
DATE FILED: December 4, 2014

Court of Appeals No. 10CA1477
City and County of Denver District Court No. 08CR3151
Honorable Shelley I. Gilman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Andres Castillo,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE BERGER
Casebolt and Dailey, JJ., concur

Opinion Modified and
Petition for Rehearing DENIED

Announced October 23, 2014

John W. Suthers, Attorney General, Brock J. Swanson, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Ned R. Jaeckle, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 OPINION is modified as follows:

Added the following paragraph after Paragraph 33 on page 17:

¶ 2 This does not mean that it is impossible for a defendant to demonstrate prejudice sufficient to justify reversal when a court gives a self-defense exception instruction that is not warranted by the evidence. *Cf. Novotny*, ¶ 31 (Hood, J., concurring in part and dissenting in part) (criticizing the majority’s opinion for creating a rule of “automatic affirmance” because a defendant “may never be able to demonstrate prejudice” from a trial court’s erroneous denial of a challenge for cause). For instance, jury confusion evidenced by a jury question could demonstrate such prejudice. Moreover, a situation could exist where a defendant so clearly acted in self-defense that no reasonable jury could reject self-defense without erroneously finding that the defendant provoked the unlawful use of force or was the initial aggressor. But that is not the case here. Rather, given the other, legitimate reasons the jury might have rejected defendant’s self-defense claim — for example, by finding that firing a shotgun in the presence of bystanders was not a reasonable way to defend himself and his family — we cannot conclude that there is a reasonable probability the jury relied on the

improperly given provocation instruction in rejecting self-defense.

¶ 3 Defendant, Andres Castillo, appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of attempted second degree murder and one count of second degree assault. Defendant argues: (1) the trial court erred in instructing the jury on the initial aggressor and provocation exceptions to self-defense; (2) the court erred in failing to include the burden of proof in its initial aggressor and provocation instructions; (3) the court erred in rejecting defendant's tendered instructions on the law of self-defense and on his theory of the case as to the second degree assault charge; (4) the prosecutor committed prosecutorial misconduct by making misstatements of fact and law during closing argument; and (5) the cumulative effect of these alleged errors deprived defendant of his right to a fair trial. After addressing and rejecting each of these arguments, we affirm.

I. Background

¶ 4 Defendant, his wife, his cousin, and three of their friends went to a club in lower downtown Denver to celebrate his wife's birthday. After they left the club, they returned to defendant's car, which was parked in a nearby parking lot. Witnesses estimated that at least one hundred people were in or around the parking lot at that time,

and some fighting had broken out.

¶ 5 While defendant and his group were waiting to exit the parking lot, an unidentified male said something to defendant through the open driver's door window. Defendant responded. No witness testified regarding what was said to defendant or what defendant replied, but one of defendant's companions testified that after the two men had exchanged some words, defendant started cursing at the other man.

¶ 6 Testimony was conflicting about what occurred next; most witnesses testified that defendant continued driving toward the exit but one witness testified that defendant stopped and got out of the vehicle. An unidentified male (who may or may not have been the same person who exchanged words with defendant) then pulled a handgun out of the waistband of his pants and fired multiple shots in defendant's direction, one of which struck defendant's car.

¶ 7 Thus, under one version of events, defendant stopped the vehicle *after* the handgun shooter began shooting, and under another, defendant stopped and got out of his vehicle *before* the handgun shooter started shooting. Under either version, however, defendant popped open the trunk before getting out of his car.

Defendant then walked to the rear of the car, removed a shotgun from the trunk, and fired several rounds at the handgun shooter.

In both versions of events, the handgun shooter began firing before defendant walked to the trunk and retrieved the shotgun.

¶ 8 Multiple police officers were in the area because of the fighting that had occurred. Two uniformed police officers, Sergeant Vincent Lombardi and Officer Jason Simmons, ran toward defendant's position and exchanged fire with defendant. One of defendant's pellets grazed Officer Simmons's stomach. Defendant was shot three times and fell to the ground. He either handed the shotgun to his cousin or his cousin took it from him. His cousin was then fatally shot by the police. The handgun shooter ran away and was never apprehended.

¶ 9 Defendant was charged with two counts of attempted first degree murder against Sergeant Lombardi and Officer Simmons, two counts of first degree assault on a peace officer, and five counts of second degree assault against bystanders who were hit with stray pellets from defendant's shotgun. Four of the second degree assault charges were later dismissed. A jury convicted defendant of two counts of the lesser included offense of attempted second

degree murder and one count of second degree assault. The jury acquitted defendant on both counts of first degree assault against a peace officer.

