SUMMARY
February 24, 2022

**2022COA23**

**No. 18CA0485, *People v. Tarr* — Constitutional Law — Fourth Amendment — Searches and Seizures — Warrantless Blood Draw; Regulation of Vehicles and Traffic — Alcohol and Drug Offenses — Expressed Consent for the Taking of Blood, Breath, Urine, or Saliva**

For the first time, a division of the court of appeals considers whether the broad language of *People v. Hyde*, 2017 CO 24, ¶ 27, 393 P.3d 962, 968-69, stating that "there is no constitutional right to refuse a blood-alcohol test" applies to conscious drivers who refuse to consent to a blood draw, where a law enforcement officer has probable cause to suspect that the driver committed vehicular homicide. The division concludes that where a law enforcement officer has probable cause to suspect that driver of this offense, the

officer may conduct a blood draw despite the driver's refusal. The division reasons that it must reach this conclusion because it is bound by the supreme court's language in paragraph 27 of *Hyde*.

Although the special concurrence agrees that the division is bound by *Hyde*, it urges the supreme court to reconsider the applicability of Colorado's Expressed Consent Statute to conscious objecting drivers in light of the United States Supreme Court's holding in *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S. Ct. 2525 (2019).

COLORADO COURT OF APPEALS **2022COA23**

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Court of Appeals No. 18CA0485
Arapahoe County District Court No. 16CR2335
Honorable Ben L. Leutwyler III, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Christopher Oneil Tarr,

Defendant-Appellant.

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JUDGMENT AFFIRMED

Division III
Opinion by JUDGE LIPINSKY
Brown, J., concurs
Furman, J., specially concurs

Announced February 24, 2022

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Megan A. Ring, Colorado State Public Defender, Casey Klekas, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 In a case involving an unconscious driver suspected of driving under the influence of alcohol (DUI), the Colorado Supreme Court broadly pronounced that "there is no constitutional right to refuse a blood-alcohol test" under Colorado's expressed consent statute, section 42-4-1301.1, C.R.S. 2021. *People v. Hyde*, 2017 CO 24, ¶ 27, 393 P.3d 962, 968-69. Today we hold that this broad language also applies to conscious drivers who refuse to take a blood-alcohol test when a law enforcement officer has probable cause to suspect that the driver committed vehicular homicide.

¶ 2 Christopher Oneil Tarr appeals his judgment of conviction for second degree murder, attempted second degree murder, vehicular homicide (DUI), vehicular homicide (reckless driving), DUI, reckless driving, and careless driving. We affirm.

## I. Background Facts

¶ 3 We begin with a summary of the evidence presented at trial. Tarr and his roommate, R.T., drove together in Tarr's car to a bar to drink and play pool. R.T. estimated that, over the course of six to eight hours, he and Tarr drank between one and three pitchers of beer. When they left the bar shortly before midnight, R.T. offered to drive home. Tarr declined the offer, however, saying he was "fine."

¶ 4 While driving his familiar route home, Tarr accelerated to a high rate of speed to "test[] [the car's] turbo out a little bit," as a mechanic had recently worked on the vehicle. As the car raced toward an intersection, R.T. saw that the light was red and told Tarr "red light, red light" and "slow the fuck down." Tarr did not slow down or stop, however. He ran the red light and attempted to make a left turn. R.T. "closed his eyes and just prayed."

¶ 5 At that moment, J.M. and D.M. were crossing the intersection in a marked crosswalk. Traffic camera footage shows Tarr's car skidding as it turns left, rolling over, and coming to a stop in a parking lot. Although Tarr's car missed J.M., it struck D.M., who died from his injuries.

¶ 6 Officer Ernest Gonzales of the Aurora Police Department was the first law enforcement officer to speak with Tarr following the collision. Although Tarr denied drinking alcohol that night, Officer Gonzales detected the smell of alcohol on him.

¶ 7 Officer Rolando Gomez then arrived and began questioning Tarr. Tarr claimed he had been hit by another car going 100 miles per hour. But he admitted that he had been driving seventy miles

per hour, although he knew the speed limit was between forty and forty-five miles per hour.

¶ 8 Like Officer Gonzales, Officer Gomez smelled alcohol on Tarr's breath and noted that his speech was slurred. Tarr told Officer Gomez he had not been drinking alcohol but that he had smoked marijuana the previous day. After Tarr refused medical treatment, Officer Gomez asked Tarr to perform roadside sobriety maneuvers. Tarr initially agreed, but before Officer Gomez could administer the maneuvers, Tarr complained of a headache and was transported to the hospital.

¶ 9 Blood tests performed at the hospital showed that Tarr's blood alcohol content (BAC) was between .30 and .32 — roughly four times the limit for DUI — at the time of the collision.

¶ 10 The prosecution charged Tarr with (1) vehicular homicide (DUI); (2) vehicular homicide (reckless driving); (3) leaving the scene of a crash resulting in death; (4) DUI; and (5) reckless driving. It later added sixth and seventh charges: first degree murder (extreme indifference) and attempted first degree murder (extreme indifference). (At a preliminary hearing, the court dismissed the charge of leaving the scene of a crash.) After the close of evidence,

defense counsel requested that the jury be instructed, and be provided with a verdict form, on a lesser nonincluded charge of careless driving.

