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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Arapahoe County District Court The Honorable Michelle A. Amico The Honorable Natalie T. Chase Case Number 15CR26	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant DEREK RAMON ROBINSON	
Megan A. Ring, Colorado State Public Defender ELIZABETH GRIFFIN 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #22218	Case Number: 17CA336

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, with the exception of the word count. Specifically, the undersigned certifies that:

The brief does not comply with C.A.R. 28(g). This brief contains 18,548 words. A motion requesting that this Court accept the brief in excess of the maximum word count has been filed along with this brief.

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.

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II. Whether prosecutorial misconduct violated Robinson's rights to a fair trial and impartial jury, to remain silent and to the presumption of innocence and burden of proof.

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STATEMENT OF THE CASE

A jury found Derek Robinson guilty of attempted first-degree (after deliberation) murder of Mary Keum, a class-two felony[1], and first-degree assault, a

[1] §§18-3-102(1)(a) and 18-2-101, C.R.S.

class-three felony.[2] The jury also returned crime-of-violence[3] and domestic-violence findings. TR(11-4-16),p.2-4; CF,p.385-392.

Although acknowledging Robinson's lack of felony convictions, family support, rehabilitation efforts, military service and mental health issues, the court found a violent history and aggravated offense circumstances and imposed the maximum available DOC sentence of 48 years. TR(1-20-17),p.15-26; CF,p.496.

TRIAL FACTS

At approximately 6:20 p.m. on January 5, 2015, Mary Keum was transported from her home to the hospital with a gunshot wound to her left jaw. She was awake and no longer bleeding in the ER. TR(11-1-16),p.60:18-20, 65:7-14, 63:10-24. Keum suffered a jaw fracture and an injury to the carotid artery behind it, which had clotted. There were bullet fragments in that same region, and no exit wound. *Id.*,p.63-68,76:3-18, 77-78; 82:18-25. She also lost two teeth. *Id.*,p.106:20-23. The surgeon described the path as "front to back and across the head and neck," but cautioned that one could not accurately determine trajectory because a "bullet can be deflected in the body from hard structures such as a bone." *Id*.,p.80:13-25. Although the fracture alone was "serious bodily injury," the bullet did not impact Keum's brain and she did not suffer major blood loss. *Id*.,p.76:17-

[2] §18-3-202(1)(a),C.R.S.

[3] §18-1.3-406(2)(a)(I)(A),(B),C.R.S.

18, 68:14-20. A later CAT scan showed evidence of a stroke (likely caused by the clot), but there was no evidence of brain damage. *Id.*,p.79:3-14. Keum spent a month in the hospital. *Id*.,p.99-100. She left the hospital with no prescriptions, but with a scar resembling a dimple that would require another surgery. *Id*.,p.155-156; 106:7-17.

Keum and Derek Robinson lived together for ten years in their Aurora home. TR(11-1-16),p.88-89. Keum had owned the revolver for years; she used to go to the range and she "never had a problem with that gun." *Id*.,p.105:7, 121-122.

At trial, Keum claimed for the first time that Robinson "was in the process of moving out" in January, and she expected him to leave. *Id*.,p.104:9-10, 138:17-20.[4] She testified that he came home on the evening of January 5 and accused her of cheating, and he was also upset about the fact that she had aborted his child and

[4] In responding to a discovery objection, the prosecution ultimately stated that Keum had never before made this claim. TR(10-31-16),p.252-57.

about having court the next day. *Id.*,p.90-91,107-08.[5] Keum said he was waving the gun around and wanted her to go to the other man's home and tell his wife. She went to the bedroom to get dressed, but he followed and "the gun goes off" in her face. *Id.*,p.91-93. Keum described falling to her stomach, asking Robinson to call 911, and Robinson instead putting the gun in her hand and telling her, "Shoot me. Shoot me." *Id*.,p.93:12-24, 129-130. Keum said she instead fired at the wall. *Id*.,p.94:3-10.

Keum's initial testimony suggested the gun came out unexpectedly and early on. She later agreed Robinson had said, "I know where your gun's at." TR(11-1-16),p.120-121. But she could identify no time when Robinson left and came back with the gun. *Id*.,p.141:1-20.

Keum had recently moved the gun to the spare-room closet. She repeatedly claimed it was unloaded (and the ammunition was in a hall closet). TR(11-1-16),p.104-105,138-140,144-145,147-184. She testified Robinson loaded the gun,

[5] The court appearance concerned Keum's report that he pulled her hair at a bar and broke a window on November 9, 2014; then assaulted her after his friends (who had intervened) left. TR(11-1-16),p.108-114. Keum agreed Robinson asked her not to go to court the next day, and she told him she wouldn't. *Id,*p.114:10-16. Rebecca Thompson testified that Robinson told her by phone before Christmas that he wanted to "kill" Keum for the abortion, but Thompson had known him 18 years, and understood his comment as venting. He sounded more sad than angry. TR(11-2-16),p.28:11-12,40-41,59-60. Thompson offered the statement after police told her Robinson shot Keum and she was "in bad shape," and she'd be in big trouble if she withheld anything. *Id*.,p.57-58; (11-2-16),p.196-198.

so it was "definitely thought out." *Id.*,p.144:23-24, 148:4-5. But—although Keum claimed that she accepted the gun and fired because "I didn't want him to…shoot me with it" and "I…wanted to see…is this thing loaded," *Id.*,p.157:7-14, 94:3-10—she fired just once, then dropped the gun. *Id.*,p.156:22-25. In other words, she seemed to know there was one (and only one) bullet remaining. Police didn't test the gun case or ammunition box for Robinson's fingerprints or DNA to corroborate Keum's claim that he loaded it. TR(11-1-16),p.214:9-14, 192-193,234:9-11.

On January 7, police asked how far away Robinson was when he fired, and Keum wrote "inch" and "close range." TR(11-2-16),p.86:16-21; (11-1-16),p.142-143,118-119. Keum was able to remember and convey the important details at that time; she was not impaired by medication. TR(11-1-16),p.159-160. Yet Keum later decided that Robinson was further, *Id.*,p.118:13-22; and estimated he was eight to ten *feet* away. *Id*.p.144:2-12, 142:12-14. Specifically, Keum testified he was standing by the bed and she was standing by her yoga mat. *Id.*,p.116-117,142:4-14; EX 72 (room diagram).

While evidence near the yoga mat (blood, eyeglasses and a tooth) corroborates Keum's location, the scene sheds no light on Robinson's location or their relative positions. TR(11-1-16),p.233:9-15. But Keum had "significant" stippling (gunpowder burns) to her face, which was "consistent with a close-range gunshot" and her initial report, according to Detective Fredericksen. TR(11-2-16),p.90:2-12, 93:4-6, 73:3-12; EX 40-42.[6] And when Keum was asked "where you fired the gun," she replied that she was on her stomach and "*He was down on the ground* and I shot it into the wall." *Id.*,p.117:11-19. Crime-scene investigator Solano-Bailey found the scene consistent with a struggle. TR(11-1-16),p.230-231. Additionally, Keum had a new scrape on her elbow that she did not account for, TR(11-2-16),p.73:16-19, 94:1-6; EX 43, and Robinson's thumb was visibly injured on January 7. TR(11-2-16),p.245-248,251-252; EX H.

Keum was able to get up and walk. She testified Robinson was "pretending to call 911," so she went to the house phone and "I don't know what happened,

[6] The court wouldn't permit Robinson to elicit Fredericksen's opinion on "how far away the gun was" or whether "the closer it is the more stippling there would be," and did not permit one juror request for a distance estimate and two juror queries whether the stippling was consistent with the gun being ten feet away or across the room. TR(11-2-16),p.91-93,97-101. *See United States v. Mozee*, 405 F.3d 1082,1084-85 (10th Cir. 2005) (the presence of gun powder burn marks around the entrance wound, known as "stippling" or "tattooing," "is one method of determining whether the gunshot occurred at close range"); *Wallace v. City of Alexander, Arkansas*, 843 F.3d 763, 766 (8th Cir. 2016) (noting medical examiner's finding that the stippling pattern around the entry "was consistent with a close range gunshot wound"); *Woolley v. Rednour*, 702 F.3d 411,425,n.2 (7th Cir. 2012) (noting that one victim's wound "had stippling which is consistent with a close-range shot," whereas the other's lacked stippling, which "supports a final shot from across the bar rather than from a person standing over the body," and finding this more probative of the shooter's location than ejected shell casings).

but…I didn't get to make a call." *Id*.,p.95-96.[7] Robinson's phone did connect with 911 for eight seconds, however. TR(11-1-16),p.241-45. Keum testified that he put his hand on the front door to prevent her from leaving,[8] so she went out the back, TR(11-1-16),p.96:15-25, where she heard her neighbor, Neil, pull into his garage. As Neil walked by, Keum called out that she'd been shot and to call police. *Id*.,p.97-98.

Neil's wife called 911. TR(11-1-16),p.11-12. He saw Robinson's truck peel out of the driveway, then went to help. Keum gave him her keys, asked him to care for the dogs, and told him where their food was. She was bloody, but Neil assumed from her behavior that the injury was superficial. *Id.*,p.19-20,12-16. Police arrived quickly. TR(11-1-16),p.32:16-20. Keum reported that Derek shot her. *Id.*,p.38-41. She walked to the ambulance, aside from being lifted over a puddle. *Id*.,p.99:12-13, 158:6-13.

Keum's .38 caliber revolver was on the floor near the bedroom door. *Id*.,p.167-170,181-82. It contained only the two fired cartridges. *Id*.,p.186:10-12. There was a bullet hole in the wall between the bedroom and spare room, an

[7] Keum later agreed that Robinson prevented her from using that phone, TR(11-1-16),p.146-47, but the cordless handset was missing in crime-scene photographs, and was found elsewhere in the home. *Id*.,p.134-135; (11-2-16),p.193-194; EX 19.

[8] Keum didn't recall him saying she would "bleed out," but later agreed that was in her police statement. *Id*.,p.103-104,122-123.

impact on the adjacent wall in the spare room, and a fragment in that room. TR(11-1-16),p.199-201. CSI Solano-Bailey was brand-new at the time, she was not qualified as an expert and she "did not do a formal [bullet trajectory] analysis," yet she showed the jury a rod she stuck in the hole (which appears from her photos to be two to three feet from the floor) as "simply a visual representation." *Id.*,p.200-202,210:17-19; EX 36,38. She was not trained in ballistics. *Id*.,p.228:16-17, 234:21-24.

Robinson was arrested on January 7, 2015, at the Aurora home of his long-time friend, Rebecca Thompson. TR(11-2-16),p.28:11-12. He'd arrived on the evening of January 5. He came and went, but didn't change his clothes. *Id*.,p.17-39. His truck was parked out front. He was compliant. TR(11-1-16),p.240-41; (11-2-16),p.10-16. His pants bore two bloodstains that contained DNA matching Keum. TR(11-2-16),p.147-150. His clothes were not tested for gunshot residue. *Id*.,p.129:11-18.[9]

[9] The prosecution successfully barred as self-serving what Robinson told police about why he was arrested ("I guess it had to do with the fight I had with Mary, we were arguing and then she pulled out a gun and it went off.") and about his injury ("I think I injured it when I got in the fight with Mary…I don't think it's broken, I think I just jammed it."). CF,p.53,162-163,247-48.

SUMMARY OF THE ARGUMENT

I. The court's refusal to instruct on the affirmative defense of self-defense violated Mr. Robinson's constitutional right to present his defense, as well as his rights to proof and jury findings of guilt beyond a reasonable doubt of every element necessary to convict—including the absence of self-defense. A new trial is required.

II. Mr. Robinson's rights to a fair trial and impartial jury, to remain silent and to the presumption of innocence and burden of proof were violated by: 1) prosecution misstatements of evidence and interjection of facts outside evidence, which was exacerbated by the court's erroneous adjudications of fact in ruling on objections; 2) several burden-shifting/comments on silence; and 3) conflating "after deliberation" with intent in jury selection and closing argument. The misconduct and rulings misled the jury about the evidence and law in ways that matter. They require reversal.

III. Robinson challenged the domestic-violence expert's proposed testimony pretrial. Judge Amico reviewed Janet Kerr's report and issued a lengthy written ruling and finding only two sections (the cycle of violence and why women stay) relevant, helpful, reliable, and more probative than prejudicial.

Judge Chase presided at trial. Before Kerr testified, the court said it had reviewed the order and refused to discuss it. The prosecutor said it was "law of the case" and he must "operate within [those] topic limits." Nevertheless, the prosecutor introduced and the court permitted testimony plainly exceeding those limits, including "lethality factors," attributions of motive, intent and insincerity that do not appear in approved sections of Kerr's report, and a highly misleading statistic (75% of domestic homicides occur when the victim tries to leave) that was not even in Kerr's report.

The testimony violated the order. It was not supported by required *Shreck* findings. And the court had denied a hearing (since it admitted just the topics arguably supported by caselaw, and precluded the rest). The testimony was obviously irrelevant, unreliable, unhelpful and more misleading and prejudicial than probative, in any event. And it was harmful. The testimony attributing motives and calculated intent unreliably suggested *Robinson* acted after deliberation and intent (the primary disputed issues) and was also improper bad character evidence. The 75% statistic unreliably suggested a 75% likelihood that Robinson decided and intended to kill Keum based *solely* on the relationship ending. And the "lethality factors" testimony suggested that the more factors present, the greater the likelihood of intent and deliberation. The testimony violated Mr. Robinson's rights to a fair trial and impartial jury. The prosecutor emphasized it in closing argument. It misled the jury, encouraged a conviction on improper grounds, and requires reversal.

