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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Teller County District Court
Honorable Scott A. Sells, Judge
Case No. 18CR330

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

PATRICK FRAZEE,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 20CA35

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PEOPLE'S ANSWER BRIEF

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I certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

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/s/ Brittany L. Limes

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STATEMENT OF THE CASE

Patrick Frazee was convicted of first-degree murder after he beat his fiancé to death with a bat on Thanksgiving Day, burned her body, and had his secret girlfriend clean up the bloody crime scene.

Frazee and the victim, Kelsey Berreth, met in 2015, and Berreth moved to Colorado to be closer to Frazee. (TR 11-01-19, pp 212:23-216:6.) Frazee lived on his mother's ranch in Florissant, and Berreth eventually got a condo in Woodland Park. (TR 11-01-19, pp 230:18-233:22, 234:5-16; TR 11-05-19, pp 120:15-122:24.) In October 2017, Frazee and Berreth had a daughter, K.F. (TR 11-01-19, pp 229:19-23.)

Frazee told people in his life—falsely—that Berreth was an alcoholic and a bad mother. (TR 11-08-19, pp 280:1-24; TR 11-12-19, pp 326:15-328:9, 333:2-335:11; *see also* TR 11-01-19, pp 232:17-23.)

Unbeknowst to everyone, Frazee also had an on-again-off-again affair with a woman named Krystal Lee dating back to 2006. (TR 11-06-19, pp 98:22-142:25.) Lee lived in Idaho with her husband and children, but starting in 2015 she frequently visited Frazee in Colorado. (TR 11-06-19, pp 99:7-15, 114:22-116:4, 117:20-122:25, 149:4-14.)

In September 2018, Frazee falsely told Lee that Berreth was abusing K.F. (TR 11-06-19, pp 143:6-146:3; *see also* TR 11-12-19, pp 328:10-329:3.) Frazee asked Lee if she "would do anything to protect someone who's innocent that couldn't protect themselves." (TR 11-06-19, p 150:9-14.) He told her he had to do "something" because K.F. was in "imminent danger." (TR 11-06-19, p 152:14-22.)

Frazee solicited Lee to murder Berreth three separate times between September and October 2018. (TR 11-06-19, pp 150:9-14, 152:14-22, 176:12-177:21, 188:24-189:8.) He told her to put a lethal dose of medication in Berreth's favorite coffee drink, to beat her to death with a pipe he provided, and to beat her to death with a baseball bat. (TR 11-06-19, pp 152:1-153:25, 157:17-158:12, 176:12-180:23, 188:24-189:13.)

Each time, Lee pretended to do as Frazee asked because she was afraid of Frazee—who told her he had "people everywhere" watching Berreth—and made excuses for not following through with his requests. (TR 11-06-19, pp 161:2-163:24, 168:17-169:18, 183:9-184:9, 184:24-

185:2, 189:14-190:16.) Each time Lee did not follow through, Frazee was upset. (TR 11-06-19, pp 166:22-165:15, 184:17-23, 191:15-18.)

After the third time he solicited Lee in October 2018 and she told him "I can't do it, I'm not going to do it," Frazee told her "that he was going to hold my feet to the fire, that if something happened to [K.F.] it was on me." (TR 11-06-19, pp 191:15-18.)

Then on the morning of November 22nd, Thanksgiving Day, Berreth called her mother. (TR 11-01-19, pp 238:25-239:13.) Berreth asked about Thanksgiving recipes, and things seemed normal. (TR 11-01-19, pp 239:20-242:11, 250:19-252:9.) At around noon, surveillance footage showed Berreth in a Safeway in Woodland Park buying groceries. (TR 11-04-19, pp 91:14-95:15.)

Frazee wrote an alibi note detailing his alleged plans for the day, which were to pick up K.F. at Berreth's condo at 12:30pm, go to Walmart and the ATM at Ent Credit Unition, take care of cattle, and go to Thanksgiving dinner. (TR 11-05-19, pp 212:15-213:10, 216:22-218:9; EX, p 450.)

Surveillance footage from a nearby furniture store and Berreth's neighbor's security camera showed Frazee picking up K.F. from Berreth's house and leaving at 12:37pm. (TR 11-04-19, pp 389:17-390:14, TR 11-05-19, pp 172:13-173:23, 181:6-185:15.) Frazee went to an Ent ATM at 12:43pm and to Walmart at around 1:00pm and was seen on their surveillance cameras. (TR 11-04-19, pp 273:4-276:16, 282:7-286:3; TR 11-05-19, pp 113:15-116:2, 185:16-22.) At 1:19pm, the furniture store surveillance footage showed Frazee driving back to Berreth's condo, and the neighbor's surveillance camera showed Berreth, Frazee, and K.F. entering Berreth's condo again at 1:23pm. (TR 11-04-19, pp 391:5-392:2; TR 11-05-19, pp 190:3-191:19; EX, pp 336-37.) The surveillance footage also showed a large black plastic tote in the back of Frazee's truck. (TR 11-05-19, pp 186:1-188:1.)

When Frazee arrived back at Berreth's condo, he blindfolded her with a sweater using a ruse that he wanted her to guess the smell of scented candles. (TR 11-06-19, p 247:9-16.) He then bludgeoned her to death with a baseball bat. (TR 11-06-19, 247:16-20.) He put her body in the tote in the back of his truck, washed his clothes, then drove back

to Florissant for Thanksgiving dinner. (TR 11-05-19, pp 128:20-129:24; TR 11-06-19, pp 249:5-250:22.) He took Berreth's cell phone with him. (TR 11-06-19, pp 48:19-52:3, 252:9-15, 270:7-14.)

The neighbor's surveillance camera showed Frazee leaving Berreth's condo with K.F. at 4:24pm, and the furniture store surveillance showed him drive by at 4:34pm, with the tote facing the opposite direction in the truck bed. (TR 11-04-19, pp 392:10-395:3; TR 11-05-19, pp 191:20-194:2, EX, pp 338-39, 349.)

Frazee called Lee multiple times that evening. (TR 11-06-19, pp 199:14-200:4.) Lee's cell phone records showed she was in Idaho. (TR 11-06-19, pp 52:4-53:22.) Frazee told her she had a "mess" to clean up and needed to come down right away. (TR 11-06-19, pp 203:8-206:21.)

Lee arrived in Colorado on the morning of the 24th and went to Berreth's condo with cleaning supplies. (TR 11-06-19, pp 219:13-221:19.) When she walked in, she saw blood everywhere. (TR 11-06-19, p 221:20-222:21.) Blood was on the walls, stove, dishwasher, kitchen items, and children's toys, and there was a large pool of blood on the living room floor. (TR 11-06-19, pp 221:22-223:5.) Lee cleaned the

condo with bleach for several hours, filling six trash bags with bloody items. (TR 11-06-19, pp 224:7-242:19.) She found a tooth underneath a chest in the living room. (TR 11-06-19, p 232:19-23.) She left small specks of blood on the fireplace and chest out of hope that law enforcement would find them. (TR 11-06-19, pp 234:24-235:17.)

When Lee returned to Florissant, Frazee told her what happened and said the way he killed Berreth "wasn't humane." (TR 11-06-19, pp 246:9-18, 247:22-25.) He gave Lee Berreth's cell phone and told her to take it back to Berreth's condo. (TR 11-06-19, pp 252:7-12.) At Frazee's suggestion, Lee texted Berreth's mother from Berreth's phone when she arrived, telling her "I'll call you tomorrow." (TR 11-06-19, pp 252:12-253:4.)

Lee and Frazee then drove to a Florissant gas station and filled up a gas can. (TR 11-06-19, pp 253:8-254:25.) From there, they drove out to Nash Ranch, where Frazee had hidden the tote containing Berreth's body and the baseball bat in the hay loft of a barn. (TR 11-06-19, pp 255:4-258:3.) They took the tote back to Frazee's property, then Frazee put it and the trash bags from Berreth's condo in a large water trough

filled with wooden pallets, doused it with gasoline and motor oil, and set it on fire. (TR 11-06-19, pp 258:5-265:11; TR 11-07-19, pp 180:7-182:22.)

Afterwards, Lee drove back to Idaho, taking Berreth's cell phone with her at Frazee's suggestion to make it look like Berreth left Colorado. (TR 11-06-19, pp 265:23-275:5.) That night, Lee sent a text to Berreth's boss pretending to be Berreth and telling him she would not be at work the next week because she was visiting her grandmother. (TR 11-06-19, pp 267:11-268:6; EX, p 302.) Lee also sent a text from Berreth's phone to Frazee that said, "Do you even love me?" (TR 11-06-19, pp 267:11-268:25.) Lee then shut off Berreth's phone and burned it. (TR 11-06-19, pp 275:9-276:16.)

Meanwhile, the day after the fire, Frazee told one of the teenage boys who worked on the ranch that he had burned wooden pallets and antler sheds in the trough, then they took the horse trough to the dump and covered the charred area with dirt. (TR 11-07-19, pp 163:18-198:19.) Frazee also placed leftover debris from the fire in a metal trash can and took it to an unknown location. (TR 11-07-19, pp 188:2-190:10, 193:20-24.)

