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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Arapahoe County District Court The Honorable Darren L. Vahle Case Number 19CR2273	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant LUIS TORO-OSPINA	
Megan A. Ring Colorado State Public Defender JAMES S. HARDY 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #38173	Case Number: 20CA2145

LUIS TORO-OSPINA'S 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).

It contains 2,835 words.

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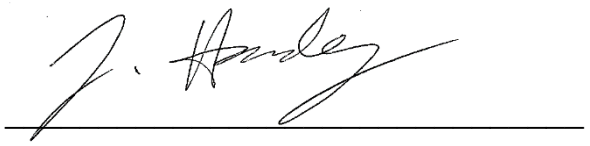

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I. The trial court violated Toro-Ospina's equal protection rights and reversibly erred by denying his *Batson* challenge.

The State agrees Toro-Ospina preserved this issue and with his statement of the standard of review. OB at 6, AB at 8.

The State concedes that step one of the *Batson* inquiry is moot and this Court should review the trial court's step two and step three rulings.[1] OB at 11, AB at 13; *see also People v. Johnson*, 2022 COA 118, ¶5 (concluding any error at step one was moot because trial court proceeded to step two); *People v. Romero*, 2022 COA 119, ¶14 (same).

As to step two, the State argues that the prosecutor's comments about Juror Robertson's views on police were not tied to the juror's race. AB at 15-16. But Robertson's views on police were inextricably connected to his race as a Black man. *See People v. Ojeda*, 2019 COA 137M, ¶26, *aff'd other grounds*, 2022 CO 7 (juror's views about criminal justice system "were inextricably linked to being a Hispanic male who had experienced racial profiling") (citing *State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1992) and *People v. Mallory*, 121 A.D.3d 1566, 1568, 993 N.Y.S.2d 609, 612 (2014)).

[1] If this Court disagrees, it should find the trial court erred for the reasons discussed in the Opening Brief. OB at 11-14.

And, as defense counsel pointed out at trial, Robertson explicitly stated he could follow the law. TR 9/21/20, p95-97, 149:16-25; *Ojeda*, 2019 COA 137M, ¶28 (juror's statements that he would listen to the evidence and follow court's instructions refuted prosecution's claim to race-neutral reason); *see People v. Ojeda*, 2022 CO 7, ¶¶9-10, 35 (noting challenged juror's assurances he could follow the law); *see also Johnson*, ¶27 (prosecution's claim juror would not be fair to prosecution refuted by juror's statement that "she could be a fair and impartial juror").

As to step three, the State argues the prosecutor was not making a pretextual claim when the prosecutor asserted Juror Villegas's statement about self-defense in a home where her children were sleeping would predispose her to side with the defense. AB at 16-19. But, as discussed in the Opening Brief at pages 15-18, this rationale did not distinguish Villegas from several other, unchallenged jurors. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235, 2248-49 (2019); *Miller-El II v. Dretke*, 545 U.S. 231, 248, 255 (2005). Moreover, several other factors – the prosecutor's failure to further inquire of Villegas, the fact that the confrontation in this case happened outside without children present, and the fact that Villegas appeared to share Mr. Toro-Ospina's racial and/or ethnic identity – demonstrate the trial court clearly erred. OB at 15-18.

Thus, the record demonstrates the prosecutor's reason was pretextual and the court clearly erred in finding otherwise. *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").

For the reasons discussed here and in the Opening Brief, this Court must therefore reverse and remand for a new trial. *Flowers*, 139 S. Ct. at 2251; *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Ojeda*, 2022 CO 7, ¶52 (concluding that erroneously overruled *Batson* challenge required reversal without conducting harm analysis); *People v. Romero*, 2022 COA 119, ¶¶27-28 (same), *Johnson*, ¶¶18, 33 ("When a court erroneously denies a *Batson* challenge, the remedy is to reverse the conviction and remand for a new trial"); *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. This issue was preserved and should be reviewed de novo.

