

COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal from: Adams County District Court Case No. 2016CR4373 Hon. Robert Walter Kiesnowski, Jr., District Judge	DATE FILED: October 1, 2019 1:15 PM FILING ID: E7E6229A38CE7 CASE NUMBER: 2018CA92
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. ERNEST DEHERRERA Defendant-Appellant	
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REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 OR C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g). It contains 5,318 words (principal brief not to exceed 9,500 words; reply brief does not exceed 5,700 words).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Lucy H. Deakins

Lucy H. Deakins, #41729

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ARGUMENT

Defendant agrees with the People that he did not plead guilty and that this Court should remand the case for the trial court to correct the mittimus. Ans. Br. at 1, n.1.

I. THE TRIAL COURT ERRED BY FAILING TO SUA SPONTE INSTRUCT THE JURY ON DEFENSE OF PREMISES.

A. Argument

The People assert the Trial Court did not err by failing to sua sponte instruct the jury on defense of premises. Ans. Br. at 10. As shown in Defendant’s opening brief and below, the People are incorrect.

(i) The Trial Court has a duty to properly instruct the jury.

It is ultimately the Trial Court’s responsibility to properly instruct the jury. “It is the duty of the trial court—not counsel—to correctly instruct the jury on all matters of law for which there is sufficient evidence to support giving instructions.” *People v. Jones*, 2018 COA 112, ¶ 64, cert. denied, No. 18SC643, 2019 WL 539754 (Colo. Feb. 11, 2019) (internal quotation marks omitted). At a minimum, as the People note, the responsibility for correctly instructing the jury is shared “equally” by the court and counsel. Ans. Br. at 11; see *People v. Stewart*, 55 P.3d 107, 120 (Colo. 2002).

(a) The court's duty is not limited to pro se defendants.

The People assert that the court's duty to sua sponte instruct the jury is limited to pro se defendants. Ans. Br. at 11–13. However, the case cited by the People for this proposition does not restrict the court's responsibility only to cases with pro se defendants. *Martinez v. People*, 470 P.2d 26, 28–29 (Colo. 1970). Courts do, in fact, review claims for failure to sua sponte instruct where the defendant was represented by counsel. *E.g.*, *Stewart*, 55 P.3d at 119–20 (omission of jury instruction by trial counsel reviewed); *People v. Jacobson*, 2017 COA 92, ¶¶ 14–23, cert. denied, No. 17SC590, 2018 WL 4308690 (Colo. Sept. 10, 2018) (omission of affirmative defense by trial counsel reviewed). In *Stewart* and *Jones*, the reviewing courts did not reject the assertion of error because the defendant was represented by counsel.

Further, the People's argument, that a court can only sua sponte instruct the jury in a case with a pro se litigant, does not comport with the law in Colorado. In Colorado, pro se litigants are not entitled to any greater safeguards or benefits than if they are represented by counsel. *People v. Romero*, 694 P.2d 1256, 1266 (Colo. 1985) (“A pro se defendant cannot legitimately expect the court to deviate from its role of impartial arbiter and accord preferential treatment to a litigant simply because of the exercise of the constitutional right of self-representation.”). The

People's interpretation would give preferential treatment to pro se defendants.

This simply is not the law in Colorado.

(b) Trial Counsel's failure to raise defense of premises was not a "tactical decision" and should be reviewed on direct appeal.

The People assert that Defense Counsel's failure to request an instruction on defense of premises was a tactical decision.¹ Ans. Br. at 12. As Defendant previously stated, he is not raising the question of ineffective assistance of counsel in this direct appeal. Op. Br. at p 16, n.4.

However, to the extent that it is relevant to this direct appeal, Defendant notes there is no evidence that the omission by his attorney was a tactical decision. The defenses of self-defense and defense of premises do not conflict in this case, and there would be no rational, strategic reason to not present defense of premises.

