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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
El Paso County District Court Honorable Gilbert A. Martinez, Judge Case No. 04CR5770	▲ **COURT USE ONLY** ▲
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. TODD WILLIAM NEWMILLER, Defendant-Appellant.	Case No.: 06CA1402
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PEOPLE'S ANSWER BRIEF

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

STATUTES

RULES

The defendant, Todd William Newmiller, appeals the judgment of conviction entered upon a jury verdict finding him guilty of second degree murder with a deadly weapon. He also appeals his sentence.

STATEMENT OF THE CASE AND OF THE FACTS

On the evening of November 19, 2004, Anthony Madril, Chisum Lopez, and Charles Schwartz went to a strip club, Appaloosa Gentlemen's Club ["Appaloosa"], where they met their friends Aaron Hoong and Phu Ha. Lopez had received free admission to the club and a $100 bar tab in exchange for work he had performed for the owner of the club (v. 12, pp. 71-74; v. 18, pp. 61-63).

That same evening, the defendant was at Benny's Bar celebrating his birthday with his brother, Joel Newmiller ["Joel"], and some friends. The defendant, Joel, Brad Orgill, Jason Melick, and Michael Lee decided to leave Benny's and go to Appaloosa in Joel's Jeep (v. 10, 84-88, v. 11, pp. 6-13, v. 14, 10-14). A dancer at Appaloosa had birthday gifts for the defendant, who was a regular customer (v. 19, p. 166, v. 11, pp. 11-12).

Both Madril's group and the defendant's group left the club at closing time. Everyone had been drinking (v. 10, p. 86; v. 12, p. 76). As Madril's group was leaving, a dancer approached Schwartz and asked him if he wanted a lap dance (v. 12, p. 78). Schwartz said he was out of money (v. 12, p. 78). Lopez then said, "I

have no money with me right now, but if you want to come back to the house, I have money there," or words to that effect (v. 12, p. 78; v. 18, p. 24). Orgill thought Lopez was being disrespectful, and he and the defendant exchanged insults with Madril's group (v. 10, p. 91; v. 12, pp. 78-83; v. 15, pp. 45-49; v. 18, pp. 64-65). Bouncers and club management intervened. They held the defendant's group in the club for a few minutes and allowed Madril's group to leave (v. 11, pp. 155-156; v. 12, p. 84; v. 14, p. 18; v. 15, pp. 49-50).

Madril's group spoke to their friends Ha and Hoong in the parking lot for a few minutes and then headed towards Schwartz's pickup truck. Just then, the defendant's group left the club (v. 12, p. 85; v. 18, pp. 66-67). The defendant and Orgill ran across the parking lot toward Madril's group (v. 12, p. 87; v. 14, p. 19; v. 15, pp. 51-53). A club manager interceded, and the defendant knocked a flashlight out of his hand. A bouncer ran up, restrained the defendant, and led him away, telling him that he was "86'd" from the club for a month or more. The defendant was "very upset" (v. 10, pp. 92-95, 162; v. 12, pp. 87-88; v. 13, pp. 115-177). Lopez and Madril yelled at the defendant's group as Schwartz drove out of the parking lot (v. 12, p. 90; v. 13, p. 117).

The defendant and Orgill "were kind of amped up" and urged Joel to go after Madril's group. He raced out of the parking lot behind the truck (v. 14, p. 20;

v. 12, p. 122). Madril's group noticed the Jeep coming up fast behind them. Schwartz slowed to take a turn, and Madril and Lopez jumped out of the truck (v. 12, pp. 94-95). Schwartz stopped and yelled at them to get back in the truck, and he heard Madril say, "I've got a knife, let's go" (v. 12, pp. 96-98). The Jeep stopped, and Orgill and the defendant jumped out, followed by the others (v. 10, pp. 97-98, v. 11, p. 23-24; v. 14, p. 21). It was dark, so no one could say for certain exactly what happened next, but members of both groups saw Madril and Orgill fighting for a brief period of time (v. 10, pp. 96-97; v. 11, p. 26; v. 12, pp. 102-103; v. 14, pp. 24-26).

Schwartz again yelled at Lopez to get back in the truck. Just after Lopez jumped in, the truck's rear passenger-side tire popped. Orgill saw the defendant crouched down near the tire (v. 12, pp. 75, 101; v. 15, p. 63). Schwartz then drove up to Madril who lay on the ground. Madril said he had been stabbed (v. 12, p. 106). Schwartz pulled him into the truck, sped off towards a hospital, and called 911. He was instructed to pull over and wait for an ambulance, which he did (v. 12, pp. 106-110). Madril died from a stab wound to the chest (v. 13, p. 59).

In the meantime, the defendant, who had chased the truck down the road as it sped off, got back in the Jeep (v. 11, p. 30). He had cuts to his face. Joel was upset about the defendant's injuries, and started driving around looking for the

pickup truck (v. 11, pp. 30-32; v. 15, pp. 65-66). Joel recalled that the defendant then said, "Don't worry about it. I slashed their tire and I stabbed one of them" (v. 11, p. 36). Melick recalled that the defendant then said, "Don't worry, I stabbed him," and that the defendant turned to the occupants of the backseat (i.e., Orgill, Melick, and Lee) and said, "You guys don't know nothing about this, okay." Melick said that they all responded, "We don't know shit" (v. 10, pp. 101, 126-127). Orgill recalled hearing someone say something about stabbing a tire, and Lee said he did not hear anyone refer to a stabbing at all (v. 14, p. 34).