¶ 11 The jury convicted Tarr of the original four charges and the lesser nonincluded charge, as well as the lesser included offenses of the sixth and seventh charges — second degree murder and attempted second degree murder. The trial court merged Tarr's conviction for reckless driving with his conviction for vehicular homicide (reckless driving) and merged his convictions for vehicular homicide (reckless driving) and DUI with his conviction for vehicular homicide – DUI. The court sentenced him to forty years in the custody of the Department of Corrections for second degree murder, twenty years for attempted second degree murder, twenty-four years for vehicular homicide (DUI), and one year for careless driving, with the sentences to run concurrently.

## II. Discussion

¶ 12 Tarr challenges his convictions on the grounds that the trial court erred by denying his motion to suppress the results of his BAC tests.

¶ 13 Tarr contests his convictions for second degree murder and attempted second degree murder on three additional grounds. First, he argues that the trial court erred by overruling his objection to the addition of the first degree murder and attempted first degree murder charges because the General Assembly intended that vehicular homicide be the sole applicable offense if a person causes the death of another while driving or operating a motor vehicle. Second, he contends that his conviction for second degree murder violates the Colorado Constitution's equal protection guarantee because there is no reasonable distinction between the conduct proscribed by the second degree murder statute and the conduct proscribed by the vehicular homicide (DUI) statute. Third, Tarr argues the prosecution presented insufficient evidence to sustain these convictions.

¶ 14 We reject these arguments.

A. The Blood Draws

¶ 15 Tarr contends that the blood draws were illegal searches under the Fourth Amendment to the United States Constitution and that the trial court erred by concluding they were legal based solely on the language of the expressed consent statute. We disagree.

1. Additional Facts

¶ 16 Officer Gomez followed the ambulance in which Tarr was transported to the hospital. At the hospital, Officer Gomez called a detective to inform him of the accident, that there was alcohol involved, and that "there was a chance that [D.M.] was not going to survive."

¶ 17 Inside Tarr's hospital room, Officer Gomez advised Tarr of the expressed consent statute. The statute provides that every driver in the state, by virtue of driving in the state, has consented to

> take and complete, and to cooperate in the taking and completing of, any test or tests of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving [under the influence of alcohol].

§ 42-4-1301.1(2)(a)(I).

¶ 18 The officer advised Tarr that his only option for a BAC test was a blood draw, and that his refusal to submit to such a test would result in revocation of his license. Tarr responded, "You're not taking my blood." (The record does not reflect why, once in the hospital, Tarr no longer had the option of submitting to a breath

test. Tarr does not challenge the accuracy of Office Gomez's statement, however.)

¶ 19 Shortly thereafter, another officer informed Officer Gomez that D.M. had died. Officer Gomez told Tarr that, because of the fatality, if he did not consent, the blood draw would "have to be done forcefully if need be." Tarr again refused to consent to a blood draw, although he said he "wouldn't physically resist."

¶ 20 Tarr's blood was drawn three times that morning — at 1:19 a.m., 2:19 a.m., and 3:15 a.m. (Blood draws over time allow a forensic toxicologist to estimate the rate at which an individual's body eliminates alcohol and then extrapolate the individual's BAC at a particular time. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2536 (2019) ("Enforcement of BAC limits . . . requires prompt testing because it is 'a biological certainty' that '[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour.") (quoting *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (Roberts, C.J., concurring in part and dissenting in part).)

¶ 21 Tarr filed a pretrial motion to suppress evidence of the results of the blood draws. The trial court denied the motion, finding that the blood draws were "accomplished within the parameters of the

[expressed consent statute], a recognized exception to the warrant requirement."

2. Standard of Review

¶ 22 "Our review of a trial court's ruling on a motion to suppress presents a mixed question of fact and law. We defer to the trial court's factual findings if those findings are supported by competent evidence in the record; however, we review the trial court's legal conclusions de novo." *People v. Shoen*, 2017 CO 65, ¶ 8, 395 P.3d 327, 330 (citation omitted).

¶ 23 In addition, we must apply the standard of review for challenges to the constitutionality of a statute if Tarr contends the expressed consent statute is unconstitutional. Although he asserts that he is not making such an argument, he acknowledges that his appeal addresses "whether 'consent' implied by statute satisfies the Fourth Amendment's requirement of voluntariness when a conscious defendant objects to the State piercing his skin and extracting his blood." We perceive this argument to be an as-applied challenge to the constitutionality of the expressed consent statute, and we must analyze it as such. *See People v. Nozolino*, 2014 COA 95, ¶ 19, 350 P.3d 940, 945 ("An as-applied

[constitutional] challenge alleges that a statute is unconstitutional as to the specific circumstances under which a defendant acted.").

¶ 24 "The constitutionality of a statute is a legal question that we review de novo. Statutes are presumed to be constitutional, and the challenger bears the burden to prove their unconstitutionality beyond a reasonable doubt." *People v. Torline*, 2020 COA 160, ¶¶ 7-8, 487 P.3d 1284, 1286 (citation omitted) (addressing an as-applied challenge to a Colorado marijuana statute under the Free Exercise Clauses of the Federal and State Constitutions).

3. The Fourth Amendment and Statutory Expressed Consent

¶ 25 The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Because a blood draw "involve[s] a compelled physical intrusion beneath [an individual's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation," it is a "search" within the meaning of the Fourth Amendment. *McNeely*, 569 U.S. at 148.