¹ To the extent there was a tactical decision by counsel to omit defense of premises, that decision violated DeHerrera's constitutional right to determine the goal of the defense. It is well settled that it is a defendant's prerogative to decide on the objective of the defense. See Colo. R. Prof. Cond. 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation"); see also *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018) ("it is the Defendant's prerogative, not counsel's, to decide on the objective of his defense") & 1508 ("These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are."). Defense counsel may not substitute his or her objectives for a defendant's; counsel may only determine strategies for how to best achieve a client-set objective. *Id.* DeHerrera made very clear, even as early as at the incident itself, what defense he was asserting. While trial counsel has discretion to choose the tactics by which the goal will be reached, she does not have the discretion to ignore a defendant's chosen defense.

Compare CF, p 292 (jury instruction on self-defense) *with* § 18-1-705, C.R.S.

Further, Defendant regularly shouted his defense of premises at the medics and police officers throughout the entire encounter (38 times in five minutes). *See, e.g.,* EX. 4 (Trial). These statements were presented to the jury. TR 09/26/17, p 44:25. It is hard to credit a “tactical decision” to not raise this issue.

Moreover, during the jury instruction conference, Defense counsel repeatedly stated that Defendant was acting to protect himself and his property. TR 09/27/17, pp 59:20–60:3, 61:2–4, & 65:6–10. Defense counsel did not select between the two to provide a tactical advantage to Defendant, but rather did not find any conflict between them.

As in *Stewart*, counsel’s omission appears to be an oversight by defense counsel, not strategy. *Stewart*, 55 P.3d at 119. Such an error should be corrected by this Court. “[A]bove all, it is the appellate court’s responsibility to avoid a miscarriage of justice for a defendant even when defense counsel fails to object to serious errors at trial.” *People v. Nardine*, 2016 COA 85, ¶ 64; *Stewart*, 55 P.3d at 119 (when defense counsel errs through inadvertence or negligence, “it is the defendant who must bear the stigma of a conviction and the burden of prison time”).

(ii) *The evidence supported giving a defense of premises instruction.*

The People deny that there was sufficient evidence to support giving a defense of premises instruction because the police and the medics were not trespassing. Ans. Br. at 13–18. However, there was sufficient evidence to warrant the instruction.

(a) Was there sufficient evidence for the jury to be instructed on defense of premises?

For a defendant to be entitled to a jury instruction on an affirmative defense, he must provide a “scintilla” of evidence supporting that defense. *Jacobsen*, 2017 COA 92, ¶ 15. That burden is “exceedingly low” and may be met even if the only supporting evidence is highly improbable testimony from the defendant himself. *People v. Degreat*, 2018 CO 83, ¶ 22; *Jacobson*, 2017 COA 92, ¶ 15.

Defense of premises provides that force may be used “...to prevent or terminate what [the defendant] *reasonably believes* to be the commission or attempted commission of an unlawful trespass....” § 18-1-705, C.R.S. (2018) (emphasis added). The People assert that “reasonably believed” requires the viewpoint of an objective reasonable individual without looking at the individual’s personality traits or defects based on the use of the same term in the self-defense context. Ans. Br. at 14. “Reasonably believed,” however, is more nuanced than

simply “objectively reasonable”: a jury must consider not only the totality of the circumstances, but also the perceptions of the defendant. *People v. Chirico*, 2012 COA 16, ¶ 11. In addition, the defendant does not have to be absolutely certain or correct in his belief, it just must be reasonable in the circumstances. *Kaufman v. People*, 202 P.3d 542, 551 (Colo. 2009) (“the law in Colorado is settled that reasonable belief rather than absolute certainty is the touchstone of self-defense.” (internal quotation marks removed)).

So the question “Was there sufficient evidence for the jury to be instructed on defense of premises?” becomes, on the specific facts here: was there at least a scintilla of evidence, however improbable, that Defendant reasonably believed (under the totality of the circumstances) that the police were committing or about to commit an unlawful trespass into his dwelling (including curtilage)? For the reasons discussed in the opening brief and below, there was sufficient evidence.

(b) It was not unreasonable for Defendant to believe the police were trespassing.

The People urge that Defendant could not have reasonably believed that the police were trespassing because (i) they were not trespassing because their entry into his premises was (a) invited and (b) privileged; and (ii) any trespass was justified. Ans. Br. at 14 & 15. However, Defendant could reasonably believe the police were trespassing.

