The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
February 17, 2022

2022COA21

No. 19CA1201, *People v Liebler* — Crimes — Robbery — By Use of Force — Aggravated Robbery; Evidence — Witnesses — Contradictory Video Evidence

In this direct criminal appeal, a division of the court of appeals considers whether witness testimony that is indisputably contradicted by video evidence can nonetheless be sufficient to support a conclusion by a reasonable jury that the prosecution proved an element of the charged offense — here, the use of force element of attempted aggravated robbery. As a matter of first impression, and under the circumstances presented, the division concludes that it cannot.

Additionally, the division considers whether a defendant's use of force while fleeing after abandoning his attempt to take something of value from another can be sufficient to satisfy the use

of force element of attempted aggravated robbery. As another matter of first impression, and under the facts of the case, the division concludes that it cannot. Because neither the witness testimony nor the defendant's use of force after abandoning the attempted taking was sufficient to establish the use of force element, the division reverses the defendant's conviction for attempted aggravated robbery and remands for sentencing.

The division rejects the defendant's contentions that the district court erred by allowing an investigating officer to testify about the veracity of other witnesses and that the prosecutor committed misconduct during closing argument. Accordingly, the division affirms the defendant's remaining convictions.

COLORADO COURT OF APPEALS **2022COA21**

Court of Appeals No. 19CA1201
Weld County District Court No. 17CR2980
Honorable Timothy Kerns, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jason Morgan Liebler,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE BROWN
Berger and Johnson, JJ., concur

Announced February 17, 2022

Philip J. Weiser, Attorney General, Jacob R. Lofgren, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Jessica Sommer, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Jason Morgan Liebler, appeals the judgment of conviction entered upon a jury verdict finding him guilty of attempted aggravated robbery, possession of a controlled substance, theft, two counts of third degree assault, and two counts of felony menacing. On appeal, he contends that (1) there was insufficient evidence to sustain his conviction for attempted aggravated robbery; (2) the lead investigating officer impermissibly testified about the veracity of other witnesses; and (3) the prosecutor committed misconduct during closing argument by expressing personal opinions on witness credibility and by urging the jury to return a conviction based on facts unrelated to the elements of attempted aggravated robbery.

¶ 2 Resolving the first issue requires us to address two matters of first impression. First, we must determine whether witness testimony that is indisputably contradicted by video evidence can nonetheless be sufficient to support a conclusion by a reasonable jury that the prosecution proved an element of the charged offense. Under the circumstances presented, we conclude that it cannot.

¶ 3 Second, we must determine whether a defendant's use of force while fleeing after abandoning his attempt to take something of

value from another can be sufficient to satisfy the use of force element of attempted aggravated robbery. In the context of an attempted robbery, and under the facts of this case, we conclude that it cannot.

¶ 4 As a result, we vacate Liebler's conviction for attempted aggravated robbery. Because we reject Liebler's other appellate contentions, however, we otherwise affirm.

I. Background

¶ 5 On December 13, 2017, Liebler went to a Safeway grocery store in Greeley, Colorado. He placed a number of high-end toys and desserts in his shopping cart, which drew the attention of loss prevention officer M.H. Grocery store personnel later determined that the value of the merchandise Liebler put in the shopping cart totaled $311.93.

¶ 6 M.H. alerted his partner, R.A., to a possible shoplifter and the two began surveilling Liebler. M.H. went outside so that he would be able to confront Liebler as Liebler left the store. R.A. stayed inside the store to keep observing Liebler.

¶ 7 Surveillance video from the store shows that Liebler left the main part of the store with a full shopping cart and entered the

vestibule between the store and outside without paying for the merchandise in his cart. As Liebler started to push the cart out of the vestibule, he was confronted by M.H., who put his hands on the front of the cart. Liebler then walked backwards, rolled the cart back inside the vestibule, pushed the cart to his side, and ran out the door.

¶ 8 At trial, M.H. testified that Liebler "decided to push the cart into me, pushing us outside the store" as he was trying to get away. R.A. testified that Liebler attempted to shove the cart aside and that he did not think Liebler "tried to shove it into [M.H.]."

