

COURT OF APPEALS,
STATE OF COLORADO

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Denver County District Court; The Honorable
Shelley I. Gilman; and Case Number 18CR184

Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
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Case Number: 18CA1949

OPENING BRIEF

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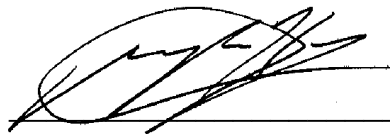


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STATEMENT OF THE ISSUES PRESENTED

- I.** Whether the warrantless search of Mr. Vigil's cell phone violated his constitutional right to be free from unreasonable searches and seizures.
- II.** Whether the district court violated Mr. Vigil's constitutional due process right by failing to suppress the impermissibly suggestive out-of-court identification based upon a single photo display.
- III.** Whether the district court reversibly erred under CRE 401 and 403, when it denied Mr. Vigil's motion to exclude the irrelevant and highly prejudicial photograph of a hatchet found inside Mr. Moan's vehicle.

STATEMENT OF THE CASE

The State charged Marcus Vigil, by information filed in Denver County District Court on January 8, 2018, with one count aggravated motor vehicle theft in the second degree.¹ CF, pp 8-9.

After a two-day trial, the jury found Mr. Vigil guilty. TR 08/21/18, pp 101:23-25; 102:1-5. Mr. Vigil moved for immediate sentencing, *Id.* at 104:7-8, and the district court sentenced him to fifteen months in the Department of Corrections ("DOC"). *Id.* at 113:22-25.

¹ Section 18-4-409(4)(b), C.R.S.

Mr. Vigil timely filed a notice of appeal, thereby perfecting this appeal. CF, pp 147, 162.

STATEMENT OF THE FACTS

Mr. Moan reported his Toyota Scion stolen on November 29, 2017, at 6:00 a.m. TR 08/20/18, pp 170:13-21; 195:17-18. Officer Winckler responded to the call. *Id.* at 195:19-25. The Toyota was equipped with an anti-theft system. When activated, the system emits a low frequency transmission. *Id.* at 197-98. Denver police were able to track the low frequency using a LoJack reader. *Id.* Officer Winckler activated the anti-theft system by registering the vehicle's VIN number with the National Crime Information Center. *Id.* at 196-97.

At or around 9:00 a.m., the LoJack reader in Officer Sullivan's patrol car alerted to a stolen vehicle in the vicinity. *Id.* at 198:16; 207:9-11. The LoJack reader transmitted a code identifying the stolen vehicle as Mr. Moan's Toyota Scion. *Id.* at 207:22-25. Officer Sullivan located the vehicle in an alleyway. *Id.* at 208-10.

As Officer Sullivan entered the alley, he observed an unknown individual entering the vehicle. *Id.* at 211:4-5. Officer Sullivan accelerated towards the vehicle in an attempt to block the driver in the alley. *Id.* at 211:8-11. After successfully blocking the vehicle, Officer Sullivan exited his patrol car, approached with his service weapon drawn, and pulled the individual from the vehicle. *Id.* at 212:23-25;

213-14. An altercation ensued between the two. *Id.* After a brief struggle, the individual broke free of Officer Sullivan's grasp. *Id.* at 216:5-6. The individual then fled from the scene. *Id.* Officer Sullivan aired the following description: "shaved head, Hispanic male, five-six, a hundred and fifty pounds, athletic build." TR 08/03/18, p 35:6-12; *see* TR 08/20/18, pp 234-35.

After processing the scene, police impounded the vehicle to District 3 station. TR 08/20/18, p 217:12. The police conducted a search of the vehicle. Amongst many other items, police discovered a cell phone and a hatchet inside the vehicle. *Id.* at 9:12-13. Officer Sullivan turned the cell phone over to Detective Duran. *Id.* at 218:4. Mr. Moan did not claim ownership over the cell phone or hatchet. *Id.* at 178:15-17; 182:17-23.

Detective Duran subsequently searched the digital contents of the cell phone. The phone was in sleep mode. Detective Duran had to tap and then swipe the screen to unlock the phone. TR 08/20/18, pp 158:5-7; 237:6-7; 246:21. Once Detective Duran opened the phone, he began to access the phone's various folders. First, he opened the phone's "settings" folder. There, he was able to record the phone's serial and model number. TR 08/03/18, p 47:2-6. Then, Detective Duran opened and viewed a profile picture stored in the phone. *Id.*; TR 08/20/18, p 247:2; *see* EX #26 TR 08/20/18, p 221. After viewing the profile picture, he took the phone to Officer

Sullivan and asked if “this guy looked familiar.” TR 08/20/18, pp 219:20-22; 247:18-19. Officer Sullivan responded to the inquiry stating: “I think that’s the guy, that’s the suspect.” *Id.* at 247:20, 25.

Next, Detective Duran accessed the phone’s calling feature and made a phone call to the Denver Police landline. In doing so, Detective Duran was able to retrieve the cell phone’s caller identification and phone number. *Id.* at 248:1-2; 12-14. The caller identification displayed the name “Marcus Vigil.” *Id.* Detective Duran then provided the name to Officer Sullivan to run a search through the police’s arrest database. *Id.* at 248:17-19. Officer Sullivan matched the second profile on the database with the profile picture located in the cell phone’s settings. *Id.* at 222-23.

Two days later, Officer Sullivan met with Detective Duran to view a photographic array of potential suspects. *Id.* at 223:23-25. Detective Duran presented a single image display for Officer Sullivan to view. *Id.* at 252:17-20. Detective Duran wrote on the photo, “is this the guy you fought with in the car.” TR 08/03/18, p 24:18-20. A six-pack photo array was not provided during the identification procedure. TR 08/20/18, p 252. Officer Sullivan identified the single image as the suspect he encountered in the alley on November 29, 2017. *Id.* at 225:19. Thereafter, Officer Sullivan identified Mr. Vigil in court. *Id.* at 215:20-25.

Later, at trial, defense counsel raised a pre-trial motion to exclude from evidence, any physical evidence or photographs of the hatchet found in Mr. Moan's vehicle. *Id.* at 9:11-12. The prosecution intended to introduce evidence of the hatchet to prove that Mr. Vigil had exercised control of the vehicle. *Id.* at 10:21-25. The court denied Mr. Vigil's motion. *Id.* at 12:13-15. The prosecution subsequently admitted a photograph of the hatchet and Mr. Moan testified that the hatchet did not belong to him. *Id.* at 178:15-17.

Additional facts will be provided below.