- Defendant could reasonably believe that the officers' entry was not invited.

The People conflate the officers' entry with the medics' entry, relying on the invitation to the medics to assert the police's entry was invited.² Ans. Br. at 15.

The People do not cite any evidence that by calling 911 for medical assistance Defendant's wife invited the police into Defendant's home. The police were not invited onto Defendant's property.

In terms of the invitation to the medics, the People argue that because Defendant's wife invited the medics to enter the home to treat her unconscious husband, it was unreasonable for Defendant to believe that he could revoke that invitation. There is no authority in Colorado that a co-resident's ability to invite a medic into a home overcomes the putative patient's right to refuse medical treatment and to thereby revoke the limited invitation. The statute on trespass is silent as to whether a co-resident can revoke an invitation. *See* § 18-4-502, C.R.S.

The license granted to the medics by the wife's invitation was limited to entry to treat the patient. Once Defendant refused treatment, their license ended. Similarly, police officers become trespassers when they exceed the scope of their

² Conflating the medics and the police would lead to additional problems for the People, including, possibly, whether the medics refusal to leave after DeHerrera declined medical treatment and their continual questioning of him would amount to a *Miranda* violation.

warrant. *Walker v. Denver*, 720 P.2d 619, 623 (Colo. App. 1986) (“absent the owner’s permission, it is a trespass for the officers to remain on the premises longer than is necessary to remove the seized property.”).

Furthermore, Defendant’s wife apparently agreed with or acquiesced to Defendant’s request that the medics leave:

Defense Counsel: Before the medical professionals left your house, did you ask them to stay?

Lochner: No.

Defense Counsel: Did you ask them to call the police for you?

Lochner: No, I did not.

Defense Counsel: Did you in any way indicate to the EMTs that you needed help in any way?

Lochner: No.

TR 09/27/17, pp 19:20–20:2.

Based on the above, it was reasonable for Defendant to believe that his refusal of medical treatment and request that the medics leave ended his wife’s limited invitation.

Finally, the People imply that because Defendant did not cite any authority expressly granting him the ability to revoke his wife’s invitation, then the error in failing to sua sponte instruct on defense of premises was not “obvious”. Ans. Br. at 15. This is incorrect. The question of whether Defendant had the ability to

revoke his wife's invitation is simply a sub-part of the question of whether the trial court's error in failing to adequately instruct the jury on the law was obvious. For this sub-part of the issue, it is only necessary that Defendant's belief that the medics became trespassers be objectively reasonable under the totality of the circumstances.

- Defendant could reasonably believe that the officers' entry was not privileged or justified.

The People assert that the officer's entry into Defendant's premises was privileged or justified because the officers had probable cause to believe Defendant had committed multiple offenses.³ Ans. Br. at 16–17.

The People list several possible offenses to support their assertion that the officers' entry was privileged or justified. However, the only one that could support the officers' entry was "threats toward the medical personal [sic]". *Id.*

³ In support of the People's assertion, one officer testified that even before he arrived on the scene, he intended to arrest DeHerrera. TR 09/01/17, 35:13–25. The officers did not have a warrant. A similar issue was analyzed in *People v. Hogan*, 649 P.2d 326 (Colo. 1982). There, the officers went to the defendant's home, purportedly to serve him with a summons. *Id.* at 330. However, one of the officer's testimony made clear that they actually intended to arrest the defendant. *Id.* They entered his home without a warrant and arrested him. *Id.* The court held that "[t]o call this procedure anything but a warrantless entry for the purpose of effecting an arrest flies in the face of the facts and, in effect, would reduce the warrant requirement to a nullity."

The other possible offenses cited by the People (refusing to let his wife leave the house, efforts to prevent the police from arresting him) occurred after the police entered Defendant's premises and cannot be used to retroactively justify the initial entry. *See, e.g.*, TR 09/25/17, pp 199–200; *People v. Jansen*, 713 P.2d 907, 911 (Colo. 1986).