IV. The court reversibly erred in addressing Mr. Robinson's *Batson* objections by immediately interjecting reasons for one strike, supplementing the prosecutor's reasons for another, and erroneously finding no discriminatory intent. Mr. Robinson is entitled to a new trial.

V. The cumulative effect of the errors requires reversal.

ARGUMENT

I. The court's refusal to instruct the jury on self-defense violated Robinson's rights to present a defense and to proof and jury findings of guilt beyond a reasonable doubt.

A. Standard of review

Robinson endorsed self-defense, CF,p.217, and tendered instructions on the affirmative defense. CF,p.379-383; TR(11-3-16),p.18-19.

Appellate courts determine de novo whether there was evidence entitling a defendant to a self-defense instruction. *People v. Garcia*, 113 P.3d 775,784 (Colo. 2005); *People v. DeGreat*, 428 P.3d 541,544 (Colo. 2018). In doing so, the court "consider[s] the evidence in the light most favorable to the defendant." *Cassels v.*

People, 92 P.3d 951,955 (Colo. 2004); *People v. Newell*, 395 P.3d 1203,1207 (Colo. App. 2017).

B. The court erred.

A defendant has the constitutional rights to a fair trial, to present a defense, and to proof and jury findings beyond a reasonable doubt of every fact essential to conviction. U.S.Const.amends.V,VI,XIV; Colo.Const.art.II,§16,23,25; *Chambers v. Mississippi,* 410 U.S. 284,294 (1973); *Hendershott v. People*, 653 P.2d 385,393 (Colo. 1982); *Apprendi v. New Jersey*, 530 U.S. 466,490 (2000); *Griego v. People*, 19 P.3d 1,7 (Colo. 2001). To preserve these rights, the trial court must properly instruct the jury. *Griego, supra*; *People v. Garcia*, 28 P.3d 340,343 (Colo. 2001).

The Colorado Constitution recognizes a "natural, essential and inalienable right" to defend one's life. Colo.Const.art.II,§3. Section §18-1-704(1),C.R.S., provides:

> A person is justified in using physical force to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force by another person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

See People v. Opana, 395 P.3d 757,759 (2017) (the statute "provides a legal justification").

Due process requires the prosecution to disprove self-defense beyond a reasonable doubt because it functions as an additional element in Colorado. *People v. Garcia*, 113 P.3d 775,784 (Colo. 2005); *Kaufman v. People*, 202 P.3d 542,550 (Colo. 2009); *People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011). *See also* §18-1-407(2),C.R.S. (requiring disproof beyond a reasonable doubt).

A jury assessing self-defense considers the "totality of the circumstances" from the standpoint of the defendant. *People v. Jones*, 675 P.2d 9,14 (Colo. 1984); *People v. Garcia*, 28 P.3d 340,347 (Colo. 2001); *Riley v. People*, 266 P.3d 1089,1094 (Colo. 2011). Apparent necessity, if "well-grounded" and of such a character as to appeal to a reasonable person "under like conditions and circumstances," justifies self-defense to the same extent as actual necessity. *Kaufman*, 202 P.3d 542,551; *Riley*, 266 P.3d 1089,1095.

"[W]here the record contains *any evidence* tending to establish…self-defense, the defendant is entitled to have the jury properly instructed with respect to that defense." *Idrogo v. People*, 818 P.2d 752,754 (Colo. 1991)(emphasis added); *Garcia*, 28 P.3d 340,347 ("even if the supporting evidence consists only of highly improbable testimony by the defendant"); *DeGreat*, 428 P.3d 541,545 (same); *People v. Wakefield*, 428 P.3d 639,644 (Colo. App. 2018)(same); *People v. Saavedra-Rodriguez*, 971 P.2d 223,228 (Colo. 1998) (the "scintilla" and "some credible evidence" standards are the same; both "merely require[] some evidence").

The evidence may be circumstantial, *Newell*, 395 P.3d 1203,1208-09, and it may come from the prosecution. *People v. Whatley*, 10 P.3d 668,670 (Colo. App. 2000); *Newell*, *supra* at 1207. *See also* §18-1-407(1),C.R.S. ("unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue"). "The court must view the defendant's offer of proof in the light most favorable to the defendant and draw all reasonable inferences therefrom." *Saavedra-Rodriguez, supra; accord, Cassels,* 92 P.3d 951,955; *Newell, supra*.

Similarly, an instruction embodying the defense theory must be given if there is *any* evidence to support it—even if it is highly improbable testimony by the defendant. *People v. Fuller*, 781 P.2d 647,651 (Colo. 1989); *People v. Nunez,* 841 P.2d 261,264 (Colo. 1992); *Garcia*, 28 P.3d 340,347; *Riley v. People*, 266 P.3d 1089,1092 (Colo. 2011).

In this case, Keum *admittedly* fired the gun, and it was her gun. Robinson tendered self-defense instructions. CF,p.379-383. Appendix A. Robinson cited governing cases and explained he was entitled to self-defense because there was evidence supporting it, including Robinson's thumb injury, Keum's statement that she was shot at "close range" and an "inch" away, and the CSI's opinion that there was a struggle. TR(11-2-16),p.258-260,262-263,265:6-9, 267-69. Robinson argued refusing the affirmative-defense instruction "would deny him the right to present a defense under the United States and Colorado Constitutions," *Id.*,p.269:19-22, and asked the court to allow a properly-instructed jury to do its job of assessing the evidence. *Id.*,p.265:10-16. Additionally, one of Robinson's instructions stated that self-defense is a natural right protected by the Colorado Constitution. CF,p.381.

The court noted the "standard is so low," found there was "barely, if any" evidence, and deferred ruling. TR(11-2-16),p.261-62,265-270. The next morning, right before closing arguments, the court focused on Keum's testimony and decided there was no evidence to support a self-defense instruction. TR(11-3-16),p.7-19. The court specifically relied on *Beckett v. People*, 800 P.2d 74 (Colo. 1990), and *People v. Laurson*, 15 P.3d 791 (Colo. App. 2000), *disapproved of by DeGreat*, 428 P.3d 541,546,n.3 (disapproving of the ruling that self-defense is not a defense to aggravated robbery), but the court misunderstood those cases.

The court seemed to mistakenly believe that *Beckett* ruled "the court properly declined to give" a self-defense instruction. TR(11-3-16),p.12-13. But the instruction refused in *Beckett* was an "amplifying" instruction explaining the right to act on appearances. *Beckett* found no error because the concept was sufficiently explained in the standard self-defense instruction, which *was* given.

The court mistakenly believed *Laurson* affirmed a refusal to instruct despite "some evidence that the victim's group may have had guns." TR(11-3-16),p.10-11. But 1) *Laurson* cited no such evidence; there was merely evidence that defendant had *asked* someone if "these guys have guns?" and 2) *Laurson* actually *agreed* that the evidence "support[ed] an instruction concerning defense of another." *Id.*, 15 P.3d 791,794-95. It found insufficient evidence of *self*-defense because, unlike here, it was overwhelmingly clear that there was no threat to Laurson. Laurson had staged a fake drug deal to retaliate against the victims, who robbed him in a previous deal. When the victims assaulted Laurson's friend, as expected, Laurson drove up in his van and got out, and they all ran away. Laurson chased and shot them *in the back*, as they ran. *Id.*, 15 P.3d 791,794-95. *Laurson* is distinguishable.

The trial court acknowledged Robinson's constitutional argument, but mistakenly believed instructing on self-defense would "violate due process and the right to a fair trial for both sides," TR(11-3-16),p.18:11-14, although the bill of rights do not apply to the government.

The court erred, because there was far more than the "scintilla" needed to require an instruction embodying the affirmative defense and defense theory, and to require the prosecution to disprove self-defense to the jury's satisfaction.

The gun belonged to Keum, who had practiced using it; she knew where it and the ammunition were located, and she had recently moved it and didn't tell Robinson where it was. TR(11-1-16),p.104-05,121-122,138-39,145. The gun was fired twice, and Keum fired (at least) one of those shots. *Id*.,p.94:3-10. Keum initially reported Robinson was an "inch" away and shot her at "close range," TR(11-2-16),p.86:16-21; (11-1-16),p.142-143,118-119; she had "significant stippling" around the wound "consistent with a close-range gunshot" and her initial report, TR(11-2-16),p.90:2-12, 93:4-6, 73:3-12; EX 40-42; she said Robinson "was down on the ground" with her when she shot into the wall, *Id*.,p.117:11-19; she had a fresh, unexplained abrasion to her elbow, TR(11-2-16),p.73:16-19, 94:1-6; EX 43; Robinson's thumb was injured on January 7, TR(11-2-16),p.245-248,251-252; EX H; and a crime scene investigator found the scene consistent with a struggle. TR(11-1-16),p.230-231. Although Keum insisted that she kept the gun unloaded and claimed that she fired the gun because "I didn't want him to…shoot me with it" and "I…wanted to see…is this thing loaded," *Id*.,p.157:7-14, 94:3-10, she fired just once, and then dropped it. *Id*.,p.156:22-25. The revolver contained only the two fired cartridges. *Id*.,p.186:10-12. There was copious evidence consistent with Keum wielding her own gun and Robinson struggling with her, in self-defense.

Certainly, Keum claimed Robinson found and loaded her gun, shot her, and then placed the gun in her hand. But the jury wasn't required to believe everything Keum said. She had an obvious motive to lie, if she was the one who wielded the gun against Robinson. There were inconsistencies in her story (e.g., when Robinson produced the gun and how far away he was). There was physical evidence consistent with Keum's account, but also consistent with her wielding the gun first and being shot in self-defense. The prosecution did not definitively corroborate her account. It was up to the jury to view, compare, and assess all of the evidence, including Keum's testimony. It was their job to decide whether she minimized, exaggerated or fabricated parts of her story, and a properly-instructed jury may have viewed that as adding to their doubts about self-defense. *See Wright v. West*, 505 U.S. 277,296 (1992) (a jury is "entitled to consider whatever it concluded to be perjured testimony [from defendant] as affirmative evidence of guilt"); *accord, People v. Clark*, 214 P.3d 531 (Colo. App. 2009); *Bassil v. United States*, 147 A.3d 303,309 (D.C. Cir. 2016) (and *any* discredited testimony may support other evidence of a contrary account); *United States v. Eisen,* 974 F.2d

246, 259 (2nd Cir. 1992) ("jury is free to draw negative inferences from an untruthful witness's testimony as long as there is affirmative testimony to supplement or corroborate" them); *United States v. Zafiro,* 945 F.2d 881,887-88 (7th Cir. 1991) (same); *United States v. Kenny*, 645 F.2d 1323,1346 (9th Cir. 1981) (same); *United States v. McCarrick,* 294 F.3d 1286,1293 (11th Cir. 2002) (same); *Stallings v. Tansy*, 28 F.3d 1018,1023-24 (1994) (negative inference impermissible *absent* corroboration or testimony that is "implausible, incredible, [or] inherently inconsistent").

The court erred because "where the record contains *any* evidence tending to establish the defense of self-defense, the defendant is entitled to have the jury properly instructed with respect to that defense." *Idrogo*, 818 P.2d 752,754 (emphasis added); *Garcia*, 28 P.3d 340,347 ("even if the supporting evidence consists only of highly improbable testimony by the defendant"); *DeGreat*, 428 P.3d 541,545 (same); *Wakefield*, 428 P.3d 639,644-46 ("The trial court's ruling did not give adequate deference to defendant's constitutional right to assert that he was acting in self-defense, and to have the jury instructed accordingly."); *Newell*, 395 P.3d 1203,1208-09 ("We are not persuaded by the People's argument that the evidence here supporting a self-defense instruction is "mere speculation" equivalent to "no evidence." Circumstantial evidence, such as the evidence here, is "some evidence" from which a jury could infer that [victim] was the initial aggressor…").

The court also erred because an instruction embodying the defense theory must be given if there is *any* evidence to support it, even if highly improbable. *Fuller*, 781 P.2d 647,651 (addressing defense theory of self-defense); *Nunez,* 841 P.2d 261,264; *Garcia*, 28 P.3d 340,347; *Riley*, 266 P.3d 1089,1092.

Since the jury was not instructed on self-defense, the prosecution was relieved of its duty to disprove it beyond a reasonable doubt, to their satisfaction. Indeed, the jury had no chance at all to consider whether Robinson was defending himself. Accordingly, Robinson was denied his rights to present his defense to the jury, to a fair trial, and to proof and jury findings beyond a reasonable doubt of all essential elements.

