

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Arapahoe County District Court; The Honorable Michelle A. Amico and The Honorable Natalie T. Chase; and Case Number 15CR26	DATE FILED: May 27, 2020 2:08 PM FILING ID: 8E1A00BB636E4 CASE NUMBER: 2017CA336
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant DEREK ROBINSON	
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REPLY BRIEF	

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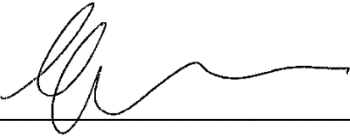


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ARGUMENT

I. The refusal to instruct on self-defense violated the rights to present a defense and to proof and jury findings beyond a reasonable doubt.

Our Supreme Court has explained that the “some credible evidence” language in §18-1-407(1), C.R.S., is an alternative statement of the “scintilla” standard, and that “[i]t merely requires some evidence to support the defense.” *People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998); accord, *People v. Newell*, 2017 COA 27, ¶21. See *Idrogo v. People*, 818 P.2d 752, 754 (Colo. 1991) (“We have consistently held that 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.”). Thus, a defense instruction “is warranted whenever a defendant shows some supporting evidence—*regardless of how incredible, unreasonable, improbable, or slight it may be*—to establish each factor described” by statute. *Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004) (emphasis added). See OB, p.11 (additional cases). The evidence is viewed “in the light most favorable to the defendant” *because* there is no burden of persuasion as to “credibility.”

Here, there was much more than the required “scintilla.” The State claims Robinson points to only “three facts: (1) the gun belonged to the victim; (2) the victim fired the gun at the defendant; and (3) the defendant had minor injuries to his

hands,” then addresses only those facts. AB, p.7-9. In doing so, the State failed to address *many* facts supporting the view that Keum initially wielded the gun and was shot in a self-defense struggle (consistent with Robinson’s precluded statement):

- Not only did the revolver *belong* to Keum, but she had practiced using it; she knew where it was; and in fact, she had recently moved it. TR (11-1-16), p. 104-05, 121-122, 138-39, 145;
- Not only did Keum fire one of the two shots in the altercation, *Id.*, p. 94:3-10, but she dropped the revolver afterward, *Id.*, p. 156:22-25, demonstrating her knowledge that it was now empty and thus that she last loaded it (where she claimed to accept it so he couldn’t shoot her again), *Id.*,p.157:5-14—Keum *never* claimed to try the trigger again;
- Keum initially reported Robinson was an “inch” away and “close range,” TR (11-2-16), p. 86:16-21; (11-1-16), p. 142-143, 118-119;
- Keum had “significant stippling” around the wound “consistent with a close-range gunshot,” TR (11-2-16), p. 90:2-12, 93:4-6, 73:3-12; EX 40-42;
- Keum admitted their proximity at trial by testifying that “my hand may have touched him...maybe when I fell down,” TR (11-1-16), p. 105:13-

14, and that Robinson “was down on the ground” with her when she shot into the wall, *Id.*, p. 117:11-19;

- Not only did Robinson have a thumb injury, TR (11-2-16), p. 245-248, 251-252; EX H; but Keum also had a fresh, unexplained abrasion to her elbow, TR (11-2-16), p. 73:16-19, 94:1-6; EX 43; and
- The CSI found the scene consistent with a struggle. TR (11-1-16), p. 230-231.

This was far more than the scintilla entitling Robinson to a jury instruction on his defense theory and the prosecution’s burden to disprove self-defense beyond a reasonable doubt. The State’s assertion that “it was uncontroverted” that Robinson was the initial aggressor, AB, p.8, is obviously incorrect. The defense directly controverted that proposition by arguing to the court (and later, to the jury) that the evidence supports a finding that Keum was shot in a struggle over her gun.¹

Reversal is required because the absence of the affirmative defense is an essential element in Colorado, such that refusing the instruction “improperly lowers the prosecution's burden” of proof and the right to a jury resolution of guilt; a