¶ 9 M.H. testified that, once Liebler was outside the store, he headbutted M.H. as he was trying to escape. (Liebler's alleged headbutt was not captured on the store's surveillance video.) Both R.A. and M.H. tackled Liebler to prevent him from getting away. M.H. noticed that Liebler had a pocket knife, so M.H. slapped the knife out of Liebler's hand.

¶ 10 Once police officers arrived, they did a pat-down search of Liebler. The officers discovered methamphetamine in Liebler's pocket during the search. And they recovered a knife from the

scene, but no officer testified to recovering the knife or documenting where it was found.

¶ 11 Liebler was charged with attempted aggravated robbery, possession of a controlled substance, theft, two counts of third degree assault, and two counts of felony menacing. Following a three-day jury trial, Liebler was convicted as charged and sentenced to ten years in the custody of the Department of Corrections.

II. Analysis

A. Sufficiency of the Evidence

¶ 12 Liebler contends that the prosecution presented insufficient evidence to sustain his conviction for attempted aggravated robbery because it did not establish that he attempted to take the items "by the use of force." While he concedes that he used force *after* he abandoned the shopping cart and tried to flee, he argues that attempted aggravated robbery requires the use of force during the attempted taking. And because the only evidence of force during the attempt to take the items from the store — M.H.'s testimony that Liebler pushed the cart into him — was contradicted by the store surveillance video, Liebler contends that there was insufficient evidence to establish the force element of the crime. Liebler also

contends that he did not take the merchandise from "the person or presence of another" because he abandoned the merchandise once the loss prevention officers were present.

¶ 13 We agree with Liebler that the evidence was not substantial and sufficient for a reasonable jury to conclude that the prosecution proved beyond a reasonable doubt that Liebler attempted to take the merchandise "by the use of force." Thus, we conclude that there was insufficient evidence to sustain his conviction for attempted aggravated robbery. As a result, we need not address whether there was sufficient evidence that Liebler took the merchandise from "the person or presence of another."

1. Standard of Review and Applicable Law

¶ 14 We review the sufficiency of the evidence de novo. *See People v. Strock*, 252 P.3d 1148, 1155 (Colo. App. 2010). We must determine "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010) (citation omitted). It does not matter

whether we might have reached a different conclusion were we the trier of fact. *Id.* "The pertinent question is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* Still, the verdict must be supported by more than "guessing, speculation, conjecture, or a mere modicum of relevant evidence." *People v. Perez*, 2016 CO 12, ¶ 25.

¶ 15 Because Liebler was charged with attempted aggravated robbery, the prosecution had to show that he engaged "in conduct constituting a substantial step toward the commission of the offense." § 18-2-101(1), C.R.S. 2021.

¶ 16 A person commits robbery when the person "knowingly takes anything of value from the person or presence of another *by the use of force*, threats, or intimidation." § 18-4-301(1), C.R.S. 2021 (emphasis added). As relevant here, a person who commits robbery is guilty of aggravated robbery "if during the act of robbery or immediate flight therefrom," the person "knowingly wounds or strikes the person robbed or any other person with a deadly weapon or by the use of force, threats, or intimidation with a deadly weapon

knowingly puts the person robbed or any other person in reasonable fear of death or bodily injury." § 18-4-302(1)(b), C.R.S. 2021.

2. The Evidence Was Insufficient to Support Liebler's Conviction for Attempted Aggravated Robbery

¶ 17 For Liebler to be convicted of attempted aggravated robbery, the prosecution first had to prove that he committed attempted robbery. *Cf. People v. Borghesi*, 66 P.3d 93, 97 (Colo. 2003) (explaining that aggravated robbery includes all the elements of robbery plus additional elements and that one who commits aggravated robbery necessarily has committed the lesser included offense of robbery). At trial, the prosecution argued that Liebler committed attempted robbery by using force, not by using threats or intimidation. *See* § 18-4-301(1) ("A person who knowingly takes anything of value from the person or presence of another *by the use of force, threats, or intimidation* commits robbery.") (emphasis added). Thus, to prove that Liebler committed attempted aggravated robbery, the prosecution was required to first prove beyond a reasonable doubt that Liebler took a substantial step

towards taking anything of value from the person or presence of another by the use of force. *See id.*

¶ 18 The prosecution's theory at trial was that Liebler used force by pushing the cart into M.H. and by headbutting M.H. in an attempt to flee. Accordingly, we must determine whether (1) there was sufficient evidence that Liebler used force against M.H. by pushing the cart into him; and (2) Liebler's headbutting of M.H. *after* abandoning the shopping cart can satisfy the use of force element of attempted robbery.