This error cannot be deemed harmless beyond a reasonable doubt. *See DeGreat*, 428 P.3d 541,546-547 ("we cannot say that the trial court's error was harmless. 'If the trial court errs in disallowing an affirmative defense, then it improperly lowers the prosecution's burden of proof;'" noting that a jury may reject self-defense on retrial, but "these are fact questions that properly rest with the jury") (quoting *Garcia*, 113 P.3d at 784); *Idrogo*, 818 P.2d at 756 (refusal to instruct requires reversal because it "deprive[d] the defendant of the right to an acquittal on the ground of self-defense if the jury could have had a reasonable doubt"); *Newell*, 395 P.3d 1203,1207-08 (refusal to instruct deprived the accused of his right to trial by jury and an acquittal on that ground; it is not harmless); *Wakefield*, 428 P.3d 639, 649 (the erroneous refusal to instruct "warrants reversal).

II. The prosecutorial misconduct requires reversal.

A. Standard of review and general law

Most of the claims here are preserved by objection (or overruled objection to the first such instance), TR(11-3-16),p.56-57,61-62,51-53; (10-31-16),p.154-155, and a mistrial motion. TR(11-3-16),p.66-68.

Whether a defendant's constitutional rights were violated is reviewed de novo. *Fero v. Kirby*, 39 F.3d 1462,1473 (10th Cir. 1994); *Donnelly v. DeChristoforo*, 416 U.S. 637,639 (1974); *Crider v. People*, 186 P.3d 39 (Colo. 2008). Absent constitutional error, review of preserved misconduct is for an abuse of discretion. *Crider supra*. Unpreserved misconduct is reviewed for plain error.

A defendant has rights to a fair trial and an impartial jury. U.S.Const.amends.VI,XIV; Colo.Const.art.II,§§16,25; *Darden v. Wainwright*, 477 U.S. 168 (1986); *Oaks v. People*, 371 P.2d 443,446-47 (Colo. 1962) (jury-trial right "comprehends a fair verdict, free from the influence or poison of evidence which should never have been admitted"); *accord, Harris v. People*, 888 P.2d 259,263-64 (Colo. 1995).

He is presumed innocent, *Martinez v. Court of Appeal of California,* 528 U.S. 152,162 (2000); *Leonard v. People,* 369 P.2d 54,61 (Colo. 1962), his silence may not be used as evidence of guilt. *Chapman v. California*, 386 U.S. 18 (1967); *Martinez v. People*, 425 P.2d 299,302 (Colo. 1967), and correct instructions are required to hold the prosecution to its burden, *Griego*, 19 P.3d 1,7 (elements must be correctly defined to ensure adequate findings); *Longinotti v. People*, 102 P. 165 (Colo. 1909). U.S.Const.amend.V,VI,XIV; Colo.Const.art.II;§16,18,25.

A prosecutor must scrupulously avoid comments that could mislead or prejudice the jury. *Harris,* 888 P.2d at 263; *Domingo-Gomez v. People*, 125 P.3d 1043,1049 (Colo. 2005). Misconduct may violate the right to a fair trial and impartial jury or cause such other prejudice that reversal is required. *See, e.g., Darden*, 477 U.S. 168,178-79,181 (due process is violated by misconduct that "infected the trial with unfairness"); *Berger v. United States,* 295 U.S. 78,88 (1935); *People v. Oliver*, 745 P.2d 222,228 (Colo. 1987) ("Prosecutorial misconduct may influence a jury and deny an accused a fair trial."); *People v. Adams*, 708 P.2d 813,816 (Colo. App. 1985) (misconduct was "so prejudicial as to deprive defendant of a fair trial"); *Wilson v. People,* 743 P.2d 415,419-20

(Colo.1987) (plain error reversal); *Harris*, 888 P.2d 259,267 (same); *Wend v. People*, 235 P.3d 1089,1097 (Colo. 2010) (same).

B. Misstatements of evidence exacerbated by improper rulings, and interjection of facts not in evidence.

It is improper to misstate evidence or assert facts not in evidence. *Domingo-Gomez*, 125 P.3d 1043,1048; *accord*, *People v. Nardine*, 2016 COA 85, ¶59. *See Oliver*, 745 P.2d 222 (improper to misstate evidence and mislead jury about inferences it may draw); ABA *Standards*, §3-6.8(a).

Here, the prosecutor misrepresented evidence and injected facts not in evidence, and the court exacerbated the misconduct by improperly and erroneously adjudicating certain facts.

The prosecutor stated:

> It took a SWAT team to get him out of that house.

TR(11-3-16),p.58:7-10.

There was no evidence that it "took" a SWAT team to remove Robinson. This implied that he was dangerous and dug in. Police use a SWAT team as standard protocol for "homicide" suspects. Robinson's truck was parked right in front of Thompson's house. He came out within two or three minutes of being contacted via loudspeaker. He was compliant and unarmed. TR(11-2-16),p.10-11,14-16.

Next, the prosecutor argued:

> *They talked a lot about how there's no blood on the handle.* You can clearly see it here…There's blood on that gun.
>
> *CSI Solano did not testify that she had never tested the handle.* The questions were she had never tested the butt.

TR(11-3-16),p.55:3-10, and:

> …CSI Solano said she didn't write down notes of exactly what she swabbed, *but her habit and practice is to swab the handle, the trigger, and the handle.*
>
> What's in the –
>
> MS. BANDUCCI: Objection, facts not in evidence.
>
> THE COURT: Overruled. *I believe that's what she testified to.*

TR(11-3-16),p.56-57.

First, the defense never claimed there was "no blood" on the handle. That comment was designed to make the defense look silly.

Second, Solano-Bailey *did* "testify that she had never tested the handle:"

> …I was with a senior investigator….And *he and I* ***decided***…***not to swab that handle*** for a reason. I don't know.

TR(11-1-16),p.222:7-10. And when the prosecutor tried to get her to say that she swabbed the trigger, she said "No." *Id.*,p.222-223.

Third, and contrary to the court's improper[10] adjudication of facts, Solano-Bailey *never* claimed it was her habit and practice to swab the trigger and handle. She explained that her goal was just to swab "blood" so it could be identified, and repeatedly said she couldn't recall (and hadn't documented) what areas of the gun she swabbed. TR(11-1-16),p.216-219,223:21-22. When Robinson elicited her inexperience at the time and pointed out that triggers and handles may be swabbed

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[10] The court may not comment on the evidence. *See Sheftel v. People*, 141 P.2d 1018,1020-1021 (Colo. 1943) (reversing because of comments on evidence in ruling on objections); Crim.P. 30 ("the court shall read its instructions to the jury, but shall not comment upon the evidence); *United States v. Rivera-Santiago*, 107 F.3d 960,965-967 (1st Cir. 1997) (court reversibly erred by reading back a selection of testimony in response to a question about evidence; "a court may not step in and direct a finding of contested fact in favor of the prosecution"); *People v. Martinez*, 652 P.2d 174,178 (Colo. App. 1981) (court must avoid any appearance of partiality and "should not indicate to the jury any personal opinion that certain testimony is worthy or unworthy of belief"); *accord*, *People v. Rogers*, 800 P.2d 1327,1328 (Colo. App. 1990). If the court believed the objection was mistaken, the correct response was to overrule and remind the jury that arguments are not evidence and it was their job to resolve factual disputes. *See People v. Castillo*, 2014 COA 140M, ¶64 (declining to find arguable misstatements reversible where such instructions were given "on a number of occasions"), *rev'd on other grounds*, 421 P.3d 1141,1151-52,n.8 (Colo. 2018) (and noting misstatements exacerbated prejudice caused by erroneous instruction).

The court also adjudicated facts during the testimony. When the prosecutor objected to Robinson's slight rewording of testimony, the court did not sustain, but told the jury, "***That's not what she said***." TR(11-2-16),p.23-24. And the court admonished counsel at the bench for questioning the ruling. *Id.*,p.26:11-12.

in an attempt to determine "who touched the gun," *Id*.,p.210-211, she *still* agreed only that she'd do so "[g]iven the right circumstances." *Id*.,p.212-213.[11]

Next, the prosecutor rendered unsupported opinions on wound trajectory and stippling (matters that require notice, expert testimony and an opportunity to challenge and rebut), and misrepresented the expert surgeon's testimony. First, he argued:

> …That shot went in just above her mandible….and the bullet fragments lodged back at the C3 vertebrae.
>
> *And you've heard Dr. McIntyre, that vertebrae is even with her Adam's apple. That's a downward shot by someone who is taller than her* shooting her in the head.

TR(11-3-16),p.36-37.

In rebuttal, he argued it was "impossible" for right-handed Keum to have shot herself "*at a downward angle*," and:

[11] Although the prosecutor wished to establish that the gun was "completely covered" in blood, to explain the lack of testing (and advisory witness Prince agreed), Detective Fredericksen also viewed it at the scene and denied that characterization, instead saying that it (and specifically, "the handle"), had "some blood" on it. TR(11-2-16),p.103-105. The handle is dark red, *Id*.,p.172:23, making it more difficult to discern blood in the photos. The DNA analyst agreed it may have been possible to develop a touch DNA profile from a bloodless swab from the wood, if it was clutched firmly, but swabbing the blood, as was done here, decreased that possibility because blood is such a robust DNA source. *Id*.,p.153-55. The analyst merely found (along with Keum's DNA) some uninterpretable genetic information that could belong to anyone. *Id*.,p.163-164.

> …You have no evidence before you that there was a struggle before this gun went off. Somebody else shot her. *Somebody that was taller than her*.

TR(11-3-16),p.59-60. Next:

> A lot's been made about the stippling, but *you've heard no evidence of how far stippling can occur from.* You've heard Mary Keum say, to her, close range is 8 to 10 feet, and frankly, yeah, *that sounds about right. Any distance within an enclosed room where a person is pointing a gun at you is close range.*
>
> *What is that evidence of? It's evidence that she was shot. The bullet trajectory is downwards.*
>
> MS. BANDUCCI: Objection, facts not in evidence.
>
> THE COURT: Overruled. *The doctor testified*.

TR(11-3-16),p.61-62.

First, this misrepresented the trajectory evidence, and the court *again* improperly and erroneously adjudicated the facts. This is how Dr. McIntyre, the treating surgeon and an expert in trauma and acute care, answered the question about "bullet trajectory:"

> …The carotid artery is deep or behind the point of the fracture, so it would seem to me as though **the trajectory of the bullet was *from front to back and across the head and neck area.***
>
> ….And then one important thing to remember is that *a bullet can be deflected in the body from hard structures such as a bone, so as much as you want to try*

to determine the exact trajectory of a bullet it may not be as obvious or clear because they can be deflected.

TR(11-1-16),p.80:13-25.[12] And McIntyre agreed he didn't know Keum's position when she was shot. *Id.*,p.84:12-14. Keum was short and Robinson was taller, but the significance of wound trajectory also would depend upon the shooter and subject's positions in space and relative to each other, as well as deflection.[13]

The court endorsed the misstated evidence when it responded to "facts not in evidence" objections by stating, "I believe that's what she testified to" and "the doctor testified," which greatly exacerbated the harm. *Sheftel*, 141 P.2d 1018,1020-1021 ("We cannot say, being mindful of the weight given to statements of the court by jurors, that this did not prejudice the defendant…."); *Bollenbach v. United States*, 326 U.S. 607,612 (1946) (" 'The influence of the trial judge on the jury is necessarily and properly of great weight'…and jurors are ever watchful of the

[12] He also testified more generally that the entry wound was about a centimeter above, and fractured, her left jaw, TR(11-1-16),p.73:5-15; the bullet caused an injury to her left carotid artery (at a point "relatively high in the neck" and "just below the level of the jaw"), *Id.*,p.66:24-25, 75:4-6, 76:3-18, 77-78; and it left fragments "*at the level of the mandible* and C3 vertical spine." McIntyre described C3 as "just below the level of the jaw" and (for demonstrative purposes) in the "general area or above" the Adam's apple, and noted the location of the Adam's apple is "highly variable between patients." *Id.*,p.77-78, 82:18-25, 83:13-17.

[13] *See, e.g, Woolley*, 702 F.3d 411,426,n.3 (noting, in a case with a sophisticated analysis by a qualified expert, that "the bullet trajectory cannot prove quite as much" as defendant wished, since "there is no way to know whether the shooter fired from a seated or standing position").

words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.")(citation omitted); *c.f., People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999) ("When 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.").

The freewheeling comments about a "downward trajectory" signifying Keum was shot by someone taller and the stippling being consistent with a shot from across the room also injected the *prosecutor's* opinions on matters requiring expertise,[14] which Robinson had no chance to cross-examine or rebut. In *People v. Davis*, 280 P.3d 51 (Colo. App. 2011), a sex-assault prosecutor presented no evidence on the "stages of trauma," yet she explained the process in closing argument. The argument was improper, misleading, and harmful because it

[14] *See, e.g., Davis v. Duran*, 277 F.R.D. 362, 371-72 (N.D. Ill. 2011) (barring opinion that bullet wound pathway, in light of parties' respective heights, was consistent with the subject being restrained in a bear hug by the shooter; the witness was "unqualified to testify about bullet wound trajectories" where his background was in police practice and procedures, not ballistics, forensic medicine or pathology, and the opinion was conclusory and lacking in explanatory reasoning); *Parvin v. State*, 113 So. 3d 1243,1249-50 (Miss. 2013) (bullet-wound trajectory opinion from forensic pathologist who conducted autopsy was unreliable and speculative).