Threats to the medics might provide probable cause to believe a misdemeanor occurred.⁴ *See* § 18-3-20; Fed. Heights Mun. Code § 38-27, § 38-115, or § 38-122. However, neither U.S. Supreme Court nor Colorado has found it constitutional for police to enter a home or curtilage without a warrant solely to arrest a misdemeanant. *See Mascorro v. Billings*, 656 F.3d 1198 (10th Cir. 2011); *People v. Stewart*, 2017 COA 99, ¶ 31 (not deciding the issue as

⁴ Of course, this presumes DeHerrera was incompetent to refuse medical treatment but was competent to form the mens rea required for the misdemeanor. Although competency to refuse medical treatment and competency to form a mens rea rely on different tests, being both incompetent enough and competent enough at the same time is hard to fathom. *See People ex rel. Ofengand*, 183 P.3d 688, 694 (Colo. App. 2008) (“[T]he People contend that respondent competently represented herself at the treatment hearing and was provided advisory counsel. Given the apparent contradiction between that contention and the People’s assertion that respondent was incapable of making medical decisions on her own behalf, we conclude respondent has made a sufficient showing of prejudice.”). Because DeHerrera was never charged with making threats to the medics, the Prosecution did not have to address this issue.

irrelevant to case before them and indicating it will be fact specific). Therefore, even if Defendant had committed a misdemeanor, it was not unreasonable for him to believe that a warrant was required for the police to enter his property and that without a warrant they were trespassing.

Indeed, the Trial Court found that whether the police were lawfully on the premises was a jury question. TR 9/27/17, p 64:12–19 (Trial Court agreeing that it was only the “government’s position that [the police] had every right to be there because Mr. DeHerrera had committed the crime of threats, whether state statute or municipal ordinance violation” but that the jury “[wi]ll decide what the facts are”).

As part of their argument regarding justification, the People assert that the medics “were not required to allow the defendant to refuse medical treatment until they could ensure that he did not pose a risk of immediate and serious harm to himself or others.” Ans. Br. at 17. The Government is incorrect about the standard required. The standard is: a person is allowed to refuse medical treatment, unless they do not have the capacity to make the decision for themselves.⁵ See, e.g.,

⁵ In fact, the right is broader: “the right to refuse medical treatment is not lost merely because the individual has become incompetent.” *Rasmussen by Mitchell v. Fleming*, 741 P.2d 674, 686 (1987) (collecting cases from six states and finding they are unanimous on this point); also *Goedecke v. State, Dep’t of Institutions*, 603 P.2d 123, 125 (Colo. 1979).

People v. Medina, 705 P.2d 961, 968 (Colo. 1985) (discussing common law right to refuse unwanted medical treatment).

The question then is how to determine whether someone has that capacity. That question does not depend on whether failure to accept treatment might result in harm to self or another.⁶ The question is solely whether the potential patient understands the consequences of refusal. So, for example the medics' own protocol in this case states that an adult is entitled to refuse medical treatment if he: "1. Understands the nature of the illness/injury or risk of injury/illness; 2. Understands the possible consequences of delaying treatment and/or refusing transport; 3. Given the risks and options, the patient voluntarily refuses or accepts treatment and/or transport." EX T (Trial), p 1.

The law allows an individual to refuse medical treatment even if it would result in harm to themselves. *See, e.g., Cruzan v. Dir. Mo. Dep't of Health*, 497

⁶ Weighing the Government's concern for the safety of others in order to determine whether a person has the right to refuse medical treatment is potentially fraught with danger. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 330 (1990) (Brennan, J., dissenting) ("As one of our most prominent jurists warned us decades ago: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.") (quoting *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 572-573, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)).

U.S. 261, 273 (1990) (“competent persons generally are permitted to refuse medical treatment, even at the risk of death.”).