On December 2nd, Berreth's mother asked Frazee if he had seen Berreth because she had not heard from her since Thanksgiving. (TR 11-01-19, pp 255:13-256:15.) Frazee told her they broke up, that Berreth left and said she needed space, and that he did not know where she was. (TR 11-01-19, pp 256:18-260:12.)

Berreth's mother called the police and reported her missing. (TR 11-01-19, pp 260:16-261:13; TR 11-05-19, pp 82:14-83:2.) Law enforcement conducted an extensive search, and Frazee told investigators he and Berreth had broken up and that Berreth had left him and K.F. without telling him where she was going. (TR 11-04-19, pp 144:22-161:3, 171:1-177:19; TR 11-05-19, pp 85:6-116:24, 207:21-208:11, 227:8-254:11; 275:25-304:7.)

When law enforcement discovered the numerous phone calls between Lee and Frazee and the cell location data from Frazee's and Berreth's phones, which showed Berreth's phone was last located in Idaho, they confronted Lee about them. (TR 11-05-19, pp 92:9-93:7, 254:12-255:4, 282:12-18, 292:23-296:25; TR 11-06-19, pp 12:20-79:16;

285:15-288:11.) Lee initially pretended not to know who Berreth was, but ultimately confessed. (TR 11-05-19, pp 285:15-290:21.)

Lee took the officers to the spot on Frazee's ranch where they burned Berreth's body. (TR 11-06-19, pp 290:22-291:9; TR 11-07-19, pp 40:1-41:14, 46:11-48:18.) Lee also took them to Nash Ranch, and a trained police bloodhound alerted to the smell of human decomposition where the tote was stashed earlier. (TR 11-06-19, pp 255:7-258:5, 290:25-291:5; TR 11-08-19, pp 21:23-37:25.) Officers recovered melted black plastic and a broken tooth fragment at the burn site, and while they detected human DNA on the tooth fragment there was not enough DNA to form a profile. (TR 11-08-19, pp 206:19-207:20, 211:14-212:23; TR 11-13-19, pp 189:20-199:11, 269:10-277:14.)

The prosecution charged Frazee with first-degree murder – after deliberation, felony murder, three counts of solicitation to commit first-degree murder, and tampering with a deceased human body. (CF, pp 435-37.) Lee pleaded guilty to tampering with a deceased human body in exchange for testifying against Frazee. (TR 11-07-19, pp 50:17-52:5.)

Mid-trial, law enforcement discovered Frazee solicited a fellow jail inmate a few weeks earlier to kill Lee, her family, and other witnesses so they could not testify against him. (TR 11-15-19, pp 90:23-100:4, 118:15-135:16.) Frazee gave this inmate several handwritten letters detailing proposed plans to have the inmate's prison gang murder Lee, her family, and other witnesses. (TR 11-15-19, pp 118:15-135:16; EX, pp 251-82.)

Frazee's defense theory, argued through counsel, was that Lee's testimony was not credible and without it there was not enough evidence to support a conviction. (TR 11-18-19, pp 50:4-64:4.)

After a three-week trial, the jury credited Lee's testimony and the substantial independent corroborating evidence and convicted Frazee as charged. (CF, p 1104.) He was sentenced to life in prison. (CF, p 1104.)

SUMMARY OF THE ARGUMENT

The court did not abuse its discretion when it questioned four jurors about a mid-trial conversation three jurors had about the schedule of witnesses. Based on the jurors' responses, the court determined they had not predeliberated and could be fair and impartial.

Because this Court gives trial courts substantial deference in handling alleged juror misconduct, its decision not to further sanction or instruct the jurors was not manifestly arbitrary, unreasonable, or unfair.

The court also did not plainly err by allowing a blood spatter expert to testify the bloodstain evidence was "consistent" with Lee's descriptions of what transpired. At the time of trial, published case law from this Court concluded similar testimony was not improper, and the law in this area is currently unsettled. Therefore, any error was not obvious and could not be plain. The evidence also did not constitute an opinion on Lee's credibility or improper bolstering, and any error in admitting it was harmless given the other overwhelming evidence of guilt.

Next, the court properly denied Frazee's motion to suppress statements he made to a DHS caseworker while he was held in Teller County Jail. The DHS caseworker did not have to give Frazee *Miranda* warnings before questioning him because she was not an agent of law enforcement and Frazee was not in custody, and the totality of the circumstances showed Frazee's statements were voluntary. Any error

was harmless beyond a reasonable doubt because this evidence was cumulative of other properly admitted evidence and the remaining evidence was overwhelming.

The court also did not abuse its discretion by admitting evidence of Frazee's ill-treatment of Berreth and Lee, his comments about disposing of bodies, and his indifference to Berreth's disappearance. This evidence was relevant to show his motive to kill Berreth and his mental state, to explain the relationship dynamics between Frazee and Lee so the jury understood why Lee was afraid of him and helped him clean up after the murder, and to show his plans and preparation to kill Berreth.

Similarly, the court did not abuse its discretion when it allowed testimony from Frazee's fellow inmate, Jacob Bentley, who said Frazee solicited him to murder Lee and several others before trial. This evidence was relevant to show Frazee's consciousness of guilt and corroborated Lee's fear of Frazee. Its probative value was not substantially outweighed by the danger of unfair prejudice, particularly

considering the court gave a limiting instruction that the jury could only consider the evidence to show consciousness of guilt.

The court also did not abuse its discretion by denying Frazee's continuance request to investigate Bentley's testimony. Although Bentley's testimony surfaced towards the end of trial, the court reasonably denied Frazee's two-week continuance request and instead offered to let Frazee delay cross-examining Bentley until the following Monday so the defense could investigate over the weekend. Given the timing of the request and the nature of the newly discovered evidence, the court's decision to deny Frazee's continuance request was not an abuse of discretion.

Additionally, the prosecution did not commit reversible misconduct during voir dire, while examining Lee, or during closing argument. The prosecution properly asked prospective jurors if they would be biased against testimony procured by a plea bargain, asked Lee about the terms of her plea agreement and if it was "hard" to talk about what she witnessed, and argued in closing that the blood spatter

expert was credible and the evidence showed Frazee acted after deliberation.

Because Frazee has not demonstrated any errors occurred, no cumulative error occurred.

Finally, sufficient evidence supported Frazee's felony murder conviction. The evidence and reasonable inferences therefrom showed Frazee took Berreth's cell phone from her person or presence after he bludgeoned her to death. This evidence showed he committed a robbery and that Berreth died during the course of that robbery.

This Court should affirm.

ARGUMENT

I. The court did not plainly err when it individually questioned four jurors about their discussions about the case during trial.

A. Standard of review and preservation

This issue is not preserved. While the court chose to individually question four jurors about a conversation they had during the trial, defense counsel never objected to the court's actions or its admonishments and never asked for further action.

This Court reviews the adequacy of a court's response to alleged juror misconduct for abuse of discretion. *See People v. Clark*, 2015 COA 44, ¶200. "Discretion is abused only where no reasonable person would take the view adopted by the trial court," and "[i]f reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *People v. Wilson*, 2014 COA 114, ¶35 (quoting *People v. Hoover*, 165 P.3d 784, 802 (Colo. App. 2006)).

This Court cannot reverse unless Frazee shows the error was plain. Plain error is obvious and substantial, and so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction. *Hagos v. People*, 2012 CO 63, ¶14.

B. Relevant law

Jurors in a criminal case should not deliberate, either on their own or collectively, before the presentation of evidence is complete and they receive closing arguments and the court's instructions. *People v. Preciado-Flores*, 66 P.3d 155, 166 (Colo. App. 2002). If the court learns jurors may have predeliberated, it must take some action to ensure the

defendant's due process rights are protected. *People v. Harmon*, 284 P.3d 124, 128-29 (Colo. App. 2011).

The trial court has "the privilege of 'continuous observation of the jury in court,'" and is best able to consider the alleged misconduct in the context of all the circumstances. *United States v. Peterson*, 385 F.3d 127, 134 (2d Cir. 2004) (citation omitted). Juror predeliberation does not necessarily render a trial unfair. *See People v. Flockhart*, 2013 CO 42, ¶19.

C. Applicable facts

Midway through the tenth day of trial, court personnel overheard Juror 5 say, "I am not going to sit in there with the three of them at the end talking about the trial." (TR 11-13-19, pp 147:18-148:15.) With the parties' agreement, the court brought Juror 5 out into the closed courtroom and asked him about this statement. (TR 11-13-19, pp 149:2-150:8.)

Juror 5 said he made that statement "because they were discussing previous witnesses again. What else is yet to come? What do they expect to happen next." (TR 11-13-19, p 150:9-12.) Juror 5

clarified that three jurors discussed a specific previous witness, the CBI serologist. (TR 11-13-19, pp 150:13-151:3.) He said these jurors commented that the CBI serologist "was a very professional witness, and we can sit here and listen to her all day," and that "they are expecting the next witness to prove DNA." (TR 11-13-19, p 151:4-9.) He identified the jurors having this conversation as Jurors 4, 6, and 9. (TR 11-13-19, p 151:12-18.)