SUMMARY OF THE ARGUMENT

- I. Mr. Vigil has a constitutional right to be free from unreasonable searches and seizures. Here, contrary to the district court's conclusions, Mr. Vigil had standing to challenge the warrantless search of his cell phone because he had a legitimate expectation of privacy in the digital data stored within. Moreover, although Mr. Vigil lost possession of his cell phone, he retained his legitimate expectation of privacy because he did not voluntarily discard his phone or deny ownership of the phone. Because police conducted the warrantless search, reversal is required.
- II. Absent exigent circumstances, single photo displays are impermissibly suggestive. Here, the district court violated Mr. Vigil's state and federal

constitutional rights to due process and fair trial by denying his suppression motion and subsequently admitting at trial evidence of Officer Sullivan's out-of-court identification based upon an impermissibly suggestive and unreliable single photo display. Because the State cannot establish the court's error to be harmless beyond a reasonable doubt, reversal is required.

III. Under CRE 401, the court should not admit into evidence facts bearing so remotely upon or collateral to the issue that they afford only a conjectural inference. Moreover, relevant evidence is subject to exclusion under CRE 403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." CRE 403. Here, the district court committed reversible error when it allowed the photograph of the hatchet into evidence. First, the photograph was irrelevant and misleading. Second, the minimal probative value of the photograph of the hatchet is substantially outweighed by the danger of unfair prejudice to Mr. Vigil. Therefore, the district court erroneously admitted the photograph of the hatchet. Reversal is required.

ARGUMENT

I. LAW ENFORCEMENT’S WARRANTLESS SEARCH OF MR. VIGIL’S CELL PHONE VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. Preservation and Standard of Review

A trial court’s ruling on a motion to suppress presents a mixed question of law and fact. *People v. Sotelo*, 336 P.3d 188, 191 (Colo. 2014). This Court defers to the district court’s findings of fact, but reviews its legal conclusions de novo. *People v. Funez-Paiagua*, 276 P.3d 576, 578 (Colo. 2012); *see also People v. Galvadon*, 103 P.3d 923, 927 (Colo. 2005) (this Court reviews “de novo the district court’s determination of reasonable expectation of privacy under the Fourth Amendment.”).

Mr. Vigil, through defense counsel, preserved this issue for review by filing a pretrial motion to suppress all evidence collected inside the vehicle by law enforcement that belonged to Mr. Vigil, under both the state and federal constitutions. CF, pp 56-61; TR 08/03/18, pp 1-67; *see People v. Jansen*, 713 P.2d 907, 912 n.8 (Colo. 1986); *People v. Carter*, 414 P.3d 15, 19 (Colo. 2015); *see also* U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7.

Where, as here, the preserved error is of constitutional dimension, constitutional harmless error applies. *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012). If there is a reasonable possibility that the defendant could have been

prejudiced by the error, then the error cannot be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 21 (1967); *see, e.g., People v. Williams*, 2019 COA 32, ¶ 6.

B. Relevant Facts

Defense counsel filed a pretrial motion seeking to suppress all evidence obtained pursuant to the stop of Mr. Vigil as fruit of an illegal stop and an illegal search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article II, section 7 of the Colorado Constitution. CF, pp 56-61.

The district court held an evidentiary hearing on August 3, 2018. TR 08/03/18, pp 1-67. At the hearing, Mr. Vigil, through defense counsel, argued that the evidence collected inside the vehicle belonged to Mr. Vigil. *Id.* at 10:1-4. Moreover, counsel unequivocally urged the court to suppress such evidence collected inside the vehicle under both the state and federal constitutions. *Id.* at 53:5-12; *see also* U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7.

The district court summarily denied Mr. Vigil's motion to suppress the evidence collected inside the vehicle. *Id.* at 62:14. First, the court ruled that "any complaints about the search of the car lack merit, since the car belonged to Mr. Moan [thus,] the defendant has no standing to challenge any search of the car." *Id.* at 62:7-

10. Second, the court found, “if any of the defendant’s alleged belongings were left in the car, they were certainly abandoned there [thus,] he has no standing to challenge any search of the car.” *Id.* at 62:10-13.

C. Law and Analysis

The Fourth Amendment of the United States Constitution protects a person’s right to be free from unreasonable searches and seizures. U.S. Const. amend. IV (“[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.”). Article II, section 7 of the Colorado Constitution reinforces this right. Colo. Const. art. II, § 7; *see also People v. Campbell*, 425 P.3d 1163, 1169 (Colo. App. 2018) (“The Colorado Supreme Court ... has held that article II, section 7 of the Colorado Constitution encompasses a broader definition of what constitutes a legitimate expectation of privacy from government intrusion than that of its federal counterpart.”).

i. The district court erroneously held that Mr. Vigil had no standing to challenge law enforcement’s warrantless search of his cell phone.

Similar to *Sotelo*, this case requires this Court to address whether an unauthorized driver of a vehicle may have standing to challenge law enforcement’s warrantless search of personal belongings found inside the vehicle, regardless of

whether the driver has standing to challenge the search of the car itself. *See, e.g., Sotelo*, 336 P.3d at 192-95.

“Judicial review of Fourth Amendment standing is made on a case-by-case basis[.]” *Galvado*, 103 P.3d at 930 (citing *O’Connor v. Ortega*, 480 U.S. 709, 718 (1987)). “The Fourth Amendment right to be free of unlawful searches and seizures is a personal right and may not be asserted vicariously.” *Perez v. People*, 231 P.3d 957, 960 (Colo. 2010) (citing *Rakas v. Illinois*, 439 U.S. 128, 133 (1978)). “The only person who can assert the right is a person with a possessory or proprietary interest in the property *or* premises searched.” *Id.* (emphasis added); *see People v. Juarez*, 770 P.2d 1286, 1289 (Colo. 1989) (explaining that standing exists only when the person challenging the legality of a search was the “victim” of that search); *see also People v. Suttles*, 685 P.2d 183, 190 (Colo. 1984).

Thus, in order to invoke the Fourth Amendment’s protections, courts must determine, based on a totality of the circumstances, whether the defendant maintained a legitimate expectation of privacy in the place or property searched. *Galvado*, 103 P.3d at 930; *see Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980); *People v. Curtis*, 959 P.2d 434, 437 (Colo. 1998); *see also Perez*, 231 P.3d at 960 (“a person must exhibit an actual, subjective expectation of privacy” and “society

must recognize that expectation as objectively reasonable.”); *see generally* *Katz v. United States*, 389 U.S. 347, 352-53 (1967).

- a. *After People v. Sotelo*, an unauthorized driver of a vehicle has standing under the Fourth Amendment to challenge law enforcement’s warrantless search of personal belongings found inside a vehicle, if the driver satisfies the reasonableness test.

In *People v. Sotelo*, the Colorado Supreme Court addressed “whether an unauthorized driver of a rental car may have standing to challenge a search of packages within the rental car, regardless of whether the driver has standing to challenge the search of the rental car itself.” 336 P.3d at 192 (footnote omitted); *see id.* (“We are mindful not to conflate standing to contest the search of the rental car itself with standing to contest the search and seizure of packages within the rental car.”).