¶ 26 Although the Fourth Amendment generally requires a warrant for a search by law enforcement officers, the "ultimate measure" of the constitutionality of a governmental search is "reasonableness." *Hyde*, ¶ 16, 393 P.3d at 966 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)). A warrantless search is reasonable if it satisfies one of the recognized exceptions to the warrant requirement. *People v. Rodriguez*, 945 P.2d 1351, 1359 (Colo. 1997). Consent is one of the recognized exceptions. *People v. Licea*, 918 P.2d 1109, 1112 (Colo. 1996). A person's consent may justify a warrantless search so long as the consent is "the product of an essentially free and unconstrained choice by its maker." *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)).

¶ 27 Tarr's argument implicates two closely related issues: (1) whether a state expressed consent statute can satisfy the Fourth Amendment's warrant requirement for a BAC test, including a blood test; and (2) if so, whether a driver possesses the constitutional right to revoke that consent. The supreme court's decision in *Hyde* addressed both of these issues.

¶ 28 As noted above, anyone who drives a motor vehicle in Colorado is deemed to have consented to the provisions of the expressed

consent statute. § 42-4-1301.1(1). These provisions include consent to a blood or breath test to determine the driver's BAC when requested by a law enforcement officer having probable cause to believe that the driver is under the influence of alcohol, drugs, or both. § 42-4-1301.1(2)(a)(I), (b)(I).

¶ 29 In *Hyde*, the Colorado Supreme Court held that an unconscious driver's statutory consent to BAC testing satisfies the consent exception to the Fourth Amendment's warrant requirement. *Hyde*, ¶¶ 23-24, 393 P.3d at 967-68. It would be illogical to read *Hyde* to mean that the expressed consent statute is binding on unconscious drivers but not on conscious drivers. Logically, a driver's physical condition is of no consequence to whether statutory consent satisfies the consent exception to the warrant requirement.

¶ 30 The *Hyde* analysis also involves the second related issue noted above: If statutory consent is sufficient to satisfy the Fourth Amendment, can a conscious driver revoke that consent? In sweeping language equally applicable to conscious and unconscious drivers, the *Hyde* court stated that "there is no constitutional right to refuse a blood-alcohol test." *Id.* at ¶ 27, 393 P.3d at 968-69 (first

citing *South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983); then citing *Cox v. People*, 735 P.2d 153, 155 n.3 (Colo. 1987); and then citing *Brewer v. Motor Vehicle Div.*, 720 P.2d 564, 568 (Colo. 1986)). "[A]ny opportunity to refuse chemical testing is 'simply a matter of grace bestowed by the [state] legislature.'" *Id.* (alteration in original) (quoting *Neville*, 459 U.S. at 565). The court did not limit this language to cases involving unconscious drivers.

¶ 31 The Colorado General Assembly has bestowed the "grace" to refuse chemical testing on drivers under certain circumstances but has imposed administrative and evidentiary consequences for such refusal. A conscious driver's refusal to submit to testing is admissible against the driver at a trial for DUI or driving while ability impaired, § 42-4-1301(6)(d), C.R.S. 2021, and results in revocation of his or her driver's license for a minimum of one year. § 42-4-1301.1(4); *see also Hyde*, ¶ 24 n.3, 393 P.3d at 968 n.3 (acknowledging that a law enforcement officer may not "forcibly conduct a blood draw on *any* driver who has *revoked* his or her statutory consent by refusing to submit to a blood-alcohol test" because the expressed consent statute forbids forced blood draws except under certain specified circumstances).

¶ 32 The General Assembly carved out four scenarios in which the "grace" to refuse a BAC test has not been bestowed. If a law enforcement officer has probable cause to believe that a driver committed one of four specified offenses, the expressed consent statute "permits a law enforcement officer to force a driver to take a blood test, notwithstanding the driver's refusal." *People v. Raider*, 2021 COA 1, ¶ 2, 490 P.3d 1079, 1081 (*cert. granted* Sept. 13, 2021); *see* § 42-4-1301.1(3). These four offenses are criminally negligent homicide, vehicular homicide, assault in the third degree, and vehicular assault. § 42-4-1301.1(3). Evidence obtained through an involuntary blood test conducted under section 42-4-1301.1(3) is admissible against a driver at a trial for one or more of the four offenses. § 42-4-1301(6)(e).

4. The Trial Court Did Not Err by Concluding that the Evidence of the Blood Draws Was Admissible

¶ 33 Tarr argues that *Hyde* should be limited to cases involving unconscious drivers and that we should adopt the view that an expressed consent statute alone does not satisfy the consent exception to the Fourth Amendment. Alternatively, Tarr urges us to hold that, even if he had consented to the blood draw through the

expressed consent statute, he had a constitutional right to withdraw that statutory consent. But we are bound by the supreme court's holding in *Hyde*. *See People v. Robson*, 80 P.3d 912, 914 (Colo. App. 2003) ("[W]e are bound by the rule as expressed by the Colorado Supreme Court, and we are not free to depart from this precedent.").

¶ 34 Tarr's argument nonetheless finds support in authorities from outside Colorado that call into question *Hyde*'s initial premise: that statutory consent, without more, can satisfy the consent exception to the Fourth Amendment's warrant requirement. *See Hyde*, ¶ 24, 393 P.3d at 968. Thus, if the supreme court were to accept Judge Furman's invitation to reconsider the scope of *Hyde*, it would have an opportunity to consider whether the Colorado expressed consent statute alone can satisfy the consent exception to the Fourth Amendment in situations where a driver, like Tarr, withdraws his statutory consent.