Joel drove Melick home and dropped off the other men at Benny's Bar (v. 10, p. 103; v. 14, pp. 33-35). The defendant and Lee then went to Orgill's house (v. 14, pp. 33-35; v. 15, pp. 66-67). Both the defendant and Orgill "had a good amount of blood on them," and Orgill thought that someone's "nose had exploded on him" (v. 14, pp. 36, 40).

Lee recalled that the defendant said that "[h]e wasn't really certain what had happened" and "he wasn't sure if he had stabbed someone or not" (v. 14, pp. 36-37). Orgill recalled that the defendant said, "I think I might have stabbed somebody" or "I hope I didn't stab somebody" (v. 15, p. 68). Someone suggested that the defendant check his knife for blood (v. 15, p. 68). The defendant pulled a knife out of his pocket and wiped it with a damp tissue, which left a "flaky residue,

black-type residue on the tissue" (v. 15, pp. 69-70). Orgill and the defendant decided to burn some of their clothes in a backyard grill; the defendant burned his t-shirt and over shirt and Orgill burned his pants and shirt (v. 14, pp. 40-41; v. 15, p. 70-75).

Lee left a few hours later. The next day, he heard a news report regarding a fatal stabbing near the Appaloosa. He talked to his father, who called the police (v. 14, p. 46). Later that day, the police contacted the defendant. He had a knife in his pocket, and Madril's DNA was on the knife (v. 14, pp. 132-134; v. 18, pp. 47-48, 145-154).

The defendant did not testify at trial. The defense argued that Madril either fell on his own knife (which was recovered unopened on the passenger's seat of Schwartz's truck, v. 14, p. 198) or was stabbed by Orgill (v. 20, 3/15/06 at 37-78). The jury found the defendant guilty of second degree murder with a deadly weapon. On May 24, 2006, he was sentenced to 31 years in the Department of Corrections (v. 2, p. 476; v. 5, 5/42/06 at 132). These proceedings followed.

SUMMARY OF THE ARGUMENT

The trial court properly denied the defendant's motion to dismiss based on

destruction of evidence. The defendant failed to show that law enforcement was responsible for the destruction of the evidence or that the evidence had apparent exculpatory value before its destruction, and the defendant was able to obtain comparable evidence by reasonably available means.

The trial court properly rejected the tendered theory of defense instructions. The rejected instructions contained statements that were not supported by the evidence or were argumentative. The revised instruction given by the court incorporated the substance of the defendant's theory of the case, and defense counsel's closing argument fairly represented the defendant's theory of the case to the jury.

The prosecutor's comments closing argument were not plain error, and there was no prosecutorial misconduct. The prosecutor did not denigrate defense counsel or improperly vouch for the credibility of the prosecution witnesses. The prosecutor's failure to turn over certain police reports and a tape to the defense until the second day of trial did not constitute misconduct. The prosecutor turned over these items as soon as she received them, and the trial court cured any prejudice to the defense by granting its request to preclude the police officer from testifying.

The record reflects that the trial court based its sentencing decision on appropriate considerations, and thus the trial court did not abuse its discretion in imposing a 31-year sentence.

To the extent that any errors occurred in this case, they did not substantially prejudice the defendant's right to a fair trial, and thus there was no cumulative error.

ARGUMENT

I. The trial court properly denied the defendant's motion to dismiss based on destruction of evidence.

The defendant contends the trial court erred in denying his motion to dismiss or suppress due to the destruction of evidence (v. 1, pp. 162-163). More specifically, he argues that because a black substance, which police observed and photographed on his knife when it was initially examined, was not present when CBI examined and tested the knife, his right to due process was violated (Def.'s Brief at 18).

A. Standard of Review

The People agree with the defendant that review of the trial court's denial of a defendant's motion to dismiss is a mixed question of fact and law. Deference is given to the trial court's findings of fact if supported by competent evidence in the

record, but the court's conclusions of law are reviewed de novo. People v. Ray, 109 P.3d 996, 998-99 (Colo. App. 2004).

B. Analysis

"[W]hen evidence can be collected and preserved in the performance of routine procedures by state agents, the failure to do so is tantamount to the suppression of evidence." People v. Braunthal, 31 P.3d 167, 172 (Colo. 2001) (quoting People v. Greathouse, 742 P.2d 334, 337 (Colo. 1987)). But the prosecution's duty to prevent the loss or destruction of evidence that may be favorable to the defendant is not absolute. Braunthal, supra.

To establish a due process violation for failure to preserve exculpatory evidence, the defendant must show that: (1) the evidence was destroyed by state action; (2) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (3) the defendant was unable to obtain comparable evidence by other reasonably available means. Braunthal, 31 P.3d at 173; see also People v. Enriquez, 763 P.2d 1033, 1036 (Colo. 1988); Greathouse, 742 P.2d at 337. The defendant must establish all three parts of the test to prove a due process violation. See Braunthal, supra. To determine whether a due process violation has occurred, the trial court must evaluate all the evidence. See Enriquez, supra.