The Supreme Court held that, “if, considering the totality of circumstances an unauthorized driver of a rental car is able to satisfy the subjective and objective prongs of the reasonableness test, the driver has standing to challenge a search of his or her possessions within the car.” *Id.* at 193; *see also United States v. Edwards*, 632 F.3d 633, 641-42 (10th Cir. 2001) (defendant had standing to challenge search of his personal luggage, but not the search of the car itself). Thus, the defendant need not have a legitimate expectation of privacy in the vehicle itself in order to have one in the property found within the vehicle. *Id.* at 193.

In reaching this conclusion, the Court found that “when the focus is on personal effects,... *Rakas* instructs that a defendant may show a legitimate expectation of privacy ‘either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’” *Sotelo*, 336 P.3d at 193 (quoting *Rakas*, 439 U.S. at 143 n.12); see, e.g., *Arkansas v. Sanders*, 442 U.S. 753, 761 n.8 (1979) (defendant unquestionably had standing to challenge a search where there was no dispute that he owned luggage in question); *United States v. Buchner*, 7 F.3d 1149, 1154 (5th Cir. 1993) (“[t]he owner of a suitcase located in another’s car may have a legitimate expectation of privacy with respect to the contents of his suitcase.”). Accordingly, where a person has a possessory or proprietary interest in the property or premises search, they can assert the right to be free from unlawful searches and seizures. *Id.* at 194.

Furthermore, the Supreme Court expressly declined to follow the Tenth Circuit’s decision in *United States v. Worthon*, 520 F.3d 1173 (10th Cir. 2008). In *Worthon*, the Tenth Circuit held that the defendant had not established a legitimate expectation of privacy in the bags seized because he was not in “lawful possession or custody of the vehicle.” *Id.* at 1183. Specifically, the defendant lacked standing to challenge the search because there was no authorized driver present. *Id.* (The Tenth Circuit treated the absence of an authorized driver as dispositive).

In footnote five of *Sotelo*, the Supreme Court expressly disagreed with the Tenth Circuit writing, “[s]uch an approach would ignore the possibility that an occupant of a vehicle might have a legitimate expectation of privacy as to the contents of the vehicle, even when not “legitimately present” in the vehicle itself. 336 P.3d at 194 n.5 (citing *Rakas*, 439 U.S. at 148 (legitimate presence is not the controlling consideration)).

Therefore, after the Supreme Court’s ruling in *Sotelo*, if an unauthorized driver of a vehicle is able to satisfy the reasonableness test, the driver has standing to challenge a search of his or her possessions on Fourth Amendment grounds.

b. Mr. Vigil had a legitimate expectation of privacy in his cell phone found inside the vehicle.

Although Mr. Vigil was an unauthorized driver of the vehicle, he had standing to challenge law enforcement’s warrantless search of his cell phone because he had a legitimate expectation of privacy in the digital data stored on the phone.

Courts turn to the two-prong test set forth in *Katz*, to determine whether a defendant has a legitimate expectation of privacy in the place or things searched. 389 U.S. at 361. A defendant has a legitimate expectation of privacy if: (1) he has “manifested a subjective expectation of privacy in the object of the challenged search” and; (2) “society is willing to recognize that expectation as reasonable.”

People v. Triplett, 411 P.3d 1054, 1062 (Colo. 2016) (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986)); *see also* *Katz*, 389 U.S. at 361.

It is well-settled precedent that an individual has an expectation of privacy in the digital contents stored on a cell phone. Specifically, both federal and state courts have held that: (1) a person has a subjective expectation of privacy in the contents of his cell phone; and (2) that this expectation of privacy is one that society recognizes as reasonable and legitimate. *See, e.g., Riley v. California*, 573 U.S. 373, 393-96 (2014); *People v. Schutter*, 249 P.3d 1123, 1125-26 (Colo. 2011); *see also* *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (“cell phones contain a wealth of private information, including emails, text messages, call histories, address books” and finding that the defendant “had a reasonable expectation of privacy in such information.”); *United States v. Finley*, 447 F.3d 250, 259 (5th Cir. 2007) (defendant had reasonable expectation of privacy in the content of the text messages on his phone); *United States v. Gomez*, 807 F.Supp.2d 1134, 1140 (S.D.Fla. 2011) (“the weight of authority agrees that accessing a cell phone’s call log or text message folder is considered a ‘search’ for Fourth Amendment purposes.”); *State v. Davis*, 787 F.Supp.2d 1165, 1170 (D.Or. 2011) (review of the content of a cell phone is a search requiring Fourth Amendment protections); *United States v. Wurie*, 612 F.Supp.2d 104, 109 (D.Mass.2009) (“It seems indisputable that a person has a

subjective expectation of privacy in the contents of his or her cell phone.”); *United States v. Quintana*, 594 F.Supp.2d 1291, 1299 (M.D.Fla. 2009) (“An owner of a cell phone generally has a reasonable expectation of privacy in the electronic data stored on the phone.”); *State v. Valles*, 925 N.W.2d 404, 408 (N.D. 2019) (“an individual’s privacy interest in a cell phone remains high even when lost.”); *State v. Boyd*, 992 A.2d 1071, 1080-81 (Conn. 2010) (defendant had a reasonable expectation of privacy in cell phone); *State v. Carroll*, 778 N.W.2d 1, 10-11 (Wis. 2010) (defendant had a reasonable expectation of privacy in his cell phone).

Therefore, Mr. Vigil had a legitimate expectation of privacy in the digital data stored on his cell phone. Accordingly, in the absence of a warrant, law enforcement’s search is only reasonable if it falls within a specific exception to the warrant requirement.

c. Contrary to the district court’s conclusion, Mr. Vigil did not abandon his legitimate expectation of privacy in his cell phone.

At the suppression hearing, the district court erroneously concluded that Mr. Vigil abandoned his personal belongings found in Mr. Moan’s vehicle. TR 08/03/18, p 62:10-12.

Generally, a warrantless search is per se unreasonable. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citing *Katz*, 389 U.S. at 457). However, Fourth Amendment jurisprudence has recognized general exceptions to the warrant

requirement, such as abandoned property. *See, e.g., Abel v. United States*, 362 U.S. 217, 241 (1960); *United States v. Flynn*, 309 F.3d 736, 738 (10th Cir. 2002) (“the Fourth Amendment allows for warrantless search and seizure of abandoned property.”). The State bears the burden of establishing that warrantless conduct by a government official falls within the exception to the warrant requirement. *Sanders*, 442 U.S. at 760

Colorado has long recognized the doctrine of abandonment. *See, e.g., Johnson v. People*, 465 P.2d 128, 129 (Colo. 1970); *People v. T.H.*, 892 P.2d 301, 303 (Colo. 1995); *People v. McClain*, 149 P.3d 787, 790 (Colo. 2007).