¶ 35 Although the Supreme Court recently analyzed state expressed consent statutes, *see Birchfield v. North Dakota*, 579 U.S. ___, ___, 136 S. Ct. 2160, 2185 (2016); *McNeely*, 569 U.S. at 160-61, those decisions did not consider whether such statutes comply with the

consent exception to the Fourth Amendment warrant requirement. As one commentator noted,

> [I]n none of the three cases collectively decided [in *Birchfield*] does it appear there was an express claim that the implied-consent statute *itself* provides a basis for a warrantless search. And in the more recent Supreme Court decision on the subject, *Mitchell v. Wisconsin*, the plurality opinion relied instead upon the established exigent circumstance exception to the search warrant requirement despite the fact, as the dissent noted, that the state court's "primary argument has always been that Mitchell consented to the blood draw through the State[']s 'implied-consent law.'" Indeed, the plurality emphasized that the Court's prior decision[s] . . . on the subject "have not rested on the idea that these laws do what their popular name might seem to suggest — that is, create actual consent to all the searches they authorized."

4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(*l*) (6th ed. 2020) (footnote omitted). (Although Tarr asserts that Professor LaFave expressly criticized *Hyde*'s reading of *Birchfield* in a supplement to an earlier edition of his treatise, the current edition of the treatise makes no reference to *Hyde*.)

¶ 36 Professor LaFave noted that the Supreme Court may have revealed its thinking on the effectiveness of statutory implied

consent in orders it entered following the announcement of *McNeely*. In that case, the Court held that the natural dissipation of alcohol in a person's bloodstream does not create a per se exigency that always justifies a warrantless blood draw. *McNeely*, 569 U.S. at 165. (There appears to be no material distinction between an "expressed consent statute" and an "implied consent statute." *See Raider*, ¶¶ 19-26, 490 P.3d at 1083-85 (applying the same analysis to both types of statutes).)

¶ 37 After announcing *McNeely*, the Supreme Court considered the defendant's petition for writ of certiorari in *Aviles v. State*, 385 S.W.3d 110 (Tex. App. 2012) (*Aviles I*). In that case, the state court had held that statutory implied consent alone was sufficient to justify a warrantless blood draw. *Id.* at 116. The Supreme Court then granted certiorari, vacated the state court's judgment, and remanded the case to the state court "for further consideration" in light of *McNeely*. *Aviles v. Texas*, 571 U.S. 1119 (2014) (mem.).

¶ 38 On remand, the state court concluded that, following the logic of *McNeely*, the mandatory blood draw and implied consent statutes "were not substitutes for a warrant or legal exceptions to the Fourth Amendment warrant requirement." *Aviles v. State*, 443 S.W.3d 291,

294 (Tex. App. 2014) (*Aviles II*). Professor LaFave commented that to conclude otherwise "would in effect nullify the Supreme Court's decision in *McNeely*." LaFave, § 8.2(*l*).

¶ 39 Absent a clear pronouncement from the Supreme Court, however, state courts remain divided on whether statutory consent alone can support a warrantless blood draw. Some courts, like our supreme court in *Hyde*, have held that expressed consent statutes alone satisfy the consent exception to the Fourth Amendment warrant requirement. *See State v. Brar*, 2017 WI 73, ¶ 23, 898 N.W.2d 499, 507 ("[L]est there be any doubt, consent by conduct or implication is constitutionally sufficient consent under the Fourth Amendment."); *Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 866-67 (Idaho Ct. App. 2015) ("[The defendant] impliedly consented to be tested for alcohol by driving a motor vehicle in Idaho. . . . [Her] statutorily implied consent was effective at the time of the warrantless blood draw as it was justified by Idaho's implied consent statute.").

¶ 40 Others courts, however, like the Texas court that decided *Aviles II*, have interpreted *McNeely*'s language that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable

must be determined case by case based on the totality of the circumstances," 569 U.S. at 156, to mean that an expressed consent statute alone does *not* establish that the consent exception to the Fourth Amendment's warrant requirement has been satisfied. *See State v. Modlin*, 867 N.W.2d 609, 618-19 (Neb. 2015) (holding that "a court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes"); *State v. Henry*, 539 S.W.3d 223, 244 (Tenn. Crim. App. 2017) ("[I]mplied consent does not qualify as consent under the United States . . . Constitution[].").

¶ 41 Further, courts that held statutory consent is sufficient to satisfy the consent exception to the Fourth Amendment's warrant requirement have split on whether a conscious driver possesses a constitutional right to revoke that consent — the second Fourth Amendment issue addressed in *Hyde*. For example, in a case involving a conscious driver who was forced to submit to a blood draw over his objections, the Nevada Supreme Court reasoned that "a driver's so-called consent cannot be considered voluntary," and thus cannot satisfy the consent exception to the Fourth Amendment warrant requirement, if the statute allows law

enforcement to conduct a blood draw despite the driver's revocation of that consent. *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014) (noting that it could find "no jurisdiction that has upheld an implied consent statute that allows an officer to use force to obtain a blood sample upon the driver's refusal to submit to a test"); *see State v. Ryce*, 368 P.3d 342, 369 (Kan. 2016) ("It would be inconsistent with Fourth Amendment principles to conclude consent remained voluntary if a suspect clearly and unequivocally revoked consent."). *But see Cash v. Commonwealth*, 466 S.E.2d 736, 738 (Va. 1996) ("The consent to submit to a blood . . . test, granted when a person operates a motor vehicle upon the highways, 'is not a qualified consent and it is not a conditional consent, and therefore there can be no qualified refusal or conditional refusal to take the test.'" (quoting *Deaner v. Commonwealth*, 170 S.E.2d 199, 204 (Va. 1969)).