Here, the trial court heard testimony from the law enforcement agents who came into contact with the knife, which police recovered from the defendant's pocket (v. 5, 2/27/06 at 12). The knife, which had a black blade, was first examined by a detective, who wore rubber gloves (Id. at 13-14). The detective noticed "some kind of substance sort of shellacked onto the blade," which appeared to "[b]e from a liquid state" on both sides of the blade (Id. at 14-15). In his report, which the defense had received before the hearing, the detective described the knife as having "various forms of debris and material" (Id. at 15-16). The detective then examined the knife a second time, along with another detective. They looked at the knife, discussed the substance, and decided not to test it but to "send it in as is" to CBI for testing (Id. at 17-18). Photographs of the knife were taken before it was sent to CBI, and a shiny substance near the hilt of the knife is visible in these photographs (Exh. KK).

When the knife arrived at CBI, a serologist examined it for the presence of blood. She did not find anything on the knife that she "would describe as some type of material being shellacked onto the knife" (v. 5, 2/27/06 at 39). She did, however, find smeared blood on the blade (Id. at 41-42). A tool mark analyst then examined the knife. There was no rubber on the knife or any substance he would describe as "debris" or "material" (Id. at 52-53).

Defense counsel argued that law enforcement's failure to preserve the black substance for testing warranted dismissal of the case or suppression of the knife because the black substance might have been rubber from Schwartz's tire truck, which would support the defense theory that the defendant's comment regarding the stabbing was a reference to stabbing the tire. The trial court noted that there was comparable evidence available because the defense could present testimony from the defendant or other witnesses that the defendant stabbed the tire (v. 5, 2/27/06 at 72).

After the prosecutor noted that there was no dispute that the defendant had punctured the tire, defense counsel argued that it was important for the defense to show whether there was blood on top of or underneath the black substance to establish the sequence of events, since "[t]he district attorney could argue that the stabbing occurred after the stabbing of the tire" (v. 5, 2/27/06 at 73). The prosecutor said he did not intend to argue that Madril was stabbed after the tire was stabbed because "it's pretty uncontested that the stabbing of the tire was the last thing that happened because the stabbing of the tire happened, the victim got in the truck and the truck drove away" (Id. at 76-77).

The trial court referred to the Greathouse-Braunthal test, noted that the detectives followed regular procedures in handling the evidence and that it was

unclear when or how the evidence was lost, found that the defendant failed to show that the evidence had apparent exculpatory value before it was destroyed, and denied the defendant's motion (v. 5, 2/27/06 at 83-84).

The trial court properly denied the motion, since the defendant did not establish any of the three prongs of the Greathouse-Braunthal test. See People v. Quintana, 882 P.2d 1366, 1371 (Colo. 1994) (on appeal a party may defend the judgment of the trial court on any ground supported by the record, whether or not that ground was relied upon by the trial court).

The defendant failed to show that law enforcement was responsible for the destruction of the evidence. It is true that the substance disappeared from the knife while in the custody of law enforcement. But there is nothing to show that law enforcement was responsible for destroying it. The substance was still present when the detectives placed the knife in the envelope to be transported to CBI, and the substance may have simply oxidized or been chemically altered to a non-detectable form by exposure to air in the envelope.

But even if law enforcement had been responsible for the destruction of this evidence by failing to take greater steps to preserve it, there was no due process violation. "When dealing with evidentiary material of which no more can be said than it could have been subjected to tests, a failure to preserve the evidence does

not constitute a due process violation unless an accused can show bad faith on the part of the police." People v. Apodaca, 998 P.2d 25, 30 (Colo. 1999) (citing People v. Wyman, 788 P.2d 1278 (Colo. 1990)). Here, there was no suggestion that law enforcement acted in bad faith. Indeed, as the trial court noted, the detectives followed regular procedures in handling the knife; they wore rubber gloves and sealed it in an envelope before sending it to CBI for testing.

The defendant also failed to show that the evidence had apparent exculpatory value before it was destroyed. The detectives had no idea what the substance was, and thus had no reason to know whether it possessed inculpatory or exculpatory value. The defendant's speculation regarding what the substance was and what the detectives should have known about it and its potential as exculpatory evidence was insufficient to establish a due process violation. See Apodaca, supra, see also People v. Simpson, 93 P.3d 551, 557 (Colo. App. 2003) (because the defendant failed to show bad faith in failing to preserve evidence or that the evidence had apparent exculpatory value was destroyed, the trial court did not err in denying defendant's motion to dismiss). Indeed, since it was undisputed that the defendant used the knife to stab the tire after Madril's stabbing, it is difficult to discern what value evidence of tire rubber on the knife would have had.

In addition, the defendant failed to show that he was unable to obtain comparable evidence by other reasonably available means. The jury was able to see photographs of the black substance, and the defense was able to cross-examine the detectives and the CBI agents about the substance. See People v. Jordan, 103 Ill. 2d 192, 469 N.E.2d 569 (1984) (photographs of deceased victim's jaw were comparable evidence to the jaw itself, despite the importance of the exact color of the victim's teeth, where defendant could cross-examine the prosecution's experts on the subject). Further, no one disputed that the defendant was the person who stabbed the tire or that the substance on the knife could have come from the tire.