"improperly encouraged jurors to rely on [the prosecutor's] supposed knowledge and expertise" derived from her position. *Id.* at 52,54. Similarly, in *People v. Walters*, 148 P.3d 331,336 (Colo. App. 2006), the prosecutor presented no expert on the effects of MS, but argued we all "know people with MS" and it does not cause loss of sexual desire. This information was "outside the record and beyond the jurors' personal observations and experiences in life, and….the prosecutor's comment also injected his own knowledge and credibility into the issue." *Id*. at 336. The prosecutor's personal assessment here of bullet trajectory and stippling and their significance is similarly improper and prejudicial.

Prosecutors must avoid "convey[ing] the impression that evidence not presented to the jury…supports the charges;" this "may induce the jury to trust the Government's judgment rather than its own view of the evidence" and "jeopardize the defendant's right to be tried solely on the basis of the evidence…." *United States v. Young,* 470 U.S. 1,18-19 (1985); *Berger,* 295 U.S. 78,88 (a prosecutor's "improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight…"); *Wilson,* 743 P.2d 415,418-19,n.7 (jury may give greater weight to prosecutor's assertions because of prestige associated with, and presumed fact-finding capabilities available to, the office); *Domingo-Gomez,* 125 P.3d 1043,1049,1052 (same). That is what occurred here.

Improper rebuttal is particularly impactful and harmful. *Domingo-Gomez*, 125 P.3d 1043,1052.

C. Improper burden-shifting/comments on silence

No person shall be compelled to be a witness against himself, and the prosecution may not use a defendant's silence as evidence of guilt. U.S.Const.amend.V,XIV; Colo.Const.art.II;§18,25; *Griffin v. California*, 380 U.S. 609 (1965); *Chapman*, 386 U.S. 18; *Martinez*, 425 P.2d 299,302; *Montoya v. People*, 457 P.2d 397 (Colo. 1969).

And every defendant "retains a presumption of innocence throughout the trial process." *Martinez*, 528 U.S. 152,162; *Delo v. Lashley*, 507 U.S. 272,278 (1993) (the presumption is meant to continually "remind the jury that the State has the burden…"); *Leonard*, 369 P.2d 54,61 ("It is not incumbent upon the defendant to prove anything to the satisfaction of the jury"); *People v. Santana*, 255 P.3d 1126,1130 (Colo. 2011) (the prosecution cannot require a defendant to prove his innocence); U.S.Const.amend.XIV; Colo.Const.art.II,§25.

Here, the prosecutor made rebuttal arguments that impacted those rights:

> MR. STEERS: …*You were just asked throughout that entire closing argument to do nothing but speculate and imagine. Where is the evidence before you that there was a struggle over the gun before it went off?*
>
> MS. BANDUCCI: Objection, burden shifting.

THE COURT: Rephrase, please.

MR. STEERS: There is no evidence before you that there was a struggle before the gun went off.

MS. BANDUCCI: Same objection.

THE COURT: Ladies and gentlemen, the burden is on the People to prove this case beyond a reasonable doubt.

Go ahead, Mr. Steers, I apologize.

MR. STEERS: Because remember, *you have to judge this case based upon the evidence we've presented only*. *Ms. Keum testified about what happened in that room. That's the only version of events before you. That's it.* This whole version of events that defense counsel just put before you, that's argument that's wholly unsupported by the evidence before you.

The judge said it multiple times, evidence comes from that witness stand. It doesn't come from an argument by defense counsel. And when they stand up here and say—and *spin this alternate reality*, ***which you did not hear from the stand*** –

MS. BANDUCCI: Objection, Your Honor, denigration of the defense.

MR. STEERS: That is not denigration of defense.

THE COURT: That is not a denigration. It is argument.

MR. STEERS: You have to disregard because it's not evidence. ***No one, no one, sat on the witness stand and said that there was a struggle over this gun before it went off. No one, no one, sat on that witness stand and said that Ms. Keum got that gun and loaded it. No one***.

> And because you didn't receive that evidence, that is speculative, *that is imagination, that is vague. It's the equivalent of standing up here and saying that a pink dragon came in and did it* because it's not something which is supported by the evidence because you heard no evidence of it.
>
> I don't get to stand up here and say things that didn't come in in evidence and neither do they. That's the standard. You received the evidence. *What is the evidence that anything other than what Ms. Keum said happened? There isn't.*

TR(11-3-16),p.51-53 (emphasis added). And:

> …*where is the evidence she made this up?* You don't just get to stand up here and stay, 'Clearly they made it up.'

TR(11-3-16),p.58:7-10.

The prosecutor and jury well knew there was only one person who could take the stand and give direct evidence that Keum produced the gun and there was a struggle—Robinson. But circumstantial evidence is equally valid, and Robinson was constitutionally entitled to remain silent and to present arguments that drew reasonable inferences from the evidence. *See People v. Villa*, 240 P.3d 343,358 (Colo. App. 2009) (closing arguments may include reasonable inferences drawn from the facts in evidence). The prosecutor instead implied that because Robinson chose not to testify, the inferences drawn in his closing must be untrue. The prosecutor also told the jury, in essence, that they *must* believe Keum because she took the stand, and Robinson didn't.

The arguments impaired the presumption of innocence and right to remain silent by suggesting Robinson's duty to prove his theory. *See Griffin*, 380 U.S. 609; *Chapman*, 386 U.S. 18; *Martinez*, 425 P.2d 299,302 (even an indirect statement concerning a failure to testify, if intended to direct the jury's attention to that failure, necessitates reversal); *accord, Montoya*, 457 P.2d 397 (reversing); *Martinez,* 528 U.S. 152,162 (2000)(the defendant "retains a presumption of innocence throughout the trial process"); *Leonard*, 369 P.2d 54,61 ("It is not incumbent upon the defendant to prove anything to the satisfaction of the jury;" reasonable doubt is the standard); *compare Santana*, 255 P.3d 1126,1131-32 (finding no reversible error where the burden-shifting appeared to have been intentional, it was a fair response to defense arguments, and the jury was correctly instructed by the court).

D. Lowering the burden on "after deliberation" by conflating it with intent

It is improper to misstate or misinterpret the law. *See Anderson*, 991 P.2d 319,321; *Longinotti v. People*, 102 P. 165 (Colo. 1909). This is particularly important with regard to an essential element. *See Griego*, 19 P.3d 1,7 (essential elements must be correctly defined to ensure that the jury makes required findings). Here, the prosecution had to prove Robinson acted both with intent and after deliberation. *People v. McBride*, 228 P.3d 216,224 (Colo. App. 2009)

In jury selection, the prosecutor stated:

> MR. STEERS: The law in the state of Colorado requires—does require a period of time and does require it to have been thought out, but ***it doesn't require that period of time to have been very long. In fact, caselaw uses things like "one thought proceeding*[sic] *another."***

TR(10-31-16),p.154:3-7 (emphasis added). Robinson objected. The following occurred at the bench:

> MR. STEERS: Judge, I don't believe that's a misstatement of the law. There are cases that refer to that, as well as other statements.
>
> MS. BANDUCCI: …There is a case that specifically states that the phrase…requires no more than one thought following another is a misstatement of the law. I have it.
>
> THE COURT: I thought he was talking about the time limit, but one thought following another thought. I remember the case, I just can't remember the name….So I think if it's--
>
> Rephrase. Because *there absolutely is no time limit.* I agree with you, I think it was the way it was phrased….

Id.,p.154-155. Although Robinson correctly argued this was a "misstatement of the law," the court didn't correct the misstatement for the jury. *See Longinotti*, 102 P. 165,168 ("the district attorney having made an unwarranted statement [about the mens rea for murder], the court, if necessary to properly correct it, should have suspended the trial and instructed the jury so as to avoid the effect of the district attorney's statement"); *Anderson*, 991 P.2d 319, 321 (Colo. App. 1999) ("When 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."). The prosecutor continued:

> MR. STEERS: Thank you, Judge. From the time it takes you to change oil in your car, things like that, *there's no time period in which that thinking about or deliberation has to take place.*

Id.,p.155:12-16.

In closing argument, the prosecutor continued this line:

> …Someone acts after deliberation if they act after they've exercised some sort of reflection and judgment. It's not hasty or impulsive. *After deliberation does not require a time frame.* You don't have to find that he planned this for a month. That he planned it for a week. ***After deliberation means he thought about his actions before he took them.***

TR(11-3-16),p.27-28 (emphasis added).

The prosecutor's comments misstated the law. They plainly conflated "after deliberation" with intent. "[A]n appreciable length of time" must have elapsed between the forming of the intent and the act itself. Otherwise, there would be no difference between intent alone and intent with deliberation. "After deliberation" would be rendered superfluous if it could be found to occur at the moment the intent was formed. *People v. Sneed*, 514 P.2d 776,778 (Colo. 1973); *Key v. People*, 715 P.2d 319,322 (Colo. 1986) (finding "one thought following another" language to be error). "[O]ne second of thinking could never amount to deliberation under settled Colorado law." *McBride*, 228 P.3d 216,224–25 (Colo. App. 2009) (prosecutor "distorted a key element of attempted first degree murder" and "obliterate[ed] any distinction between intentional and deliberative acts" by analogizing "after deliberation" to the second it takes to "reflect and…judge" whether to go through a yellow light, and referring to "one second" rendered the yellow-light analogy not just error, but reversible plain error).

The prosecutor rendered "after deliberation" superfluous and improperly lowered his burden on this essential, contested element. *See Griego*, 19 P.3d 1,7 (essential elements must be correctly defined to ensure that the jury makes required findings); *Longinotti*, 102 P. 165,168 (reversing because of prosecutor's uncorrected misdescription of mens rea); *McBride*, *supra*.

E. The violations of Robinson's rights to a fair trial and impartial jury, the presumption of innocence and proof beyond a reasonable doubt and to remain silent require reversal.

As soon as the jury was excused, Robinson requested a mistrial, citing Robinson's state and federal rights to due process, effective assistance of counsel, to remain silent, and to be presumed innocent, due to: burden-shifting comments when “we don't have to present any evidence or Mr. Robinson doesn't have to testify,” which the court failed to clarify; the court responding to “facts not in evidence” objections by telling the jury "I believe that's what she testified to" and “the doctor testified,” where “this Court is supposed to be an impartial overseer” and jurors “look to the Court as a position of authority in deciding this case;” and relatedly, the court’s apology to the prosecutor for a defense objection. TR(11-3-16),p.66-68.

The court noted that it reminded the jury of the prosecutor’s burden, faulted Robinson for not requesting a curative instruction on his right to remain silent, and chastised counsel for her “facts not in evidence” objections, stating three times that the court was “shocked” that counsel was “saying these things were not in evidence *when they clearly were*,” and stating,

> ...this Court sat through this trial just like you did and got to make a lot of notes on this trial just like you did. The jury is supposed to follow the instructions that this Court gives, and that's exactly what this Court has done is gave curative instructions when it thought it was necessary.

TR(11-3-16),p.70-71. The court denied the motion. *Id*.,p.72:3-6.

Thus, the court continued to misunderstand its role. *See* n.10, *supra.* By adjudicating the facts incorrectly, it endorsed and exacerbated the misstatements.

Sheftel, 141 P.2d 1018,1020-1021 ("We cannot say, being mindful of the weight given to statements of the court by jurors, that this did not prejudice the defendant…."); *Bollenbach*, 326 U.S. 607,612 ("…jurors are ever watchful of the words that fall from [the judge]" and "the judge's last word is apt to be the decisive word"); *c.f., Anderson*, 991 P.2d 319,321 (the court "improperly permits the jury to adopt" a misstatement of law when it declines to correct it).

Cumulatively, the misconduct misled the jury on issues that were important to their resolution of the charges. *See McBride*, 228 P.3d 216,225-26. [A] jury that has been misled by inadmissible evidence or argument cannot be considered impartial." *Harris*, 888 P.2d 259,263-64; *Adams*, 708 P.2d 813,816 (arguments violated due process). *See also Darden*, 477 U.S. 168,178-79,181 (due process is violated by misconduct that "infected the trial with unfairness"). The prosecution cannot prove the errors harmless beyond a reasonable doubt or harmless. *Chapman*, 386 U.S. 18,23-24; *United States v. Glover*, 413 F.3d 1206,1210 (10th Cir. 2005)(where an error is preserved, the government must prove defendant's substantial rights were not affected). And reversal is required under any standard since the misconduct and rulings so undermined fundamental fairness as to cast doubt on the reliability of the verdicts. *See Wilson*, 743 P.2d 415,418-21 (plain error reversal); *Harris*, 888 P.2d 259,263-64 (same); *Wend*, 235 P.3d 1089,1097 (same); *People v. Jones*, 832 P.2d 1036,1040 (Colo. App. 1991)(same); *Nardine*, 2016 COA 85, ¶69 (same); *McBride, supra* (same).

III. Reversal is required because of the elicitation and admission of expert testimony that violated the pretrial order; was not supported by required *Shreck* findings; and that was obviously irrelevant, unreliable, unhelpful, and more misleading and prejudicial than probative.

A. Standard of review

Robinson filed a pretrial motion objecting to Janet Kerr's expert testimony and arguing its admission would violate Robinson's federal and state rights to a fair trial, CF,p.185-187, and Judge Amico issued an order finding only a small portion of her report (sections on the cycle of violence and why women stay) relevant, helpful, reliable, and more probative than prejudicial. CF,p.206-213. Robinson objected to statistics before Kerr was called, TR(11-2-16),p.206-207,211-213, and he renewed his objections when she was offered as an expert. *Id*.,p.218:14-15.