When the medics were faced with the question of whether Defendant was competent to refuse medical treatment, they were not concerned with the safety of “others.” See Op. Br. at 5–6. The question of whether a medic can force treatment on one person to avoid harm to someone else simply did not arise in this case at the time the medics were determining whether Defendant was competent to refuse medical treatment. The issue is extraneous to this case and should be ignored.⁷

Additionally, the Colorado cases discussing whether there is a justification for medically treating a patient against their will based on whether there is a danger to others, are factually distinct from this one.⁸ For example, the case cited by the People on this point is *Medina*, 705 P.2d 961. In *Medina*, the court was asked whether anti-psychotic medication could be forcibly administered over a patient’s express refusal where the patient had been diagnosed with psychosis, was institutionalized, had refused medication over the course of two-plus weeks, and

⁷ It is, however, another interesting conflation of the roles of the medics and the police.

⁸ See *In re Conroy*, 486 A.2d 1209, 1225 (N.J. 1985) (collecting cases addressing forced medical treatment to protect innocent third parties: forced vaccination to protect the public health, to prevent risk to prison security, or to prevent emotional or financial abandonment of the patient’s children).

was becoming increasingly psychotic and agitated. *Id.* at 974. The court held that a patient in such a condition cannot be medicated against his will, absent an “emergency,” unless all of the following are shown by clear and convincing evidence:

- (i) the patient is incompetent to effectively participate in the treatment decision;
- (ii) treatment by antipsychotic medication is necessary to prevent a significant and likely long-term deterioration in the patient’s mental condition or to prevent the likelihood of the patient’s causing serious harm to himself or others in the institution;
- (iii) a less intrusive treatment alternative is not available; and
- (iv) the patient’s need for treatment by antipsychotic medication is sufficiently compelling to override any bona fide and legitimate interest of the patient in refusing treatment.

Id. at 963–64. This test attempts to balance the patient’s constitutional rights with the facility’s desire to treat the patient. *Medina*, however, does not define “emergency” or outline which of the prongs of its test would be appropriate in emergency circumstances to determine whether to forcibly treat someone against their will.⁹

⁹ *Medina* provides another factor to consider even in emergency situations: medical treatments can carry substantial costs that are best weighed by the patient. In *Medina*, the court noted that the anti-psychotic medication at issue could cause significant and irreversible nerve damage. *Medina*, 705 P.2d at 965. In the case at issue here, DeHerrera had a complex medical situation (diabetes, neuropathy, and a spinal court implant) and he was in the best position to determine what treatment to accept. See TR 12/20/17, pp 14:19–15:2.

Furthermore, although the lead medic testified that his department had a policy it used to determine whether a potential patient was capable of refusing medical treatment, (1) the medic did not follow his department's policy, Op. Br. at 2–4, and (2) there is no legal authority that the department's policy would allow a medic in the field to decide to remain in someone's home against their express wishes to either determine whether they have capacity to refuse medical treatment or to treat someone against their will.¹⁰ The People point to no authority for the proposition that medics can stay in your home against your express wishes until you tell them how many quarters are in a dollar.¹¹

As Justice Scalia has noted, citizens are not protected against all deprivations of liberty, just those that occur without due process of law. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. at 293 (Scalia, J., concurring). Here, the medics may have been entitled to seek court intervention to require Defendant to

¹⁰ Just the bare fact that the medics had some standardized procedure (that they did not follow), does not overcome Defendant's constitutional, common-law, and statutory rights to refuse medical treatment. *See, e.g., People v. Quick*, 2018 CO 28, ¶ 8 (“[S]eizure of a motor vehicle by the police is not made reasonable within the meaning of the Fourth Amendment merely by being effected according to standardized criteria dictated by routine police policies or procedures.”).

¹¹ One of the questions the testifying medic indicated he uses to determine if someone can refuse medical care. TR 09/25/17, p 168:14–23. It is not at all clear that this question gets at the heart of the constitutional question: is the person aware of the potential risks of refusing medical care. *See* Op. Br. at 3–4.

submit to treatment, but Defendant was not unreasonable in believing that they were not free to impose their own protocol (or in fact, as here, simply their own actions without regard to their official protocol) on Defendant without a court order in the face of his refusal of medical treatment.

(c) The holding in *Lutz* applies to this case.