The modern abandonment exception focuses on abandonment as an intentional relinquishment of a legitimate expectation of privacy in the property. *California v. Greenwood*, 486 U.S. 35 (1988). “The test for abandonment is whether the defendant retained a reasonable expectation of privacy in the property.” *Flynn*, 309 F.3d at 738; *see People in Interest of D.E.J.*, 686 P.2d 794, 796 (Colo. 1984) (to be effective, abandonment must be voluntary); *United States v. Hernandez*, 7 F.3d 944, 947 (10th Cir. 1993) (“[a]n expectation of privacy is a question of intent which may be inferred from words, acts, and other objective facts.”); George L. Blum et al., *Searches and Seizures*, 68 Am. Jur. 2d, § 23 (2019) (“abandonment is a question

of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it.”).

1. *After Riley v. California, this Court should not employ a mechanical application of common law doctrines that limit constitutional privacy protections.*

This Court must determine whether the common law doctrine of abandonment applies to technology that was inconceivable at the time the doctrine was formulated. *Cf. Riley*, 573 U.S. at 385 (“These cases requires us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from mars might conclude they were an important feature of human anatomy.”).

“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.” *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). Accordingly, when confronted with new and evolving technology, this Court should not employ a “mechanical application” of common law doctrines that limit constitutional privacy protections. *See, e.g., Id.; Riley* 573 U.S. at 386 (the United States Supreme Court rejected a mechanical application of the search incident to arrest exception to cell phone data because unlike ordinary physical objects, cell phones “place vast quantities of personal information literally in the hands of individuals.”); *see also*

State v. Samalia, 375 P.3d 1082, 1091-92 (Wash. 2016) (Yu, J., dissenting) (“Rapidly advancing technology makes it both more difficult and more important to delineate the scope of a person’s private affairs[.]”)

In the past, this Court, as well as the Colorado Supreme Court and the Supreme Court of the United States “have repeatedly analyzed specific new technologies and their particular role in modern society when determining whether a particular governmental intrusion constitutes a search.” *Samalia*, 375 P.3d at 1091-92 (Yu, J., dissenting); *see, e.g., Riley*, 573 U.S. at 401 (the search incident to arrest warrant exception is not applicable to cell phones); *United States v. Jones*, 565 U.S. 400, 405-406 (2012) (use of a GPS tracking device to monitor a vehicle’s movements on public streets was a search within the meaning of the Fourth Amendment); *Carpenter*, 138 S.Ct. at 2221 (the government must generally obtain a search warrant before acquiring location information recorded by a cell phone’s wireless carrier); *Kyllo*, 553 U.S. at 36 (infrared thermal imaging of a home constitutes search); *Katz*, 389 U.S. at 352 (electronic recording of calls made from a public telephone booth is a search, in part because “[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication”); *People v. Davis*, 438 P.3d 266, 269 (Colo. 2019) (“the existence of a valid search warrant addresses any concern posed by the distinctive

nature of cell phones as repositories of highly personal information.”); *People v. Herrera*, 357 P.3d 1227, 1233-34 (Colo. 2015) (a text message folder stored on a cell phone, is analogous to a closed container for search and seizure purposes); *Campbell*, 425 P.3d at 1169-70 (defendant did not have a reasonable expectation of individual privacy in GPS data contained in an ankle monitor); *People v. Sporleder*, 666 P.2d 135, 142 (Colo. 1983) (the installation of a pen register to record numbers dialed constitutes a search).

There is a significant privacy interest in the data and information contained on cell phones and existing jurisprudence recognizes the constitutionally significant privacy interest in that data. *See Riley*, 573 U.S. at 392 (quoting *Maryland v. King*, 569 U.S. 435, 463 (2013)) (“when ‘privacy-related concerns are weighty enough’ a ‘search may require a warrant, notwithstanding the diminished expectations of privacy of the’ individual).

Ninety-five percent of Americans own a cell phone of some kind. *See* A. Smith, Pew Research Center, *Record shares of Americans now own smartphones, have home broadband* (Jan. 12, 2017); *see also* Pew, Research Center, *Mobile Fact Sheet* (Feb. 5 2018). Moreover, the share of Americans that own a smartphone is seventy-seven percent. *Id.* Today, smartphones “could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries,

albums, televisions, maps, or newspapers.” *Riley*, 573 U.S. at 393. Smartphones have the capability of accessing immediately vast quantities of sensitive information, such as where users have been, who they talk to and how often, what they have eaten, and what they spend their money on. The capabilities are continually evolving and expanding. *Id.* Therefore, there can be little doubt that such information stored on or accessed by cell phones requires heightened privacy protections.

Furthermore, modern cell phones implicate privacy concerns far beyond those implicated by a search of any other physical object. *See Riley*, 573 U.S. at 393 (The Court rejected the notion that a cell phone is materially indistinguishable from other physical items, such as a wallet, purse, or address book: “This is like saying a ride on horseback is materially indistinguishable from a flight to the moon.”). The intrusion on privacy is not physically imitated in the same way when it comes to phones. Cell phones today collect distinct information, such as pictures, videos, locations visited, emails, medical information, credit cards, and bank statements. *See Id.* at 394 (“The sum of an individual’s private life can be reconstructed through a thousand photographs.”). The element of pervasiveness far exceeds that of physical records. *See Id.* at 396 (“Historic location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.”).

Additionally, as stated by the Supreme Court in *Riley*,

A cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

573 U.S. at 396-97. Therefore, a search of cell phone data is akin to “ransacking [an individual’s] house for everything which may incriminate him.” *Id.* (citing *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d. Cir. 1926); see *Payton v. New York*, 445 U.S. 573, 590 (1980) (the Fourth Amendment draws “a firm line at the entrance to the house.”). “It would be patently absurd to suggest that abandonment of a traditional key means that warrantless access is allowed to the house it locks; the same must be true of digital keys to electronic information.” *Samalia*, 375 P.3d at 109 (Yu, J., dissenting) (quoting Amicus Curiae Br. of Am. Civil Liberties Union of Wash. at 11).

Privacy comes at a cost. See *Riley*, 575 U.S. at 392 (“when privacy related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy[.]”) (internal quotations omitted). “Modern cell phones are not just another technological convenience[, w]ith all they contain and all they may reveal, they hold for many Americans the privacies of life.” *Id.* at 403 (internal quotations omitted). “The fact that technology now allows an individual to

carry such information in his hand does not make the information any less worthy of the protection for which the founders fought.” *Id.*

Accordingly, this Court should not employ a mechanical application of the abandonment doctrine, but rather hold that the significant privacy interest in the data and information contained on cell phones requires law enforcement to obtain a lawfully issued warrant prior to conducting a search of a cell phone.