A defendant has rights to a fair trial and an impartial jury. U.S.Const.amends.VI,XIV; Colo.Const.art.II,§§16,25. These rights may be violated by prosecutorial misconduct, *Darden*, 477 U.S. 168; *Harris*, 888 P.2d 259,263-64; *Oliver*, 745 P.2d 222,228 ("Prosecutorial misconduct may influence a jury and deny an accused a fair trial."); *Adams*, 708 P.2d 813,816 (misconduct was "so prejudicial as to deprive defendant of a fair trial"), or when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808,809 (1991); *Bloom v. People*, 185 P.3d 797,805-806 (Colo. 2008); *Oaks*, 371 P.2d 443,446-47 (jury-trial right "comprehends a fair verdict, free from the influence or poison of evidence which should never have been admitted").

Whether the constitution was violated is determined de novo. *Bloom, supra* (reviewing "totality of the circumstances" to determine whether constitution was violated). The propriety of the prosecutor's conduct and court's admission of evidence is otherwise reviewed for abuse of discretion. *Id.*; *Salcedo v. People*, 999 P2d 833 (Colo. 2000); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (experience-based expert testimony must be relevant and reliable, and its admission is reviewed for abuse of discretion).

In the absence of the specific findings required by *Shreck* "or a record not only supporting admission but virtually requiring it or precluding any reasonable dispute as to the basis of the court's admission, the trial court must be considered to have abused its discretion in admitting expert testimony." *Ruibal v. People*, 2018 CO 93, ¶14. Unpreserved error is reviewed for plain error.

B. Governing law

The prosecution must comply with the terms of a pretrial order. *See Oliver*, 745 P.2d 222,228 ("A prosecutor must promptly comply with all orders and directives of the court…."); *Adams*, 708 P.2d 813,814 (reversing "[b]ecause the prosecutor's conduct violated previous orders of the trial court and exposed the jury to inadmissible, prejudicial evidence").

In assessing admissibility of challenged expert testimony, a trial court determines whether: (1) the scientific principles underlying the testimony are reasonably reliable; (2) the expert is qualified to opine on such matters; (3) the expert testimony will be helpful to the jury; and (4) the evidence satisfies CRE 403. *People v. Rector*, 248 P.3d 1196,1200 (Colo. 2011) (citing *Shreck*, 22 P.3d at 77–79). *See also Kumho Tire Co., Ltd.*, 526 U.S. 137 (1999) (experience-based testimony must be relevant and reliable). The inquiry should be broad in nature and consider the totality of the circumstances of the case. *Shreck,* 22 P.3d at 70,77; *Ruibal,* 2018 CO 93, ¶12. The court may consider a wide range of pertinent factors, including those mentioned in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579,593–94 (1993). *Shreck, supra*; *Rector, supra*. The trial court must issue specific findings on all 5 questions above, including reliability. *Ruibal* at ¶12-13 (and stating, "With regard to the requirement for specific findings concerning a determination of the reliability and relevance of evidence to be admitted pursuant to CRE 702, with record support, we have…been unwavering."). "In the absence of these specific findings, or a record not only supporting admission but virtually requiring it or precluding any reasonable dispute as to the basis of the court's admission, the trial court must be considered to have abused its discretion in admitting expert testimony." *Ruibal* at ¶14.

"Reliability" means that the testimony must rest on a reliable foundation. That generally means it is grounded in empirical data or science, not subjective belief or speculation. CRE 702; *Estate of Ford v. Eicher*, 250 P.3d 262,270 (Colo. 2011) (finding opinion reliable "because it is grounded in the methods and procedures of science"); *People v. Ramirez*, 155 P.3d 371,379 (Colo. 2007); *People v. Wilkerson*, 114 P.3d 874 (Colo. 2005). Expert social science testimony based on a recognized field of study with a body of research and literature involving "systematic comparisons" between study and control groups has been found reliable. *Masters v. People*, 58 P.3d 979,989 (Colo. 2002). Subjective or anecdotal testimony tends to be unreliable and misleading. *Salcedo*, 999 P2d 833,837-840; *Wilkerson, supra*; CRE 403.

"Helpfulness" means it must fit the facts and assist in resolution of the case. *People v. Martinez*, 74 P.3d 316,323 (Colo. 2003). Testimony that a reaction or behavior is consistent with perpetrator status is not relevant and helpful if that reaction or behavior is just as consistent with non-perpetrator status, and/or contradictory reactions and behaviors are just as indicative of perpetrator status. *See, e.g., Salcedo* 999 P.2d 833.

Testimony that tends to confuse, distract or mislead is inadmissible. *See* CRE 702,403; *Salcedo,* 999 P2d 833; *Ramirez,* 155 P.3d 371,379. A jury "misled by inadmissible evidence or argument cannot be considered impartial." *Harris*, *supra* at 264; *Domingo-Gomez, supra* at 1048.

C. Procedural facts

1. Written motions and ruling

Janet Kerr is a licensed professional counselor with a Master's degree. TR(11-1-16),p.215-216. Her report (Appendix B, attached to Robinson's motion) states that she knew nothing about the case and "may testify to the following topics," depending on trial testimony. CF,p.189. Nine single-spaced pages of information follow, including (as relevant here):

> Section 1, regarding the frequency of domestic violence and other generalities;
>
> Section 5, "why victims stay.../delayed reporting," listing six factors;

Section 4, "cycle of violence," describing behaviors of the cycle (without attributing motive, intent or insincerity);

Section 3, "power and control," stating that this is behind the dynamic, listing ten ways in which offenders control and abuse, and attributing motivations/intentions (but citing the Domestic Abuse Intervention Project's 1984 power and control wheel, a compilation of "*behaviors*" from "focus groups of [battered] women," CF,p.192, which does not itself attribute motivations/intentions[15]);

Section 7, "suspect characteristics," presenting a fourteen-part psychological profile (citing a 2003 self-help book by a counselor, written from his experience and an advocate's point of view[16]) and attributing negative motivations/intentions/insincerity; and

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[15] Kerr's report said the wheel was attached, but it was not. CF,p.192,185-86. *See* https://www.theduluthmodel.org/wp-content/uploads/2017/03/PowerandControl.pdf.

[16] https://www.penguinrandomhouse.com/books/289845/why-does-he-do-that-by-lundy-bancroft/9780425191651/ (categorizing the book as "self-improvement" and providing an excerpt of the introduction, which states, "*The purpose of this book* is to equip women…to protect themselves…from angry and controlling men," and asserts that abusers are "very reluctant to face up to the damage that they have been causing…and hold on tightly to their excuses and victim blaming," but the author works with them in order to hold them accountable and because "*I consider the woman that my client has mistreated to be the person I am primarily serving, and I make contact with her at least every few weeks. My goal is to give her emotional support…and help her get her mind untangled….and I may be able to warn her of underhanded maneuvers that he is planning or of escalation that I'm observing*;" in the acknowledgements, the author thanks "above all the hundreds of female partners and ex-partners of my clients who have shared their stories with me and who have thereby shed light on the denial and distortions running through my clients' accounts of events. The survivors of abuse have been my greatest educators….").

> Section 6, "Levels of lethality…," listing eight "key risk factors" for domestic homicide (citing "Websdale, N. 2000 February").[17]

CF,p.189-196.

Robinson challenged Kerr's proposed testimony and demanded that the prosecution provide more complete bases for her opinions and demonstrate admissibility pursuant to *People v. Shreck*, 22 P.3d 68 (Colo. 2001) and CRE 702 and 403 at a hearing, arguing her testimony would otherwise violate his federal and state rights to a fair trial. CF,p.185-187.

Robinson *specifically* challenged Kerr's opinions about suspect characteristics and levels of lethality as not based in science, unreliable, unhelpful

[17] Kerr's comment preceding her list quotes an article that immediately continues, "The research into the evaluation of lethality assessments in domestic violence cases is practically non-existent," later notes that almost none of the instruments are "based upon a domestic homicide dataset," but instead "derive from a generalized appreciation or commonsense analysis of what questionnaire writers have gleaned from the research literature on domestic violence in general," and notes, "*One of the biggest problems with the lethality assessment instruments is that they purport to use 'lethality indicators' that are, in fact, characteristics of many domestic violence relationships, the vast majority of which do not end in death*," and concludes "*it is impossible to measure*" the risk of lethality (versus dangerousness) in "a standardized assessment tool," but finds them useful "educational tool[s] for service providers" and abused women. Websdale, N., *Lethality Assessment Tools: A Critical Analysis*, p.1,4,7, VAWnet Applied Research Forum, https://vawnet.org/sites/default/files/materials/files/2016-09/AR_Lethality.pdf. Kerr's list is one of several discussed by Websdale; it was compiled decades ago "to help battered women ascertain their own levels of risk," *Id*.,p.2, not as a predictive tool for court.

and “extremely prejudicial…character evidence;” and challenged her opinions on power and control, cycle of violence and why victims stay as not based on reliable scientific principles and more prejudicial than probative. CF,p.186-187; Appendix B (para.15,16).

The prosecution opposed a hearing and argued victim characteristics and relationship dynamics testimony had been ruled admissible in previous cases. CF,p.200-204.

Judge Amico denied a hearing, but issued a ruling that accurately summarized governing caselaw, reviewed Kerr’s report and found that only two sections met all of the *Shreck* requirements. CF,p.206-213. The court addressed the helpfulness, reliability and CRE 403 prongs of *Shreck* separately.

The court found only the matters in sections 4 and 5 of Kerr’s report to be relevant and helpful:

> An expert opinion about *how the cycle of domestic violence works, why a victim might not seek police intervention and why a victim might remain in an abusive relationship over a long period of time* is relevant and assistive to the jury in this particular case.

CF,p.209-210; Appendix C. The court explained its reasoning: “…jurors will hear [404(b) evidence] from 2007, 2013 and 2014….on some occasions; the victim did not contact the police. In addition, despite these previous instances of abuse, the victim is alleged to have remained in a relationship with the Defendant." CF,p.210. The court found *no* other sections of the report relevant or helpful.

The court found only the matters in sections 4 and 5 more probative than prejudicial ("the probative value of the testimony from an expert witness about why someone remains in an abusive relationship, the cycle of violence and why someone might not report…outweighs the danger of any unfair prejudice") for the same reason. CF,p.211; Appendix C. The court found *no* other report sections more probative than prejudicial.

The court arguably found the matters in sections 4 and 5 reliable. The court relied solely on appellate cases and the subjects it found reliable do not match up with the sections of Kerr's report: "[t]he reliability of the principles underlying the *battered woman opinion evidence* is well recognized," and "[c]ourts have repeatedly found social science experts who discuss *dynamics of relationships, risk factors and victims responses and behaviors* to be a reliable area of expertise" so long as the expert isn't vouching. CF,p.210. None of the cited cases actually address "risk factors." Because some of the cited cases mention the cycle of violence or why victims stay, though, it seems that the court meant to address sections 4 and 5.[18]

2. Pre-testimony objection and ruling

Before Kerr was called, Robinson called Judge Chase's attention to Judge Amico's ruling limiting her testimony, in case she was unfamiliar with it. Additionally, he objected to "general statistics" about domestic violence as irrelevant and suggesting a duty to convict on an improper basis. TR(11-2-16),p.206:2-16.

The prosecutor argued the order was "law of the case" and "[t]hey don't get to continue to bring up things. As long as I'm operating within the topic limits of Judge Amico's order I believe I'm well within my rights to do any of that." *Id*.,p.206-207. Robinson argued relevance objections may be made at any time. *Id*.,p.207:5-6.

Judge Chase stated,

> I disagree, Ms. Banducci. Judge Amico did an eight-page order. ***I've read it multiple times***…That issue that Judge Amico had was about physical effects of trauma on the person[19]….Everything else was fair game.

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[18] The inadequacy of the reliability findings as to any other sections is fully discussed at p.56-59, infra.

[19] This testimony was not offered and is not at issue.

TR(11-2-16),p.207:7-12 (emphasis added). The prosecutor noted another subject that was inadmissible (recanting, since Keum didn't recant), and the court continued to castigate defense counsel:

> We're not relitigating this, Ms. Banducci. It is a relevant issue. Judge Amico ruled on this, spent an extensive amount of time doing an eight-page order. And…Judge Amico found that this was relevant. This Court finds it's relevant. I'm not arguing this, Ms. Banducci. It's already been established by Judge Amico and by me. Thank you.

TR(11-2-16),p.207:19-25 (emphasis added).

When counsel pointed out that the order didn't address domestic violence statistics, Judge Chase replied:

> Ms. Banducci, she read everything. I'm not relitigating this issue. And even if she didn't—which I highly doubt, because she is so thorough—I'm finding it relevant. The caselaw allows for it and allows for all of this information, and she cites the caselaw in her ruling. So your request is denied.

TR(11-2-16),p.211-213 (emphasis added). The court announced a recess and left the room.

Robinson renewed his objections when Kerr was offered as an expert. *Id*.,p.218:14-15.

D. Erroneously admitted testimony

Testimony emphasized below is outside the scope of the pretrial ruling.