The State disagrees that review is de novo. OB at 18, AB at 20. Mr. Toro-Ospina maintains this issue should be reviewed de novo, given that the trial court's error prevented creation of an adequate appellate record. OB at 18; *Hoang v. People*, 2014 CO 27, ¶38.

The State disagrees that this issue is preserved, arguing that the defense's request for information was inadequate because it referenced jurors' ethnicity. AB at 21. But the defense motion for a jury questionnaire mentioned needing to know the jurors' self-identified race at least three times. (CF, p222-29, ¶¶19, 39, 40)

Moreover, as the State cites at pages 21-22, the defense requested the juror information because Mr. Toro-Ospina had "a right to a jury from the fair cross section of the community and to ensure jurors are not discriminated against inappropriately" and "[i]n order to know if any ethnic group is excluded from jury service, the defendant needs to know the ethnicity of the potential jurors." (CF, p227) The right to a jury representing a fair cross section of the community and jurors' rights against racial discrimination are two of *Batson's* foundational principles. *Batson v. Kentucky*, 476 U.S. 79, 85-87 (1986).

It was therefore unmistakable what information the defense sought via the jury questionnaires. *See, e.g.*, *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) ("talismanic language" not required to preserve particular arguments for appeal); *accord Giron v. Hice*, 2022 COA 85M, ¶18; *see also Rael v. People*, 2017 CO 67, ¶17 (holding that to preserve an argument for appeal, a party must draw the district court's attention to the asserted error, thus allowing the court "a meaningful chance

to prevent or correct the error" and creating a record for appellate review (quoting *Martinez v. People*, 2015 CO 16, ¶14)).

Thus, this issue was fully preserved.

B. The State is wrong on the merits.

The State argues that the best way to protect against racial discrimination and create a "race neutral" playing field, AB at 23, is ***not*** to ask jurors about their race – *i.e.*, to have ***less*** information about race than readily available by simply including the question in the jury questionnaire. AB at 21-25.

This head-in-the-sand approach cannot be the rule. *See Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) ("The ostrich is a noble animal, but not a proper model for an appellate advocate."); *accord United States v. Arroyo-Blas*, 783 F.3d 361, 367 (1st Cir. 2015).

The State's argument runs directly into Supreme Court jurisprudence discussed in the Opening Brief. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (The Supreme Court's decisions demonstrate that rooting out racial bias is critical to "the promise of equal treatment under the law that is so central to a functioning democracy."); *Miller-El II*, 545 U.S. at 241-53 (consulting questionnaires in reviewing *Batson* claim); *Batson*, 476 U.S. at 85-87 (defendant has right to cross section of community selected without racial discrimination; potential

jurors have right to be free from racial discrimination preventing them from performing jury service). Indeed, "[i]n an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*." *Pena-Rodriguez*, 868.

And, not incidentally, the State's position impedes full appellate review, leaving appellate courts to piece together jurors' race from the statements of counsel and dubious deductions derived from a juror's name. *See People v. Beauvais*, 2017 CO 34, ¶52 ("[W]ithout a record that facilitates a complete and meaningful comparison, appellate courts have no basis to review and reverse *Batson* rulings based on unargued comparisons.").

The State further argues that the trial court was correct to deny the jury questionnaire question about race because section 13-71-115, C.R.S., does not require it. AB at 24. But, as trial counsel pointed out in the motion below, that reasoning is misplaced and inconsistent with Colorado law. (CF, p227)

While section 13-71-115 requires jurors be asked about their occupation, sex, and marital status, Colorado statutes also provide: "No person shall be exempted or excluded from serving as a trial or grand juror because of race, color, religion, **sex**, sexual orientation, **marital status**, national origin, ancestry, economic status, or

occupation." §13-17-104(3)(a), C.R.S. (emphases added). Likewise, the standard questionnaire asks where people were born and raised despite the prohibition against discrimination based on national origin.

Thus, contrary to the State's argument about race, the General Assembly has determined asking jurors about these categories does not foment discrimination based on the answers. Rather, providing requested information ensures such discrimination does not occur.