¶ 42 While we acknowledge the logic of the reasoning in cases such as *Henry*, 539 S.W.3d at 244, and *Byars*, 336 P.3d at 946, as well as in Professor LaFave's treatise, the expansive language of paragraph 27 of *Hyde* requires us to hold that Tarr consented to the blood test by virtue of the expressed consent statute and, moreover, that he had no constitutional right to refuse the test because the

officers had probable cause to believe he had committed vehicular homicide. Thus, under *Hyde*, Tarr was not entitled to the statutory "grace" to revoke his statutory consent and refuse a BAC test.

¶ 43 The plain meaning of section 42-4-1301.1(3) is that a law enforcement officer may require a driver to submit to a blood draw if the officer has probable cause to believe the driver committed vehicular homicide, even if "the [driver] is refusing to take or to complete, or to cooperate in the completing of, any test or tests." The expressed consent statute "indicates that the Colorado legislature did *not* intend to bestow that grace [of refusal]" upon a driver under such circumstances. *See Hyde*, ¶ 28, 393 P.3d at 969.

¶ 44 In sum, we apply *Hyde* as written and hold that, by driving a motor vehicle in the State of Colorado, Tarr consented to a warrantless blood draw in the event a law enforcement officer had probable cause to believe he committed vehicular homicide. § 42-4-1301.1(3). For this reason, the trial court did not err by admitting the evidence of the warrantless blood draws and we need not address Tarr's arguments regarding the applicability of other exceptions to the warrant requirement.

### B. Legislative Preclusion

¶ 45 Tarr contends that the "comprehensive scheme for regulating and punishing intoxicated driving shows that the General Assembly intended Tarr's conduct to be prosecuted and punished" exclusively under the vehicular homicide statutes, and not under the general murder statutes. We are not persuaded.

#### 1. Preservation

¶ 46 We agree with the People that this issue is not preserved. Although Tarr claims the issue is preserved because his attorney objected during the preliminary hearing to the added counts of first degree murder and attempted first degree murder, the record shows that Tarr's counsel objected to the added counts on other grounds. During the hearing, counsel did not present a legislative preclusion argument or cite to authorities on legislative preclusion. Because Tarr's counsel did not give the trial court "an adequate opportunity to make findings of fact and conclusions of law" on this issue, it is not preserved for our review. *People v. Heisler*, 2017 COA 58, ¶ 42, 488 P.3d 176, 183 (quoting *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004)). Thus, we must consider Tarr's legislative preclusion argument under the plain error standard. *People v. Valdez*, 2014

COA 125, ¶ 18, 411 P.3d 94, 99 ("[W]e review unpreserved issues for plain error.").

¶ 47 "To qualify as plain error, an error must generally be so obvious that a trial judge should be able to avoid it without the benefit of an objection." *Scott v. People*, 2017 CO 16, ¶ 16, 390 P.3d 832, 835. "For an error to be this obvious, the action challenged on appeal ordinarily 'must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law.'" *Id.* (quoting *People v. Pollard*, 2013 COA 31M, ¶ 40, 307 P.3d 1124, 1133). "We reverse under plain error review only if the error 'so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.'" *Hagos v. People*, 2012 CO 63, ¶ 14, 288 P.3d 116, 120 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)).

2. Applicable Law

¶ 48 Under Colorado law, "a single transaction may give rise to the violation of more than one statute." *People v. Blue*, 253 P.3d 1273, 1277 (Colo. App. 2011) (quoting *People v. James*, 178 Colo. 401, 404, 497 P.2d 1256, 1257 (1972)). "The enactment of a specific criminal statute does not preclude prosecution under a general

criminal statute unless the language clearly evinces legislative intent to limit prosecution to the specific statute." *People v. Prieto*, 124 P.3d 842, 848 (Colo. App. 2005). In determining whether the General Assembly intended to preclude prosecution under a general statute by enacting a more specific statute, we consider three factors: "(1) whether the specific statute invokes the full extent of state police powers; (2) whether the specific statute is part of a comprehensive regulatory scheme to control an entire substantive area of behavior; and (3) whether the specific statute carefully defines different types of offenses in detail." *Id.*; *see People v. Bagby*, 734 P.2d 1059, 1062 (Colo. 1987). "Where a [specific] statute does not satisfy at least the first two prongs of the [preclusion] test, it does not supplant the general statute." *Blue*, 253 P.3d at 1278.

3. The Vehicular Homicide Statute Does Not Evince a Legislative Intent to Preclude Prosecution Under the General Murder Statutes

¶ 49 Tarr has not demonstrated that the vehicular homicide statute, section 18-3-106, C.R.S. 2021, evinces the General Assembly's intent to preclude prosecution under the general murder statutes for causing the death of a person while driving. We

review Tarr's statutory interpretation argument de novo. *See People v. Johnson*, 2021 COA 102, ¶ 15, 498 P.3d 157, 161. Applying the first *Prieto* factor, we perceive no error, much less plain error.

¶ 50 "[W]e see nothing in the language of the vehicular homicide statute . . . that suggests a legislative intent to preempt" the general murder statutes. *Prieto*, 124 P.3d at 848. Even if we did not deem the *Prieto* analysis persuasive, Tarr points to no language in section 18-3-106 that suggests the statute "invokes the full extent of state police powers." *Prieto*, 124 P.3d at 848; *cf. Bagby*, 734 P.2d at 1062 (noting that the General Assembly adopted the Liquor Code as "an exercise of the police powers of the state for the protection of the economic and social welfare and the health, peace and morals of the people of the state" (quoting § 12-47-102(1), C.R.S. 1986)). Moreover, Tarr concedes that "the General Assembly has not made an express declaration [of intent] regarding vehicular homicide."