¹ And the prosecution knew, although it succeeded in precluding it, that when Robinson asked why he was arrested, he said, “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 he thought he injured his thumb “when I got in the fight with Mary....” CF, p. 53, 162-163, 247-48.

reviewing court therefore can't say the error is harmless. *People v. DeGreat*, 2018 CO 83, ¶34; *Idrogo*, 818 P.2d at 756 (refusal deprived defendant of “the right to an acquittal on the ground of self-defense if the jury could have had a reasonable doubt” and required reversal); accord, *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005); *Newell*, ¶30; *People v. Wakefield*, 2018 COA 37, ¶44. And even if the refusal to instruct on the affirmative defense and defense theory could be harmless beyond a reasonable doubt, the State hasn't met that high burden. The State's claim that the defense theory required improper “speculation” is incorrect. AB, p.9. Jurors were free to disbelieve Keum on various points, to accept whichever evidence they believed, and to draw inferences from the evidence. Real possibilities may amount to reasonable doubt; only “imaginary” possibilities may not. *Victor v. Nebraska*, 511 U.S. 1, 17,20 (1994); *United States v. Jefferson*, 911 F.3d 1290, 1304-05 (10th Cir. 2018). Because there was a very real possibility based on the evidence that Keum was shot in a struggle over the gun, and thus that Robinson acted in self-defense, reversal is required.

II. Prosecutorial misconduct requires reversal.

The State argues that the prosecutor's comments shifting the burden of proof commenting on Robinson's silence and those conflating “after deliberation” with intent were only partially preserved because only some of the instances complained

of were objected to. AB, p.11. But because Robinson objected to the first instance of each type of misconduct, subsequent similar arguments are preserved. Robinson wasn't required to repeat the same objection to the same judge to get the same ruling. CRE 103(a)(2) ("Once the court makes a definitive ruling...admitting...evidence, either at or before trial, a party need not renew an objection...to preserve a claim of error for appeal."); *People v. Pratt*, 759 P.2d 676, 686, n.5. (Colo. 1988) (finding issues preserved by "previous objections"); *McCormick on Evidence* §52 (7th ed.) ("most courts sensibly hold that B is entitled to assume that the judge will continue to make the same ruling" and "the reach of the initial objection extends to all subsequent, similar evidence vulnerable to the same objection;" to rule otherwise "wastes time and casts [defendant] in the unenviable role of an obstructionist in the jurors' eyes").

Regarding the prosecutor's assertion that "it took a SWAT team to get [Robinson] out of that house," the State fails to acknowledge the clear implication that this implied police *needed* a SWAT team because a dangerous person was refusing to come out. AB, p.14. It would only "take a SWAT team" to remove someone if they were uncooperative and dangerous. It was highly misleading and prejudicial to inform the jury that was the case when Robinson came out voluntarily, and unarmed.

In addressing misstatements of evidence about the gun handle, the State injects many collateral matters but fails to acknowledge the most blatant misstatement: that the CSI “*did not testify that she had never tested the handle.*” TR (11-3-16), p. 55:3-10. In fact, the CSI testified the “senior investigator...and I decided...not to swab that handle” (and when the prosecutor tried to get her to say that she swabbed the trigger, she said “no”). TR (11-1-16), p. 222-23. *See* OB, p.19. The State offers no defense for this misstatement. AB, p.15-19.

Regarding the prosecutor’s objected-to claim that “her habit and practice is to swab the handle, the trigger”—meant to *again* suggest that she did so in this case, the State notes (as did the Opening Brief) that defense counsel *asked* if the CSI “routinely” did that in cases with guns, but she responded: “Given the right circumstances.” In other words, it *wasn’t* her “habit and practice” to swab triggers and handles in all cases with guns; it was a case-by-case decision. Therefore, the court’s response to the objection--“**Overruled. I believe that’s what she testified to.**” TR (11-3-16), p.56-57—was exactly wrong. By directly endorsing the misstatement, the court greatly exacerbated its effect. *See* OB, p.19-20, 30.