The record shows that law enforcement did not destroy the evidence, that the black substance did not have any apparent exculpatory value before it disappeared, and that the defense had other means to obtain comparable evidence. Therefore, the trial court properly denied the motion to dismiss or suppress.

II. The trial court properly rejected the tendered theory of defense instructions, and assisted defense counsel in crafting an appropriate theory of defense instruction.

After rejecting three tendered theory of defense instructions, the trial court gave the following theory of defense instruction:

> Mr. Newmiller's defense is that he did not stab Mr. Madril. Mr. Newmiller asserts that he was not in a confrontation with Anthony Madril on Conrad Street.

> Mr. Newmiller's defense is that he does not know how Anthony Madril got stabbed. Mr. Newmiller believes that either Brad Orgill stabbed Mr. Madril with a knife, or that Mr. Madril was injured with his own knife during the fight he had with Brad Orgill.

(v. 2, p. 302).

The defendant now contends the theory of defense instruction given by the trial court was inadequate and the court erred in rejecting his tendered instructions. He preserved this issue by tendering three versions of a theory of defense instruction (which are attached to this brief) and by complaining that the revised instruction given by the trial court was insufficient (v. 2, pp. 281-283).

A. Standard of Review

An instruction embodying the defendant's theory of the case must be given if there is any credible evidence to support it and it is not encompassed in other instructions. See People v. Saavedra-Rodriguez, 971 P.2d 223 (Colo. 1998); People v. Preciado-Flores, 66 P.3d 155, 163 (Colo. App. 2002).

The People agree that a trial court's failure to give a theory of defense instruction *may* constitute reversible error. See People v. Nunez, 841 P.2d 261, 264 (Colo. 1992). However, a trial court may properly refuse to give an instruction that is encompassed in other instructions, is argumentative, unduly emphasizes particular evidence, or contains statements not supported by the evidence. People

v. Merklin, 80 P.3d 921, 927 (Colo. App. 2003); People v. Inman, 950 P.2d 640, 645 (Colo. App. 1997).

B. Analysis

The defendant asserts that the theory of defense instruction given by the trial court was inadequate because it did not cover three concepts that were necessary to his defense: (1) that when the defendant said, "I stabbed one of them," he was referring to stabbing a tire, and he made that statement simply to calm down his brother; (2) that there was no blood visible on the defendant's knife when it was examined at Orgill's house; and (3) that the defendant believed that the blood on his knife was transferred from Orgill. He argues that the trial court should have included these three concepts because there was some evidence to support them.

The trial court properly excised these statements from the theory of defense instruction. It would have been inappropriate for the theory of defense instruction to include the defendant's assertion that when he said, "I stabbed one of them," he was referring to stabbing a tire and that he made the statement to calm down his brother. The defendant did not testify, and thus there was no evidence regarding what he meant by the statement or why he made it. Further, even if there had been such evidence, it would have been inappropriate to emphasize it in the instruction. See Merklin, 80 P.3d at 927 (theory of defense instructions should not contain

statements not supported by the evidence and may not be used to call attention to specific points of evidence).

Likewise, it would have been inappropriate for the instruction to state that blood was not visible on his knife when it was examined at Orgill's house and that the defendant believed any blood on the knife was transferred from Orgill. The first statement called attention to a specific portion of testimony, and the second statement was unsupported by any evidence and was nothing more than argument. See Inman, 950 P.2d at 645.

The revised instruction incorporated the substance of the defendant's theory of the case, and defense counsel's closing argument fairly represented the defendant's theory of the case to the jury (v. 20, 3/15/06 at 37-78). As such, the jury was adequately informed as to the defendant's theory of the case. See Inman, supra.

III. The prosecutor's comments during closing argument were not plain error, and there was no prosecutorial misconduct.

The defendant contends that comments made by the prosecutor during closing argument and the prosecutor's failure to turn over reports and a tape until the second day of trial constitute misconduct.

A. Standard of Review

The People agree with the defendant that he failed to preserve an objection to the conduct he now claims is reversible prosecutorial misconduct. His claims, therefore, can only be reviewed for plain error. Harris v. People, 888 P.2d 259, 267 (Colo. 1995).

Error is not plain unless it 1) is obvious, 2) is substantial, and 3) "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." People v. Miller, 113 P.3d 743, 750 (Colo. 2005). A prosecutor's misconduct must be flagrant or "glaringly or tremendously" improper to be plain error, People v. Constant, 645 P.2d 843, 847 (Colo. 1982), and "[p]rosecutorial misconduct in closing argument rarely, if ever, is so egregious." People v. Wallace, 97 P.3d 262, 269 (Colo. App. 2004).