i. The Surveillance Recording Indisputably Contradicts M.H.'s Testimony That Liebler Pushed the Cart into Him

¶ 19 The People contend that the evidence was sufficient to establish that Liebler tried to take items from the store "by use of force" because M.H. testified that Liebler pushed the cart into him. The surveillance video, however, does not support M.H.'s testimony on this point. For example, M.H. testified that Liebler "decided to push the cart into me." However, the video shows that, when Liebler began to push the cart out the door, M.H. put his hands on the front of the cart Liebler was pushing. Liebler then pulled the cart back into the vestibule *away* from M.H. M.H. also testified

that, by pushing the cart into him, Liebler pushed "us outside the store." But the video shows that M.H. was already outside the store when he confronted Liebler and that Liebler never made it out the vestibule door with the cart.

¶ 20 As a general rule, appellate courts, including this court, do not reweigh the evidence. *See People v. Sharp*, 104 P.3d 252, 256 (Colo. App. 2004). We generally do not assess the credibility of witnesses or resolve inconsistencies or contradictions in testimony. *See People v. Plancarte*, 232 P.3d 186, 191-92 (Colo. App. 2009). In other words, we may not act as a thirteenth juror and set aside a verdict merely because we might have reached a different conclusion had we been the trier of fact. *People v. McIntier*, 134 P.3d 467, 471 (Colo. App. 2005).

¶ 21 Where there is a video recording of the relevant events, however, we are in the same position as the jury to determine whether the video supports or contradicts a witness' testimony. That is because the nature of the evidence presented in the video does not depend on an evaluation of credibility or a weighing of disputed facts; rather, it presents indisputable visual evidence contradicting M.H.'s testimony. *See Wiggins v. Fla. Dep't of*

Highway Safety & Motor Vehicles, 209 So. 3d 1165, 1172 (Fla. 2017) (explaining that "the objective nature of video evidence" allows it to be reviewed on appeal "without the need for interpretations" of the lower judicial officer); *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) ("[T]he nature of the evidence presented in the videotape does not pivot 'on an evaluation of credibility and demeanor.'") (citation omitted).

¶ 22 For the video evidence to indisputably contradict the witness testimony, it must be such that no reasonable person could view the video and conclude otherwise. *See Love v. State*, 73 N.E.3d 693, 699 (Ind. 2017). To determine whether different interpretations of a video may be reasonable, we consider the video quality, the lighting and angle, and whether the video is a complete depiction of the events at issue. *Id.*

¶ 23 Applying the factors articulated in *Love*, we conclude that no reasonable person could view the video without concluding that it contradicted M.H.'s testimony about Liebler pushing the cart into him. The quality and lighting of the surveillance video allow us to see Liebler and the cart of merchandise clearly. Even though the frame of the door leading from the vestibule to outside obstructed

some of the view, the angle of the recording allows us to see M.H. approach the door and the front of the cart that Liebler was pushing from the outside. It also allows us to see that Liebler did not push M.H. "out the door" with the shopping cart. In fact, the video clearly shows Liebler pulling the cart back inside once M.H. puts his hands on it. And the video was a complete depiction of the relevant events necessary to our resolution of this issue.

¶ 24 We do not have to ignore the videotape evidence simply because M.H.'s testimony, if viewed in a vacuum, would be enough for a reasonable jury to conclude that Liebler used force in his attempt to take the items from the store. *See Carmouche*, 10 S.W.3d at 332; *cf. State v. Boger*, 2021 ND 152, ¶ 18 (collecting cases and concluding that because video evidence clearly contradicted the officer's testimony, the testimony was contrary to the manifest weight of the evidence); *Love*, 73 N.E.3d at 699 ("[I]n those instances, where the video evidence indisputably contradicts the trial court's findings, relying on such evidence and reversing the trial court's findings do not constitute reweighing."); *Wiggins*, 209 So. 3d at 1172 ("[A] judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be

expected to ignore that video evidence simply because it totally contradicts the officer's recollection. Such a standard would produce an absurd result.").