Similarly, in seeking to defend the misstatements and unsupported opinions about wound trajectory (which requires more specialized expertise than “gunshot trajectory”), the State ignores the contradictory on-point opinion of wound trajectory

that the prosecution’s medical expert in trauma and acute care actually offered: he testified it is difficult to determine the exact trajectory of a bullet within the body because of deflections, but he thought “***the trajectory of the bullet was from front to back and across the head and neck area.***” TR (11-3-16), p. 36-37. AB, p.21 (omitting this opinion from explanation of doctor’s testimony). And the prosecutor said, “*You’ve heard Dr. McIntyre*” shortly before insisting, “That’s a downward shot by someone who is taller” and then, “the bullet trajectory is downwards.” Thus, these were misstatements of the sole qualified evidence on the issue as well as unsupported opinions on a matter requiring expertise. In light of the doctor’s *actual* testimony, the court’s ruling on the “facts not in evidence” objection--“**Overruled. The doctor testified.**”—was exactly wrong, and exacerbated the prosecutor’s misstatement. See OB, p.20-24, 30.

Regarding stippling, the State argues the prosecutor’s attempt to reconcile Keum’s claim that Robinson was eight to ten feet away, on the one hand, with the stippling on her jaw and detective’s testimony that it was consistent with a shot fired at “close range,” on the other, was “proper,” AB, p.22-23, but it plainly was not. The prosecutor reconciled the inconsistency by opining, as a government prosecutor, that a description of eight to ten feet away as close-range “**frankly, yeah, that sounds about right.**” TR (11-3-16), p.61-62. Robinson has not misconstrued the

argument. There was no evidence to support this personal assurance (“*frankly, yeah...*”), which was not only unsupported by evidence, but was false. Since the defense theory was that Keum was shot in a close struggle over the gun, and *not* from eight feet away, the unsupported (if not false) “expert” assurance was extremely prejudicial. See OB, p.21, 23-24.

Regarding the burden-shifting / comments on the silence of Robinson, obviously the only other person who could have testified about the struggle, the State omits the final, summarizing repetition of the comment as to which two objections were previously overruled:

...You have no evidence before you that there was a struggle before this gun went off.

TR (11-3-16), p.60:3-4. The State seeks to defend the other comments as merely pointing out weaknesses in the defense case, but that’s not what the prosecutor said. He repeatedly misinformed the jury that the witness stand was the *sole source* of “evidence,” and therefore, there was “*no evidence*” supporting a struggle (which is contradicted by the list on p.2-3, *supra*), and he told the jury “*you have to disregard*” the defense theory because “no one, sat on the witness stand and said there was a struggle....no one sat on that witness stand and said...Keum got that gun and loaded it. No one.” In addition to repeatedly pointing out Robinson’s silence in violation of his constitutional privilege, see *Howard-Walker v. People*, 2019 CO 69, ¶44

(prosecutor's comment that "there is only one person in this room that could tell you where all of [the stolen] items are now and he won't" was an improper comment on his right to silence and "the most serious error" in the case), all of the comments about direct witness testimony being the only legitimate "evidence" and about the defense theory being pure speculation, an "alternate reality" and "the equivalent of...saying that a pink dragon did it," shifted the burden, misstated the law and seriously misled the jury, whose job was *not* simply to accept Keum's accusation on its face ("...you have to judge this case based upon the evidence we've presented only. Ms. Keum testified...that's the only version of events before you. That's it."), but to *assess* her testimony, to consider *all* of the evidence, including circumstantial, and to draw appropriate inferences from the evidence. Additionally, as counsel's "denigrating" objection conveyed, the comments implied the defense theory was illegitimate and improper. See OB, p.24-27, 30.

Regarding the comments conflating "after deliberation" with intent, it is important to understand that the court did not instruct the prosecutor to "rephrase" before the jury, but at the bench. To the jury, it would appear that the objection was overruled; the prosecutor said, "Thank you, judge," then *continued* to assert (contrary to *Sneed*, *Key* and *McBride*'s requirement of "an appreciable length of time") that "*no time period*" was required for deliberation. TR (10-31-16), p.154-

155. Then in closing, it again informed the jury that “After deliberation does not require a time frame” but simply “*means he thought about his actions before he took them.*” This repeatedly misstated the law, conflated the element with “intent,” and removed the burden of proving a separate element. *See* OB, p.28-30.