¶ 51 Rather, Tarr contends that the enactment of the vehicular homicide statute, in and of itself, years after the General Assembly criminalized murder, demonstrates that the General Assembly intended to preclude prosecution of vehicular homicide offenses under the general murder statutes. The historical background of

the enactment of a particular statute is not a factor in the legislative preclusion analysis, however. *See Bagby*, 734 P.2d at 1062.

¶ 52 So long as the offenses do not violate constitutional protections such as equal protection, the General Assembly is free to "create a separate crime" to "reach a distinct group of wrongdoers" if it so chooses, without precluding prosecution under a more general statute. *People v. Smith*, 938 P.2d 111, 116 (Colo. 1997); *see People v. Jackson*, 627 P.2d 741, 746 (Colo. 1981). Thus, we hold that, by enacting the vehicular homicide statute, the General Assembly did not intend to bar murder prosecutions of drivers who cause the death of another while behind the wheel.

C. The As-Applied Equal Protection Claim

¶ 53 Tarr argues that, as applied to his conduct, the second degree murder and vehicular homicide (DUI) statutes violate Colorado's constitutional equal protection guarantee because they proscribe identical conduct. We reject this argument.

¶ 54 We note that, on appeal, Tarr does not present a developed equal protection argument regarding the attempted second degree murder or vehicular homicide (reckless driving) statutes. For this reason, we limit our analysis to Tarr's as-applied equal protection

argument focused on the interplay between the second degree murder and vehicular homicide (DUI) statutes.

1. Standard of Review

¶ 55 We review the constitutionality of statutes de novo. *People v. Lente*, 2017 CO 74, ¶ 10, 406 P.3d 829, 831.

¶ 56 As with Tarr's legislative preclusion argument, the parties dispute whether Tarr's attorney preserved his equal protection argument. While the record makes clear that Tarr's attorney presented an equal protection argument to the trial court in response to the addition of the first degree murder and attempted first degree murder charges, in such argument, Tarr's attorney did not contend that the charges for the lesser included offenses, including second degree murder, violated Tarr's right to equal protection. But in his appeal, Tarr asserts that the charges for second degree murder and vehicular homicide (DUI) punished him twice for the same conduct and, thus, violated his right to equal protection.

¶ 57 Particularly because this type of equal protection challenge requires an offense-specific analysis, *see infra* Part II.C.2, we agree with the People that Tarr's attorney did not preserve the equal

protection argument focused on second degree murder. *See Thornton v. State*, 539 S.W.3d 624, 628-29 (Ark. Ct. App. 2018) (holding that, to preserve a challenge to a conviction on a lesser included offense, a defendant "must anticipate an instruction on a lesser-included offense and specifically address the elements of that lesser-included offense" in making his argument to the trial court); *see also Heisler*, ¶ 42, 488 P.3d at 183. "We review de novo whether two statutes prohibit the same or different conduct." *People v. Curtis*, 2021 COA 103, ¶ 32, 498 P.3d 677, 684. Because Tarr's counsel did not contend in the trial court that the combined charges under the second degree murder and vehicular homicide (DUI) statutes violated his right to equal protection, we will reverse his conviction on this basis only if the district court plainly erred. *Hagos*, ¶ 14, 288 P.3d at 120.

2. Equal Protection and Criminal Offenses

¶ 58 "Our analysis starts with the presumption that the statutes are constitutional." *Prieto*, 124 P.3d at 846. "Under the Colorado Constitution, equal protection is violated if different statutes proscribe the same criminal conduct with disparate criminal sanctions." *People v. Sharp*, 104 P.3d 252, 255 (Colo. App. 2004).

"Similarly, '[s]tatutes prescribing different sanctions for what ostensibly might be different acts, but offering no rational standard for distinguishing such different acts for purposes of disparate punishment,'" contravene the equal protection guarantee of the Colorado Constitution. *People v. Clanton*, 2015 COA 8, ¶ 26, 361 P.3d 1056, 1061 (quoting *People v. Wilhelm*, 676 P.2d 702, 704 (Colo. 1984)). But "the fact that a single act may give rise to more than one criminal violation does not, by itself, create an equal protection problem." *People v. Madril*, 746 P.2d 1329, 1333 (Colo. 1987).

¶ 59 When evaluating an as-applied equal protection challenge, we consider whether, under the circumstances of the case, "the relevant statutes, or specific subsections of the statutes, punish identical conduct, and whether a reasonable distinction can be drawn between the conduct punished by the two statutes." *People v. Trujillo*, 2015 COA 22, ¶ 21, 369 P.3d 693, 697. "To establish a reasonable distinction between two statutes for purposes of equal protection, the statutory classifications of crimes must be 'based on differences that are real in fact and reasonably related to the general purposes of criminal legislation.'" *People v. Brockelman*,

862 P.2d 1040, 1041 (Colo. App. 1993) (quoting *People v. Mumaugh*, 644 P.2d 299, 301 (Colo. 1982)).

### 3. The Combined Second Degree Murder and Vehicular Homicide (DUI) Charges Do Not Violate Tarr's Right to Equal Protection

¶ 60 We begin our analysis by reviewing the specific statutes under which Tarr was charged and convicted.