The court brought Jurors 4, 6, and 9 into the courtroom individually and asked them about this conversation. (TR 11-13-19, p 154:2-13.) Juror 4 said "there's been anticipation about the balance of the presentation of the case" referring to who the next witness would be, but they did not discuss the merits or credibility of witnesses, and he believed he could still be fair and impartial. (TR 11-13-19, pp 155:2-156:1.)

Juror 6 said he mentioned finding the CBI serologist "attractive," and he and the other two jurors expressed "the hope that some things would come together" with future witnesses. (TR 11-13-19, p 157:17-23.) He referred to earlier testimony about finding a tooth and hoped

there would be "follow-up" on that evidence. (TR 11-13-19, p 158:11-21.) Juror 6 also confirmed he could be fair and impartial. (TR 11-13-19, p 158:21-25.)

Juror 9 said he mentioned thinking the trial would end on Friday, so "there was just speculation about, you know, I guess, the Prosecution must be almost finished, and the Defense is about to start and things—it was just like—what I thought was generic. That it wouldn't be a problem." (TR 11-13-19, p 160:9-16.) Regarding the CBI serologist's testimony, Juror 9 said they were "speculating" about "the DNA and leading up to that," since they had not heard about any DNA at that point. (TR 11-13-19, pp 160:17-161:7.) He also confirmed he believed he could be fair and impartial. (TR 11-13-19, p 161:8-12.)

The prosecution and the defense declined to ask these jurors any questions or make any further record. (TR 11-13-19, pp 156:9-11, 159:7-12, 161:20-23, 162:5-9.)

Based on the court's conversation with the jurors, it ruled:

> Well, I've had the opportunity to speak with all four jurors and observe their demeanor, and I have no concerns about any of the four jurors'

> ability to be fair and impartial jurors. I did talk to the jury, try to give them a heads up that we were getting close to the end, and I don't think it's inappropriate for them to wonder how close we are because I brought it up.
>
> I will—I will beef up my admonition at the conclusion of each and every break from here on out, but I think we can go ahead and let the public in, and then we'll bring the jury in in just a couple of moments. Thank you.

(TR 11-13-19, p 162:10-23.)

Neither party objected, requested further admonishment, or suggested any modifications to the admonishment.

D. Argument

The court did not abuse its discretion or plainly err when it individually questioned four jurors about potential predeliberation discussions, concluded they did not predeliberate and could be fair and impartial, and chose to "beef up" its admonitions as the remedy.

To begin, the court did not abuse its discretion when it concluded the jurors had not improperly predeliberated. At most, the jurors discussed who the remaining witnesses might be based on the court's scheduling statements and previous evidence. (TR 11-13-19, pp 155:2-

156:1, 157:17-158:21, 160:9-161:7.) The court reasonably concluded these jurors had not discussed whether Frazee was guilty or otherwise predeliberated. *People v. Mollaun*, 194 P.3d 411, 416 (Colo. App. 2008) ("When confronted with allegations of irregularity in the jury's proceedings, the trial judge has broad discretion 'to determine what manner of hearing *if any*, is warranted.'") (emphasis original) (citations omitted).

The court also directly asked all four jurors if they believed they could be fair and impartial after these discussions, and all four jurors said they could. (TR 11-13-19, pp 152:2-11, 155:2-156:1, 158:21-25, 158:21-25.) The court, having observed their demeanor during questioning, believed them. (TR 11-13-19, p 162:10-23.) Because the trial court was in the best position to make these credibility-related judgments, this Court should defer to the court's assessment. *Cf. Gibbons v. People*, 2014 CO 67, ¶31 (noting that "addressing the fluid dynamics associated with possible [jury] deadlock is a quintessential trial court responsibility" because "[t]he trial judge has eyes and ears on the situation as it unfolds").

For the first time on appeal, Frazee claims the court's response was inadequate and suggests the court instead should have chastised the jurors for ignoring its instructions, asked for more details about other potential predeliberation conversations, or questioned the remaining jurors. (AOB, pp 13-14.) But given the four jurors' responses and the relatively trivial nature of their conversation, the court's decision not to exacerbate the situation further by chastising the jurors or questioning uninvolved jurors was not manifestly arbitrary, unreasonable, or unfair. *See United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) (noting a court's investigation of juror misconduct "is intrusive and may create prejudice by exaggerating the importance and impact of what may have been an insignificant incident").

But even if the court abused its discretion, any error was not plain.

The court repeatedly instructed the jury after the incident not to discuss the case among themselves or with anyone else. (TR 11-13-19, p 329:9-17; TR 11-14-19, pp 75:19-24, 132:6-9, 230:4-8; TR 11-15-19, pp 69:23-70:2, 136:10-12, 149:14-24.) These admonitions reduced any

prejudice stemming from the possibility that three jurors might have predeliberated. *See Flockhart*, ¶28; *Preciado-Flores*, 66 P.3d at 166-67.

Moreover, the evidence of Frazee's guilt was overwhelming. *See Flockhart*, ¶29 (erroneous predeliberation instruction harmless based on strong evidence of guilt); *see also People v. Fichtner*, 869 P.2d 539, 543 (Colo. 1994) ("[I]f there is overwhelming evidence to support the conviction, we will not reverse it under a plain error standard."). Accordingly, Frazee failed to demonstrate plain error.

II. The court did not plainly err by letting the blood spatter expert testify that bloodstains in Berreth's condo were "consistent" with Lee's testimony.

A. Standard of review and preservation

Frazee did not object to the blood spatter expert's testimony that the blood at the crime scene was "consistent" with Lee's testimony, so this issue is unpreserved.

Evidentiary claims are reviewed for an abuse of discretion. *People v. Daley*, 2021 COA 85, ¶104. Because this issue is unpreserved, any

error must be plain to warrant reversal. *People v. Miller*, 113 P.3d 743, 751 (Colo. 2005).

Plain error "must generally be so obvious that the trial judge should be able to avoid it without the benefit of an objection." *Scott v. People*, 2017 CO 16, ¶16. An error is obvious if it contravenes "(1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law." *Id.* at ¶16 (quoting *People v. Pollard*, 2013 COA 31M, ¶39).

B. Relevant law

One witness may not testify that she believes another witness was truthful on a particular occasion. CRE 608(a); *Venalonzo v. People*, 2017 CO 9, ¶32. Bolstering testimony improperly encourages the jury to substitute the witness's personal credibility evaluation for its own. *See Venalonzo*, ¶12.

Recently, divisions of this Court split on whether testimony regarding "consistency" between evidence is improper bolstering.

One division of this Court has concluded that a detective's testimony that the victim's testimony was "consistent" with other

evidence in the case was not improper, reasoning "the detective said nothing about the truth of testimony; instead, the detective indicated only that certain statements did not conflict with other statements or evidence." *People v. West*, 2019 COA 131, ¶43. But in 2021, another division concluded a detective's testimony that the victim's prior statements were "consistent" with her trial testimony was improper bolstering, albeit harmless. *Daley*, ¶¶81-102.

C. Applicable facts

On the last day of trial testimony, the prosecution presented evidence from a blood spatter expert, Jonathan Priest.

Priest testified that many of the blood droplets he saw were very small, "which is indicative of a greater force being applied to the blood source." (TR 11-15-19, pp 32:16-34:1.) The prosecution played body camera footage of Lee walking through Berreth's condo, and Priest testified, "what she's pointing to here are areas that are on the rock fascia of this fireplace, and that's consistent with photographs that were taken of those areas showing stains that ultimately tested positive for blood that are consistent with spatter stains, so those that are created

by some force being applied to a blood source." (TR 11-15-19, pp 34:2-35:5.) The prosecution asked, "Is that consistent with someone being—a blood source being hit with a bat?" and Priest responded, "Certainly it's consistent with that, yes." (TR 11-15-19, p 35:8-11.)

Later, Priest testified that bloodstains that had soaked into the living room floorboards were "indications of a significant blood source being on the surface of these wooden floor planks." (TR 11-15-19, pp 63:4-65:7.) The prosecution asked, "If we have evidence that's presented that Patrick Frazee said he beat her with a bat, would that be consistent with what you see here?" and Priest said, "absolutely." (TR 11-15-19, pp 65:8-11.)

On cross-examination, defense counsel elicited testimony that portions of Priest's opinions were based "on Krystal Lee's description of the scene." (TR 11-15-19, pp 76:2-11, 79:11-80:4.) Defense counsel asked, "Is it fair to say that a large part of your analysis is based on what Krystal has described in the apartment?" and Priest said, "That and my experience in similar types of cases where cleaning occurs, yes." (TR 11-15-19, p 82:19-23.)