¶ 25 The video evidence indisputably contradicts M.H.'s testimony that Liebler pushed the shopping cart into him. And M.H.'s testimony was the only evidence that Liebler used force in his attempt to take the items from the store. Under such circumstances, we conclude that M.H.'s demonstrably inaccurate testimony could not have led a reasonable jury to conclude that Liebler used force in his attempt to take the merchandise. It was, at best, a mere modicum of evidence relevant to the use of force element, which cannot sustain the verdict. *See Perez*, ¶ 25.

ii. The Headbutt Did Not Occur During the Taking or in an Effort to Retain Control Over the Merchandise

¶ 26 The People next argue that, even if there was insufficient evidence of Liebler "pushing" the grocery cart into M.H., there was sufficient evidence that Liebler headbutted M.H. during his attempt to flee. Citing *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983), and its progeny, the People argue that the use of force by Liebler at any point during the transaction, including after Liebler

abandoned the items he had attempted to take, is sufficient to establish the elements of robbery.

¶ 27 In *Bartowsheski*, our supreme court explained that the "gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a transaction culminating in the taking of property from the victim's person or presence." *Id.* But, "[t]here is no requirement that the application of force or intimidation must be virtually contemporaneous with the taking." *Id.* Thus, where the evidence established that the defendant entered a home to steal guns and murdered a child before taking the guns, there was sufficient evidence of the use of force element of robbery. *Id.* at 244-45.

¶ 28 Following *Bartowsheski*, several divisions of our court have concluded that "when a defendant uses force or intimidation to *retain* control over property he has already taken, he commits robbery." *People v. Buell*, 2017 COA 148, ¶ 24, *aff'd*, 2019 CO 27; *see also People v. Villalobos*, 159 P.3d 624, 627 (Colo. App. 2006) (finding sufficient evidence to support aggravated robbery conviction where "defendant shot the victim to retain control of the victim's money"); *People v. Foster*, 971 P.2d 1082, 1085 (Colo. App. 1998)

(finding sufficient evidence to support robbery conviction where the defendant "used force to continue his unlawful possession"); *People v. Fox*, 928 P.2d 820, 821 (Colo. App. 1996) (finding sufficient evidence to support robbery conviction where the defendant, after taking the property, utilized "force against a person who had a right to exercise control over [the] property that was still within his sight and which would have been within his control if not for defendant's use of force").

¶ 29 Liebler contends that, by concluding that the use of force *after* the taking is enough to establish robbery, these divisions have misapplied *Bartowsheski*. He urges us to part ways with these divisions and make clear that, in the words of *Bartowsheski*, the use of force must be "during the course of a transaction *culminating in the taking of property*." *Bartowsheski*, 661 P.2d at 244 (emphasis added).

¶ 30 We note that none of the cited cases specifically held that use of force against a victim *after* the taking satisfies the use of force element of in the context of an *attempted* robbery, which is the question we face. True, the defendant in *Buell* was charged with both aggravated robbery and attempted aggravated robbery. *Buell*,

¶ 5. There, the division determined that the cases holding that a defendant can be convicted of robbery if he uses force or intimidation after taking the property "to *retain* control over property he has already taken" were faithful to *Bartowsheski*. *Id.* at ¶¶ 24-26. Declining to depart from such cases, the division concluded that the defendant's concession that he committed theft and used a knife to avoid apprehension was sufficient to support his aggravated robbery and attempted aggravated robbery convictions. *Id.* at ¶ 27.

¶ 31 *Buell* is distinguishable because the defendant in that case did not abandon his attempt to take the property before using force against the person from whom he was taking it. *See id.* at ¶¶ 3-4. So, we need not disagree with this line of cases to reach a different result in this case.

¶ 32 Here, Liebler's use of force — the headbutt — occurred not "during the course of the transaction culminating in the taking of property," or even during Liebler's attempt to take the property, but after Liebler had abandoned the merchandise and was trying to flee. And, unlike *Buell*, *Villalobos*, and *Foster*, Liebler did not use force to "continue his unlawful possession" of the stolen items; when he

used force, he no longer possessed the items he had tried, but failed, to take.