Lutz applies here. In *Lutz*, a division of this court held that the language of the defense of premises statute could apply to an individual's actions in response to the police. *People v. Lutz*, 762 P.2d 715, 716 (Colo. App. 1988). The People assert that in *Lutz*, it was not unreasonable for Lutz to believe the police were unlawfully trespassing, but that it was unreasonable for Defendant to so believe. Ans. Br. at 18. In *Lutz*, the division was clear that it could not say, as a matter of law, whether Lutz's belief was reasonable. *Lutz* at 717. Rather, the division held she was entitled to a jury determination of that question. The same is true here. Defendant presented at least a "scintilla" of evidence that his belief was reasonable and he is entitled to have a jury, not this Court, determine whether defense of premises justified his actions.

(iii) *In the unusual circumstances presented here, it was error not to sua sponte instruct on defense of premises.*

In sum, on these unusual facts, the failure to sua sponte instruct the jury on defense of premises was an error:

- Defendant could reasonably believe that the medics and the police were trespassing;
- Defendant had repeatedly asserted the defense to the medics and the police during the incident;
- The officers consistently stated to Defendant that their only purpose was to ensure he received medical treatment;
- Defendant’s defense of premises statements had been presented to the jury through the introduction of the body cam videos;
- Defense counsel argued to the court that Defendant was defending himself “and his property”; and
- The Trial Court acknowledged that whether the police had justification to be on Defendant’s property was a factual question for the jury.

(iv) The failure to instruct the jury on the affirmative defense undermined fundamental fairness of the trial.

Here, the Defendant presented more than a “scintilla” of evidence that raised the affirmative defense of defense of premises. Where “presented evidence raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution

bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable.” *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) (internal citations omitted). As noted in the opening brief, the failure to instruct on defense of premises lowered the Prosecution’s burden of proof. § 18-1-407(2), C.R.S. When a court instructs the jury in a way that lowers the prosecution’s burden to prove its case, “[p]rejudice to the defendant is inevitable.” *People v. Kanan*, 526 P.2d 1339, 1341 (1974).

The jury here was never instructed that defense of premises could be a complete defense to the charges. This failure denied Defendant the right to have a jury assess his actions under the law. See *People v. Turner*, 680 P.2d 1290, 1292 (Colo. App. 1983) (“[o]nce a defendant presents some credible evidence of an affirmative defense it becomes a jury question”); *Lutz*, 762 P.2d at 717. This is not a case where a defendant only after conviction comes up with a plausible justification for his actions. Defendant was clear from the moment he was awakened by the medics why he was taking the actions he was taking. On this case’s unusual facts, it undermined fundamental fairness for the Trial Court not to instruct the jury on defense of premises.

II. THE TRIAL COURT ERRED BY REFUSING THE DEFENSE’S SELF-DEFENSE INSTRUCTIONS.

A. Argument

Defendant relies on the arguments in his opening brief to support this issue with the following responses to specific arguments in the People’s answer brief.

Defendant did not argue in the opening brief that the police officers’ knowledge was irrelevant, rather he argued that the problem with the instructions was that they did not properly instruct the jury that the police’s perspective did not automatically trump his perspective in determining his criminal liability. See Op. Br. at 31–32. *Kaufman* holds that in the self-defense context, the important point is *Defendant’s perception* of the officers’ intent. *Kaufman*, 202 P.3d at 551 (“Thus, while the actual intent of [the victims] was not the focus of the inquiry, *[defendant’s] perception of their intent was a primary consideration.*” (emphasis added)). The instructions, as given, improperly slanted the jury’s analysis toward the police’s point of view.

The People assert that any error of the trial court in refusing Defendant’s proffered instructions was harmless because Defendant could not reasonably have believed the officers’ use of force was excessive. Ans. Br. at 32–33. In fact, as shown above, Defendant could reasonably have believed that the officers were

trespassing on his premises and therefore any use of force was unlawful. This error was not harmless.