2. *Nevertheless, Mr. Vigil did not voluntarily abandon his legitimate expectation of privacy in his cell phone after he involuntarily lost the phone.*

“To demonstrate abandonment, the government must establish by a preponderance of the evidence that the defendant’s voluntary words or conduct would lead a reasonable person in the searching officer’s position to believe that the defendant relinquished his property interests in the item searched or seized.” *United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000) (citing *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000)). “Because this is an objective test, it does not matter whether the defendant harbors a desire to later reclaim an item;” rather this Court must “look solely to the external manifestations of [the individual’s] intent as judge by a reasonable person[.]” *Id.* Thus, courts must focus on the totality of the circumstances and pay attention to explicit denials of ownership and any

physical relinquishment of the property. *Id.* (citing *United States v. Chandler*, 197 F.3d 1198, 1200 (8th Cir. 1999)).

Generally, the majority of abandonment cases are “characterized by the presence of a fleeing defendant who relinquishes an object to make his flight easier or because discarding the item might make it easier for him to later claim that he never possessed it.” *Id.*; see, e.g., *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *United States v. Richardson*, 427 F.3d 1128 (8th Cir. 2004); *People v. McClain*, 149 P.3d 787 (Colo. 2007); *Commonwealth v. Martin*, 4 N.E.3d 1236 (Mass. 2014); see also Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(b) (5th ed. 2018).

However, this Court should not assume that in every instance in which a defendant relinquishes possession or control, abandonment has occurred. A phone that is lost, dropped, or misplaced is not ownerless. Rather, the owner retains the protection of both the federal and state constitutions. See, e.g., *Valles*, 925 N.W.2d at 408 (“unlike abandoned property, lost property still has an owner and is not outside the protection of the Fourth Amendment.”).

“The term ‘lost’ is concerned with the involuntary change of location or inability to find.” *Id.* at 409 (quoting *State v. Brewster*, 7 N.W.2d, 742, 744 (N.D. 1943)). “[L]ost property” is “property which the owner has involuntarily and

unintentionally parted with ... and does not know the whereabouts.” *Corliss v. Wenner*, 34 P.3d 1100, 1104 (Idaho Ct. App. 2001); *cf. Hernandez*, 7 F.3d at 947 (abandonment is a question of intent); *State v. Huether*, 453 N.W.2d 778, 781 (N.D. 1990) (if a defendant “intends to retain his... interest in that property, there has been no abandonment.”).

Here, the objective facts establish that Mr. Vigil did not voluntarily discard his cell phone. First, there is no physical relinquishment of the cell phone. *See Relinquish*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/relinquish> (to “give up”). Mr. Vigil did not intentionally “give up” his cell phone. Rather, the trial facts establish that Officer Sullivan approached Mr. Vigil with his pistol drawn. Officer Sullivan then opened the vehicle’s door, grabbed Mr. Vigil by the jacket, and “yanked him out of the car.” TR 08/20/18, pp 212:22-25; 213:1-5. Mr. Vigil did not voluntarily exit the vehicle or voluntarily leave his personal belongings in the vehicle in an attempt to flee the scene, make such flight easier, or because discarding the item might make it easier for him to later claim that he never possessed it. *See Basinski*, 226 F.3d at 837; *see generally* Abigail Hoverman, Note, *Riley and Abandonment: Expanding Fourth Amendment Protection of Cell Phones*, 111 N.W. U. L. Rev. 517, 546 (2017) (“presuming an owner unintentionally left the device behind better protects the

personal data on a cell phone, especially in light of the unlikelihood that its owner intended to allow a stranger to dig through its entire contents.”). Based on these facts, it is unlikely that a police officer would believe the mere act of leaving a phone in a car he was involuntarily pulled from was an intentional relinquishment of his privacy.

Second, Mr. Vigil did not deny ownership of the cell phone. After the phone was lost, Mr. Vigil did not cancel his cellular service. *See, e.g., State v. Brown*, 815 S.E.2d 761, 765 (S.C. 2018). Instead, through counsel, Mr. Vigil asserted ownership and filed a motion to suppress law enforcement’s warrantless search of his personal belongings. CF, pp 56-61; TR 08/03/18, pp 1-67.

Under these circumstances, Mr. Vigil retained his legitimate expectation of privacy in the cell phone. Therefore, contrary to the district court’s ruling, Mr. Vigil had standing to challenge law enforcement’s warrantless search of his cell phone. U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7.

ii. Law enforcement’s warrantless search of Mr. Vigil’s cell phone is per se unconstitutional and the State cannot prove the district court’s failure to suppress the evidence was harmless beyond a reasonable doubt.

The district court erred by denying Mr. Vigil’s motion to suppress all evidence obtained pursuant to the stop of Mr. Vigil as fruit of an illegal stop and an illegal search and seizure in violation of the Fourth and Fourteenth Amendments to the

United States Constitution and Article II, section 7 of the Colorado Constitution. CF, pp 56-61.

Since the preserved error is of constitutional dimension, constitutional harmless error applies. *See, e.g., Carter*, 414 P.3d at 19 (defendant preserved review of the court’s denial of a motion to suppress by “filing a motion to suppress and further arguing in support of his motion at the motion’s hearing.”). The State has the burden of demonstrating, beyond a reasonable doubt, that the constitutional error here was harmless. *Chapman*, 386 U.S. at 21.

A search prohibited by the Fourth Amendment occurs when the government intrudes on an area where an individual has a “constitutionally protected reasonable expectation of privacy.” *Henderson v. People*, 879 P.2d 383, 387 (Colo. 1994) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)); *see also Kyllo*, 533 U.S. at 33.

Furthermore, a constitutional search also occurs when the government “physically occupie[s] private property for the purpose of obtaining information.” *United States v. Jones*, 565 U.S. 400, 404 (2012) (“such physical intrusion would have been considered a “search” within the meaning of the Fourth Amendment when it was adopted.”); *see also Florida v. Jardines*, 569 U.S. 1, 5-6 (2013).

Any search of a cell phone that requires bypassing a lock screen, password, or other security feature of a cell phone must be performed pursuant to a warrant. *See Valles*, 925 N.W.2d at 410 (security features on a cell phone signals the information within is not intended for public viewing); *see also Katz*, 389 U.S. at 360; *Jones*, 565 U.S. at 404; Abigail Hoverman, *supra*. The fact that Mr. Vigil’s cell phone did not have a passcode does not defeat his claim that police needed a warrant to search his phone. *See generally State v. Peoples*, 378 P.3d 421, 425 (Ariz. 2016); *see also State v. LaPonsie*, 136 Ariz. 73, 75 (App. 1982) (an individual does not forfeit their reasonable expectation of privacy in their home merely by leaving the door unlocked).