Contrary to the State’s suggestion, the arguments were not “fleeting” and, in any event, “the question is not whether the errors were “brief” or “fleeting” but whether, viewed in the aggregate, the errors deprived the defendant of a fair trial.” *Howard-Walker*, ¶40. As explained at OB, p.30-31, the cumulative effect of the misconduct requires reversal.

III. The expert testimony violated a pretrial order, lacked required *Shreck* findings, and was obviously unreliable, unhelpful and prejudicial.

The errors are preserved by pretrial motion and objections, as well as the written ruling: Robinson sought preclusion of Kerr’s testimony pretrial, CF, p.185-87; was denied a hearing but obtained a ruling, CF, p.206-213 (OB, Appendix C); wished to clarify the limits for Judge Chase (“because I know that you weren’t the Court on that”) and argued general statistics were irrelevant and misleading, but was shut down, TR (11-2-16), p. 206-207, 211-213; and renewed “previous objections” when Kerr was offered. *Id.*, p. 218:14-15. CRE 103(a)(2) (“Once the court makes a definitive ruling...admitting...evidence, either at or before trial, a party need not renew an objection...to preserve a claim of error....”); *Pratt*, 759 P.2d at 686, n.5.

(finding issues preserved by “previous objections”); *McCormick on Evidence* §52 (“the reach of the initial objection extends to all subsequent, similar evidence;” to rule otherwise “wastes time and casts [defendant] in the unenviable role of an obstructionist in the jurors' eyes”). “Previous objections” included, in addition to the relevance, reliability and CRE 403 objections noted at AB, p.35-36, that Kerr’s testimony was unhelpful and that testimony about offender characteristics was **“extremely prejudicial...character evidence”** (in addition to being irrelevant, unreliable and unhelpful). CF, p.185-87 (OB, Appendix B, para. 15,16).

The testimony Robinson challenges are the quotations at OB, p.39-40, not the neutered characterizations at AB, p.39-40.

The State argues Judge Chase reasonably interpreted Judge Amico’s order as admitting everything not explicitly precluded, despite the lack of any *Shreck* findings about offender motivations, intentions or characteristics, lethality factors or general statistics. The State proffers two reasons, both of which fail. First, the State asks why the court would have specified inadmissible topics if the order were as narrow as Robinson argues. But Robinson could say the same: why would the court only specify that *certain* topics relating to victim conduct were relevant, reliable, helpful, and more probative than prejudicial, and rely on cases addressing *those* topics, if the court meant that *all* of the diverse topics (except those specifically precluded) were

relevant, reliable, helpful, and more probative than prejudicial? *See* OB, p.37-38 (quoting relevant findings). Furthermore, *Shreck* and *Ruibal* required specific findings and Judge Amico made specific findings, but only as to the topics not challenged on appeal.

Second, the State alleges that “the pretrial order *explicitly stated* that Ms. Kerr would testify ‘generally’ regarding domestic violence and her ‘general opinion’ would be assistive to the jury,” AB, p.41, and asserts that the order “deems the testimony ‘generally’ admissible.” AB, p.42. But the State provides no record citation for these “explicit” rulings. In fact, nowhere does the order say Kerr may testify “generally” regarding domestic violence, nor that her testimony is “generally” admissible. While para. 18 says “her general opinions will be assistive in gauging the victim's credibility,” that relates to the findings in para.16-17 that testimony will be assistive because “the victim did not contact the police” and “remained in a relationship with the Defendant” despite prior alleged abuse. CF, p.210. The clear import was that testimony about these *victim* behaviors would assist the jury. But that testimony, which falls within sections four and five of Kerr’s report (cycle of violence *behaviors* (not including offender motivations) and “why victims stay”), isn’t challenged here.