B. Applicable Law

A prosecutor is entitled to wide latitude during closing argument. People v. Walters, 148 P.3d 331, 334 (Colo. App. 2006). A prosecutor's closing argument must be evaluated in the context of the argument as a whole and in light of the evidence before the jury. People v. Gutierrez, 622 P.2d 547 (Colo. 1981); People v. Marquantte, 923 P.2d 180, 185 (Colo. App. 1995). It should be based on facts in the record and reasonable inferences drawn from those facts. People v. Moody,

676 P.2d 691, 697 (Colo. 1984). Rhetorical devices and oratorical embellishment are appropriate, so long as the prosecutor does not induce the jury to determine guilt on some basis other than the facts in evidence and the reasonable inferences therefrom. Harris, 888 P.2d at 266. In addition, "[i]n considering whether prosecutorial remarks are improper, the reviewing court must weigh the effect of those remarks on the trial, and also take into account defense counsel's 'opening salvo.'" Wallace, 97 P.3d at 269.

C. Analysis

Here, the defendant contends that the prosecutor committed misconduct at the outset of his rebuttal closing argument by stating, "Ladies and gentlemen, you're not here to guess. You're not here to imagine. And what you have just heard was guessing, imagination and speculation. That's all it was. That's all it was. And on top of that, it was a misrepresentation of the facts" (v. 20, 3/15/06 at 79).

As soon as the prosecutor made that comment, the trial court called the parties to bench and warned the prosecutor not to say that the defense closing argument "was a lie." The prosecutor responded that "several of the facts were misrepresented" (v. 20, 3/15/06 at 79). The prosecutor then continued with his

rebuttal closing argument, detailing how the defense argument was not in line with the evidence presented at trial (v. 20, 3/15/06 at 79-91).

The defendant asserts that it is always improper for a prosecutor to accuse defense counsel of misrepresenting the facts. That is not so. Although arguments made for the obvious purpose of denigrating defense counsel are improper, People v. Roadcap, 78 P.3d 1108, 1114 (Colo. App. 2003), being critical of the defense approach is not the same as denigrating defense counsel. See People v. Foster, 971 P.2d 1082, 1086 (Colo. App. 1998) (no denigration where statements suggested that defense lacked credibility). It is fair for a prosecutor to comment on a defendant's theory, strategy, arguments, and characterization of the facts. People v. Dunlap, 124 P.3d 780, 809 (Colo. App. 2004); see Roadcap, 78 P.3d at 1114 (prosecutor referred to stepping into the defendant's "fantasy world"); People v. Kenny, 30 P.3d 734, 741 (Colo. App. 2000) (acceptable to characterize counsel's closing argument as a "smoke screen").

Further, even if the prosecutor's comment were improper, it was one brief remark and the defendant's failure to object or to ask for any curative measures during the bench conference belies his claim of prejudice. See Domingo-Gomez v. People, 125 P.3d 1043, 1054-55 (Colo. 2005) (lack of an objection by defense counsel is an appropriate consideration in determining whether a prosecutor's

remarks constitute plain error); see also People v. Valencia-Alvarez, 101 P.3d 1112, 1117 (Colo. App. 2004) (because the defendant did not request curative instruction, trial court did not commit plain error in failing to give one sua sponte after improper remark by prosecutor).

Next, the defendant contends the two of the prosecutor's comments constituted improper vouching for the credibility of prosecution witnesses.

The prosecutor made the first challenged comment during his initial closing argument:

> If they were saying what detectives told them to say, well, then, they probably would have said, yeah, I saw – I saw the defendant stab him. They would have at least said, having read the discovery and knowing this was important to the case, yeah, Joel's right. I heard him say I stabbed one of them. How do you believe those two? *Because they're not exaggerating. They're not making stuff up after the fact.* They're telling you exactly what they heard and exactly what they remember.
>
> Do we wish they had remembered that? Of course. Do we wish that they hadn't been intoxicated and excited and yelling back and forth and heard what Jason Melick and Joel Newmiller did here? Of course, but they didn't. *And they're not about to come in here and lie to you and say that they did when they didn't.*

(v. 20, 3/15/06 at 26-27) (emphasis in the defendant's brief at page 36).

The second challenged remark was made in rebuttal closing.

> You also heard from the defense that there were some magic words in this case. You say these magic words, you say that the defendant got in that car and he said, "I stabbed the guy, you don't know nothing about this," as a witness in this case if you said those magic words, you got a deal. You know that's not true. Brad Orgill has never said that he heard that. He came in here and he told you, "I didn't hear it. I missed it." You heard from Michael Lee he never heard that, but they both got charged commensurate with what they did, accessory to a crime for burning the clothes and they both got plea bargains based on that [sic] they said, not on what detectives told them to say.
>
> Ladies and gentlemen, if you think Brad Orgill did this, he sure could have done a better job than framing one of his best friends. He sure could have done a heck of a lot better job, but he didn't. You know why? *Because he came in here and told the truth.*

(v. 20, 3/15/06 at 90) (emphasis in the defendant's brief at page 37).

The defendant asserts that the prosecutor's two comments amounted to "egregious vouching for the witnesses' credibility" and were improper "expressions of personal opinion" (Def.'s Brief at 36-37).