The prosecution followed-up on this line of questioning on redirect:

> Q. Counsel asked you about things that were based on Krystal Lee versus not. Let me ask. Is there anything that you saw that was inconsistent with the description that Krystal Lee gave of this crime scene?
>
> A. No.
>
> Q. Or inconsistent with the description Krystal Lee gave of what Patrick Frazee told her occurred at this crime scene?
>
> A. No.
>
> Q. Were the floorboards consistent with what she told you?
>
> A. Very much.
>
> Q. Was every single drop of blood that you could see either tested or untested consistent with what she told you?
>
> A. Yes. Well, what she described. She told me nothing.
>
> Q. You're correct. I'm sorry.
>
> Was the cleaning that she described consistent with what you found?
>
> A. Yes.
>
> Q. Was the couch—blood on the couch consistent with what was described?
>
> A. Yes.

> Q. Was the blood on the baby gate consistent with what was described?
>
> A. Yes.

(TR 11-15-19, pp 85:5-86:6.)

Defense counsel did not object.

D. Argument

For the first time on appeal, Frazee claims the court plainly erred by allowing Priest to testify that the blood evidence found at Berreth's condo was "consistent" with Lee's testimony because it was improper bolstering. This claim fails for three reasons.

First, any error was not obvious. At the time of Frazee's trial, *West* had held no plain error occurred when a detective testified that the timing of text messages between the victim and defendant was "consistent" with the victim's testimony because "the detective said nothing about the truth of testimony; instead, the detective indicated only that certain statements did not conflict with other statements or evidence." *West*, ¶43. Shortly after Frazee's trial, another division similarly concluded that testimony about whether various witness statements were "consistent" was not plainly erroneous, as "the

detective did not testify about whether the witnesses had testified truthfully." *People v. Bobian*, 2019 COA 183, ¶34. Judge Berger specially concurred, reasoning that this testimony was improper bolstering but not plain error given the decision in *West*. *Id.* at ¶¶37-55.

After the opening brief was filed, a third division disagreed with *West* and held that a detective's testimony that the victim's prior statements were "consistent" with her trial testimony was improper bolstering, but that it was harmless. *Daley*, ¶¶81-102.

Given this case law, any error in allowing Priest to testify in 2019 that blood found at Berreth's condo was "consistent" with Lee's testimony was not obvious and could not be plain. *Scott*, ¶18 (error not obvious when a published case at the time of trial "had rejected the precise argument [the defendant] makes" for the first time on appeal); *People v. Valdez*, 2014 COA 125, ¶27 ("[W]here the law is unsettled, the trial court's alleged error with respect to the law cannot constitute plain error.").

Second, Priest's testimony was not improper bolstering. As the *West* division concluded, testimony that Lee's statements were

consistent with the blood spatter evidence "said nothing about the truth of testimony," but instead merely opined the physical evidence "did not conflict" with Lee's statements. *West*, ¶43.

Third, even if this testimony was improper, it was not substantial error. This testimony "was miniscule in comparison to the proper corroboration accomplished by other witnesses." *Daley*, ¶98. This other corroborating evidence included, but was not limited to, extensive cell phone location data, the burn site with melted plastic and a human tooth found at Frazee's property, a bloodhound's alert to the smell of human decomposition in the barn on Nash Ranch, and testimony from numerous witnesses who corroborated minor details of Lee's account. And as discussed previously, the evidence of guilt was overwhelming. *See id.* at ¶99-100 (error harmless when evidence of guilt is overwhelming).

III. The court properly denied Frazee's motion to suppress statements he made to a DHS caseworker in jail.

A. Standard of review and preservation

This issue is preserved. (CF, pp 730-33.)

Suppression motions present a mixed question of law and fact. *People v. Stock*, 2017 CO 80, ¶13. This Court defers to factual findings if they are supported by the record and reviews the legal effect of those facts de novo. *Id*. Reviewing courts look only at the evidence presented at the suppression hearing, not the trial testimony, when evaluating a suppression ruling. *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007).

If the court erroneously denied the motion to suppress, this Court will not reverse if the error was harmless beyond a reasonable doubt. *Bartley v. People*, 817 P.2d 1029, 1034 (Colo. 1991).

B. Relevant law

Miranda v. Arizona, 384 U.S. 436 (1966), established a prophylactic rule that police must inform a suspect of certain rights before any custodial interrogation takes place. *Id*. at 444. *Miranda* warnings are required when (1) an agent of law enforcement, (2) interrogates, (3) a suspect in custody. *People v. Baird*, 66 P.3d 183, 188 (Colo. App. 2002).

Miranda only applies "to actions of law enforcement officials." *People v. Chastain*, 733 P.2d 1206, 1213 (Colo. 1987). "State action has

been extended to include civilians acting as agents of the state in order to prevent law enforcement officials from circumventing the *Miranda* requirements *by directing* a third party to act on their behalf." *People v. Robledo*, 832 P.2d 249, 250 (Colo. 1992) (emphasis added).

A person acts as an agent of law enforcement for purposes of criminal investigation when "the person 'in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state.'" *People v. Lopez*, 946 P.2d 478, 481 (Colo. App. 1997) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)). Critical factors include whether the prosecution knew of and acquiesced in the intrusive conduct and whether the party intended to assist law enforcement efforts. *Id.* at 481-82.

The suspect must also be in custody for *Miranda* to apply. While the usual custody test is whether a reasonable person in the suspect's position would consider himself deprived of freedom of action to the degree associated with a formal arrest, *People v. Matheny*, 46 P.3d 453, 459 (Colo. 2002), "the traditional test of custody is inapplicable in a prison or jail setting 'because it would lead to the conclusion that all

prison questioning is custodial because a reasonable person would always believe he could not leave the prison freely.'" *People v. Parsons*, 15 P.3d 799, 801 (Colo. App. 2000) (quoting *People v. Denison*, 918 P.2d 1114, 1116 (Colo. 1996)).

In the jail context, courts consider four factors to determine whether an inmate is "in custody" for *Miranda* purposes: "(1) the language used to summon the individual; (2) the physical surroundings of the interrogation; (3) the extent to which he is confronted with evidence of his guilt; and (4) the additional pressure exerted to detain him." *Denison*, 918 P.2d at 1116. These four factors are applied "to determine whether the detainee has had a change in surroundings 'that results in an added imposition on [her] freedom of movement.'" *People v. J.D.*, 989 P.2d 762, 768 (Colo. 1999) (quoting *Denison*, 918 P.2d at 1116).

Other circumstances courts consider include "(1) the time, place, and purpose of the encounter; (2) the persons present during the interrogation; (3) the words spoken by the officer to the defendant; (4) the officer's tone of voice and general demeanor; (5) the length and

mood of the interrogation; (6) the placement of any limitation of movement or other form of restraint on the defendant during the interrogation; (7) the officer's response to any questions asked by the defendant; (8) any directions given to the defendant during the interrogation; and (9) the defendant's verbal or nonverbal response to such directions." *Parsons*, 15 P.3d at 801-02.

C. Applicable facts

At the suppression hearing, Mary Longmire testified that she was employed with the Teller County Department of Human Services and was assigned to K.F.'s case after it was referred to DHS by the Woodland Park Police Department. (TR 08-23-19, pp 11:5-13, 13:23-15:9.) She took legal custody of K.F. and interviewed family members to find a safe placement for her. (TR 08-23-19, pp 15:10-16:24, 18:25-20:24.)

Longmire visited Frazee at the Teller County Jail on December 21, 2018 and served him with a notice of the shelter care hearing, gave him information on the dependency and neglect process, and told him K.F. was in DHS's custody. (TR 08-23-19, pp 16:18-17:12.) During that

meeting, she gave him a brief description of the allegation and told him "[t]hat he had been arrested for the murder of KF's mother and that there was not an appropriate caregiver due to his incarceration." (TR 08-23-19, p 18:7-16.)

Longmire visited Frazee a second time on December 26th at Teller County Jail at 7:00pm, after Frazee needed to reschedule their 3:00pm appointment. (TR 08-23-19, pp 20:25-22:6, 45:13-20.) Longmire met Frazee in the jail's TV advisement room. (TR 08-23-19, pp 22:4-23:1.) A sergeant described this room as the place inmates meet visitors, including attorneys and personal visitors. (TR 08-23-19, pp 4:23-5:7.) This room was not a cell used to house or detain inmates, it contained one door that the sergeant was not sure could lock, and it contained a television, video equipment, a shelf, table, chairs, and a telephone. (TR 08-23-19, pp 5:8-23.) Inmates could refuse to meet with visitors and could leave the visitation room at any time by asking a deputy to escort them back to their housing unit. (TR 08-23-19, pp 5:24-7:7.)

Frazee was not handcuffed during the meeting with Longmire, and the deputy who brought Frazee did not remain in the room with them. (TR 08-23-19, p 23:2-10.)