Notably, since Kerr’s report contained nine single-spaced, small type pages and *many* opinions (OB, Appendix B, Attachment); a vague comment that her “general opinions” would assist the jury wouldn’t satisfy *Ruibal* even if that were what Judge Amico intended. *Ruibal v. People*, 2018 CO 93, ¶12-14 (absent specific findings required by *People v. Shreck*, 22 P.3d 68 (Colo. 2001), “or a record...virtually requiring [admission] 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.”) (emphasis added).

Next, the State claims Judge Chase merely “clarified” or “reconsidered” or “modified” Judge Amico’s order, and argues this was proper. AB, p.34,42. But it is clear from Judge Chase’s comments and refusal to hear argument that she instead misread the order, which made findings of relevance, reliability, helpfulness and overcoming CRE 403 only as to sections four and five of Kerr’s report. Judge Chase mistakenly asserted that Amico’s order ruled “*everything* [except physical effects of trauma] *was fair game*,” and refused to hear any further objections or arguments. TR (11-2-16), p. 206-7, 211-213. Chase clearly didn’t “reconsider” the order, and she made no new or different findings to satisfy *Shreck* and *Ruibal* (aside from a conclusory and mistaken assertion that general statistics were “relevant”).

Next, because Kerr’s testimony falling within sections four and five of her report (re: cycle of violence *behaviors* and “why victims stay”) isn’t challenged here, the cases relied upon at AB, p. 44 (addressing cycle of violence behaviors and victim recantation) are inapplicable. The error in this case, unlike in those cases, is that Kerr testified about the allegedly strategic and malignant thought processes of “offenders” (such as Robinson) and the highly misleading “lethality factors” (several of which existed in this case) and statistics that 25-30% of women have been domestic-violence victims and that 75% of domestic homicides happen when victims try to leave (as Keum claimed was the case here). OB, p.39-40 (testimony at issue). The State cites no case ruling *these* topics admissible, much less a case saying their admissibility is so well-established that a hearing may be denied.²

Finally, the portions of Kerr’s testimony not challenged here were far less controversial, inflammatory or damaging to the defense, and that testimony did not somehow neutralize or remove the prejudicial effect of the *challenged* testimony, as suggested at AB, p.48, n.2. Rather, for the reasons at OB, p.41-44, the challenged testimony was highly prejudicial and requires reversal.

² *Chamberlain v. State*, 819 S.E.2d 303, 310 (Ga. App. 2018), cited by the State, rejects a claim that defense counsel was ineffective for failing to object to testimony about the prevalence of recantation in child-sex-assault cases; even if correctly decided, *Chamberlain* has no application here.

IV. The court erred in denying three *Batson* objections.

The State asserts that the trial court's error in injecting its own reason before asking for the prosecutor's reason for striking S is "not preserved" because Robinson failed to inform the court that it can't do this. AB, p.48-49. The State is incorrect. By making his *Batson* objection and prima facie case as to the three named jurors, Robinson invoked the well-established *Batson* procedure and preserved his claim in its entirety. Further, once the court vocalized the reason, objecting would be futile. The State apparently concedes that the trial court's improper supplementation of the prosecutor's reasons for striking V is preserved (along with the trial court's *reliance* on its own reasons for striking both jurors), since it does not say otherwise.

On the remainder of this claim, Mr. Robinson rests at this time on his Opening Brief.

V. The errors cumulatively require reversal.

In addition to authorities in the Opening Brief, this Court should find cumulative error based on *Howard-Walker v. People*, 2019 CO 69, ¶26, in which the Court found cumulative error after reiterating the rule that "reversal is warranted when numerous errors in the aggregate show the absence of a fair trial, even if

individually the errors were harmless or did not affect the defendant's substantial rights."

CONCLUSION

For the foregoing reasons, in addition to those in the Opening Brief, this Court must reverse Mr. Robinson's convictions.

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CERTIFICATE OF SERVICE

I certify that, on May 27, 2020, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Gabriel P. Olivares of the Attorney General's office.