¶ 61 "A person commits the crime of murder in the second degree if . . . [t]he person knowingly causes the death of a person . . . ." § 18-3-103(1)(a), C.R.S. 2021. Second degree murder is a class 2 felony. § 18-3-103(3)(a).

¶ 62 The vehicular homicide (DUI) statute provides:

> If a person operates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. This is a strict liability crime.

§ 18-3-106(1)(b)(I). Vehicular homicide (DUI) is a class 3 felony. § 18-3-106(1)(c).

¶ 63 There are two key differences between the offenses of second degree murder and vehicular homicide (DUI). First, the offenses involve different levels of intent. To be convicted of second degree

murder, a defendant must have acted "knowingly." To act knowingly, a person must be "aware that his conduct is practically certain to cause the result." § 18-1-501(6), C.R.S. 2021. In contrast, vehicular homicide (DUI) is a strict liability offense, requiring only voluntary conduct. *See Prieto*, 124 P.3d at 847. Second, unlike the second degree murder statute, to obtain a conviction under the vehicular homicide (DUI) statute, "the prosecution must demonstrate that the defendant drove or operated a motor vehicle," *People v. Stewart*, 55 P.3d 107, 115-16 (Colo. 2002), and that the defendant was legally intoxicated. These distinctions are not only "real in fact," but also "reasonably related to the general purposes of criminal legislation," *Marcy*, 628 P.2d at 74, such as deterring individuals from more egregious behavior by imposing a harsher penalty for offenses having a greater deleterious impact on society.

¶ 64 As applied to Tarr, the second degree murder statute and the vehicular homicide (DUI) statute do not criminalize the same conduct. Under the prosecution's theory of the case, each offense involved a different sets of facts. Tarr committed vehicular

homicide (DUI) by driving while intoxicated and proximately causing D.M.'s death.

¶ 65 In contrast, the prosecutor argued that Tarr also committed murder because he was aware that driving on the city street at a high rate of speed, failing to stop at the red light despite his roommate's exhortations, and veering into the intersection marked with a crosswalk were practically certain to cause the death of a pedestrian in the crosswalk. During closing argument, the prosecutor described in detail Tarr's decisions leading up to D.M.'s death. Not only did Tarr decide to drive after drinking, but he "chose to enter the intersection at a speed of roughly seventy miles an hour." The light had been red for thirteen seconds before he swerved to the left, despite his roommate's screams that he needed to stop. Such behavior is materially different and more specific than that required for a vehicular homicide (DUI) conviction. Further, Tarr's intoxication at the time is irrelevant for a second degree murder conviction.

¶ 66 Tarr argues that charging him with both second degree murder and vehicular homicide (DUI) nonetheless violated his right to equal protection because "there is no sufficiently pragmatic way

to uniformly decide if a given drunk driver who causes a fatality has done so 'knowingly.'" Under different circumstances, that may be true, such as where the prosecution did not present evidence of the defendant's mental state. But, here, as explained above, the prosecution did present evidence regarding Tarr's mental state. Because of these additional facts, the jury was able to find that Tarr was not only intoxicated and the proximate cause of D.M.'s death, but also that he knew his behavior was practically certain to result in the death of a pedestrian in the crosswalk.

### D. Sufficiency of the Evidence

¶ 67 Tarr contends that the evidence introduced at trial was insufficient to sustain his convictions for second degree murder and attempted second degree murder. We are not persuaded.

#### 1. Standard of Review

¶ 68 We review sufficiency of the evidence claims de novo. *McCoy v. People*, 2019 CO 44, ¶ 27, 442 P.3d 379, 387.

#### 2. Applicable Law

¶ 69 "The Due Process Clauses of the United States and Colorado Constitutions require proof of guilt beyond a reasonable doubt on

each of the essential elements of a crime." *People v. Duncan*, 109 P.3d 1044, 1045 (Colo. App. 2004).

> A challenge to the sufficiency of the evidence requires a reviewing court to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in a light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable fact finder that the defendant is guilty of the crime charged beyond a reasonable doubt.

*Id.* "The conviction must be upheld 'if there is substantial evidence in the record, viewed in the light most favorable to the prosecution, that supports the verdict.'" *Mata-Medina v. People*, 71 P.3d 973, 983 (Colo. 2003) (quoting *People v. Fuller*, 791 P.2d 702, 706 (Colo. 1990)).

¶ 70 "Because jury verdicts deserve deference and a presumption of validity," *id.*, in making this determination, the reviewing court "must give the prosecution the benefit of every reasonable inference that might fairly be drawn from the evidence, and the resolution of inconsistent testimony and determination of the credibility of the witnesses are solely within the province of the jury," *Duncan*, 109 P.3d at 1045-46. Thus, although a verdict "cannot be supported by guessing, speculation, conjecture, or a mere modicum of relevant

evidence," the reviewing court "should not attempt to 'serve as a thirteenth juror or invade the province of the jury'" by weighing conflicting evidence. *People v. Perez*, 2016 CO 12, ¶ 25, 367 P.3d 695, 701 (quoting *People v. Bennett*, 183 Colo. 125, 130, 515 P.2d 466, 469 (1973)).

### 3. Tarr's Sufficiency Arguments Lack Support and Are Undeveloped

¶ 71 As noted above, to find Tarr guilty of second degree murder, the jury needed to find that Tarr acted knowingly — that he was aware at the time his speeding vehicle struck D.M. that his conduct was "practically certain to cause the result." § 18-1-501(6).