Here, Detective Duran’s testimony established that by “maneuver[ing]” through the phone’s applications he was able to “open up” the settings folder and record the phone’s serial and model number. TR 08/03/18, p 47:2-6; TR 08/20/18, pp 158:5-7 (“pressed the button to make [the phone] light up”); 237:6-7; 246:21 (“I opened [the phone] up”). Moreover, he was able to “pull up the [phone’s profile] picture” to present to Officer Sullivan. TR 08/03/18, p 20:16-19; TR 08/20/18, pp 218:15-17 (“pulled up the picture on it”); 237:6-7 7 (“maneuver[ed]” through the phone’s applications). Finally, he accessed the cell phone’s call application and was

able to call the Denver Police landline in an effort to identify the owner's name and phone number. TR 08/20/18, pp 247:25; 248:1-2.

Because police conducted the warrantless search and there were not exigent circumstances present, the search violated Mr. Vigil's constitutional rights to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Colo. Const. art. II, § 7; *see also State v. K.C.*, 207 So.3d 951, 955 (Fla. Ct. App. 2016) (where there is no danger to individuals, property, or the need to immediately capture a criminal suspect and there is time for the police to obtain a warrant, which could limit the scope of the search of the phone, police must obtain a warrant to search the cell phone).

The warrantless search provided law enforcement with Mr. Vigil's name, his phone number, the cell phone's serial and model number, and a photograph. Identity was the main issue in dispute. At trial, the prosecution exclusively relied on this evidence to corroborate Officer Sullivan's testimony regarding the events and establish Mr. Vigil as the individual in question. Accordingly, the central evidence of guilt used at trial was derived from the warrantless search of Mr. Vigil's cell phone.

For that reason, the State cannot meet its burden of establishing the court's failure to suppress the evidence was harmless beyond a reasonable doubt. This Court should reverse Mr. Vigil's conviction and remand to the district court for a new trial.

II. THE DISTRICT COURT'S FAILURE TO SUPPRESS OFFICER SULLIVAN'S UNNECESSARILY SUGGESTIVE AND UNRELIABLE OUT-OF-COURT IDENTIFICATION SEVERELY PREJUDICED MR. VIGIL AND CANNOT BE CONSIDERED HARMLESS BEYOND A REASONABLE DOUBT.

A. Preservation and Standard of Review

A trial court's ruling on a motion to suppress presents a mixed question of law and fact. *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002); *People v. Palacios*, 419 P.3d 1014, 1016 (Colo. App. 2018). This Court defers to the trial court's findings of fact, but reviews its legal conclusions de novo. *People v. Godinez*, 2018 COA 170, ¶ 55.

This issue is preserved. Defense counsel filed a pretrial motion seeking to suppress evidence of the out-of-court identification based on an impermissibly suggestive photographic array. CF, pp 62-65.

Where, as here, the preserved error is of constitutional dimension, constitutional harmless error applies. *See Hagos*, 288 P.3d at 119. If there is a reasonable possibility that the defendant could have been prejudiced by the error, then the error cannot be considered harmless beyond a reasonable doubt. *See*

Williams, ¶ 6 (this Court will reverse “if there is a reasonable possibility that any erroneous admission of the identification contributed to the conviction.”); *Chapman*, 386 U.S. at 21.

B. Relevant Facts

Mr. Vigil filed a pretrial motion seeking to suppress evidence of Officer Sullivan’s out-of-court identification of Mr. Vigil based on an impermissibly suggestive photographic array. CF, pp 62-65. The motion additionally sought to suppress any potential in-court identification of Mr. Vigil by Officer Sullivan. *Id.*

On August 3, 2018, the district court held an evidentiary hearing. TR 08/03/18, pp 1-67. Mr. Vigil, through counsel, argued that the photographic array created by Detective Duran was impermissibly suggestive and unreliable because Mr. Vigil’s mugshot—from the police’s arrest database—was the only photo used in the array. *Id.* at 55-56; CF, p 65.

The district court denied Mr. Vigil’s motion to suppress the out-of-court identification finding the identification was not suggestive as it was the “result of a police investigation.” *Id.* at 62:23; 64:12-13. In addition, the court found that the identification was reliable because Officer Sullivan focused on the suspect during the incident, he then expressed a high level of certainty in the identification, and his prior description of the suspect was accurate. *Id.* at 63:12-14, 18, 20-22; 64:4-7.

Thereafter, Officer Sullivan identified Mr. Vigil at trial. TR 08/20/18, p 215:20-25.

C. Law and Analysis

- i. *The district court violated Mr. Vigil's constitutional due process rights by failing to suppress the impermissibly suggestive out-of-court identification.*

“An identification used as proof to link a defendant to a crime denies that defendant due process of law if the identification procedure is unnecessarily suggestive and conducive to irreparable mistaken identification.” *People v. Horne*, 619 P.2d 53, 56 (Colo. 1980) (citing *Manson v. Braithwaite*, 432 U.S. 98, 104, 120-21 (1977)); *see also* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; *People v. Borghesi*, 66 P.3d 93, 103 (Colo. 2003) (“A defendant is denied due process when an in-court identification is based upon an out-of-court identification which is so suggestive as to render the in-court identification unreliable.”).

Eyewitness identification evidence is among the least reliable forms of evidence. Both, the United States Supreme Court and the Colorado Supreme Court have recognized the unreliability of eyewitness identification in criminal cases. *See, e.g., United States v. Wade*, 388 U.S. 218, 229 (1967) (“the annals of criminal law are rife with instances of mistaken identification”); *Bernal*, 44 P.3d at 191 (“mistaken eyewitness identification is responsible for more ... wrongful

convictions than all other causes combined.”). Show-ups, line-ups, and photographic arrays are among the most common forms of pretrial identification.

A photo array is a pretrial identification method consisting of “[a] series of photographs, often police mug shots, shown sequentially to a witness for the purpose of identifying the perpetrator of a crime.” Black’s Law Dictionary (11th ed. 2019). The Colorado Supreme Court has established a two-part test to determine the admissibility of an out-of-court identification from a photo array. *See Palacios*, 419 P.3d at 1017; *Borghesi*, 66 P.3d at 103; *Bernal*, 44 P.3d at 190-91.

First, the defendant bears the burden of showing that the out-of-court identification procedure was impermissibly suggestive. *See Godinez*, ¶ 56; *Bernal*, 44 P.3d at 190-91. Upon a showing of suggestiveness, the burden then shifts to the State to show by clear and convincing evidence that the identification was nevertheless reliable. *See Borghesi*, 66 P.3d at 103. The court analyzes each prong separately. *Johnston v. Makowski*, 823 F.2d 387, 391 (10th Cir. 1987).

In determining whether the procedure was impermissibly suggestive, the court looks to several factors, including: “the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves.” *Bernal*, 44 P.3d at 191 (citing *United States v. Wiseman*, 172 F.3d 1196, 1208 (10th Cir. 1999)).