Expressions of personal opinion, personal knowledge, or inflammatory comments are improper. Thus, "a prosecutor cannot communicate her opinion on the truth or falsity of witness testimony during final argument." Domingo-Gomez, 125 P.3d at 1049. It is not, however, improper for a prosecutor to draw reasonable inferences as to the credibility of witnesses. Wilson v. People, 743 P.2d 415, 418

(Colo. 1987). Counsel may properly comment on how well and in what manner a witness measures up to the tests of credibility. People v. Constant, 645 P.2d 843, 846 (Colo. 1982). "In cases that turn on the credibility of witness testimony, the line between argument about whether the jury can rely on the testimony of witnesses and improper expressions of personal opinion becomes hard to draw." Domingo-Gomez, 125 P.3d at 1051.

The two challenged comments did not constitute plain error. The prosecutor did not say that he believed Orgill's and Lee's testimony, he merely commented on the circumstances that tended to show that their testimony was truthful, which was entirely proper. See People v. Rivas, 77 P.3d 882 (Colo. App. 2003) (no misconduct where prosecutor stated, "Oliver was honest with you, he didn't remember a whole lot," and "the witnesses' stories had 'slight discrepancies,' but were consistent, that speaks of honesty"); see also Domingo-Gomez, supra (it is proper to comment upon the circumstances showing that a witness is being untruthful, but improper to say that a witness "lied" or is a "liar" in closing argument).

Further, the prosecutor's comments were responsive to defense counsel's opening statement and closing argument concerning the credibility of the

witnesses. See People v. Krutsinger, 121 P.3d 318, 324 (Colo. App. 2005) ("The prosecution is afforded considerable latitude in replying to opposing counsel's arguments. ... Furthermore, where the case turns on which witness the jury believes, each side is entitled to argue that its witnesses testified truthfully while the witnesses for the opposing side testified falsely"). During opening statement, defense counsel asserted that the "stories" of the prosecution witnesses "were exaggerated" and that the witnesses had retained lawyers who "cut deals for them" and "got them a promise that they wouldn't be charged if they made the statement about the knife in the car, about the stabbing in the car" (v. 10, pp. 69-70). During closing argument, defense counsel asserted that Orgill had a "selective" and "[v]ery slick" memory, and suggested he was not being forthcoming because he was the one who stabbed Madril (v. 20, 3/15/06 at 75-76).

Finally, the defendant contends that the prosecutor committed misconduct, resulting in reversible error, by stating, "Ladies and gentlemen, I'm asking you to find this man, Todd Newmiller, guilty of second-degree murder. Anthony Madril, *our victim. The sins in the dark by a dark man carrying a dark knife need to go and have some punishment for them*" (v. 20, 3/15/06 at 91) (emphasis in defendant's brief at page 37).

This statement was merely oratorical embellishment and it was not "glaringly or tremendously" improper. See Harris, supra; Constant, supra. Moreover, the trial court instructed the jury to disregard it, which cured any prejudice. See e.g., Domingo-Gomez, 125 P.3d at 1053-54 (a reviewing court must presume the jury followed the court's instruction to disregard improper statement in closing argument).

Accordingly, the prosecutor's closing argument comments do not warrant reversal.

The defendant also contends the prosecutor violated Crim. P. 16 and committed misconduct by failing to provide certain police reports and a 911 tape to the defense until the second day of trial.

On the second day of trial, the prosecutor said that she had just received reports from two Colorado Springs police officers, Officer Shive and Officer Lucky, and a 911 tape containing two calls, which she was turning over to the defense (v. 11, p. 67). The trial court asked defense counsel if she had any objections to the reports or the tape, and defense counsel replied, "I need to be able to review them and listen to the tape. I don't know if the district attorney is calling Officer Shive or Officer Lucky. I would object to them being called today so I

have an opportunity to review the discovery" (v. 11, pp. 67-68). After that, the following exchange took place:

The trial court:	We you intending to call them today?
The prosecutor:	We were intending to call Officer Shive, yes.
The trial court:	All right. And why don't we have the reports before now?
The prosecutor:	I don't know, Your Honor.
The trial court:	Then he's not going to testify.
The prosecutor:	Okay.
The trial court:	To give discovery the day of trial or the day he's going to testify is not appropriate.
The prosecutor:	I understand, Your Honor.
The trial court:	So Officer Shive would not be allowed to testify. Is that your request?
Defense counsel:	Yes.

(v. 11, p. 68).

On appeal, the defendant claims that the prosecutor's actions constituted misconduct, denying him his right to a fair trial and requiring reversal. More specifically, he argues that the failure to receive the information sooner "deprived the defense of the ability to make full use of those statements in developing its trial strategy" (Def.'s Brief at 40).

However, there is nothing in the record that would even suggest that the prosecution willfully failed to turn over the reports; rather, the record reflects that the prosecutor turned over the reports as soon as she received them. See People v. Lee, 18 P.3d 192 (Colo. 2001) (recognizing that trial courts have discretion regarding the imposition of discovery violations, and the nature of the sanction imposed may depend on whether the prosecutor's violation was willful). Moreover, the trial court granted the sanction the defense sought, exclusion of Officer Shive's testimony, and the defendant's failure to seek a continuance belies his claim of prejudice. Chambers v. People, 682 P.2d 1173 (Colo. 1984) (any claim of prejudice on appeal is convincingly belied by defendant's failure to seek a continuance); People v. Sepeda, 581 P.2d 734, 729 (1978) (even where prejudice results from late endorsement of a witness, it "is not reversible error unless the defendant makes a timely request for a continuance which is denied by the trial court").