Longmire told Frazee she was there to complete an assessment of the family and gather information about K.F. to complete the paperwork required to determine if K.F. could be placed with Berreth's parents in Washington. (TR 08-23-19, p 24:14-16.) She told Frazee she needed to learn about his background, K.F.'s development, K.F.'s relationship with her mother, and Frazee and Berreth's custody schedule to gain a sense of K.F.'s daily schedule and relationships. (TR 08-23-19, p 24:16-24.) She used a standardized list of fourteen questions to compile a family social history. (TR 08-23-19, pp 25:13-26:23.)

Longmire described her conversation with Frazee as "professional and personable." (TR 08-23-19, p 27:1-5.) At the onset of the interview, she explained that she understood if he did not want to answer certain questions due to the ongoing criminal investigation and the allegations made against him. (TR 08-23-19, p 27:9-23.)

Frazee told Longmire about his and Berreth's shared custody arrangement for K.F., said that he picked K.F. up from Berreth as arranged on Thanksgiving Day, and said that Berreth later asked Frazee to keep K.F. because she "needed to sort some things out" after she "lost it" during a conversation about their relationship. (TR 08-23-19, p 28:18-37:4.) He tried to contact Berreth on-and-off after Thanksgiving but was unable to reach her, and he was not concerned about not being able to get in touch with her because he thought she was "taking time to sort things out." (TR 08-23-19, pp 37:5-38:15.)

Longmire never confronted Frazee with any evidence or accusations or made any threats to him during their hour and a half interview, and she described her demeanor during the interview as "respectful" and "engaged." (TR 08-23-19, pp 38:13-39:9, 41:10-14.) She never limited Frazee's movement in the room; he was free to leave at any time; and he never indicated that he did not want to talk to Longmire. (TR 08-23-19, pp 40:6-41:3, 42:18-21.)

Longmire did not notify the police department that she planned to interview Frazee, and they did not ask her to do so. (TR 08-23-19, p

41:4-9.) She did not know specific information about the case other than Frazee had been charged with Berreth's murder and some details of Berreth's disappearance she had seen on the news. (TR 08-23-19, pp 29:25-30:9, 54:12-24.) She was not a law enforcement officer, had not been trained in law enforcement interrogation techniques, and did not give Frazee or any of the other respondent parents she interviewed in similar contexts *Miranda* warnings. (TR 08-23-19, p 42:7-17.)

Frazee filed a motion to suppress statements he made to Longmire. (CF, pp 730-33.) He claimed Longmire was an agent of law enforcement who interrogated him while he was in custody without first giving him *Miranda* warnings. (*Id.*) The prosecution responded that Longmire was not an agent of law enforcement and Frazee was not in custody, so *Miranda* warnings were not required. (CF, pp 767-70.)

The court denied Frazee's motion to suppress. (CF, pp 777-81.) It first found Longmire was not a law enforcement agent because she was "not a police officer, peace officer or law enforcement officer" and "[h]er actions were consistent with her duties under the Colorado Children's Code." (CF, p 781.) After discussing the case law explaining the factors

for determining whether a jail inmate is "in custody" for *Miranda* purposes, the court also concluded that while "[d]efendant was in jail," no custodial interrogation took place. (CF, pp 780-81.) It found the totality of the circumstances showed "no threats, limits of movement, harsh words, confrontation of evidence of guilt, or any other factor" indicated that *Miranda* warnings were required. (CF, p 781.)

D. Argument

The court properly denied Frazee's motion to suppress for two independent reasons: Longmire was not an agent of law enforcement and Frazee was not "in custody" for *Miranda* purposes.

First, Longmire was not an agent of law enforcement. She did not tell the police or prosecution she was going to interview Frazee or receive any instructions or directions from them. (TR 08-23-19, p 41:4-9.) She did not interview Frazee to investigate whether he violated any laws, but instead to determine a safe placement for K.F. (TR 08-23-19, p 24:14-24.) While some courts disagree, several jurisdictions have found a social worker or person in Longmire's similar position is not an agent of law enforcement for *Miranda* purposes. *See, e.g.*, *People v. Keo*,

253 Cal. Rptr. 3d 57, 65 (Cal. Ct. App. 2019) (social worker was not an agent of law enforcement for *Miranda* purposes and collecting cases); *but see Jackson v. Conway*, 763 F.3d 115, 138 (2d Cir. 2014) (social worker was an agent of law enforcement for *Miranda* purposes).

Second, even if Longmire was a law enforcement agent, Frazee was not in custody under the applicable *Denison* factors. *See Denison*, 918 P.2d at 1116.

For the first *Denison* factor—the language used to summon the individual, a sergeant testified that when inmates have visitors, inmates can choose whether they want to meet their visitor. (TR 08-23-19, pp 5:24-7:7.) Nothing in the record suggests anyone ordered Frazee to meet with Longmire or otherwise forced him to meet her.

For the second factor—the physical surroundings of the interrogation, Frazee met Longmire in the jail's TV advisement room usually used for visitors, which contained a table and chairs, bookshelves, a television, and a large window with blinds looking out into the jail booking area. (TR 08-23-19, pp 5:8-23.) The door was either incapable of locking or unlocked during Frazee's visit. (*Id.*)

These physical surroundings did not subject Frazee to further confinement or custody.

For the third factor—the extent to which Frazee was confronted with evidence of his guilt, Longmire had no evidence of guilt to confront Frazee with, as she only knew Berreth had disappeared around Thanksgiving from news reports and that Frazee had been charged with Berreth's murder. (TR 08-23-19, pp 29:25-30:9, 54:12-24.) She asked Frazee open-ended questions about his relationship with Berreth, his and Berreth's custody schedule, and K.F.'s whereabouts around the time Berreth disappeared. (*See* TR 08-23-19, pp 25:13-26:23.)

For the fourth factor—the additional pressure exerted to detain Frazee, neither Longmire nor the jail personnel exerted any additional pressure to detain Frazee. The door to the interview room was unlocked, Frazee was not handcuffed, and the deputy who escorted Frazee to the room did not remain there with him and Longmire. ((TR 08-23-19, pp 5:8-7:7, 23:2-10.) Inmates could ask to leave visits at any time. (TR 08-23-19, pp 5:24-7:7.) Because no additional pressure was exerted to detain Frazee, he was not in custody.

The remaining general circumstances for assessing *Miranda* custody also showed Frazee was not in custody. Longmire's tone was professional and personable; the purpose of her visit was to help determine K.F.'s custody arrangement, not to gather evidence; she did not make any threats or promises to Frazee; Frazee was unrestrained during the meeting; and Frazee never indicated that he did not want to speak to her or wanted to leave. *See Parsons*, 15 P.3d at 801-02.

Because Frazee did not experience "a change in surroundings 'that results in an added imposition on [his] freedom of movement,'" he was not in custody and *Miranda* warnings were not required. *J.D.*, 989 P.2d at 768 (quoting *Denison*, 918 P.2d at 1116).

Lastly, even if error occurred, it was harmless beyond a reasonable doubt. Longmire's testimony played a minor role in the three-week trial. Her testimony about Frazee's statements was largely cumulative, as Frazee made similar statements about Berreth's disappearance to Berreth's mother, to law enforcement before his arrest, and to acquaintances. And the other evidence of guilt was

overwhelming. Accordingly, Frazee's convictions were surely unattributable to any error in admitting Longmire's statements.

IV. The court did not abuse its discretion by allowing evidence of Frazee's ill-treatment of Berreth and Lee and his actions after Berreth's disappearance.

A. Standard of review and preservation

Evidentiary rulings are reviewed for an abuse of discretion. *Daley*, ¶104.

As discussed below, some of Frazee's evidentiary claims were preserved, while others were not. *See infra* section IV.C. Preserved evidentiary claims are reviewed for nonconstitutional harmless error and unpreserved claims for plain error. *Hagos*, ¶¶12, 14.

B. Relevant law

CRE 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible for a specific purpose, such as to prove motive, intent, preparation, or plan. Such evidence must satisfy the four-part test laid out in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

Under *Spoto*, other act evidence must (1) relate to a material fact; (2) be logically relevant in that it makes the existence of a material fact

more or less probable than it would be without the evidence; (3) have logical relevance independent of the prohibited intermediate inference that the defendant acted in conformity with his or her bad character; and (4) have probative value that is not substantially outweighed by unfair prejudice under CRE 403. *Id.* at 1318.

For the first and second *Spoto* prong, evidence may be relevant to prove "ultimate facts"—*i.e.* facts that directly establish a particular element—or "intermediate or evidentiary facts"—which themselves are probative of a separate, ultimate fact. *Clark*, ¶31; *see also People v. Oliver*, 2020 COA 150, ¶12 (while "proof of motive is not necessary to prove the commission of a crime" it is "often relevant").

In a homicide prosecution, "evidence of prior threats, mistreatment, or malice by the defendant toward the victim is admissible to show the defendant's motive and culpable mental state." *People v. Jensen*, 55 P.3d 135, 140 (Colo. App. 2001); *see also People v. Madson*, 689 P.2d 18, 26 (Colo. 1981) (same); *People v. Gladney*, 570 P.2d 231, 233 (Colo. 1977) (same).

For the third *Spoto* prong, the "test does not demand an absence of the inference [of bad character] but merely requires that the proffered evidence be logically relevant independent of that inference." *People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994).