¶ 10 Defendant received consecutive sentences of fourteen years imprisonment on each of the attempted second degree murder charges and five years on the second degree assault charge, for a total of thirty-three years.

II. Instructions on Self-Defense Exceptions

A. Initial Aggressor Instruction

¶ 11 Defendant argues that because no evidence supported an initial aggressor instruction, the trial court erred by instructing the jury that he was not entitled to self-defense if he was the initial aggressor. We disagree.

¶ 12 As part of its instruction on the affirmative defense of self-defense, the trial court instructed the jury, over defendant's objection, that

[self-defense] is not an affirmative defense . . . if the defendant was the initial aggressor unless: (A) the defendant withdrew from the encounter, and (B) effectively communicated to the other person his intent to do so, and (C) the other person nevertheless continued or threatened the use of unlawful physical force.

¶ 13 “The trial court has a duty to correctly instruct the jury on all matters of law for which there is sufficient evidence to support giving instructions.” *Cassels v. People*, 92 P.3d 951, 955 (Colo. 2004). A trial court should instruct the jury concerning an exception to an asserted affirmative defense if some evidence supports the exception. *People v. Zukowski*, 260 P.3d 339, 347 (Colo. App. 2010). Whether sufficient evidence supports a jury instruction is a question of law we review de novo. *People v. Coughlin*, 304 P.3d 575, 587 (Colo. App. 2011). When an instruction was given, we view the evidence in the light most favorable to the giving of the instruction. *People v. Silva*, 987 P.2d 909, 914 (Colo. App. 1999).

¶ 14 A court may give an initial aggressor instruction “if the evidence will support a reasonable inference that the defendant initiated the physical conflict by using or threatening the imminent use of unlawful physical force.” *People v. Griffin*, 224 P.3d 292, 300 (Colo. App. 2009). The participation in the exchange of insults or verbal argument is insufficient to justify an initial aggressor instruction. *People v. Manzanares*, 942 P.2d 1235, 1241 (Colo.

App. 1996).

¶ 15 The trial court ruled that defendant's racking of the gun (inserting a round into the chamber of the gun by pulling the slide back and releasing it) when Sergeant Lombardi and Officer Simmons approached was the first significant event that occurred between defendant and the two police officers, and that this was sufficient to submit the initial aggressor issue to the jury. We disagree with the court's ruling because defendant's encounter with the police cannot be considered as a separate encounter from that with the handgun shooter.

¶ 16 "In determining whether an initial aggressor instruction is appropriate under the circumstances of a case in which hostilities begin and escalate among a group of people, the conduct of the defendant in the context of the situation must be the focus of any analysis of the defendant's right to self-defense." *Silva*, 987 P.2d at 915-16. Here, the entire incident, starting from when the handgun shooter fired his first shots until defendant was felled by police, lasted less than a minute and probably considerably less.

¶ 17 Defendant testified that he believed Sergeant Lombardi and Officer Simmons were part of the same group as the handgun

shooter and thus he did not know he was shooting at the police. Sergeant Lombardi testified that neither he nor Officer Simmons announced they were police or ordered defendant to drop his gun before they fired their weapons. Officer Simmons testified that he believed Sergeant Lombardi said something but he could not hear what he said. In these circumstances, the police entered an ongoing and uninterrupted fight between defendant and the handgun shooter. *Cf. People v. Beasley*, 778 P.2d 304, 305-06 (Colo. App. 1989) (concluding that it was error to give an initial aggressor instruction because “initial” means “first” in this context and a fight was already underway between the defendant’s associate and the victim when the defendant entered the physical conflict).

¶ 18 Despite our disagreement with the court’s ruling, “on appeal, a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court.” *People v. Eppens*, 979 P.2d 14, 22 (Colo. 1999). The People recognize that most of the witnesses testified that the handgun shooter started firing before defendant left his car. But they argue that there was

some evidence that defendant was the initial aggressor because one person in defendant's car testified, at least on direct examination, that she heard gunshots *after* defendant got out of the car and thus also after he popped open the trunk (although on cross-examination, she stated she heard gunshots *when* defendant got out of the car). This witness testified that after she heard defendant exchange words with the other man (who may or may not have been the handgun shooter), defendant put the car in park, got out, and started cursing at the other man. She then heard gunshots.