IV. The defendant's sentence is based on appropriate considerations as reflected in the record.

The defendant contends he is entitled to be resentenced because "[t]he trial court based the length of sentence on an improper consideration" (Def.'s Brief at 40).

A. Standard of Review

The People agree with the defendant that a trial court's sentencing decision is reviewed for abuse of discretion. See e.g., People v. Watkins, 684 P.2d 234 (Colo. 1984) (a trial court's discretionary sentencing choice will be reversed only when the choice is an abuse of that discretion). In order to constitute an abuse of discretion, a court's actions must be "manifestly arbitrary, unreasonable, or unfair." People v. Milton, 732 P.2d 1199, 1207 (Colo. 1987).

B. Analysis

Sentences must be based on a balance of several, sometimes competing, sentencing goals, including rehabilitation of the offender, deterrence, and protection of the community. See § 18-1-102.5, C.R.S. (2006); People v. Horne, 657 P.2d 946 (Colo. 1983). But it is not necessary for the sentencing court to engage in a point-by-point discussion of every factor relevant to its decision; rather, a reasonable explanation for the sentence will suffice, provided the record demonstrates that the court evaluated the essential factors and considered the evidence supporting the sentence. People v. McAfee, 104 P.3d 226 (Colo. App. 2004).

Here, the trial court said it had considered each factor in the sentencing code, had read "the many letters" from the defendant's family and friends and "the many

letters from the Madril family and friends," and had considered the numerous statements at the sentencing hearing, including the defendant's statement (v. 5, 5/24/06 at 128-129). The court also noted that the applicable sentencing range was 16 to 48 years (v. 5, 5/24/06 at 128).

The court took into account the defendant's "positive" and "negative" "attributes," and determined that the minimum sentence of 16 years was not appropriate because it "would unduly depreciate the seriousness of your crime and undermine respect for the law" (v. 5, 5/24/06 at 129-130).

The court observed that the defendant had "killed a person in the prime of their life" and that the offense was "violent" and "serious." The court then noted that the victim's death was caused by a stab to the heart, rather than something such as falling and hitting his head during a bar fight (v. 5, 5/24/06 at 130).

The court then commented on the defendant's potential for rehabilitation. The court noted that while the defendant lacked a violent past, he had two DUI convictions and he made "some very stupid mistakes" when drinking. The court said it had considered the defendant's "excellent" behavior, both in court and while in custody, as well as his "stable" work and school history. The court said that while the defendant "probably wouldn't commit another crime" if sober, "who knows" what would happen if he was drinking. The court was "impressed" that

the defendant, while maintaining his innocence, "took some responsibility" regarding what the victim's family was "going through" (v. 5, 5/24/06 at 130-131).

After that, the court pronounced the sentence:

> Taking all of that, I'm going to sentence you to 31 years in the Department of Corrections. *And the fact that I don't give you the minimum is because you took somebody's life, and that life can never be brought back again.*
>
> The fact that I didn't give him 48 years doesn't mean and shouldn't be taken by the Madril family that Anthony's life was not worth anything, that I didn't consider your feelings or that I didn't consider what Anthony Madril could contribute to society, but, fortunately, the law gives me some guidance. The law gives me some factors to look at and, quite frankly, my sentence is pretty close to right in the middle.

(v. 5, 5/24/06 at 132) (emphasis added).

On appeal, the defendant argues that the trial court erred in imposing a 31-year sentence based on the fact that the defendant "took somebody's life" because "in all second degree murder convictions someone's life is taken" (Def.'s Brief at 43). However, not all class two felonies carrying a 16 to 48 year sentencing range involve the death of another person, and it was entirely appropriate for the trial court to consider the nature of the offense and the harm caused in reaching its sentencing decision. See e.g., People v. Myers, 45 P.3d 756 (Colo. App. 2001).

"If the sentence is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case, an appellate court must uphold the sentence." People v. Howell, 64 P.3d 894, 898 (Colo. App. 2002) (citing People v. Fuller, 791 P.2d 702 (Colo. 1990)). A reviewing court will only overturn the trial court's judgment in sentencing matters in exceptional cases. Id.

This case is not one of those rare exceptions. The record shows that the trial court considered all the appropriate factors and did not give undue weight to any particular factor. As such, the defendant's 31-year sentence must be affirmed.

V. There was no cumulative error.

Lastly, the defendant contends that his claims, if not individually, then cumulatively, require reversal of his convictions.

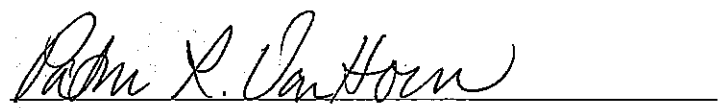
The doctrine of cumulative error requires that numerous errors be committed, not merely alleged. People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986). Even though an appellate court may conclude that individual errors do not require reversal, numerous irregularities may in the aggregate show the absence of a fair trial. If there is no error that substantially prejudiced the defendant's right to a fair trial, there is no error to compound. People v. Roy, 723 P.2d 1345 (Colo. 1986).

To the extent any errors occurred in this case, they did not substantially prejudice the defendant's right to a fair trial. As such, his convictions must stand.