For the fourth *Spoto* prong, CRE 403 allows a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.

C. Applicable facts

Frazee claims the prosecution improperly presented the following evidence of Frazee's ill-treatment of Berreth:

The "hooker" comment. When Berreth first arrived in Colorado, Frazee's mother suggested Berreth was a "hooker." (TR 11-01-19, p 226:12-20.) Berreth and Frazee also initially decided not to tell his family she was pregnant, and when Frazee's mother found out she accused Berreth of lying and threw her out of the house. (TR 11-01-19, pp 227:11-228:25.) Defense counsel objected to this evidence on

relevance grounds, which the court overruled. (TR 11-01-19, pp 224:9-226:4.)

Frazee's mistreatment of Berreth and false rumors he spread about her. Frazee's friend, Jim Moore, met Berreth in 2016 when she came with Frazee to help them run cattle. (TR 11-08-19, pp 267:24-268:16.) When Berreth panicked as the herd came towards her, Frazee "berated her horribly" and "yelled at her, cussed at her terribly." (TR 11-08-19, pp 268:17-21, 270:8-10.) Defense counsel objected under CRE 404(b), which the court overruled. (TR 11-08-19, pp 268:22-270:7.)

Moore also testified that Frazee made an out-of-the-blue comment about kids disappearing from parks, that Frazee knew a hit man from the mob, and that Frazee had people spying on Berreth so he could get custody of K.F. (TR 11-08-19, pp 276:9-277:11, 280:1-8, 281:8-18.) Frazee also told Moore he had a picture showing Berreth left K.F. in a running car while she went into a liquor store. (TR 11-08-19, pp 280:1-281:7.) Defense counsel did not object.

Frazee also had several conversations with Katherine Donahue where he talked about Berreth. (TR 11-12-19, pp 321:23-324:19.)

Frazee never said anything "good" or "kind" about Berreth; he falsely claimed Berreth abandoned K.F. two days after she was born; he described Berreth as "absolutely crazy" and "not a good mother"; and after Berreth disappeared, he complained Berreth hadn't been working enough to support K.F.'s health insurance and suggested Berreth previously went to rehab. (TR 11-12-19, pp 326:15-328:9, 333:2-335:11.) Defense counsel did not object.

Frazee also falsely told Moore and Donahue that Berreth hid her pregnancy from him and that he found out about it the day K.F. was born. (TR 11-08-19, pp 271:19-272:23; TR 11-12-19, pp 325:5-326:11.)

Defense counsel objected to Moore's testimony about Berreth hiding her pregnancy on hearsay grounds, and the prosecution argued the evidence was relevant to show Frazee's campaign to "taint [Berreth] in the eyes of everyone he knew." (TR 11-08-19, p 273:5-22.) Defense counsel never made a CRE 404(b) objection.

Frazee also challenges the following evidence relating to his relationship with Lee:

The dog incident. In late 2008, Frazee gave Lee a puppy and told her she had to choose between Frazee and her boyfriend. (TR 11-06-19, pp 103:10-108:12.) When Lee chose to stay with her boyfriend, Frazee said she needed to pay for the dog, and when Lee did not pay, he said he would come to Idaho and kill the dog. (TR 11-06-19, pp 108:12-109:10.) Defense counsel objected based on CRE 404(b), and the court said it would not strike the testimony but told the prosecution to be "very careful." (TR 11-06-19, pp 109:11-110:11.)

Lee's 2016 abortion. Lee became pregnant with Frazee's child in March 2016. (TR 11-06-19, pp 122:24-123:2.) Frazee was upset, said the child would be a "bastard," and said everyone would find out about their affair. (TR 11-06-19, p 123:3-10.) When Lee asked Frazee what he wanted her to do, he said, "I guess you're a baby killer or you're not." (TR 11-06-19, p 123:11-13.) Lee terminated the pregnancy, but told Frazee she miscarried. (TR 11-06-19, p 124:4-11.) Defense counsel did not object to this testimony; in fact, the prosecution originally filed a motion in limine to preclude this testimony, but the defense argued it was relevant to show Lee's untruthfulness. (CF, pp 919, 940.)

Comments about Lee's children. When Lee filed for divorce, she and Frazee talked about who would care for Lee's children. (TR 11-06-19, pp 124:20-125:12.) Lee learned that she could not share custody of her kids if she left Idaho, so she wanted Frazee to move with her. (TR 11-06-19, p 125:7-16.) Frazee did not want to move and asked her "what I was going to do with my shit loads," referring to her children. (TR 11-06-19, p 125:7-21.) Defense counsel did not object.

Finally, Frazee challenges the following evidence relating to comments about bodies disappearing and his indifference to Berreth's disappearance:

Frazee's comment about bodies disappearing in Teller County. In 2015, Frazee mentioned to an acquaintance that Teller County was a large county in which to "get rid of someone." (TR 11-12-19, pp 286:17-288:7.) Defense counsel objected on relevance and CRE 404(b) grounds, and the court overruled and gave the jury a limiting instruction that it could only consider that evidence for the purpose of evaluating Frazee's knowledge of Teller County. (CF, p 925-28; TR 11-12-19, pp 279:14-282:11, 286:25-287:5.)

Frazee's behavior after Berreth's disappearance. After Berreth's mother reported her missing, Frazee did not make any efforts to look for Berreth, did not post to Facebook pages dedicated to finding Berreth, and did not attend the candlelight vigil for her. (TR 11-04-19, pp 31:5-32:17; TR 11-14-19, pp 106:3-107:4.) Defense counsel did not object to this evidence.

D. Argument

The court properly admitted evidence of Frazee's ill-treatment of Berreth, his relationship with Lee, his indifference to Berreth's disappearance, and his comments about "getting rid of someone" in Teller County.

Evidence relating to Frazee's ill-treatment of Berreth, including evidence that he spread false rumors about Berreth being an alcoholic, hiding her pregnancy, abandoning K.F., and being "crazy," were relevant to show Frazee's motive to kill Berreth and to show he killed her after deliberation. *Madson*, 689 P.2d at 26; *Gladney*, 570 P.2d at 233; *Jensen*, 55 P.3d at 140.

Similarly, evidence of Frazee's ill treatment of Lee was relevant to provide context for their relationship, including why Frazee solicited her three separate times to murder Berreth, why Lee agreed to participate, and why she ultimately helped Frazee clean up the crime scene and destroy evidence for him. *Cf. People v. Woertman*, 786 P.2d 443, 448 (Colo. App. 1989) (evidence of other acts of abuse committed by the defendant against the victim were admissible as res gestae where "they were admitted to show the relationship between the defendant and the victim and to clarify and explain the context in which the abuse took place"), *rev'd on other grounds by* 804 P.2d 188 (Colo. 1991).

Particularly, Lee agreed to help Frazee because she was afraid he would hurt her or her family, and his prior ill treatment of her made it more likely that fear was credible. Evidence regarding the dynamics of their relationship, where Frazee exerted control over Lee through emotional abuse and manipulation, helped the jury understand why Lee agreed to help Frazee and placed her role in the criminal episode in context. This evidence was particularly important considering the

defense extensively attacked Lee's credibility by arguing no one would behave the way she said she did. (*See* TR 11-18-19, p 58:8-13.)

Finally, evidence that Frazee made comments about bodies disappearing in Teller County and his general indifference to Berreth's disappearance was relevant to his knowledge of Teller County, consciousness of guilt, that he killed Berreth after deliberation, and that he planned to kill Berreth. *People v. Rath*, 44 P.3d 1033, 1040 (Colo. 2002) ("Plan, scheme, design, modus operandi, and motive, while not usually elements or ultimate facts themselves…are well-accepted methods of proving the ultimate facts necessary to establish the commission of a crime….").

All this evidence had logical relevance independent of the propensity inference. Instead of introducing this evidence to show Frazee was a bad person, this evidence was relevant to show Frazee's specific motive to kill Berreth, his mental state (including killing Berreth after deliberation), and his plan and general methods used in killing Berreth.

The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. This evidence had significant probative value, as it primarily consisted of Frazee's statements and actions relating to his mental state. Because Frazee burned Berreth's body and had Lee clean up the crime scene, evidence relating to his motive to kill Berreth, his psychological influence over Lee, and his statements reflecting plans or preparation or knowledge about places to dispose of a body was relevant to whether he committed these offenses. *Id.* at 1041 (in evaluating the fourth *Spoto* prong, "the court must weigh 'the logical force of the evidence and the proponent's need for the evidence,' in light of other available evidence.") (citation omitted).

Plus, the evidence Frazee challenges was substantially less prejudicial than the evidence relating to the crime itself. *Cf. People v. Brown*, 2014 COA 130M, ¶22 (evidence was unfairly prejudicial because it "was qualitatively different, more severe, and more inflammatory than the evidence concerning the charged offenses"). Frazee was charged and convicted of a violent murder, where he viciously beat

Berreth to death with a baseball bat while their one-year-old daughter was in the other room, left a "horrific" bloody crime scene that included one of Berreth's knocked out teeth, put her body in a plastic tote of the bed of his truck and hid it before eating Thanksgiving dinner with his family, and finally burned Berreth's body in a massive all-night bonfire. This crime vastly overshadowed any prejudice from Frazee's ill-treatment of Berreth or Lee.

