo. Const.

art. II, §§ 16, 25. The right present a defense is violated where the accused is deprived of the opportunity to subject the prosecution's case to meaningful adversarial testing. *Krutsinger v. People*, 219 P.3d 1054, 1060 (Colo. 2009). The "exclusion of relevant and competent evidence offered in defense of a criminal charge" implicates "the defendant's right to present a defense and ultimately the right to a fair trial." *People v. Hampton*, 696 P.2d 765, 778 (Colo. 1985).

It is well-established that an accused person who claims self-defense is entitled to present testimony about a victim's prior violent acts if the defendant knew about them at the time of the alleged offense. *People v. Jones*, 675 P.2d 9, 17 (Colo. 1984); *People v. Smith*, 848 P.2d 365, 370-71 (Colo. 1993); *People v. Vasquez*, 148 P.3d 326, 331 (Colo. App. 2006). The victim's prior acts of violence are "admissible as direct evidence of an essential element of self-defense, namely, the reasonableness of the defendant's belief in the imminent use of unlawful physical force against him." *Jones*, 675 P.2d at 17; CRE 405(b).

Here, the trial court did not allow the evidence of prior drug dealing to be admitted, but did mention that prior acts of violence would have been admissible. TR 9/22/20, pp 183-84. However, the court overlooked the defense's argument that the drug dealing is linked to violence. *See, e.g.*, *People v. Ratcliff*, 778 P.2d 1371, 1379 (Colo. 1989) (investigatory stop was justified where exchange occurred in

"high drug-trafficking area" and person involved was known as a "user and supplier of drugs"). Also a person charged with a drug offense can face a sentence enhancement if the person possessed or had access to a firearm. § 18-18-407(d), C.R.S. Our courts have justified this statute because of the "increased risk of injury or death to private citizens and law enforcement personnel that may result from the combination of drugs and weapons…" *People v. Atencio*, 878 P.2d 147, 149-50 (Colo. App. 1994).

Each of these examples demonstrate that drugs and violence are often intertwined. Hence, evidence that Toro-Ospina had knowledge that Oliver dealt drugs around the building would have helped explain Toro-Ospina's belief that Oliver may act violently that morning. The evidence of drug dealing should have been considered under the same analysis as prior acts of violence. *Jones*, *supra*. The court erred in excluding the evidence because it was highly probative of Toro-Ospina's mental state as it related to the reasonableness of his belief that Oliver would use imminent unlawful physical force against him.

In addition, contrary to the court's ruling, the probative value is not substantially outweighed by any danger of unfair prejudice. CRE 403. Rule 403 "strongly favors admissibility of relevant evidence." *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995). Here, the probative value of the drug-dealing evidence was

high because it went directly to Toro-Ospina's state of mind as it related to self-defense. The evidence went to a material and disputed issue in the case. And the evidence was not unfairly prejudicial nor did it risk confusing or misleading the jury. CRE 403.

**D. Reversal is required.**

Because the error in excluding this testimony violated Toro-Ospina's constitutional rights, reversal is required under either the constitutional or non-constitutional harmless error analysis. *Vega v. People*, 893 P.2d 107, 119 (Colo. 1995); *Yusem*, 210 P.3d at 469; *James v. People*, 2018 CO 72, ¶18; *Supra*, p 35.

The evidence went directly to the strength of Toro-Ospina's self-defense claim. *Supra*, pp 36-37. In addition, the jury asked, "if you knew he was [a] maintenance worker, why did you feel you needed to go out there with a gun?" TR 9/22/20, p 229:13-15. The court did not ask the question because both parties objected. Id., pp 229-30. The defense explained that Toro-Ospina "would have testified that he was frightened of Oliver because of his drug dealing," but he was precluded from answering in that way due to the court's ruling. Id., p 229:16-23. Although the court did not ask the question, the fact that the jury asked it demonstrated that the jury was confused about why Toro-Ospina feared Oliver, why Toro-Ospina brought the gun with him, and why he shot the gun in the air. These

questions would have been a lot clearer if the jury knew that Toro-Ospina believed Oliver dealt drugs in the building. Such evidence was vital to explain Toro-Ospina's actions that morning and the reasonableness of his beliefs.

Moreover, "the classic formulation for applying the harmless beyond a reasonable doubt test to improperly *admitted* evidence" is not as "easy to apply where evidence has been improperly *excluded*." *People v. Dunham*, 2016 COA 73, ¶64 (emphases in original). This improperly excluded evidence went to the heart of the theory of defense. The error requires reversal.

## VI. Assuming arguendo the above errors do not individually require reversal, cumulatively they deprived Toro-Ospina of his right to a fair trial and require reversal.

### A. Standard of Review

De novo review applies to whether the cumulative effect of errors deprived a defendant of a fair trial. *See Oaks v. People*, 371 P.2d 443, 446 (Colo. 1962).

### B. Argument

"[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal would be required." *Howard-Walker v. People*, 2019 CO 69, ¶24 (quoting *Oaks*, 371 P.2d at 446). The aggregate impact of the errors prejudiced Toro-Ospina's substantial rights and deprived him of a fair trial. *See* U.S. Const. amends. V, VI,

XIV; Colo. Const. art. II, §§ 16, 25. Three of the errors at issue here implicated racial justice, Toro-Ospina's equal protection rights, and his right to an impartial jury. *Supra*, Arguments I-III. Altogether, the errors cumulatively deprived Toro-Ospina of a fair trial with an impartial jury. Reversal is required.

## CONCLUSION

Toro-Ospina respectfully requests that this Court grant him the relief requested in the argument sections above.

MEGAN A. RING
Colorado State Public Defender

JEANNE SEGIL, #50898
Deputy State Public Defender
Attorneys for LUIS TORO-OSPINA
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on August 23, 2021, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's office.