¶ 33 We conclude that the evidence, even when viewed as a whole and in the light most favorable to the prosecution, is not substantial and sufficient to support a conclusion by a reasonable jury that Liebler used force during the attempted taking. Thus, we conclude that the evidence presented to the jury was insufficient to sustain Liebler's conviction for attempted aggravated robbery. Therefore, we vacate Liebler's conviction for attempted aggravated robbery. And because we are vacating only one of Liebler's convictions, we remand to the district court for resentencing. *See People v. Johnson*, 2016 COA 15, ¶ 25 ("In multicount cases, judges typically craft sentences on the various counts as part of an overall sentencing scheme, but when a count is vacated and that scheme unravels, they should have the discretion to reevaluate the underlying facts and sentences on the remaining counts.").

¶ 34 In addition, because we have vacated Liebler's conviction for attempted aggravated robbery, we need not determine whether there was sufficient evidence that Liebler took the merchandise from the "presence of another." Because Liebler raises other

contentions on appeal that relate to his remaining convictions, however, we address those contentions next.

B. Witness Veracity

¶ 35 Liebler next contends that the district court erred by allowing a police officer to opine on the veracity of another witness when it allowed the officer to explain why he did not pursue other potential avenues of investigation. On the facts presented, we disagree.

1. Additional Background

¶ 36 On cross-examination, defense counsel spent significant time attacking the thoroughness of the officer's investigation. Before redirect, the prosecutor alerted the court to his next line of questioning:

> So I just want to put counsel on notice about my next line of questioning. So I'm going to ask – because the investigation has been attacked pretty thoroughly on cross, I'm going to ask questions about his impressions of the credibility of the people that were on scene, what they were telling him, and whether or not that had an impact on the investigative steps he chose or did not choose to take. And there is a specific case on this issue called Davis v. People.

¶ 37 When defense counsel was asked if she had anything to add, she responded "[n]o, not to the issue [of] credibility."

¶ 38 The court then allowed the following exchange:

> [Prosecutor]: When you respond to a scene like the one that you responded to on December 13th, do you have to make determinations on whether you believe what people are saying?
>
> [Officer]: Yes. Yes, you do. You have to try to figure out what's going on, and there is some semblance of reading a scene. But a lot of times when there is a lot of people and a lot of things going on, the best way to gain control is just to find a piece, start working that piece, and then work your way up.
>
> [Prosecutor]: Okay. When you are interviewing a witness or a victim and they are making statements to you, if you believe what that person is saying, does that have an impact on where you go with your investigation?
>
> [Officer]: Sure.
>
> [Prosecutor]: In what way?
>
> [Officer]: So if I'm interviewing a victim or a witness and their story is saying I need to go down this path, naturally I'm going to go down that path.
>
> [Prosecutor]: If you don't believe what a victim of a crime is telling you, does that change how your investigation goes?
>
> [Officer]: One hundred percent. You start to look to try to find how to not believe it because, again, we are public servants. We work for the public. So when a victim or someone like that, a witness, is giving me an idea of what happened at a crime, I need to

find a way to discredit, to disprove this statement.

[Prosecutor]: That's if you don't believe it?

[Officer]: Correct. If I don't believe, yes, sir.

[Prosecutor]: In this case, did you speak to [M.H.]?

[Officer]: I did.

[Prosecutor]: Did you speak to [R.A.]?

[Officer]: Yes, sir, I did.

[Prosecutor]: Now, did the statements they gave you about what had occurred, did that have an impact on how you decided to investigate the case?

[Officer]: One hundred percent.

[Prosecutor]: So if you had not believed what they were telling you, you would have handled things differently?

[Officer]: One hundred percent. I mean, you have to look at it from our aspect. We go to a lot of calls that are high stressed. Right? And if two individuals in plain clothes are running around with badges tackling people and fighting them in a doorway, that's a safety concern, is it not? So if I thought that they – that something had went wrong or if they weren't telling me the truth of what happened, I would have wanted to investigate it further. Because the last thing I want is two people in plain clothes with badges causing problems in Greeley, Colorado.

2. Applicable Law and Standard of Review

¶ 39 A trial court has broad latitude in determining the admissibility of evidence, and we review its determination for an abuse of discretion. *Davis v. People*, 2013 CO 57, ¶ 13. A court abuses its discretion where its decision misconstrues or misapplies the law, or is manifestly arbitrary, unreasonable, or unfair. *People v. Sosa*, 2019 COA 182, ¶ 10.