CONCLUSION

Based on the foregoing arguments and authorities, the People respectfully request that this Court affirm the defendant's conviction and sentence.

JOHN W. SUTHERS
Attorney General



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AG File: Q:\AP\APVANHPR\BRIEFS\NEWMILLERTODD.DOC

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 27th day of 2007 September addressed as follows:

Blain D. Myhre, Esq.
Isaacson Rosenbaum P.C.
633 17th Street, Suite 2200
Denver, Colorado 80202

Tiffiny Menger

Mr. Newmiller states that he did not stab Mr. Madril. When Mr. Newmiller exited the Jeep, he walked directly toward Chisum Lopez. Mr. Newmiller was in a confrontation with Chisum Lopez at the passenger door of the Dodge pick up truck. When Chisum Lopez got back into the pick up truck, Mr. Newmiller stepped toward the back of the pick up truck, pulled out his knife and stabbed the right rear tire of the truck. At no time did Mr. Newmiller get into any confrontation with Anthony Madril. The only person that Mr. Newmiller confronted on Conrad Street was Chisum Lopez.

Mr. Newmiller believes that he got a small amount of Mr. Madril's blood on his knife, by being near Brad Orgill who was covered in Mr. Madril's blood. Mr. Newmiller believes that Mr. Madril's blood was transferred to him by touching Brad Orgill or touching things that Brad Orgill had previously touched. Mr. Newmiller believes that the blood was then transferred to the knife when he opened and closed the knife at Brad Orgill's house.

Mr. Newmiller has never stated that he stabbed a person. Mr. Newmiller stated in the Jeep that "I stabbed a tire. I stabbed one of them." Mr. Newmiller was referring to a tire. Mr. Newmiller made this statement in an effort to calm his brother Joel, who was driving fast and erratically going after the pick up truck. Mr. Newmiller made the statement to his brother to keep them from any further conflict.

A conversation occurred at Brad Orgill's house between Brad Orgill, Michael Lee and Mr. Newmiller. The conversation was trying to figure out where all of the blood on Mr. Orgill came from. Mr. Newmiller told Michael Lee and Brad Orgill that he had pulled his knife out while on Conrad Street to stab the tire. Either Michael Lee or Brad Orgill suggested that Mr. Newmiller examine his knife to see if it had any blood on it. The three men looked at the knife and there was no blood on it. Brad Orgill suggested that he and Mr. Newmiller burn their clothes because they had been in fights. Mr. Newmiller agreed to do so.

Mr. Newmiller does not know how Anthony Madril got stabbed. Mr. Newmiller believes that either Brad Orgill stabbed Mr. Madril with a knife, or that Mr. Madril was injured by his own knife during the fight he had with Brad Orgill.

Mr. Newmiller states that the prosecution has not proven that he is guilty beyond a reasonable doubt.

Δ's TENDERED #1 & REFUSED

Def Marking
People v Newmiller
04CR5770

Mr. Newmiller states that he did not stab Mr. Madril. Mr. Newmiller was in a confrontation with Chisum Lopez on the passenger side of the pick up truck and did not have any confrontation with any other person on Conrad Street.

Mr. Newmiller believes that he got a small amount of Mr. Madril's blood on his knife, by being near Brad Orgill who was covered in Mr. Madril's blood. Mr. Newmiller believes that Mr. Madril's blood was transferred to him by touching Brad Orgill or touching things that Brad Orgill had previously touched. Mr. Newmiller believes that the blood was then transferred to the knife when he opened and closed the knife at Brad Orgill's house.

Mr. Newmiller stated in the Jeep that "I stabbed a tire. I stabbed one of them." Mr. Newmiller was referring to a tire. Mr. Newmiller made this statement in an effort to calm his brother Joel, who was driving fast and erratically going after the pick up truck. Mr. Newmiller made the statement to his brother to keep them from any further conflict.

Mr. Newmiller examined his knife at Brad Orgill's home at the suggestion of Michael Lee and Brad Orgill. The three men looked at the knife and there was no blood on it. Brad Orgill suggested that he and Mr. Newmiller burn their clothes because they had been in fights. Mr. Newmiller agreed to do so.

Mr. Newmiller does not know how Anthony Madril got stabbed. Mr. Newmiller believes that either Brad Orgill stabbed Mr. Madril with a knife, or that Mr. Madril was injured by his own knife during the fight he had with Brad Orgill.

Mr. Newmiller states that the prosecution has not proven that he is guilty beyond a reasonable doubt.

DG TENDERED #2 & Refused

Pv. Newmiller
04CR 5770

Mr. Newmiller asserts that he did not stab Mr. Madrid. He has pled not guilty. Mr. Newmiller asserts that he was not in a confrontation with Anthony Madrid on Conrad Street.

Mr. Newmiller asserts that he does not know how Anthony Madrid got stabbed Mr. Newmiller asserts that either Brad Orgill stabbed Mr. Madrid with a knife, or that Mr. Madrid was injured with his own knife during the fight he had with Brad Orgill.

Mr. Newmiller asserts that the prosecution has not proven that he is guilty beyond a reasonable doubt.

D's Tendered #3 & refused
Ken Mackey
PV. Newmiller
04DR-5770