III. THE TRIAL COURT ERRED BY NOT INQUIRING INTO DEFENDANT'S DISSATISFACTION WITH HIS COUNSEL.

The Prosecution asserts that the Trial Court did not err by not inquiring into Defendant's dissatisfaction with his counsel because Defendant never stated on the record that he was dissatisfied. The catch-22 is that Defendant was not allowed to express his dissatisfaction, so it does not appear in the record. Each time Defendant began to express dissatisfaction, the Trial Court refused to allow him to speak. *See* Op. Br. at 35–36. Defendant finally sent the Trial Court a letter (after the trial but before sentencing), however, the Trial Court refused to even open the letter to see whether there was anything that needed to be addressed. TR 11/29/17, p 2:12–25. The Trial Court did not enter the letter into the record, but instead returned it directly to Defendant's trial counsel. *Id.*

The Government asserts that the Trial Court acted adequately by “inviting” Defendant to explain his concerns after sentencing was completed. This is an inadequate remedy for the problem. Essentially, the Government is suggesting that the only allowable remedy for a defendant's concerns with his counsel during a trial is a petition under Crim. P. 35(c), which requires a defendant to complete the

trial (and possibly an appeal) before the problem can be addressed, rather than having it addressed during the trial.

The Government's assertion that defense counsel competently represented Defendant throughout all stages of the proceeding (Ans. Br. at 42) is incorrect: defense counsel failed to offer the affirmative defense of defense of premises when it should have been offered. To the extent that this implicates Rule 35(c), Defendant is not raising that issue now but only responding to the People's assertion that the Trial Court did not err because defense counsel was competent.¹²

IV. THE TRIAL COURT ERRED BY PROCEEDING WITH THE JURY INSTRUCTION CONFERENCE WITHOUT THE DEFENDANT OR A VALID WAIVER.

There is no evidence that the Trial Court examined whether the purported waiver was valid. No one determined whether the Defendant's absence was voluntary. Defendant was at the time, and still is, a diabetic with significant other medical issues. This entire case was premised on Defendant's inability to refuse medical treatment because he did not have sufficient capacity when in the throes of a medical problem. There was no effort on the part of the Trial Court to determine whether Defendant had a medical problem at the time he did not appear for the jury instruction conference.

¹² Defendant is not waiving any other potential claims of ineffective assistance of counsel by not raising them here.

V. CUMULATIVE ERROR

The Government asserts, without citation to authority, that Defendant's cumulative error argument should be reviewed for plain error. That is incorrect. *See Howard-Walker v. People*, 2019 CO 69, ¶ 26 (the *Oaks* standard governs, regardless of whether any error was preserved or unpreserved).

As noted by the People, the Colorado Supreme Court recently clarified the standard for cumulative error in *Howard-Walker*. This decision was issued after Defendant's opening brief was filed in this case. The proper standard for review is whether the cumulative effect of otherwise harmless errors deprived the defendant of his due process right to a fundamentally fair trial. *Id.* at ¶ 24.

As explained in the opening brief, the initial errors of the trial court related to the jury instructions and Defendant's argument that he was defending his premises. Alone and in combination, these errors presented an incomplete picture of the law applicable to the case to the jury, lowered the Prosecution's burden, and therefore prejudiced Defendant. The Trial Court's failure to inquire into Defendant's conflict with his counsel exacerbated this same problem. Defendant began to raise his concern during argument over his defense—but the Trial Court refused to allow him to speak. Similarly, the Trial Court's failure to ensure that Defendant had properly waived his presence at the jury instruction conference

(when the jury instructions were at the heart of the problem in the case), further contributed to the problem by preventing the problem from surfacing before the jury was inadequately instructed. These errors combined to undermine the fundamental fairness of Defendant's trial by ensuring that the jury was not instructed in accordance with Defendant's defense.

CONCLUSION

For the reasons given in Defendant's opening brief and this reply brief, Mr. DeHerrera's convictions should be set aside and the case should be remanded for a new trial.

Respectfully submitted October 1, 2019.

/s/ Lucy H. Deakins

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Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on October 1, 2019 a copy of the foregoing **REPLY BRIEF** was served via ICCES on **BROCK J. SWANSON**, Colorado Dept. of Law—Appellate Division, as attorneys for Plaintiff-Appellee, through their AG Criminal Appeals account.

By: /s/ Lucy H. Deakins