The prosecutor asked if domestic violence was common. Kerr replied:

> Oh, it's quite common. The Department of Justice statistics estimate that *between 25 and 30 percent of women are victims of domestic violence* over their…life span.

TR(11-1-16),p.219:13-16.

Kerr testified "there is a cycle" in most domestic violence relationships that begins with a "tension-building" phase, when the victim tries to please the partner and forestall the "battering phase," when the abuse occurs, which is followed by the "honeymoon phase," when the abuser promises "*whatever...they think will keep the victim in the relationship*," and often "you just go through the cycle again and again," but the cycle condenses and the batterings often become more serious over time. *Id*.,p.219-221.

Kerr explained the honeymoon phase is critical, because:

> …the offender is *trying to do what they can to keep the person hooked into the relationship.* The relationship is really about--*the core issue for most offenders, it's power and control. And so they…use this strategy to keep power and maintain control.*
>
> And when the *strategy* of battering *doesn't work and they feel like, oh, oh, maybe I've gone too far,* and they start to feel their victim pull away. *They engage in honeymooning type behavior.*

TR(11-1-16),p.221:10-20.

Kerr testified:

> So threats are, again, another one of the *strategies that offenders use* during that tension-building phase….And…*specific, well-thought-out [threats] are the ones that concern us and that we think of as more highly lethal*. But the threats are *just another power and control strategy that offenders use*.

TR(11-1-16),p.222:2-11.

The prosecutor asked for more "concerning" signs, and Kerr replied:

> So *in terms of trying to assess lethality* in the domestic violence relationship *there are a number of things that we listen for and look for, so that would be one, specific, well-thought-out threats.*
>
> *Another would be a threat to use weapons and access to those weapons. That's…very high on the lethality list….*

Id.,p.222:14-20.

The prosecutor asked:

> Q Is it safe for a victim to attempt to step away from domestic violence relationship?
>
> A That's an excellent question. What we know from the research is that the very most dangerous time for a victim in a domestic violence relationship is when she tries to leave. Again, *according to the Department of Justice, 75 percent of domestic homicides happen at that time.*
>
> Q Thank you.

TR(11-1-16),224:12-19.

E. The testimony violated the pretrial order. It is unsupported by the required *Shreck* findings. It was obviously irrelevant, unhelpful and more misleading and prejudicial than probative. It requires reversal.

As noted, the only testimony found in the pretrial order to be "relevant and assistive to the jury" and more probative than prejudicial was "how the cycle of domestic violence works and…why a victim might remain in an abusive relationship," in sections 4 and 5 of Kerr's report. CF,p.210-211; Appendix C.

The court found *no* other proffered testimony relevant or helpful or more probative than prejudicial. CF,p.206-213. For that reason alone, the following should not have come in:

- 75% of domestic homicides occur when a victim tries to leave;

- 25-30% of women experience domestic violence;

- certain circumstances (specific, well-thought-out threats, a threat to use weapons and access to those weapons) indicate "lethality;"

- the core issue for most offenders is power and control, and they use the [the honeymoon phase] strategy to keep the person hooked into the relationship and to keep power and maintain control;

- threats are another power and control strategy that offenders use; and

- additional characterizations of cycle-of-violence behaviors in terms of “strategies” or “tactics” that offenders use;

The 75% statistic is not even in Kerr’s report. It unreliably suggested a 75% likelihood that Robinson decided and intended to kill Keum based solely on Keum’s testimony that Robinson was supposed to leave, TR(11-1-16),p.138:17-20, which the prosecutor emphasized. TR(10-31-16),p.240:18-19 (“Keum had asked him to move out” and “his relationship…is coming to an end”); (11-3-16),p.60:20-25, 62:5-16 (“she wants out,” “She wanted out,” Robinson could feel her “slipping away”).

The remaining points are from the statistics, “power and control,” “lethality” and “suspect characteristics” sections that were not deemed admissible. The “lethality factors” testimony suggested that the more factors present, the greater the likelihood of a plan and intent to kill. The jury heard numerous such factors in addition to the relationship ending (Thompson testified to a specific threat, Robinson had access to Keum’s gun, and Keum said it wasn’t “the first time” she’d seen Robinson with a gun or that he’d threatened to shoot someone. TR(11-1-16),p.92:8-10, 112:9-12).

The “power and control” testimony imputed motives and intent to Robinson that were not ruled admissible. Similarly, the repeated use of the terms “strategies” and "tactics" imputed calculation, intent, and insincerity. A "strategy" is "a careful plan or method; a clever stratagem" (defined as "a cleverly contrived trick or scheme for gaining an end"), and a "tactic" is "a device for accomplishing an end." *See* https://www.merriam-webster.com/dictionary. By definition and common understanding, strategies and tactics are used to accomplish a goal; i.e., they are used consciously, intentionally, and even deliberatively. The cycle-of-violence section of Kerr's report merely described *behaviors*; it didn't impute calculation, intent or lack of sincerity. CF,p.192. By repeatedly characterizing these behaviors at trial as "*strategies*" or "*tactics*" used to manipulate, control and abuse, Kerr folded in more of the inadmissible "power and control" and "suspect characteristics" sections of her report. Her testimony unreliably asserted that any behaviors in the cycle (which include "battering") are planned strategies and intentional tactics—although the surrounding circumstances or behavior itself might suggest they were impulsive or less than intentional.

Additionally, as Robinson argued, testimony purporting to explain offenders' general characteristics and motives was bad character evidence. Kerr told the jury that offenders (like Robinson) are deliberately manipulative and abusive, and never sincerely remorseful. CF,p.186-187. *See Gill v. People*, 339 P.2d 1000,1008 (Colo. 1959) ("extraneous prejudicial matter tending to disparage the character of the accused is inadmissible"); CRE 404(a) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity…on a particular occasion…."); *See Old Chief v. United States,* 519 U.S. 172,179-180 (1997); *People v. Griffin,* 224 P.3d 292,296-97 (Colo. App. 2009) (the logical relevance of *any* evidence suggesting bad character—not just bad acts—must be independent of the inference that the defendant acted in conformity with his bad character).

Even if this Court did not view the bulleted testimony as precluded by the pretrial order (Appendix C), it was erroneously admitted because it was specifically challenged and the court denied a hearing and failed to make the *Shreck* findings required for its admission. *Ruibal*, 2018 CO 93, ¶12-14 (noting *Shreck's* requirement of "specific findings" and ruling, "In the absence of these specific findings, or a record not only supporting admission but virtually requiring it or precluding any reasonable dispute as to the basis of the court's admission, the trial court must be considered to have abused its discretion in admitting expert testimony."). The court found none of the challenged testimony to be relevant, helpful, or more probative than prejudicial, as noted.

None of the court's reliability findings apply to the testimony, either. Judge Amico cited *People v. Lafferty* 9 P.3d 1132 (1999); *People v. Yaklich,* 833 P.2d

758 (Colo. App. 1991); and *People v. Wallin* , 167 P.3d 183 (2007), in finding "The reliability of the principles underlying the battered woman opinion evidence is well recognized." None of the disputed testimony is "battered woman opinion evidence." Furthermore, *Lafferty* and *Yaklich* predate *Shreck's* reliability requirement. *See Lafferty, supra* at 1134-35 ("CRE 702 calls for a two-tiered analysis….whether the substance of the proffered testimony will be helpful to the fact finder…[and] whether the witness…is competent to render an expert opinion on the subject in question."). *Yaklich* did not even concern the admissibility of evidence. The defense admitted battered-woman evidence, but the sole issue in that prosecution appeal was whether the trial court erred in giving a self-defense instruction. 833 P.2d 758. *Wallin* asserts that "The reliability of the principles underlying opinion evidence about battered women is well recognized," 167 P.3d 183,188, but the sole authority it cites is *People v. Johnson*, 74 P.3d 349,353 (Colo. App. 2002), which erroneously relied on *Lafferty* and *Yaklich* for that assertion. As explained, neither of those cases found evidence to be *reliable*.

Next, Judge Amico cited *Rector*, 248 P.3d 1196; *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007); *People v. Baenziger*, 97 P.3d 271 (Colo. App. 2004); *People v. Aldrich*, 849 P.2d 821 (Colo. App. 1992) and *People v. Hampton*, 746 P.2d 947 (Colo. 1987), in finding, "Courts have repeatedly found social science experts who discuss dynamics of relationships, risk factors and victims responses and behaviors to be a reliable area of expertise both when dealing with victims of domestic violence and sexual assault so along as the expert is not specifically testifying to the veracity of a witness."

Rector did not find social science expert testimony about any of those matters to be reliable. *Rector* dealt with a doctor's medical diagnosis of child abuse. 248 P.3d 1196. *Rector* has no bearing on the reliability of Kerr's testimony. *Hampton* is a pre-*Shreck* case that found testimony about common rape-victim reactions "helpful" (not reliable) and admissible "[g]iven the limited scope of the expert testimony which was not used to establish that a crime had been committed" but to explain the delayed report, given the evidence and defense theory. 746 P.2d 947,952-53, *abrogated by Shreck,* 22 P.3d 68. *Whitman* similarly ruled "expert testimony about the behavior of sexual assault victims is admissible," but did so in reliance upon pre-*Shreck* cases that did not find such testimony reliable. 205 P.3d 371,383. *Baenziger* relied on *Hampton* and another pre-*Shreck* case in stating, "It has been repeatedly held that rape-trauma-syndrome evidence is reasonably reliable." 97 P.3d 271,275. But again, those cases didn't actually find such testimony "reliable." And rape trauma testimony, which explains common *victim* reactions to rape, is not like any of the testimony at issue here. *Aldrich* involves no reliability finding, and it deals with "validation criteria" testimony (vouching) that is unlike the testimony here. 849 P.2d 821.

The categories found reliable do not match sections of Kerr's report. Based on the "battered woman" cases mentioning the cycle of violence or delayed reporting (without finding such testimony "reliable"), though, it seems clear that the reliability findings were *meant* to cover sections 4 and 5. But none of the cited cases address or find reliable "risk factors" (whatever that means) or an abuser's thought processes. The court made no other reliability findings.

Kerr's testimony that "according to the Department of Justice, 75 percent of domestic homicides happen" when the victim tries to leave, TR(11-1-16),224:12-19, was also inadmissible because it appears nowhere in her report, and Robinson had no opportunity to challenge or rebut that damaging testimony.[20] *See People v. Stewart*, 55 P.3d 107 (Colo. 2002); *Wilkerson*, 114 P.3d 874,877 (when an expert purports to relay "statistical or numerical conclusions related to the underlying evidence," the reliability and relevance of such evidence must be independently determined).

Finally, even if somehow deemed unpreserved, Kerr's testimony was *obviously* unreliable, unhelpful and more prejudicial and misleading than

[20] Defense counsel did not object on that ground but was likely gun-shy, having just been overruled on a similar objection. TR(11-2-16),p.223:15-20.

probative. Testimony attributing a calculated intent by repeated reference to "strategies" and a "power and control" motive was unreliable (on its face and for the reasons at pp.45-46,n.15,16,*supra*) and suggested *Robinson* acted after deliberation and intent, the primary disputed issue. It was also bad character evidence that was subject to misuse. *See* CRE 401-404; *Gill*, 339 P.2d 1000,1008; *Old Chief*, 519 U.S. 172,179-181; *Griffin*, 224 P.3d 292,297.

The statistics were obviously irrelevant to Robinson's guilt, and statistics are often misunderstood. The final statistic was likely to be understood as establishing a 75% likelihood that Robinson decided and intended to kill Keum based *solely* on the relationship ending. *See Wilkerson*, 114 P.3d 874,876-77 (opinions expressed in numerical terms created a danger "that the expert would be understood simply as vouching for [one] account of events").

The "lethality" factors were irrelevant and unreliable on their face and for the reasons at pp.45-46,n.17, *supra*. The jury heard that numerous such factors existed in this case. Keum told the jury Robinson was in the process of moving out (although she never mentioned that before trial). Thompson testified to a specific threat. Robinson had access to a gun, since Keum kept one in the home. Other "lethality factors"—that it wasn't "the first time" Keum had seen Robinson with a gun or that he'd threatened to shoot someone, TR(11-1-16),p.92:8-10, 112:9-12—

were injected by Keum in violation of the CRE 404(b) ruling.[21] Kerr's "lethality" testimony unreliably and misleadingly suggested that the more factors present, the greater the likelihood of intent and deliberation on January 5, 2015.

Additionally, the 75% statistic and "lethality" factors called for a "preventive conviction;" they told the jury that even if they were unsure whether Robinson intended to kill Keum this time, they'd better convict in order to prevent him from doing so, as the data allegedly predicted. *See Old Chief*, 519 U.S. 172,180-81. (bad-character evidence may be seen as "calling for preventive conviction even if he should happen to be innocent momentarily").

Testimony that tends to mislead the jury, such as this, is inadmissible. CRE 403; *Wilkerson*, 114 P.3d 874*; Salcedo*, 999 P2d 833; *People v. Welsh*, 80 P.3d 296,299 (Colo. 2003) (evidence that affords only conjectural inferences should not be admitted).

The prejudice of Kerr's improper testimony was exacerbated by its emphasis in closing argument:

> We also know that he was moving out of the house around that time. You heard from Janet Kerr. The most dangerous time for a victim of domestic violence is when she's trying to leave. This relationship was coming to an end. The relationship as he knew it was gone. 75 percent

[21] The CRE 404(b) order ruled only certain incidents admissible and specifically barred reference to any vague allegations of wrongdoing. CF,p.136 (para.77).