This Court should reverse the convictions and remand for a new trial.

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

The State agrees this issue was preserved and this Court reviews jury instructions de novo. OB at 26, AB at 26.

The State disagrees that constitutional harmless error review is implicated. AB at 26-27. But the trial court's refusal to provide the tendered implicit bias instruction violated Mr. Toro-Ospina's due process rights. *See* U.S. Const. amends. V, VI, XIV; Colo. Const., art. II, §§16, 23, 25; *Pena-Rodriguez*, 868, 871; *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.").

This Court should therefore review for constitutional harmless error. OB at 26-27, 30.

The State does not dispute the accuracy or appropriateness of Mr. Toro-Ospina's tendered instruction. Rather, the State argues that the principles explained in the instruction were "encompassed by the pattern introductory instruction, which says that jurors must not be influenced by bias or prejudice." AB at 28-29. Alternatively, the State argues any error was harmless because "[d]efense counsel educated the jury on implicit bias during a meaningful discussion with the prospective jury." AB at 29.

Thus, the parties agree educating the jury in the principles of implicit bias explained in the tendered instruction was appropriate and necessary. The only disagreement is whether the standard trial procedures and defense counsel's voir dire were sufficient to achieve this goal.

Respectfully, the State is wrong. There is a legal, substantive difference between counsel's voir dire and an instruction from the court. For one thing, "[c]ounsel may not use voir dire for the purpose of instructing or educating the jury." *People v. Shipman*, 747 P.2d 1, 3 (Colo. App. 1987). Meanwhile, the court's instructions have the force of law. *See*, *e.g.*, *People v. Rodriguez*, 2022 COA 11, ¶38

(trial court "must correctly instruct the jury on the applicable law") (citing *Townsend v. People*, 252 P.3d 1108, 1111 (Colo. 2011)).

And the very nature of implicit bias is what renders the pattern instruction insufficient to make jurors aware of its pernicious, unconscious effects. OB at 27-30; *Pena-Rodriguez*, 868, 871 (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.); *Berhe*, *supra*, 1178.

If the pattern instruction were sufficient, there would be no need for the ABA's declaration 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." ABA Principles for Juries and Jury Trials (revised 2016), Principle 6 – Courts Should Educate Jurors Regarding the Essential Aspects of a Fair Trial, Subsection C.

And several incidents in Colorado confirm that racial bias remains prevalent in our criminal legal system. *Pena-Rodriguez, supra*; *see, e.g., People v. Robinson*, 2019 CO 102 (prosecutor's race-based statements in opening statement were unnecessary and improper); *Valdez v. People*, 966 P.2d 587, 595 (Colo. 1998) (Denver County prosecutor improperly suggested that a certain cognizable racial

group of jurors, *i.e.*, African Americans, "would be unable to be impartial"); *People v. Sharpe*, 781 P.2d 659, 660 (Colo. 1989) (Jefferson County prosecutor in capital case involving two Hispanic defendants and the killing of a police officer called the defendants [among other slurs] "chili-eating bastards"); *see also* https://www.denverpost.com/2019/01/10/colorado-appeals-judge-laurie-booras-resigns/ (last viewed November 8, 2022) (detailing disciplinary proceedings and resignation of Colorado Court of Appeals Judge Laurie Booras resulting from racist references to a Native American person as "the squaw" and to a Latina woman as the "little Mexican"); SUMMARY: Report on the C.L.E.A.R. ACT Community Law Enforcement Action Reporting Act (Nov. 2018), pp 8-9, *available at* http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB15-185-Rpt.pdf (last viewed November 8, 2022) (discussing statistics that Hispanic adults represented 20% of the population, 29% of arrests/summonses, 30% of district court filings and 30% of cases sentenced in district court).

Thus, the trial court erred in denying the implicit bias instruction. This Court should reverse the convictions and remand for a new trial. OB at 26-30.

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

The State agrees with Mr. Toro-Ospina's statement of the applicable standards and preservation. OB at 31, AB at 29-30.