¶ 72 Tarr argues that the prosecution did not present sufficient evidence to prove that he "knew his conduct was practically certain to cause death because his conduct was not, in fact, practically certain to cause death." In support of this contention, Tarr cites statistics and studies on the probability of a traffic fatality resulting from a single incident of driving under the influence. But we agree with the People that, because Tarr did not present these statistics and studies to the jury, we may not consider them. *See People v. Henson*, 2013 COA 36, ¶ 7, 307 P.3d 1135, 1137 (holding that,

"because our review is limited to the record on appeal," the court would not consider evidence presented for the first time in an appellate brief).

¶ 73 Similarly, Tarr argues that the evidence could not have proved that he acted knowingly because "death is a random rather than inevitable result of the reckless conduct of a highly intoxicated driver." He does not point to record evidence or any legal authorities that support this argument, however. "Because this is an undeveloped assertion of error lacking support in legal authority, we decline to address it." *People v. Lowe*, 2021 CO 51, ¶ 20 n.4, 488 P.3d 1122, 1126 n.4.

¶ 74 In any event, we note that the record evidence established that

- Tarr was familiar with the intersection, as it was on his usual route home;
- the intersection was a busy one, with businesses on all four corners;
- the intersection had a significant volume of pedestrian traffic;
- even though the incident occurred at night, the intersection was well-lit at the time;

- Tarr knew the speed limit was between forty and forty-five miles per hour but nonetheless drove into the intersection at seventy miles per hour;
- the traffic light had been red for thirteen seconds before Tarr drove through the intersection;
- the traffic camera videos showed that the headlights of a vehicle stopped at the intersection illuminated D.M. and J.M. and that the victims were plainly visible to a driver making a left turn toward the crosswalk;
- Tarr drove straight into the victims while they were in the crosswalk; and
- Tarr ignored R.T.'s admonition to slow down and shouts that the light was red.

¶ 75 In light of this evidence, and given the deference we must afford the jury's verdict, we cannot say that the jury was presented with insufficient evidence to find that Tarr acted knowingly when he sped into the intersection.

## III. Conclusion

¶ 76 The judgment is affirmed.

JUDGE BROWN concurs.

JUDGE FURMAN specially concurs.

JUDGE FURMAN, specially concurring.

¶ 77 Under the Fourth Amendment, are police permitted to conduct a warrantless blood draw from a *conscious* driver — who they have probable cause to believe has committed vehicular homicide — even though the driver has clearly stated that he does not consent to the blood draw?

¶ 78 The majority answers this question in the affirmative. It does so based on a provision of Colorado's Expressed Consent Statute — section 42-4-1301.1(3), C.R.S. 2021 — and expansive language about implied consent employed by our supreme court in *People v. Hyde*, 2017 CO 24 — a case involving an *unconscious* driver. *See id.* at ¶ 27 (holding that "there is no constitutional right to refuse a blood-alcohol test").

¶ 79 I conclude that the majority's analysis is correct because of the breadth of the language employed by the supreme court in *Hyde* and our duty to follow our supreme court's precedent. *See People v. Robson*, 80 P.3d 912, 914 (Colo. App. 2003). I therefore concur.

¶ 80 But I write separately to urge our supreme court to address this difficult question considering the more recent decision by the

United States Supreme Court in *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S. Ct. 2525 (2019). The *Hyde* court did not have the benefit of *Mitchell*. In *Mitchell*, the Supreme Court seemed to signal an important clarification of its jurisprudence on warrantless blood draws from drivers suspected of alcohol-related driving offenses. The Court appears to be moving away from implied consent created by statute and back to more traditional Fourth Amendment principles — those being the warrant requirement and the established exceptions to the warrant requirement.

¶ 81 In *Mitchell*, a driver, in challenging his conviction for driving under the influence (DUI), argued that Wisconsin police violated his rights under the Fourth Amendment when they conducted a warrantless draw of his blood while he was unconscious. *See id.* at ___, 139 S. Ct. at 2530-32. The State of Wisconsin argued that by driving on Wisconsin's roads, the driver had consented to the blood draw based on provisions of Wisconsin's implied consent statute. *See id.* This statute, much like Colorado's, authorizes police to conduct a warrantless blood draw from an unconscious driver if a law enforcement officer has probable cause to believe the driver is under the influence of alcohol. *See id.* The Supreme Court granted

certiorari on "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." *Id.* at ___, 139 S. Ct. at 2532.

¶ 82 The plurality in *Mitchell* noted that while prior decisions of the Supreme Court had "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences" on drivers who refuse to comply with blood alcohol concentration testing, these decisions "have not rested on the idea that [implied consent] laws do what their popular name might seem to suggest — that is, create actual consent to all the searches they authorize." *Id.* at ___, 139 S. Ct. at 2532-33 (quoting *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160, 2185 (2016)). The plurality clarified that the Court has "based [its prior] decisions on the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving." *Id.* at ___, 139 S. Ct. at 2533. The plurality then resolved the controversy in *Mitchell* based on the exigent circumstances exception to the Fourth Amendment. *See id.* at ___, 139 S. Ct. at 2538-39.

¶ 83 Justice Sotomayor's dissent in *Mitchell* put it more plainly: "The plurality does not rely on the consent exception here. With that sliver of the plurality's reasoning I agree. I would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires." *Id.* at ___, 139 S. Ct. at 2545 (Sotomayor, J., dissenting) (citation omitted).

¶ 84 Given this important clarification in jurisprudence, I urge our supreme court to address the question posed by Tarr's case after *Mitchell*.