¶ 19 The People also emphasize that another of defendant's companions allegedly told the police during her initial interview that defendant got out of the car after somebody said something to defendant "that got him mad," a statement which was admitted as an inconsistent statement (and thus substantive evidence pursuant to section 16-10-201, C.R.S. 2014) because the witness testified at trial that she heard shooting *before* defendant got out of the car.

¶ 20 We acknowledge that it is a very close question whether there was sufficient evidence to support the initial aggressor instruction. However, given the testimony discussed above, the uncertainty about the sequence of events that occurred in a very short period

under very stressful circumstances, and the minimal showing that must be made by the prosecution to support an instruction on an exception to self-defense, we cannot hold that the trial court erred in giving the instruction.

¶ 21 We stress that our role is not to determine whether the evidence that supports the instruction also supports a finding beyond a reasonable doubt that defendant was the initial aggressor. Rather, our job is limited to determining whether there was some evidence that supported the instruction. The determination whether defendant was in fact the initial aggressor, and the resolution of conflicting testimony on that issue, was a question of fact for the jury to decide. *Coughlin*, 304 P.3d at 588.

¶ 22 Accordingly, we conclude that the trial court did not err in giving the initial aggressor instruction to the jury.

B. Provocation Instruction

¶ 23 The trial court also instructed the jury, over defendant's objection, that self-defense is not an affirmative defense if defendant, "with intent to cause bodily injury or death to another person, provoked the use of unlawful physical force by that person." We agree with defendant that this instruction should not have been

given because there was no evidence to support it.

¶ 24 “An instruction on provoking the victim . . . should be given if (1) self-defense is an issue in the case; (2) the victim makes an initial attack on the defendant; and (3) the defendant’s conduct or words were intended to cause the victim to make such attack and provide a pretext for injuring the victim.” *Silva*, 987 P.2d at 914. Thus, in order for a defendant to forfeit self-defense under the provocation exception, the defendant must act with the intent to provoke the victim into attacking first. *See id.*

¶ 25 No evidence was presented that defendant’s words or actions were intended to provoke the handgun shooter into attacking first in order to provide a pretext for defendant to use physical force. There also was no evidence that defendant intended to provoke the police into shooting at him so that he could shoot back. The trial court therefore should not have given the jury an instruction on the provocation exception to self-defense.

¶ 26 We review a preserved objection to a jury instruction for harmless error. *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001); *see also Kaufman v. People*, 202 P.3d 542, 561 n.21 (Colo. 2009).

“Under a harmless error standard, reversal is required if the error

affected the substantial rights of the defendant.” *People v. Gordon*, 160 P.3d 284, 288 (Colo. App. 2007). An error thus requires reversal if it “create[d] a reasonable probability that the jury could have been misled in reaching a verdict” or otherwise contributed to the defendant’s conviction. *Zukowski*, 260 P.3d at 343; *Garcia*, 28 P.3d at 344.

¶ 27 In *Kaufman*, the Colorado Supreme Court held that the giving of an instruction on an exception to self-defense when the evidence did not warrant it was error. 202 P.3d at 562. The supreme court explained that “[d]uring deliberations, it is possible that the jury may have wondered why it was given the instruction, decided that it must have been for some purpose, and forced the evidence to fit the instruction, thereby denying [the defendant] his claim to self-defense.” *Id.* However, the supreme court explicitly stated that because it was reversing the defendant’s convictions on other grounds, it considered this issue “purely in an attempt to provide guidance to the court upon retrial” and it did “not address whether the error . . . was sufficiently prejudicial to require reversal.” *Id.* at 561 n.21. Therefore, although *Kaufman* provides useful guidance in analyzing this issue, it does not necessarily require reversal here.

¶ 28 Under the same rationale quoted above from *Kaufman*, divisions of this court have held that giving an unwarranted instruction on an exception to self-defense required reversal because it “create[d] a reasonable possibility that the jury could have been misled.” *Silva*, 987 P.2d at 915. For example, in *Silva*, the division concluded:

Although the giving of an instruction even if there is no evidence to support it may be considered harmless error if no reasonable possibility exists that the jury was misled, such is not the case here. If, as here, the lack of any evidence to support the giving of an instruction [on an exception to self-defense] creates a situation in which it would be misleading and confusing for the trial court to ask the jury to resolve an issue that does not exist, then the error cannot be considered harmless.