Mr. Toro-Ospina otherwise reasserts the arguments and authorities discussed in the Opening Brief. OB at 31-37.

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

The State does not dispute preservation. OB at 37, AB at 41-42. The State argues the exclusion of defense evidence did not implicate Mr. Toro-Ospina's right to present a complete defense because it "did not entirely foreclose [Mr.] Toro-Ospina from presenting his self-defense theory," citing *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009). AB at 42.

But this principle purportedly derived from *Krutsinger* has been disavowed as "contrary to clearly established federal law as determined by the Supreme Court of the United States." *Krutsinger v. Williams*, 2020 WL 6318382, at *13 (D. Colo. Oct. 28, 2020). As the federal district court explained, our supreme court's *Krutsinger* opinion "misconstrues the holdings of the relevant cases" defining a defendant's constitutional right to present a defense, namely:

- *Washington v. Texas*, 388 U.S. 14 (1967)
- *Chambers v. Mississippi*, 410 U.S. 284 (1973)
- *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)
- *Crane v. Kentucky*, 476 U.S. 683 (1986)

- *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006)

The federal district court further explained that the federal constitution requires an opportunity for "meaningful adversarial testing" of the prosecution's case. *Id.* at *14 (quoting *Crane* 476 U.S. at 691. "The Colorado Supreme Court flips the analysis and reasons that, if significant prosecution evidence was subject to meaningful adversarial testing in any way, the defendant could not have been denied his right to a meaningful opportunity to present a complete defense." *Id*.

Critically, and refuting the State's position here:

> Protecting a defendant's opportunity to present "competent, reliable evidence... central to [his] claim of innocence," *Crane*, 476 U.S. at 690, ***is not the same*** as shielding "virtually his only means of effectively testing significant prosecution evidence," *Krutsinger*, 219 P.3d at 1062-63.

Id. (emphasis added).

Moreover, even assuming our supreme court's *Krutsinger* opinion is compatible with federal law, the principle cited by the State does not stand for the proposition the State wishes. *Krutsinger* did ***not*** hold, as the State's cursory argument suggests, that so long as a defendant is permitted to present *some* evidence that supports his defense, his constitutional right to present a complete defense has been satisfied.

On the contrary, the right is violated when the defendant is prohibited from presenting relevant evidence on the central disputed issue where that evidence might well influence the verdict. *C.f. Hendershott v. People*, 653 P.2d 385, 393 (Colo. 1982) ("A reasonable doubt as to guilt may arise not only from the prosecution's case, but also from defense evidence casting doubt upon what previously may have appeared certain."). Error in limiting a defendant's ability to challenge the credibility of evidence against him, either by restricting the cross-examination of prosecution witnesses or by restricting the presentation of defense evidence, implicates "the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)) (denial of right to present evidence challenging credibility of defendant's confession was constitutional error).

Mr. Toro-Ospina otherwise reasserts the arguments and authorities discussed in the Opening Brief. OB at 37-42.

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.

The State agrees review is de novo. OB at 42, AB at 50. The State concedes that the touchstone cumulative error case from our supreme court establishes that a cumulative error claim does not require specific preservation. *See Howard-Walker*

v. People, 2019 CO 69, ¶22. Yet, the State cites older authorities to claim that individual, unpreserved errors should not be considered.

The State is right about the former and wrong about the latter. *Howard-Walker*, ¶22; *Oaks v. People*, 371 P.2d 443 (Colo. 1962).

Mr. Toro-Ospina otherwise reasserts the arguments and authorities discussed in the Opening Brief. OB at 42-43.

CONCLUSION

For the reasons and authorities discussed here and in the Opening Brief, Luis Toro-Ospina respectfully requests that this Court reverse his convictions and remand for a new trial.

MEGAN A. RING
Colorado State Public Defender

JAMES S. HARDY, #38173
Lead 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 December 6, 2022, a copy of Luis Toro-Ospina's Reply Brief was electronically served through Colorado Courts E-Filing on Megan C. Rasband of the Attorney General's Office.

Nancy L. Medina