Here, Officer Sullivan’s out-of-court identification of Mr. Vigil was impermissibly suggestive because the photo array consisted only of a single image. See TR 08/03/18, p 51:6-8. In *People v. Borghesi*, the Colorado Supreme Court stated:

“[w]ith respect to the size of the array, courts have held that a lineup with as few as six pictures is not a per se due process violation, *but the fewer the pictures, the closer the array must be scrutinized for impermissibly suggestive irregularities.*”

66 P.3d at 104 (emphasis added); see also *United States v. Sanchez*, 24 F.3d 1259, 1262 (10th Cir. 1994).

Additionally, the United States Supreme Court has cautioned courts to view single photo displays with suspicion. See, e.g., *Manson v. Braithwaite*, 432 U.S. 98, 104, 120-21 (1977); *Simmons v. United States*, 390 U.S. 377 (1968). Several federal and state courts have also found that in the absence of exigent circumstances, single photo displays are impermissibly suggestive. See, e.g., *Commonwealth v. Carlson*, 93 N.E.3d 1198 (Mass. 2018); *Dunnigan v. Keane*, 137 F.3d 117 (2d Cir. 1998); *United States v. Johnson*, 114 F.3d 435 (4th Cir. 1997).

Here, Detective Duran presented Officer Sullivan with a single image. Detective Duran did not compile a six-pack photo array. Instead, he relied solely upon Mr. Vigil’s “mugshot” from the arrest database. Detective Duran did not present any additional photos to Officer Sullivan. Therefore, the size of the photo

array demonstrates the identification procedure was impermissibly suggestive. *See e.g., Manson*, 432 U.S. at 110 (the identification procedure was unduly suggestive because only one photograph was used in the photographic array).

Furthermore, the manner of the identification procedure renders Officer Sullivan's out-of-court identification impermissibly suggestive. "[T]he manner of an officer's presentation will result in an unduly suggestive identification procedure when 'the procedure used to present the [array] ... suggest[s] a particular suspect.'" *Palacios*, 419 P.3d at 1017 (quoting *People v. Wilford*, 111 P.3d 512, 515 (Colo. App. 2004)).

Here, the manner of the identification procedure impermissibly suggests Mr. Vigil is the suspect. Mr. Vigil was the only individual to appear in the photographic array. The photographic array consisted of one photo: a prior "mugshot" of Mr. Vigil from the police's arrest database. Next, Officer Sullivan viewed the photograph used in the array two days before the identification procedure. Officer Sullivan first viewed Mr. Vigil's "mugshot" after Detective Duran conducted a warrantless search of the digital contents of Mr. Vigil's cell phone. Detective Duran and Officer Sullivan matched the "mugshot" with the profile picture located in the cell phone's settings. Finally, Detective Duran directed Officer Sullivan's attention towards Mr.

Vigil when he wrote on the photo: “is this the guy you fought with in the car.” TR 08/03/18, p 24:18-20.

Therefore, the circumstances and manner of the identification procedure clearly suggests Mr. Vigil as the suspect. *See, e.g., Smiley v. State*, 111 A.3d 43, 50 (Md. 2015) (“Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness ... indicates which photograph the witness should identify.”); *State v. Turner*, 777 P.2d 432, 435 (Utah 1989) (“The word and actions of law enforcement who present the photos should convey an attitude of disinterest ... [a]ny manipulation indicating that the police believe one of the photographers portrays the accused could lead to a finding of suggestiveness.”).

Accordingly, by failing to suppress the out-of-court identification, the district court violated Mr. Vigil’s constitutional due process rights under both the United States and Colorado Constitutions. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25.

- ii. *Because the State cannot establish the court’s error to be harmless beyond a reasonable doubt, reversal is required.*

Reversal is required if there is a reasonable possibility that the erroneous admission of the identification contributed to the conviction. *See, e.g., Williams*, ¶ 6; *see also Hagos*, 288 P.3d at 119.

Here, the State cannot establish the court's error to be harmless beyond a reasonable doubt. The court's failure to suppress Officer Sullivan's out-of-court identification severely prejudiced Mr. Vigil. First, the out-of-court identification procedure was impermissibly suggestive. Second, the in-court identification was unreliable as a product of the suggestive pre-trial procedure. *See Bernal*, 44 P.3d at 190 (quoting *United States v. Wade*, 388 U.S. 218, 229 (1967)) ("it is a matter of common experience that, once a witness picked out the accused at the line-up, he is not likely to go back on his word later on[.]"). Third, the central evidence of guilt was derived from Officer Sullivan's identification out-of-court and subsequent in-court identification of Mr. Vigil.

Therefore, this Court should reverse Mr. Vigil's conviction and remand to the district court for a new trial.

III. THE DISTRICT COURT REVERSIBLY ERRED BY DENYING MR. VIGIL'S MOTION TO EXCLUDE THE IRRELEVANT AND HIGHLY PREJUDICIAL PHOTOGRAPH OF THE HATCHET.

A. Preservation and Standard of Review

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *See People v. Welsh*, 80 P.3d 296, 305 (Colo. 2005); *People v. Hall*, 107 P.3d 1073, 1080-81 (Colo. App. 2004).

This issue is preserved. At trial, defense counsel filed a motion in limine to exclude the photographic evidence and objected to its admission on the basis that the photograph was irrelevant and unfairly prejudicial. TR 08/20/18, pp 9:22-25; 10:2-4; see EX #5 TR 08/20/18, p 177; see, e.g., *People v. Pratt*, 759 P.2d 676, 685 (Colo. 1988).

A trial court's erroneous admission of irrelevant and prejudicial evidence requires reversal unless the reviewing court is able to determine admission was harmless. See *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986) (this Court must reverse if the error "substantially influenced the verdict or affected the fairness of the trial proceedings."); see also *People v. Quintana*, 665 P.2d 605 (Colo. 1983); *People v. Lucero*, 615 P.2d 660 (Colo. 1980).

B. Relevant Facts

Law enforcement found a hatchet in the driver's side panel door of the Toyota Scion. TR 08/20/18, p 9:12-13. In addition to the hatchet, police recovered an air freshener, yellow gloves, black gloves, glasses, pill bottles, a placard, shopping bag, black backpack, yellow backpack, mask, key, black jacket, purse, and a makeup kit. *Id.* at 177-81; see EX #4-17 TR 08/20/18, p 177. Mr. Moan did not claim ownership over these items. *Id.*

Prior to trial, Mr. Vigil filed a motion in limine to exclude the photograph of the hatchet. *Id.* at 9:11-12; see EX #5 TR 08/20/18, p 177. Defense counsel argued that the hatchet—as a small ax—was a weapon and the admission of the photograph would be unduly prejudicial and misleading because Mr. Vigil was not on trial for possession or use of a weapon. *Id.* at 9-10. In opposition, the prosecution argued that the photograph of the hatchet was relevant because it demonstrated Mr. Vigil’s control over the vehicle. *Id.* at 10-11. Ultimately, the trial court denied Mr. Vigil’s motion finding that “it’s a stretch to say that ... [the hatchet] was in the car for weapon purposes.” *Id.* at 12:13-15.