Similarly, any error in admitting this evidence was harmless or not plain. *People v. Herron*, 251 P.3d 1190, 1198 (Colo. App. 2010) (while the bad act evidence was "unfavorable, it was vastly overshadowed by evidence of defendant's more threatening acts" particularly "in light of the abundant evidence supporting the jury's guilty verdict" and was therefore harmless).

V. The court did not abuse its discretion by admitting the jailhouse informant's testimony.

A. Standard of review and preservation

This issue is preserved. (TR 11-14-19, pp 242:11-246:21.) Evidentiary rulings are reviewed for an abuse of discretion and are not reversible if the error is harmless. *Daley*, ¶104.

B. Relevant law

Relevant evidence is admissible. CRE 402. Evidence is relevant if it 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 than it would be without the evidence." CRE 401.

CRE 403 allows a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice occurs under CRE 403 if otherwise admissible evidence has 'an undue tendency to suggest a decision [made] on an improper basis,' which is 'commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror.'" *People v. Cousins*, 181 P.3d 365, 370 (Colo. App. 2007) (citation omitted).

CRE 403 "strongly favors the admission of relevant evidence, so the evidence should be given its maximum probative value and minimum prejudicial effect." *People v. Greenlee*, 200 P.3d 363, 367 (Colo. 2009).

C. Applicable facts

During Frazee's trial, a former jail inmate named Jacob Bentley told a prosecution investigator that Frazee solicited him and his prison gang a month before trial while they were in jail together to kill several witnesses in this case. (TR 11-14-19, pp 234:1-238:6.) Bentley gave the investigator several handwritten letters in Frazee's handwriting. (TR 11-14-19, pp 234:9-236:15.) The letters referenced information Bentley could have learned only from Frazee. (TR 11-14-19, pp 236:16-237:18.)

The court admitted Bentley's testimony and found it satisfied *Spoto*, including that its probative value was not substantially outweighed by unfair prejudice. (TR 11-15-19, pp 4:20-10:13.) It instructed the jury that it could only consider the evidence as it related to Frazee's consciousness of guilt. (TR 11-15-19, pp 15:13-16:25.)

D. Argument

The court properly admitted Bentley's testimony. Its probative value was significant, as Frazee's attempts to make unfavorable witnesses disappear showed his consciousness of guilt. *See People v. Medina*, 51 P.3d 1006, 1013 (Colo. App. 2001). Contrary to Frazee's arguments, common sense reasons that innocent people are not likely to solicit others to murder witnesses to "defend" their innocence or "prevent" false testimony. (*See* AOB, pp 41-42.) Additionally, Bentley's testimony was accompanied by Frazee's handwritten letters, which contained information Bentley could have only learned from Frazee, such as where Lee's family lived and the names of endorsed witnesses and their relatives' names, adding to its reliability and probative value. While this testimony damaged Frazee's defense, this damage stemmed from the evidence's legitimate probative value rather than from the evidence being "unduly" inflammatory. *See People v. Asberry*, 172 P.3d 927, 932-33 (Colo. App. 2007).

The court also blunted any unfair prejudice associated with this evidence by instructing the jury to only consider this evidence to assess

Frazee's consciousness of guilt. (TR 11-15-19, pp 92:13-16, 117:25-118:6.); *People v. Cisneros*, 2014 COA 49, ¶110.

Accordingly, the court's decision to admit this testimony was not an abuse of discretion, and any error was harmless given the other direct evidence that Frazee killed Berreth. *Herron*, 251 P.3d at 1198.

VI. The court did not abuse its discretion by denying Frazee's request for a continuance to investigate the jailhouse informant's statements.

A. Standard of review and preservation

This issue is preserved. (TR 11-14-19, p 249:7-9.) This Court reviews the denial of a continuance for an abuse of discretion. *People v. Ahuero*, 2017 CO 90, ¶11.

B. Relevant law

Trial courts have significant latitude in scheduling trials. *Ahuero*, ¶12. "Not the least of [a trial court's] problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 11 (1983)). "[O]nly an unreasoning and arbitrary 'insistence upon expeditiousness in the

face of a justifiable request for delay'" constitutes an abuse of discretion. *Id.* (quoting *Morris*, 461 U.S. at 11-12).

There are no mechanical tests for assessing whether a court abuses its discretion in denying a continuance request. *Id.* In determining whether a court has abused its discretion in denying a motion for continuance, this Court evaluates "the circumstances confronting the court at the time the motion is made, particularly the reasons 'presented to the trial judge at the time the request is denied.'" *Id.* at ¶11 (quoting *People v. Crow*, 789 P.2d 1104, 1106 (Colo. 1990)). This discretion "is at its zenith when the issue [of a continuance] is raised close to the date of trial." *United States v. Nguyen*, 526 F.3d 1129, 1134 (8th Cir. 2008).

C. Applicable facts

The prosecution's investigator learned the substance of Bentley's testimony on Monday evening during the second week of trial testimony. (TR 11-14-19, pp 234:1-238:6.) The prosecution discovered all the information it learned from Bentley to the defense the next morning. (TR 11-14-19, pp 246:25-249:6.)

Two days later when the court had the prosecution make an offer of proof about this newly-discovered evidence, defense counsel said he was not ready to cross-examine Bentley. (TR 11-14-19, pp 246:16-24.) Counsel claimed the defense had not had time to perform their own investigation since learning about Bentley on Tuesday morning. (TR 11-14-19, pp 246:25-249:6.)

Defense counsel requested a two-week continuance to investigate. (TR 11-14-19, p 249:7-9.) The court denied this request but said it was open to granting a one- or two-day continuance depending on what corroborating evidence the prosecution could procure by the next morning. (TR 11-14-19, pp 249:10-250:25.) It said it would rule on the evidence's admissibility the next morning and that defense counsel would likely "need to go forward with as much information...and investigating as possible tonight." (TR 11-14-19, p 251:1-9.)

The next morning, a Friday, the court ruled the evidence was admissible, and defense counsel renewed his request for a two-week continuance. (TR 11-15-19, pp 4:20-11:3.) The court denied this request, ruling:

> I have given this significant thought since we adjourned yesterday, and I'm going to deny the request for a two-week continuance. Today is the end of Week 2. I do think it's appropriate to give…the defense a little bit of time. So my intent would be to take the testimony this morning, and then…the defense may defer cross-examination until Monday morning at 8:30. That gives you the afternoon to think about it. It gives you the weekend to prepare for it.… [M]y thought process was that just letting the whole thing go to Monday I don't think is particularly helpful because I think it's better to get the testimony out there and the defense to have time to think about it and prepare their cross-examination.

(TR 11-15-19, pp 11:4-18.)

Defense counsel rejected this proposed schedule, arguing that postponing cross-examination until after the weekend would prejudice Frazee, and instead asked the court to defer all Bentley's testimony to Monday. (TR 11-15-19, p 12:8-17.) The court declined to alter its ruling, noting that it did not want to waste an entire day and wanted to keep the trial going. (TR 11-15-19, p 13:9-20.)

D. Argument

The court did not abuse its discretion in denying Frazee's continuance request. When he made the request, testimony had

already been going for two weeks and the prosecution had almost reached the end of its case. The court gave defense counsel a reasonable option of waiting to cross-examine Bentley until the following Monday, but defense counsel declined this offer. (TR 11-15-19, pp 11:4-18, 12:8-17.) The defense also had access to the same information as the prosecution, and the investigation necessary to effectively cross-examine a jailhouse informant is not extensive.

Accordingly, the court's decision to deny Frazee's continuance request was not an abuse of discretion.

But even if the court erred, it was harmless. After declining to investigate over the weekend, Frazee was able to effectively cross-examine Bentley on Friday. (TR 11-15-19, pp 101:3-113:12.) Frazee does not identify further information he could have discovered that would have benefited him had he had more time to investigate—and he elected not to use the weekend to discover any such information. *People v. Marsh*, 396 P.3d 1, 13 (Colo. App. 2011) ("A defendant must show that the denial of the continuance resulted in actual prejudice.").

VII. The prosecution did not commit misconduct.

A. Standard of review and preservation

Frazee claims the prosecution committed misconduct by: (1) indoctrinating the jury during voir dire; (2) improperly bolstering Lee's credibility; and (3) engaging in misconduct at closing argument.

These claims are not preserved, so plain error applies. Prosecutorial misconduct is rarely plain error, and only "'flagrantly, glaringly, or tremendously improper' warrants reversal." *People v. Nardine*, 2016 COA 85, ¶63 (quoting *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005)).