> of domestic violence homicides result from that time period, and that is exactly what this was.
>
> MS. BANDUCCI: Objection, Your Honor. It's asking for a verdict based on prejudice.
>
> THE COURT: Overruled. This is argument.

TR(11-3-16),p.p.29-30;

> What's clear, ladies and gentlemen, is he had been planning this for awhile. He had been making statements about it. He knew this relationship was ending and he wanted to kill her. And she almost died.

Id.,p.55:13-16;

> The weeks leading up, he accuses her of cheating. You heard Ms. Kerr talk about that. Things offenders do to keep the victim there. They threaten them. He fixed up the room, honeymoon phase. He's trying to be nice, but these things aren't working. She still wants out.
>
> She's taking the power back….

Id.,p.60:20-25

> The relationship was ending and this is so key. He knew it was over. He was mad that she called the police, that there was a court date. He was accusing her of cheating on him. He was mad that she had had an abortion, and he couldn't get control back. So what does he do? He ends it.
>
> She wanted out, and during this dangerous time, when he's feeling this woman whom he'd been in a relationship with for 10 years slipping away, he could no longer control her, he no longer had power, he loads a handgun. He points it at her face and he pulls the trigger.

Id.,p.62:5-16.

The State cannot prove the improperly admitted evidence harmless beyond a reasonable doubt or harmless. *See Chapman*, 386 U.S. 18,23-24; *Glover*, 413 F.3d 1206,1210 (where an error is preserved, the government must prove defendant's substantial rights were not affected). And as explained, reversal would be required even under plain error review.

IV. The court reversibly erred in addressing Mr. Robinson's *Batson* objections by immediately interjecting reasons for one strike, supplementing the prosecutor's reasons for another, and erroneously finding no discriminatory intent.

A. Standard of review

The errors are preserved by Robinson's timely *Batson* objections. TR(10-31-16),p. 223-24.

Whether the trial court applied the correct analysis is a question of law for de novo review. *People v. Guthrie*, 286 P.3d 530, 533 (Colo. 2012); *Koon v. United States*, 518 U.S. 81,100 (1996). A court errs when it fails to apply the controlling legal standard or to consider all appropriate factors. *See Miller-El v. Cockrell*, 537 U.S. 322,339 (2003) (*Miller-El I*) (reversing lower court's decision to "accept[ed] without question the state court's evaluation of the demeanor of the prosecutors and jurors"); *Buckmiller v. Safeway*, 727 P.2d 1112,1115-17 (Colo.

1986) (court errs when it fails to apply the controlling legal standard, fails to consider all appropriate factors, or considers inappropriate factors).

While a finding on the ultimate issue is ordinarily reviewed only for clear error, a finding based on an incorrect legal standard need not be accorded any deference. *People v. Baker*, 924 P.2d 1186,1190 (Colo. App. 1996).

And deference does not imply abandonment of judicial review. *Miller-El I*, 537 U.S. 322,340. A finding is clearly erroneous when it finds no support in the record or when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co*., 333 U.S. 364,395 (1948); *Hernandez v. New York*, 500 U.S. at 369 (1991); *Miller-El v. Dretke*, 545 U.S. 231,240 (2005) (*Miller-El II*) (applying habeas presumption of correctness on federal review of state decision, and still finding clear error); *Snyder v. Louisiana*, 552 U.S. 472,478,485 (2008) ("we are left with the firm conviction that the strikes of Garrett and Hood were 'motivated in substantial part by discriminatory intent' "); *Foster v. Chatman*, 136 S. Ct. 1737,1754 (2016); *Hunter v. Underwood*, 471 U.S. 222,229 (1985) (state court committed clear error in finding no discriminatory purpose); *People v. Gabler*, 958 P.2d 505 (Colo.App.1998) ("Despite the fact that our review is limited to clear error…we conclude that [the] peremptory challenges…constituted purposeful discrimination….”); *accord*, *People v. Collins*, 187 P.3d 1178 (Colo. App. 2008).

B. Governing law

The Equal Protection Clauses prohibit the State from discriminating on the basis of race in jury selection. U.S.Const.amend.XIV; Colo.Const.art.II,§16,25; *Batson v. Kentucky*, 476 U.S. 79,85-86 (1986); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*); *Valdez v. People*, 966 P.2d 587 (Colo. 1998). The exercise of a single peremptory challenge on the basis of race violates the Fourteenth Amendment. *Foster*, 136 S. Ct. 1737,1747; *Snyder*, 552 U.S. 472,478.

The three-step process is well-established: First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, the prosecution must offer a race-neutral basis for striking the juror in question; and third, the trial court must determine whether the defendant has shown purposeful discrimination. *Foster*, 136 S. Ct. 1737,1747.

At the second step, “the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge.” *Miller-El II*, 545 U.S. 231,239; *Batson*, *supra* at 98. The *Batson* framework is designed to “produce actual answers” and to reduce speculation about whether the process was infected by discrimination by requiring a direct answer to a simple question.

Johnson v. California, 545 U.S. 162,172 (2005). The prosecutor "simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II,* 545 U.S. at 252.

At the third step, a discriminatory purpose implies that the prosecutor made the strike at least in part because of race. *Hernandez,* 500 U.S. 352,360; *accord, Cerrone v. People,* 900 P.2d 45,53 (Colo.1995); *Collins,* 187 P.3d 1178,1181-1182. In assessing the prosecutor's credibility, the court should consider his demeanor, how reasonable or improbable his explanations are, and whether the proffered rationale has some basis in accepted trial strategy. *Miller-El I,* 537 U.S. at 339; *People v. Wilson,* 351 P.3d 1126,1132 (Colo. 2015). Inquiry is necessary because "[s]ome stated reasons are false," *Miller-El II*, 545 U.S. at 240, and because "unconscious internalization of racial stereotypes may color the proponent's perception of a prospective juror's demeanor or body language." *Batson*, 476 U.S. at 106 (Marshall, J., concurring); *accord, Miller-El*, 545 U.S. at 268 (Breyer, J., concurring).

Courts must consider *all* relevant facts. *Foster*, 136 S. Ct. 1737,1748 ("We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.' ")(quoting *Snyder,* 552 U.S. at 478)); *Batson*, 476 U.S. at 93,96-97 (court "must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"); *Miller-El II*, 545 U.S. at 251-52 (analysis "requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it;" finding "[t]he whole of the voir dire testimony" cast the prosecutor's reasons in an implausible light"); *Miller-El I*, 537 U.S. 322,339 (reversing because of failure to consider all relevant circumstances); *Johnson*, 545 U.S. 162,163,170 (*Batson* "assumed that the trial judge would have the benefit of all relevant circumstances…"); *Craig v. Carlson*, 161 P.3d 648,654 (Colo. 2007); *Collins*, 187 P.3d 1178,1182.

In particular, a prosecutor's explanations that are contradicted by the record, or that apply to white jurors that were accepted, are "difficult to credit." *Foster*, 136 S. Ct. 1737,1750,1753-54; *Miller–El II,* 545 U.S. at 241,244 ("[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination," and mischaracterizations of juror testimony may indicate “an ulterior reason” for removal); *Snyder*, 552 U.S. 472,483 (disparate treatment reinforced “implausibility” of stated concern); *Gabler*, 958 P.2d at 508 (failure to question and disparate treatment established pretext).

If the prosecutor's asserted race-neutral reasons do not hold up, and “the racially discriminatory hypothesis” better fits the evidence, the trial court must uphold the *Batson* challenge. *Miller–El II*, 545 U.S. at 265–66; *accord, Wilson*, 351 P.3d 1126,1132.

C. Relevant facts, objection and ruling

The prosecutor began jury selection by asking someone, “What is it in your mind that makes a fair juror?” That person gave a vague and somewhat confusing answer. When asked to clarify, he stated, “We all have prejudices coming into here. We try to keep an open mind to what's being presented.” TR(10-31-16),p.135:4-15. The prosecutor then turned to Mr. N:

> MR. STEERS: How are you?
>
> MR. N: Very good. Thank you.
>
> MR. STEERS: …I want to test you about the question [the previous juror] just said, which is setting prejudice and biases aside. What does that mean to you when you come into this room? I know it's a bit of a hard question.

> Let me give you a slightly less hard question. First, I'll ask a broad question. There's certain hot-button issues in society: Gun control—we had somebody talking about being an NRA member, how that might cause them difficulties in a case involving a gun; you know, abortion, what's going on with police and police shootings, all of those issues. Those are out there. How do you go about setting those aside?
>
> MR. N: Listen to the evidence. What took place.
>
> MR. STEERS: And judge this case solely by the evidence; is that fair?
>
> MR. N: Yes.

TR(10-31-16),p.135-136. This appears to be the only conversation involving Mr. N in the entire voir dire. The prosecutor used his second peremptory challenge on N. *Id*.,p.220:24.

After pointing out that his burden of proof was not beyond "all" doubt, and eliciting that another juror was "comfortable maybe still having questions at the end of this case…And still finding the defendant guilty," TR(10-31-16),p.140-141, the prosecutor turned to Mr. V:

> MR. STEERS: And Mr. V, what about you?
>
> MR. V: Like, basically you have to have like an open mind. And just listen and absorb everything that's going on. That's what I think the juror's job is to do, listen to that.

> MR. STEERS: Mr. V, when—let me simplify this a little bit, because we can't talk about the facts of the case that's coming up. But when we have to prove something, there are certain things—and the judge told you this—elements that we have to prove. Let's say it's a speeding case. We have to prove that there was a guy or woman—there's a person who was in a car, speed limit was 45. They were doing 55. Let's say we prove all those things, but you really want to know what the color of the car was, but that's not something we have to prove—but we never answer that question for you—and the judge tells you all we have to do is prove those four things beyond a reasonable doubt and you have to find him guilty, but you really want to know what the color of the car is. Are you comfortable finding that defendant guilty?
>
> MR. V: Hmm, I would have to—the color has to be kind of close.
>
> (Laughs.)
>
> MR. STEERS: What if that's not something we have to prove? Officer gets up, says, "Hey, that's that guy." You find the officer credible. Shows you a photo of the stop sign, maybe like a dash cam video. The car going past, but it's going so fast you can't tell what color it is. It's just a blur.
>
> MR. V: Yeah. I don't know. I don't know on that one.
>
> MR. STEERS: You don't know?
>
> MR. V: I'm not too sure on that one.

TR(10-31-16),p.141-143.

The prosecutor used his first peremptory challenge on V. *Id*.,p.220:15-16.

After discussing witness credibility with Mr. S, the prosecutor continued:

> MR. STEERS: One of the things we'd have to prove in this case, Mr. S—in every criminal case—is what's called "mental state"; in other words, what's going on in a person's mind when they are committing a crime. How do we go about proving that?
>
> MR. S: Basically, like, what's going—how do we prove what's going on in their mind?
>
> MR. STEERS: Um-hum.
>
> MR. S: Like, I really don't know besides, you know, presenting the evidence and, you know, basing it on what, you know, what the witnesses say and what we hear from the evidence. Beyond that, I'm not really sure.
>
> MR. STEERS: Are you comfortable judging what's going on in someone's mind by looking at their actions?
>
> MR. S: By their what?
>
> MR. STEERS: By looking at their actions. I apologize.
>
> MR. S: Yeah. If the evidence is strong enough and it's presented to me in a well manner and I feel that it's overwhelmingly supporting that claim, absolutely.
>
> MR. STEERS: What do you mean by "overwhelmingly supporting?"
>
> MR. S: If it's to the point where—someone had mentioned earlier they might have a little bit of doubt. Always. But if it's, you know, overwhelming enough—overwhelmingly evident enough to the point where my doubt isn't so strong that it's kind of wearing on me, thinking, okay, you know, how strong is my doubt, is it

just a—some things that are minor that don't really relate to the case or is it something that really is weighing on my mind, and saying, okay, what—do I really have a lot of doubt about this, if the evidence is overwhelmingly supporting that, you know, the evidence to the contrary, then I would be comfortable with that.

MR. STEERS: That's an interesting statement right now. The overwhelmingly supporting is overwhelming the doubt in your mind and how you judge that. One of the interplays in reasonable doubt and the definition that the Court will give you at the end of this trial and has already given you is this notion that it can't be something which is vague, speculative, or imaginary. So when you say overcoming that doubt, you know, when the judge is saying that it can't be, you know, like a vague feeling in the pit of your stomach, that's not reasonable doubt. That's exactly what they're saying, isn't it? Are—is that what you're referring to? Can you give me a little more in what your talking about?

MR. S: For example, like, if something like—for example, they were talking about the color of the car earlier.

MR. STEERS: Yeah.

MR. S: I mean, if it had absolutely nothing to do with proving the crime—

MR. STEERS: Um-hum.

MR. S:—then—and the question's not answered, you know, I would be okay with it not being answered. But if it—if knowing the color of the car was really a necessary fact, in knowing—in knowing the case and knowing the—knowing the facts of the case, then I would be not very comfortable with not knowing that fact.