Id. (citation omitted). Similarly, the division in *Beasley* held that the giving of an unwarranted initial aggressor instruction was reversible because

inasmuch as there was no basis for the jury to find that [the] defendant initiated the physical conflict, it was misleading to instruct the jurors on the “initial aggressor” concept. By giving such an instruction, the [trial] court may have induced the jurors to characterize the defendant as the first aggressor even though another individual actually started the

conflict and thereby unjustifiably to conclude that [the] defendant lost his right of self-defense.

778 P.2d at 306.

¶ 29 Conversely, in *Manzanares*, the division held that erroneously giving an instruction on the initial aggressor exception was harmless because, “in the circumstances presented,” no reasonable possibility existed that the jury was misled. 942 P.2d at 1241. The division emphasized that there was no evidence that the defendant initiated or was involved in the initial altercation and the prosecutor did not make any attempt to characterize the defendant as the initial aggressor. *Id.* Thus, according to the division, it was likely that the jury simply discarded the instruction rather than forced the evidence to fit into the instruction. *Id.*

¶ 30 We are unable to reconcile *Silva* and *Beasley* with *Manzanares*. Although the *Silva* division cites *Manzanares* (“the giving of an instruction even if there is no evidence to support it may be considered harmless error if no reasonable possibility exists that the jury was misled,” *Silva*, 987 P.2d at 915 (citing *Manzanares*, 942 P.2d 1235)), it does not explain why its facts are distinguishable from the facts of *Manzanares* such that a

reasonable possibility existed that the jury would be misled in *Silva* but not in *Manzanares*. We cannot discern any reason why *Manzanares* reached a different result than *Beasley* and *Silva* given that all three cases explicitly based their reversal analysis on the fact that no evidence supported the instruction. *Silva*, 987 P.2d at 915; *Manzanares*, 942 P.2d at 1241; *Beasley*, 778 P.2d at 306. Thus, divisions of this court are split regarding whether and in what circumstances the giving of an unwarranted instruction on a self-defense exception is misleading to the jury and therefore reversible error.

¶ 31 The holdings in *Silva* and *Beasley* are fundamentally inconsistent with the ordinary application of the harmless error rule. We do not understand why the erroneous giving of an unwarranted self-defense exception instruction essentially requires automatic reversal,¹ but numerous other types of trial errors do not.

¹ *People v. Silva* seems to recognize the possibility that the giving of an unwarranted self-defense exception will be harmless error, but it also states that “[i]f, as here, the lack of any evidence to support the giving of an instruction [on an exception to self-defense] creates a situation in which it would be misleading and confusing for the trial court to ask the jury to resolve an issue that does not exist, then the error cannot be considered harmless.” 987 P.2d 909, 915 (Colo. App. 1999). When the giving of a self-defense exception instruction

In this respect, we note the supreme court’s recent overruling of its precedents that required automatic reversal when, during the jury selection process, an “erroneous ruling on a challenge for cause adversely impact[ed] the defendant’s ability to shape the jury through peremptory challenges.” *People v. Novotny*, 2014 CO 18, ¶ 14. The supreme court stated that “reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate or an appropriate case specific, outcome-determinative analysis, can no longer be sustained.” *Id.* at ¶ 27.

¶ 32 Therefore, we agree with the rationale of *Manzanares* and hold that unless a defendant demonstrates the required level of prejudice under a harmless error or plain error standard, the giving of an unsupported instruction on a self-defense exception does not necessarily warrant reversal. To the extent that *Silva* and *Beasley* are inconsistent with this holding, we decline to follow them. *See, e.g., People v. Smoots*, 2013 COA 152, ¶ 20 (one division of the court of appeals is “not obligated to follow the precedent established

is erroneous, it is precisely because there is no evidence to support it. This statement from *Silva* thus seems to require reversal anytime a self-defense exception instruction is given erroneously. Accordingly, *Silva* appears to apply a rule of automatic reversal rather than harmless error.

by another division”) (*cert. granted in part on other grounds* June 30, 2014).²

¶ 33 Nor, as discussed above, do we read *Kaufman* to require us to follow the rationale of *Silva* and *Beasley*. Rather, a careful reading of *Kaufman*, 202 P.3d at 562, reveals that when the supreme court stated that the jury “may have wondered why it was given the instruction . . . and [thus] forced the evidence to fit the instruction,” it was explaining why the giving of the unwarranted instruction was error, rather than creating a rule of automatic reversal.