B. Relevant law

Prosecutors have wide latitude in the language and presentation style they use during closing argument. *Domingo-Gomez*, 125 P.3d at 1048. Prosecutors can refer to the strength and significance of the evidence and the reasonable inferences that can be drawn therefrom, as well as respond to arguments made in defense counsel's opening salvo. *People v. Lovato*, 2014 COA 113, ¶¶62-63; *People v. Rhea*, 2014 COA 60, ¶46.

Prosecutors "may not use arguments calculated to inflame the passions and prejudices of the jury, denigrate defense counsel, misstate the evidence, or assert a personal opinion as to the credibility of witnesses." *Nardine*, ¶¶34-35. But arguments anchored in evidence and relevant credibility factors are proper. *Domingo-Gomez*, 125 P.3d at 1050-51. "The context in which challenged prosecutorial remarks are made is significant, including the nature of the alleged offenses and the asserted defenses, the issues to be determined, the evidence in the case, and the point in the proceedings at which the remarks were made." *Id.* at 1050 (quoting *Harris v. People*, 888 P.2d 259, 266 (Colo. 1995)).

C. Argument

Frazee first claims the prosecution's questioning of potential jurors during voir dire about their views on the practice of offering plea bargains to procure testimony was misconduct because it "indoctrinated" the jurors to the prosecution's point of view. (AOB, pp 49-52.) This questioning was not improper.

Immediately after the voir dire discussion about the practice of offering plea bargains that Frazee challenges on appeal, the prosecution

asked a potential juror, "It may be in this case that you would be angry at the plea bargain or the—the sentence that the person was given. You might be angry with the prosecution over that. Would that make it—blind you so much that you would not listen to the information they have to provide?" (TR 11-01-19, pp 33:4-34:22.)

In this context, the prosecution appropriately asked questions geared toward determining whether potential jurors would be biased against a particular witness simply because their testimony was procured by a plea agreement, not to "indoctrinate" jurors to view such testimony as inherently credible or reliable. *See Lovato*, ¶64 (statements must be considered in context). This was a proper line of questioning. *People v. Binkley*, 687 P.2d 480, 483 (Colo. App. 1984) ("The purpose of voir dire examination is to enable counsel to determine whether any prospective juror possesses beliefs which would cause bias so as to prevent a fair and impartial trial.").

Frazee next claims the prosecution committed flagrant misconduct when it asked Lee if her plea agreement included an agreement to "tell

the truth" and elicited testimony that it was "hard" for her to testify about what happened. This was not improper.

The prosecution can introduce evidence that a witness's plea agreement included an agreement to tell the truth, as this evidence "allows the finder of fact to consider all the pertinent factors surrounding such agreement in making its assessment of the witness' credibility." *People v. Racheli*, 878 P.2d 46, 48 (Colo. App. 1994). Jurors can also properly consider "each witness'[s] knowledge, motive, state of mind, demeanor, and manner while on the stand" when evaluating credibility. *People v. Theus-Roberts*, 2015 COA 32, ¶20 (quoting pattern witness credibility instruction).

Accordingly, Lee's agreement to tell the truth, her state of mind (including her emotional state), and her demeanor while testifying were relevant credibility factors for the jury to consider.

Finally, Frazee claims the prosecution committed misconduct in closing argument when it called Frazee's story a "lie," misstated the law on after deliberation, and improperly vouched for the blood spatter expert's credibility. Context shows no plain misconduct.

During closing argument, the prosecution made the following arguments about the after-deliberation element:

> "The term 'after deliberation' means intentionally—not only intentionally, but the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. It's never committed in a hasty or impulsive manner." ....
>
> What does "after deliberation" mean in this case? Lie. A lie. He'd been planning for months. He told Joe Moore—he was testing the waters with Joe Moore, trying to figure out how he would react: "Hey, I figured out how to kill [Berreth]," He talks with references of a hit man. He solicits Krystal Lee three times. He calls her on or about November 4th, three weeks before she's dead. "Now is the time; today is the day" is what he tells Krystal Lee.
>
> ....
>
> And if you don't think the Defendant had a plan in advance to do this, then look at Kyle Ritchie and Sam Dygert, who were helping the Defendant, unknowingly. He manipulated them like he manipulates everyone else, to build a fire on his property, to drag a trough from the lower end of the property to a higher area that had never been in that spot before, to have Kyle Ritchie and Sam Dygert pile up pallets so he could burn things.
>
> He went to [Berreth]'s house with a box in the truck, tote box. He made sure he had a weapon

> when he entered [Berreth]'s residence that day, and he made sure he was on those Walmart and Ent videos. This is deliberation. This is the culmination of a longstanding plan to kill [Berreth].

(TR 11-18-19, pp 33:14-34:21.)

While the People agree it was improper to refer to Frazee's story as a "lie," *Domingo-Gomez*, 125 P.3d at 1054, the remainder of the argument properly applied the evidence to the law. The evidence showed Frazee had two teenage boys move the horse trough and fill it with pallets *before* he killed Berreth. (TR 11-07-19, pp 164:18-180:17.) Thus, the context refutes Frazee's claim that the prosecution "misstated" the law on deliberation by arguing it could find the deliberation element met based "solely" on evidence related to the fire that occurred *after* the murder.

The prosecution also did not express an improper personal opinion on the blood spatter expert's credibility. During rebuttal closing argument, the prosecution discussed evidence corroborating Lee's account. (TR 11-18-19, pp 66:13-70:2.) It referenced Lee's statement about a large pool of blood on the floor and said, "His witness [Lee] told

you the amount of blood that was on that floor. Jonath[a]n Priest. Do you believe Jonath[a]n Priest? He seemed to really know what he was talking about, explaining this case to you. He told you exactly what you should find on that floor, and that's what we found." (TR 11-18-19, pp 69:22-70:2.)

In context, the prosecution told the jury it should believe Priest's testimony because Lee's account and the physical evidence corroborated it. *Domingo-Gomez*, 125 P.3d at 1050-51. This argument was proper.

But even any of these statements were improper, they were not plain error. They were fleeting comments during a three-week trial. *People v. Whitman*, 205 P.3d 371, 385 (Colo. App. 2007). And they were unobjected to, suggesting "defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging." *Domingo-Gomez*, 125 P.3d at 1054.

VIII. No cumulative error occurred.

A. Standard of review and preservation

Cumulative error claims are reviewed de novo. *Howard-Walker v. People*, 2019 CO 69, ¶22.

B. Argument

A defendant is entitled to a fair trial, not a perfect one. *Flockhart*, ¶36. This Court will "reverse for cumulative error only where, although numerous trial errors individually have been found harmless, in the aggregate those errors prejudiced the defendant's substantial rights and deprived him or her of a fair trial." *People v. Herdman*, 2012 COA 89, ¶78 (citation omitted). "[C]umulative error requires that numerous errors be committed, not merely alleged." *Id.*

Aside from the single use of the word "lie," no errors occurred, and any errors did not cumulatively deprive Frazee of a fair trial, particularly considering the overwhelming evidence of guilt.

IX. The prosecution presented sufficient evidence that Frazee committed robbery to support his felony murder conviction.

A. Standard of review and preservation

Sufficiency claims are reviewed de novo, regardless of preservation. *McCoy v. People*, 2019 CO 44, ¶¶2, 26.

B. Relevant law

Evidence is sufficient if "the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charged offense beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). The law makes no distinction between direct and circumstantial evidence, and "if there is evidence upon which one may reasonably infer an element of the crime, the evidence is sufficient to sustain that element." *People v. Bertrand*, 2014 COA 142, ¶9.

A person commits felony murder when he commits robbery and, in the course of or the furtherance of committing that robbery, he causes another's death. §18-3-102(1)(b), C.R.S. (2020). A person commits robbery when he "knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation." §18-4-301(1), C.R.S. (2020).

"The gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a

transaction culminating in the taking of property from the victim's person or presence." *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983). "There is no requirement that the application of force or intimidation must be virtually contemporaneous with the taking." *Id.*

C. Argument

The prosecution presented sufficient evidence that Frazee killed Berreth in the course of a robbery. Cell tower data showed Berreth's phone in the same location as Frazee's in Woodland Park the afternoon he killed her and that same evening in Florissant, and Frazee later gave Lee Berreth's phone. (TR 11-06-19, pp 48:19-52:3, 252:9-15, 270:7-14.) Because people commonly carry their cell phones on their person or keep them nearby, the jury could reasonably infer Frazee took Berreth's phone from her person or presence after bludgeoning her to death.

This evidence was sufficient to show Frazee applied physical force against Berreth and, during the transaction, took her phone from her person or presence. *Bartowsheski*, 661 P.2d at 244. Contrary to Frazee's arguments, the prosecution did not have to prove Frazee "planned" to take Berreth's phone beforehand; only that he knowingly

committed a robbery and that Berreth died during the course of that robbery. §18-3-102(1)(b). The prosecution met its burden.

CONCLUSION

This Court should affirm Frazee's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **SEAN JAMES LACEFIELD** and all parties herein via Colorado Courts E-filing System (CCES) on September 30, 2021.

/s/ Tiffiny Kallina