> MR. STEERS: Okay.
>
> What if it is not something that the judge tells you we have to prove, but it's necessary to you; are you comfortable putting that aside and holding us to only proving what the judge tells us we have to prove?
>
> MR. S: If I feel it's something that's necessary to really provide facts for the case, then no, I wouldn't be comfortable with that.
>
> MR. STEERS: Thank you very much.
>
> MR. S: I'm just telling you that it's not an important thing.
>
> MR. STEERS: Thank you, sir. I appreciate that.

TR(10-31-16),p.149-152.

The prosecutor used his fourth peremptory challenge on S. *Id*.,p.222:2-3.

Before the jurors were excused, Robinson raised a *Batson* objection, noting that "three of four peremptories used by the People were for persons of color. Mr. S…appears to be Indian descent. Mr. N appears to be of Asian descent. Mr. V appears to be of Hispanic descent. These jurors, none of whom were talkative, didn't say anything that really showed that they were one way or the other. All of them expressed that they would follow the law and consider the evidence." TR(10-31-16),p. 223-24.

The prosecutor complained that "they left out" the one white juror he excused and argued the defense needed to prove a "pattern," and hadn't done so. *Id.* The following ensued:

> THE COURT: Three out of four potentially could be considered a pattern, so let's go through this. *But I will note for the record that No. 1, Mr. S, had you guys asked for a for-cause challenge. He did not—he was not willing to follow the reasonable-doubt standard. In fact, he made several statements that I even highlighted in here about reasonable doubt and that he would not follow the law and take—if he thought the fact was necessary he would not follow the beyond-a-reasonable-doubt instruction and use that in the jury room. So I will note for that for Mr. S.*
>
> But let's go to the second step.
>
> MR. STEERS: Your Honor, in terms of Mr. S, I'll adopt the Court's record. That was going to be my record, as well. I asked him if there's something you feel is necessary but is not something we have to prove, should it have been are you going to hold us to that, and he unequivocally said yes. I didn't raise a for-cause challenge because I didn't personally feel it rose to that; however, I think it's certainly grounds for peremptory challenge.
>
> As to Mr. N, it was similar as—the question I asked him he answered in such a way that led us to believe that he didn't fully understand what the question was. We believe it's a language issue, and we have concerns about him being able to understand the trial.

In terms of Mr. V, if I can step back to talk to Ms. Moriarty real quick, there was a specific statement he made that I need to get.

(Pause.)

Mr. V, my concern was, in using the example on the speeding, I -- it was the same thing essentially as Mr. S. I asked him repeatedly about the color of the car and he said he didn't know in terms of color, even if it was an element, he didn't know if he could find guilty if the color of the car wasn't proven.

MS. BANDUCCI: Your Honor, Mr. N—starting with him—I did not see any issues with him being able to understand the People's question.

THE COURT: So he wasn't asked a ton of questions, but his response—English is clearly not his first language. So I do remember not completely understanding his answer when he gave it. And I don't know if it's because I was sitting so far away. But I do remember thinking that potentially could be a problem, but that was with Mr. Steers.

I didn't see it as much with you, Ms. Banducci, when you questioned him. But I did with Mr. Steers. And I don't know if it's the way the question was phrased.

MS. BANDUCCI: To me, it appeared that he just didn't know how to answer the question, not because he didn't understand the question. Because the question was sort of a broader question…like what do you think it means to be a good juror, or how would you judge somebody's credibility, something that was sort of broad in nature and not necessarily a specific question.

He also didn't respond when the Court was asking…whether…they can read and understand English. He was not one of the people that raised their hand….

As to Mr. V and Mr. S, it appears the People are relying on the same line of questioning. Their responses were that if—if that detail was important for some reason, so not necessarily that they would make the People prove facts beyond the elements, but that if it was an important detail because it mattered for the case that they—that that would be a problem if they still had questions about that particular thing, like the color of the car.

THE COURT: All right. So the Court is finding that the *Batson* challenge has not been met, and here's why. *For Mr. S, like I previously stated*, had either side asked for a for-cause challenge I would have granted it. *It was highlighted on my sheet he was not able to follow reasonable doubt. I'm seeing that there is a race-neutral reason.*

As for Mr. N,…the Court does see the hesitation that the People have, and the Court had originally the same hesitation, and so the Court finds that that's a race-neutral reason.

As for Mr. V,…he had a really hard time with the car example on the color—and so did some other jurors, I will give you that. *But he also didn't know about reasonable doubt. He kept saying he didn't know, and I wrote that down.* So the Court is finding that there is a race-neutral reason for that.

The Court would also note for the record that there is still an African-American on the panel, which is the defendant is African-American. And in the Court's

> perspective he was a very strong, very neutral panelist….*So the Court is denying this request*.
>
> The Court is seeing very different reasons for this, as like you have with that new case that just came out by the United States Supreme Court—and it's not just based on race—and very applicable reasons. So the Court is denying the request at this time.
>
> MS. BANDUCCI: I just wanted to add this one piece of record. The Court—understanding the Court has not made its ruling,…the panel that is left is entirely white, absent [Mr. H.].
>
> THE COURT: Yeah, but most of the panel that we had were not very race-mixed to begin with, and…none of the members that the prosecutor discharged were the same race as the defendant.

TR(10-31-16),p.224-228.

D. The court misapplied the law, irremediably tainted the inquiry and erred.

First, the court misapplied the law and tainted the *Batson* inquiry by interjecting a reason to strike S before the prosecutor spoke. And in ruling on the strike of S, the court reverted to its own reason ("*it was highlighted on my sheet he was not able to follow reasonable doubt*") as the "race neutral" one, TR(10-31-16),p.227:6-7, although the prosecutor claimed to remove S because he would require the prosecution to prove "something you feel is necessary but is not something we have to prove." *Id*.,p.224-225.

Similarly, after the prosecutor gave his reason for striking V ("it was the same thing essentially as Mr. S. I asked him repeatedly about the color of the car and he said…even if it was an element, he didn't know if he could find guilty if the color of the car wasn't proven," *Id*.,p.225:15-19), the court added and considered a new reason of its own: "*he also didn't know about reasonable doubt. He kept saying he didn't know, and I wrote that down*." *Id*.,p.227:17-20. The court seemed to prefer this reason since "some other jurors" also "had a really hard time with the car example," *Id*.,p.227:15-17, so that would indicate pretext.

The court erred because "the *prosecutor* must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge." *Miller-El II*, 545 U.S. 231,239; *Batson, supra* at 98. The prosecutor "simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II*, 545 U.S. at 252; *Johnson,* 545 U.S. 162,172 (the inquiry is designed to "produce actual answers" and reduce speculation about whether the process was infected by discrimination by requiring a direct answer to a simple question); *Valdez,* 966 P.2d 587,603,n.11 ("The trial court in this case sua sponte offered its own plausible reasons behind the peremptory strikes at issue. This was improper.”). Reversal is required because the court misapplied the law and irremediably tainted the inquiry.

First, the “race neutral” reasons ultimately found by the court for the strikes of S and V, but not put forward by the prosecutor (that they would not follow the reasonable doubt standard), cannot be considered.[22] *Miller-El II,* 545 U.S. at 252 (the court’s “substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions”);

Second, because the court did not rely on S and V’s car-color responses in denying the challenge (although that was the prosecutor’s stated reason for striking

[22] Although the court’s reason is irrelevant, it is worth noting that it is contradicted by the record. Contrary to the court’s belief that V “didn't know about reasonable doubt. He kept saying he didn't know,” Mr. V said *nothing* about “reasonable doubt.” And contrary to the court’s belief that S “was not able to follow reasonable doubt,” S demonstrated a firm grasp of two difficult concepts (inferring intent from conduct in light of the burden) when he said he would “absolutely” be “comfortable judging what's going on in someone's mind by looking at their actions” if “the evidence is strong enough and it's presented to me in a well manner and I feel that it's overwhelmingly supporting that claim,” and if it was “overwhelmingly evident enough to the point where my doubt isn't so strong that it's kind of wearing on me.” *See Foster*, 136 S. Ct. 1737,1750,1753-54 (noting that a prosecutor’s explanations that are contradicted by the record are “difficult to credit,” and finding pretext); *Miller–El II,* 545 U.S. at 241,244 (finding that mischaracterization of juror’s testimony indicated “an ulterior reason” for removal).

both), this Court "cannot presume that the trial judge credited" this reason. *See Snyder*, 552 U.S. 472, 479 (where the prosecutor gave two reasons and the judge simply allowed the challenge without explanation, and where the second reason was deemed implausible because similar jurors were accepted, the court would not presume that the judge credited the first, demeanor-related reason); *accord*, *Collins*, 187 P.3d 1178,1181–83 (finding pretext where "three of the race-neutral reasons articulated by the prosecutor are affirmatively refuted by the record, *and the district court did not specifically credit the others*."). Indeed, the court's acknowledgment that other jurors had a really hard time with the car example, "I'll give you that," suggests that the court did *not* credit that reason. *Id*.,p.227:15-17.[23]

And that reason couldn't be credited. Both Ms. D and Mr. H pushed back on the car color example. Ms. D explained, "some details are a whole lot more important than others….You know, maybe even the color of the car. If…I see a film where I can't tell, in a blur, you know, which car that was in road rage then it might be very important to know, to find out what color the car was." TR(10-31-16),p.165:7-15. The prosecutor wasn't bothered by D's need to know the color.

[23] The court may have recognized that hypothetical was flawed. The color of a car may be critical to proving a speeder's identity. Identity is an element in every criminal case, and subsidiary facts probative of identity may be *extremely* important, although not themselves "elements." Absent sufficient other evidence of identity, car color might be needed to prove identity beyond a reasonable doubt.

He moved right on to the next topic. *See Miller-El II*, 545 U.S. at 246,248-249,n.8, 255 (a presumption of discrimination arises when a prosecutor fails to meaningfully question white jurors about a purported area of concern, or employs different questioning strategies with minority and white jurors). In fact, when Robinson challenged D for cause (on other grounds), *Id*.,p.165-166,202-203, the prosecutor objected, "She believes very strongly in following any instructions that the Court would give…. she did repeatedly say she would follow the Court's instructions." *Id.*,p.203-204. Mr. H also gave a qualified answer, saying only that "*if the color of the car had nothing to do with what was going on in the case,* I believe I could leave it out and make my best judgment based on the evidence that was given." TR(10-31-16),p.143:14-21. That's exactly what Mr. S said. But the prosecutor thanked H for his answer and moved on.[24] *See Miller–El II,* 545 U.S. at 241,244 ("[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination"), and 247,n.6 (a comparative analysis need not involve jurors "identical in all respects"); *Foster*, 136 S. Ct. 1737,1750,1753-54 (a prosecutor's explanations that apply to white jurors that were accepted, are "difficult to credit"); *Snyder,* 552 U.S. 472,483

[24] Mr. H was the African-American whom the court described as a "very strong, very neutral panelist," but Ms. D was white.

(disparate treatment reinforced "implausibility" of stated concern); *Gabler*, 958 P.2d at 508 (disparate treatment established pretext).

Finally, there is no indication that Mr. N had difficulty speaking or understanding English. As Robinson noted, he did not raise his hand when the court asked if anyone was unable to read, speak and understand English, although three other jurors did. TR(10-31-16),p.53-55.[25] The prosecutor challenged two of those jurors for cause, with no objection from Robinson. TR(10-31-16),p.102-03. The prosecution did not challenge Mr. N for cause, however. Nor did he ask more questions in order to determine his language ability. *See Miller–El II,* 545 U.S. 231, 246,250,n.8 (failure to question suggests pretext as it "undermines the persuasiveness of the claimed concern"); *accord, Collins*, 187 P.3d 1178,1183 (prosecutor's failure to question juror about alleged concern indicated pretext); *Gabler*, 958 P.2d at 508.

To the extent that the court seemed to view Mr. H's presence on the jury as proof that the prosecution didn't discriminate, it is worth repeating that "[t]he exercise of a single peremptory challenge on the basis of race violates the Fourteenth Amendment," *Foster*, 136 S. Ct. 1737,1747; *Snyder*, 552 U.S. 472,478, and a later "decision to accept a black panel member…does not…neutralize the

[25] One of those was #88, *Ms.* N—a different person.

early-stage decision to challenge a comparable venireman." *Miller-El II*, 545 U.S. at 250 (noting that a black juror might be accepted "to obscure the otherwise consistent pattern of opposition to seating one").

The court misapplied the law and its denial was clearly erroneous. *See Miller-El II*, 545 U.S. at 240 (finding clear error); *Snyder*, 552 U.S. 472,478,485 (same); *Foster*, 136 S. Ct. 1737,1754 (same); *Collins*, 187 P.3d 1178 (same); *see also Baker*, 924 P.2d 1186,1190 (a finding based on an incorrect legal standard need not be accorded any deference).

V. The cumulative effect of the errors requires reversal.

Even if this Court deems each of the errors individually harmless, their cumulative effect so impacted Robinson's rights to a fair trial and impartial jury that reversal is required. *See Oaks*, 371 P.2d 443,447; *Jones*, 832 P.2d 1036,1038,1040; U.S.Const.amend.VI,XIV; Colo.Const.art.II,16,25.

CONCLUSION

For the foregoing reasons and authorities, Robinson's convictions must be reversed and the case remanded for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on January 7, 2019, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.

Nancy L. Medina