¶ 34 Under the circumstances of this case, we discern no reasonable probability that the provocation instruction misled the jury or otherwise improperly contributed to defendant’s convictions. There is no evidence in the record that gives rise to an inference that this jury was misled by the provocation instruction or generally confused. To the contrary, the jury acquitted defendant on the most serious charges and convicted him on the lesser offenses. This does not demonstrate jury confusion.

² While we recognize that decisions of other divisions of this court are entitled to deference, when two or more divisions are split on an issue like they are here, it is impossible for us to defer to each division that has addressed that issue.

¶ 35 Moreover, absent evidence to the contrary, a jury is presumed to follow the trial court’s instructions. *See, e.g., People v. Moody*, 676 P.2d 691, 697 (Colo. 1984). The jury was instructed that it should consider all of the evidence in the case and that, as to the affirmative defense, the prosecution had the burden of proving the guilt of defendant beyond a reasonable doubt. There was no evidence presented that defendant provoked the use of physical force by the handgun shooter or police *with the intent* to cause bodily injury or death to another person. We thus must presume that the jury disregarded the provocation exception rather than forced the evidence to fit into it.

¶ 36 This does not mean that it is impossible for a defendant to demonstrate prejudice sufficient to justify reversal when a court gives a self-defense exception instruction that is not warranted by the evidence. *Cf. Novotny*, ¶ 31 (Hood, J., concurring in part and dissenting in part) (criticizing the majority’s opinion for creating a rule of “automatic affirmance” because a defendant “may never be able to demonstrate prejudice” from a trial court’s erroneous denial of a challenge for cause). For instance, jury confusion evidenced by a jury question could demonstrate such prejudice. Moreover, a

situation could exist where a defendant so clearly acted in self-defense that no reasonable jury could reject self-defense without erroneously finding that the defendant provoked the unlawful use of force or was the initial aggressor. But that is not the case here. Rather, given the other, legitimate reasons the jury might have rejected defendant's self-defense claim — for example, by finding that firing a shotgun in the presence of bystanders was not a reasonable way to defend himself and his family — we cannot conclude that there is a reasonable probability the jury relied on the improperly given provocation instruction in rejecting self-defense.

¶ 37 Accordingly, we conclude that while the trial court erred in instructing the jury on the provocation exception to self-defense, the error was harmless.

C. Burden of Proof Instructions

¶ 38 Defendant argues that the trial court erred in failing to explicitly instruct the jury that to reject his claim of self-defense under the self-defense exceptions, the prosecution had the burden to prove beyond a reasonable doubt that defendant was the initial aggressor or provoked the use of unlawful force by another person. We disagree.

¶ 39 The trial court's affirmative defense instruction on self-defense provided:

(1) It is an affirmative defense to the crimes of Criminal Attempt to Commit Murder in the First Degree, Criminal Attempt to Commit Murder in the Second Degree, Assault in the First Degree, and Assault in the Second Degree that the defendant used physical force upon another person: (A) in order to defend himself or a third person from what he reasonably believed to be the use of unlawful physical force, and (B) he used a degree of force which he reasonably believed to be necessary for that purpose. Defendant was not required to retreat in order to claim the right to employ force in his own defense.

(2) It is not an affirmative defense that the Defendant used physical force upon another person as set out in paragraph (1) of this instruction if the defendant was the initial aggressor unless: (A) the defendant withdrew from the encounter, and (B) effectively communicated to the person his intent to do so, and (C) the other person nevertheless continued or threatened the use of unlawful physical force.

(3) It is not an affirmative defense that the defendant used physical force upon another person as set out in paragraph (1) of this instruction if the defendant, with intent to cause bodily injury or death to another person, provoked the use of unlawful physical force by that person.

¶ 40 Defendant tendered defense Instruction Number 3, which the

trial court declined to give. Defendant’s proposed instruction included the same language as the court’s instruction, but additionally stated, at the end of paragraph (2), that “[t]he prosecution must prove beyond a reasonable doubt that defendant was the initial aggressor. If the prosecution does not prove beyond a reasonable doubt that defendant was the initial aggressor, you must consider whether the defendant was acting in self-defense.” Defendant’s tendered instruction added the same statements at the end of paragraph (3) but substituted “provoked the use of unlawful physical force” for “was the initial aggressor.” Defendant argues that the trial court erred in refusing to give his tendered instruction because without the added language, the jury simply did not know what burden of proof, if any, to apply.