¶ 40 Pursuant to CRE 608, the credibility of a witness may be attacked or supported by evidence in the form of an opinion. But lay and expert witnesses alike are prohibited from testifying that another witness was telling the truth on a particular occasion. *People v. Eppens*, 979 P.2d 14, 17 (Colo. 1999). As a result, our case law "disfavors comments by one witness about another witness' truthfulness." *Davis*, ¶ 15; *see also Liggett v. People,* 135 P.3d 725, 731 (Colo. 2006) (adopting the general rule that asking a defendant or witness to comment on the veracity of another witness is improper); *People v. Vialpando*, 2020 COA 42, ¶ 59 ("It is categorically improper to ask a witness to opine on the veracity of another witness . . . ."); *People v. Cook*, 197 P.3d 269, 275-76 (Colo. App. 2008) ("The rule that a witness may not express an opinion as

to the credibility of another witness is both clear and long established.”).

¶ 41 However, in *Davis*, our supreme court held that “a detective may testify about his or her assessments of interviewee credibility when that testimony is offered to provide context for the detective’s interrogation tactics and investigative decisions.” *Davis*, ¶ 19; *see also People v. Lopez*, 129 P.3d 1061, 1066 (Colo. App. 2005) (holding that it is acceptable for detectives to reference witness credibility within the narrow context of describing an investigative interview); *cf. Vialpando*, ¶¶ 63-64 (holding that it was improper for an officer to testify that defendant was the primary suspect where the testimony did not explain the officer’s investigation). The admissibility of such testimony “hinges on the particular circumstances under which it is elicited and offered.” *Davis*, ¶ 19.

¶ 42 Because Liebler did not preserve this issue by objecting contemporaneously at trial, we review for plain error. *Hagos v. People*, 2012 CO 63, ¶ 14. Plain error is obvious and substantial, such that it “undermine[s] the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.” *Id.* (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo.

2005)). For an error to be obvious it must contravene a statute or rule, a well-settled legal principle, or established Colorado case law. *Campbell v. People*, 2020 CO 49, ¶ 25. Plain error must be so obvious that a trial judge should be able to avoid it without the benefit of an objection. *Id.*

3. The District Court Did Not Plainly Err

¶ 43 Liebler contends that the district court plainly erred by admitting the officer's assessment of M.H.'s and R.A.'s credibility because the officer's testimony did not explain his interrogation techniques or any particular investigative steps he took based on his assessment of credibility.

¶ 44 In *Davis*, the supreme court concluded that the trial court properly admitted testimony by two detectives regarding their perception of the credibility of three witnesses they interviewed as part of their investigation of a shooting. *Davis*, ¶ 22. The testimony was admitted primarily to explain the detectives' use of different interrogation techniques during the interviews. *See id.* at ¶¶ 5-9. Although the court emphasized that the admissibility of such testimony was highly fact-specific, it identified several facts

underlying its conclusion that the testimony was proper, including the following:

- the prosecutor did not use inflammatory or prejudicial words such as "lie";
- the prosecutor used open-ended questions;
- the detectives did not testify as to the credibility of the witnesses' in-court testimony, but rather to their assessment of the interviewees' credibility during the investigatory interviews;
- the detectives' testimony was offered to explain their investigative decisions;
- the witnesses on whose credibility the detectives opined testified at trial and were subject to cross-examination, which provided the jury ample opportunity to judge their credibility for itself; and
- although the trial court did not provide a limiting instruction about each challenged portion of testimony, a limiting instruction was not required by statute or requested by either party.

Id. at ¶¶ 19-21.

¶ 45 Here, as in *Davis*, the prosecutor refrained from inflammatory or prejudicial words, asked mostly open-ended questions about the investigative process, and offered the officer's testimony to explain his decision not to pursue certain investigative steps, such as interviewing additional witnesses, to rebut defense counsel's attack on the investigation. *See id.* The officer did not opine on the credibility of M.H.'s or R.A.'s trial testimony. *See id.* at ¶ 21. M.H. and R.A. testified at trial and were subject to cross-examination, giving the jurors the opportunity to judge the witnesses' credibility for themselves. *See id.*; *Lopez*, 129 P.3d at 1067 (no plain error where jury had "ample opportunity to judge the credibility" of the witnesses for itself, independent of the detective's statements). And although the district court did not give a limiting instruction, defense counsel did not request one. *See Davis*, ¶ 21.