At trial, the prosecution admitted the photograph of the hatchet as People’s Exhibit 5. *Id.* at 178:9-10; EX #5 TR 08/20/18, p 177. Mr. Moan subsequently testified that the hatchet did not belong to him. *Id.* at 178:15-17. However, the prosecution failed to present any evidence linking ownership or control of the hatchet to Mr. Vigil.

C. Law and Analysis

A defendant has the constitutional right to a fair trial by an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25. A jury misled by inadmissible evidence can no longer be considered impartial. *See Harris v. People*, 888 P.2d 259, 264 (Colo. 1995); *People v. Walters*, 148 P.3d 331, 334 (Colo. App.

2006). Moreover, when evidence is “so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process clause of the Fourteenth Amendment provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). As relevant here, the irrelevant and unduly prejudicial photograph of the hatchet misled the jury and rendered the trial fundamentally unfair.

Subject to certain exclusions, evidence is admissible if it is relevant, meaning that the evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable[.]” CRE 401. Under CRE 401, relevant evidence must possess two characteristics: (1) it must have *probative value*, that is “any tendency to make a proposition more or less probable than it would be without the evidence;” and (2) it must be *material*, that is, its probative value must address a consequential fact. CRE 401 (emphasis added); *see also* CRE 402; *People v. Martinez*, 74 P.3d 316 (Colo. 2003). The rule requires only a showing of minimal logical relevance. *People v. Kenny*, 30 P.3d 734, 740 (Colo. App. 2000); *see People v. Rudnick*, 878 P.2d 16, 20 (Colo. App. 1993) (facts that “shed light upon the matter contested are relevant.”). Accordingly, “facts bearing so remotely upon or collateral to the issue that they afford only *conjectural inference* should not be admitted in evidence.” *Rudnick*, 878 P.2d at 20 (emphasis added); *see Conjecture*, Merriam-Webster Online Dictionary, <https://www.merriam->

webster.com/dictionary/conjecture (“inference formed without proof or sufficient evidence.”).

Here, the photograph of the hatchet lacked probative value and should not have been admitted. Throughout trial, ownership and possession of the hatchet was in dispute. At no point in time did the prosecutor present any direct or circumstantial evidence to establish Mr. Vigil owned or exerted control over the hatchet. Rather, the only evidence adduced at trial regarding the hatchet was that police recovered it inside of Mr. Moan’s vehicle, along with several other items, and that Mr. Moan did not claim ownership of the hatchet. TR 08/20/18, 177-81; *see* EX #4-17 TR 08/20/18, p 177.

Consequently, the lack of evidence forced the jury to guess and speculate as to whether Mr. Vigil owned and possessed the hatchet. *See, e.g., People v. Franklin*, 782 P.2d 1202, 1206 (Colo. 1989) (any probative value from the evidence would only arise if a number of speculative assumptions were made). Furthermore, because of the lack of evidence, the prosecution failed to “shed light upon” the proffered purpose of demonstrating the hatchet represented Mr. Vigil’s control over the vehicle. *See Rudnick*, 878 P.2d at 20. Because the prosecution relied solely upon conjectural inferences, the photograph was irrelevant and misleading to the jury and the court should not have admitted the evidence under CRE 401.

Nevertheless, relevant evidence is subject to exclusion under CRE 403 if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” CRE 403; *see People v. Wakefield*, 428 P.3d 639, 653 (Colo. App. 2018); *Yusem v. People*, 210 P.3d 458, 464-65 (Colo. 2009). Courts have discretion to control distracting side issues, and to exclude evidence that, for one reason or another, is misleading. *People v. Rodriguez*, 209 P.3d 1151, 1161-62 (Colo. App. 2008).

Here, the danger for unfair prejudice and the likelihood of misleading the jury far outweighed any possible probative value that the photograph of the hatchet might have had. Contrary to the district court’s conclusions, a hatchet, otherwise known as an ax, is a weapon. TR 08/20/18, p 12:13-15; *see Hatchet*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/hatchet> (“a short-handed ax”); COLJI-Crim F:88 (“Deadly weapon” means a knife, *bludgeon*, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury.”) (emphasis added).

Mr. Vigil was not on trial for possession or use of a deadly weapon. Throughout trial, the prosecutor repeatedly mentioned the hatchet – first, in his opening statement, second he questioned Mr. Moan and Officer Sullivan about the

hatchet, and finally through the admission of People's Exhibit 5. See TR 08/20/18, p 157:4; TR 08/21/18, p 74. Given the highly prejudicial connotations surrounding the hatchet as a weapon, there was great potential to mislead the jury to make a decision on an improper basis. See, e.g., *People v. Hall*, 107 P.3d 1073 (Colo. App. 2004); *People v. Welsh*, 80 P.3d 296, 308 (Colo. 2003).

Moreover, the court's failure to provide a limiting instruction increased the likelihood of the hatchet misleading the jury. The court could have effectively eliminated any possible prejudice by instructing the jury to consider the hatchet only for a certain and limited purpose. In the absence of an instruction, the jury was left to make their own conclusions regarding the hatchet. See, e.g., *Wakefield*, 428 P.3d at 653 (photos admitted of marijuana leave the jury with the impression that the defendant may have been conducting a grow operation, causing the jury to view the defendant unfavorably). Therefore, it is likely the admission of the hatchet left the impression that Mr. Vigil intended to use the hatchet as a weapon, causing the jury to view him in an unfavorable light.

Under these circumstances, the district court reversibly erred in admitting the photo of the hatchet. CRE 401, 403. The error was not harmless because the fairness of the trial proceedings was tainted by the unduly prejudicial and misleading connotations associated with the hatchet as a weapon. The evidence lacked probative

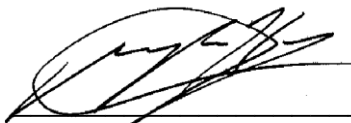
value so as to render it inadmissible under CRE 401, and its danger for unfair prejudice also required its exclusion under CRE 403.

Accordingly, this Court should reverse Mr. Vigil's conviction and remand to the district court for a new trial.

CONCLUSION

For the reasons and authorities set forth in Arguments I, II, and III, Mr. Vigil respectfully requests that this Court reverse his conviction and remand to the district court for a new trial.

MEGAN A. RING
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A handwritten signature in black ink, appearing to read 'Taylor Hoy', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that, on February 6, 2020, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.

Nancy L. Medina