¶ 46 Still, Liebler contends that the "sort of generic testimony that police would have investigated more if they did not believe primary witnesses is beyond the scope of *Davis*" because it "does not provide context or explain a specific investigative decision — it merely bolsters the credibility" of the witnesses. We agree that caution is warranted when the "course-of-investigation exception" is invoked

to admit otherwise inadmissible evidence. *See Vialpando*, ¶ 65; *People v. Bobian*, 2019 COA 183, ¶ 51 (Berger, J., specially concurring). Under certain circumstances, however, an officer's perception of a witness' credibility might be relevant and admissible when the course of the police investigation is legitimately at issue. *Bobian*, ¶ 50; *see also Davis*, ¶ 19. This is one such case. Accordingly, we conclude that the district court did not err by admitting the officer's testimony.

¶ 47 Even if the court erred, however, any error was not plain. *Davis* broadly held that a detective may testify about their "assessments of interviewee credibility when that testimony is offered *to provide context for the detective's* interrogation tactics and *investigative decisions*." *Davis*, ¶ 19 (emphasis added). The prosecutor cited *Davis* and put defense counsel on notice that he was going "to ask questions about [the officer's] impressions of the credibility of the people that were on scene, what they were telling him, and whether or not that had an impact on the investigative steps." Defense counsel responded that she did not take issue with the proposed line of questioning in terms of "credibility." The investigating officer then testified that his investigative decisions

were shaped "[o]ne hundred percent" by the statements M.H. and R.A. made and that he would have handled the investigation differently if he "thought that they . . . weren't telling [him] the truth of what happened." The officer did not articulate a specific investigatory step he took or chose not to take after considering these witnesses' credibility, but he said that if he disbelieved these two witnesses, "I would have wanted to investigate it further. Because the last thing I want is two people in plain clothes with badges causing problems in Greeley, Colorado."

¶ 48 Under these circumstances, we conclude that any error was not so obvious that the district court should have intervened without the benefit of an objection. *See Campbell*, ¶ 25. And if the error was not obvious, it was not plain. *See People v. Rediger*, 2018 CO 32, ¶ 48.

C. Prosecutorial Misconduct in Closing Argument

¶ 49 Finally, Liebler contends that all of his convictions should be reversed because the prosecutor engaged in misconduct during closing argument by (1) referring to his personal opinion of the witnesses' credibility and (2) misstating the law and misleading the

jury by arguing facts unrelated to the elements of attempted aggravated robbery. We discern no reversible misconduct.

1. Applicable Law and Standard of Review

¶ 50 We engage in a two-step analysis when reviewing claims for prosecutorial misconduct. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, we determine whether the prosecutor's conduct was improper based on the totality of the circumstances. *Id.* Second, we decide whether such actions warrant reversal under the proper standard of review. *Id.*

¶ 51 While prosecutors can use every legitimate means to bring about a just conviction, they have a duty to avoid using improper methods designed to obtain an unjust result. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). When determining whether a prosecutor's statements were improper and whether reversal is warranted, we may consider the language used, the context of the statements, the strength of the evidence, whether the prosecutor improperly appealed to the jurors' sentiments, whether the misconduct was repeated, and any other relevant factors. *People v. Walters*, 148 P.3d 331, 335 (Colo. App. 2006).

¶ 52 Because Liebler did not object during closing argument, we review for plain error. *People v. McMinn*, 2013 COA 94, ¶ 58. "To constitute plain error, prosecutorial misconduct must be flagrant or glaringly or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *Id.* And defense counsel's lack of contemporaneous objection may indicate counsel's belief that the comments were not overly damaging when they were made. *Domingo-Gomez*, 125 P.3d at 1054.

2. Prosecutor's Opinion About Witness Credibility

¶ 53 During closing argument, the prosecutor summarized the evidence presented at trial, including the two videos offered as exhibits. The prosecutor walked the jury through relevant parts of the videos, referring back to M.H.'s and R.A.'s testimony about the events. Specifically discussing the evidence that Liebler pulled a knife on M.H., the prosecutor noted that there was a "momentary break in time" between the events depicted in the videos and that the jury would need to fill the gap with the testimony of the witnesses. The prosecutor made the following statements:

> This goes back to what we talked about in [jury] selection, which is there is no requirement in the law that you have a video of a crime for that crime to have been – to have occurred. If there is credible testimony like these two men who took this stand and told you credible testimony to the effect that shows the elements and proves this happened, then it happened. And these men told you exactly what happened.

¶ 54 The prosecutor continued discussing the evidence that Liebler had a knife. He then referred the jury back to the witness testimony and the credibility jury instruction, reminding the jurors of the factors that they should consider in assessing credibility. He highlighted the factors he argued lent credibility to M.H.'s and R.A.'s testimony and tried to explain away discrepancies in their testimony. He said, "They are just telling you what happened. That's all they are telling you, what happened. They are giving you the facts."

¶ 55 Later, the prosecutor discussed Liebler's statements to police following his arrest, denying that the drugs found in his pocket were his. He argued that it was nonsensical for someone to walk around with drugs in their pocket and not know about it. He continued,

> And when [Liebler's] making that statement [denying the drugs were his], you can evaluate those statements just like you do the witnesses that testified, consider the relationship that the person has to the case. He is a party to this case. So when he is making those statements, those drugs weren't mine, that knife wasn't mine, well of course he didn't want – I mean, of course he is going to say that.

¶ 56 Finally, after summarizing all the evidence, the prosecutor concluded his argument by urging the jury to return a guilty verdict:

> [M.H.]'s testimony is really all you need. That testimony right there told you what happened. When you think about this, we are confident that you will find . . . Liebler guilty of all charges as charged.

¶ 57 Liebler contends that the quoted excerpts from the prosecutor's closing argument were improper expressions of the prosecutor's personal opinion regarding the witnesses' credibility.

¶ 58 Prosecutors may not communicate their opinion on the truth or falsity of witness testimony during closing argument. *Wilson v. People*, 743 P.2d 415, 419 (Colo. 1987). But a prosecutor may point to circumstances that raise questions or cast doubt on a witness'

testimony and draw reasonable inferences from the evidence as to the credibility of witnesses. *Id.* at 418.

¶ 59 We do not read the prosecutor's closing argument as improperly expressing a personal opinion as to witness credibility. The prosecutor was actively discussing the evidence in the case when he made the comments. He never said that he believed M.H.'s or R.A.'s testimony was the truth, instead phrasing his argument in terms of what the witnesses told the jury, such as "if there is credible testimony that . . . shows the elements and proves this happened, then it happened," and the "testimony right there told you what happened." And he encouraged the jury to consider facts bearing on its own assessment of the witnesses' credibility.

¶ 60 The prosecutor's argument encouraging the jury to disbelieve Liebler is a closer call. In *Domingo-Gomez*, a prosecutor argued to the jury that a witness simply "told you what happened. *They didn't get together on their story like the defendant and his friends.*" 125 P.3d at 1052. Our supreme court concluded that the prosecutor's comments were improper because the prosecutor did not "anchor her comment that Domingo-Gomez and his alibi witnesses made up their stories with direct references to evidence."

Id. But here, unlike *Domingo-Gomez*, the prosecutor anchored his argument about Liebler's credibility to the timing of Liebler's statements and the credibility factors the prosecutor had identified already for the jury.

¶ 61 Even if we assume that the prosecutor's comments were improper, they were not "flagrant or glaringly or tremendously improper" such that they undermined the fundamental fairness of the trial or cast serious doubt on the reliability of Liebler's conviction. *See McMinn*, ¶¶ 58, 60. Reversal is not warranted.

3. Misstating the Law and Misleading the Jury as to the Elements of Robbery

¶ 62 Next, Liebler asserts that the prosecutor's arguments misstated the law by encouraging the jury to convict Liebler based on facts unrelated to the elements of attempted aggravated robbery. All of the alleged instances of misconduct, however, relate to the attempted aggravated robbery conviction. Liebler does not otherwise argue that these instances relate in any way to his other convictions. Because we have vacated his attempted aggravated robbery conviction, we need not address these contentions.

III. Conclusion

¶ 63 We vacate Liebler's conviction and sentence for attempted aggravated robbery and remand to the district court to correct the mittimus and for resentencing. The judgment is otherwise affirmed.

JUDGE BERGER and JUDGE JOHNSON concur.