¶ 41 A trial court has the duty to correctly instruct the jury on all matters of law applicable to the case. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009); *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). “We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law.” *Lucas*, 232 P.3d at 162. In making this determination, we consider all of the instructions given by the trial

court together. *Riley v. People*, 266 P.3d 1089, 1083 (Colo. 2011). No reversible error occurs if the jury instructions, read together, adequately informed the jury of the law. *People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005).

¶ 42 Colorado law provides that “[i]f the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.” § 18-1-407(2), C.R.S. 2014. Thus, once a defendant meets his or her burden of going forward with a defense, “the prosecution has the burden of disproving the claimed affirmative defense beyond a reasonable doubt.” *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005).

¶ 43 As a logical corollary of this proposition, the prosecution must prove beyond a reasonable doubt an exception to self-defense (provided in section 18-1-704(3), C.R.S. 2014) for the jury to reject a defendant’s claim of self-defense on that basis. In rejecting tendered Instruction Number 3, the trial court found that the jury was informed of this requirement because the court had “appropriately and on more than one occasion advised the jury of the burden of proof as to affirmative defenses.” The court noted

that in each of the elemental instructions where the affirmative defense applied to the offense charged (attempted first degree murder, attempted second degree murder, and first degree and second degree assault) one of the listed elements was “without the affirmative defense.” And, in each of these instructions, the jury was instructed that, to find defendant guilty, it had to decide that the prosecution had proved each element beyond a reasonable doubt. The court also pointed to Instruction Number 19, which provided:

The evidence presented in this case has raised an affirmative defense. The prosecution has the burden of proving the guilt of the defendant as to your satisfaction beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged. After considering the evidence concerning the affirmative defense, with all the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant’s guilt, you must return a verdict of not guilty.

¶ 44 Likewise, the People argue that the jury was sufficiently advised on the prosecution’s burden of proof as to the exceptions to self-defense. The People emphasize that the jury was instructed multiple times in the court’s instructions, including Instruction

Number 4 on the presumption of innocence, that the burden of proof was upon the prosecution to prove to the jury's satisfaction beyond a reasonable doubt the existence of all of the elements, including the absence of self-defense, necessary to constitute the crimes charged.

¶ 45 Although the instructions could have been clearer that the exceptions had to be proved beyond a reasonable doubt, we ultimately agree with the trial court and the People that the jury was sufficiently informed regarding the burden of proof to apply to the self-defense exceptions.³ In reaching this conclusion, we rely on the instructions discussed above as well as the fact that defense counsel explicitly argued during closing, without objection or contradiction by the prosecutor, that the prosecution had to prove beyond a reasonable doubt that defendant was the initial aggressor to negate the claim of self-defense. *Cf. People v. Dore*, 997 P.2d

³ The latest version of the Colorado pattern criminal jury instructions, which was not available at the time of the trial in this case, more explicitly instructs the jury that the jury's determinations regarding the exceptions to self-defense must be made beyond a reasonable doubt by including language that the prosecution must disprove beyond a reasonable doubt that the defendant did not provoke the use of unlawful physical force by the other person and the defendant was not the initial aggressor. COLJI-Crim. H:11, H:12 (2014).

1214, 1222 (Colo. App. 1999) (in determining whether the jury has been adequately informed of the defendant's theory of defense, a reviewing court may consider whether defense counsel's closing argument fairly represented defendant's theory to the jury).

¶ 46 Therefore, the trial court did not err in declining to give defendant's tendered Instruction Number 3 or refusing to modify its own instruction to explicitly include the burden of proof applicable to the initial aggressor and provocation exceptions.

III. Defendant's Tendered Instructions

¶ 47 Defendant tendered two instructions that he claims the trial court erroneously rejected. Defendant's Instruction Number 4 stated:

In determining whether the Defendant acted reasonably, you are instructed that a reasonable person is defined as a reasonable person in the Defendant's situation and circumstances. Furthermore, in determining whether Defendant reasonably believed that the victim's use of unlawful force was imminent, you must consider the circumstances surrounding the Defendant's actions as they appeared to him at the time and not with the benefit of hindsight. In certain circumstances, instinctive reaction may be considered reasonable conduct.

Defendant's Instruction Number 6 provided that "[w]here a person

unintentionally harms a bystander while acting in self-defense against another person, he is not culpable for the injury to the bystander.” We disagree with defendant that the court erred in refusing to give these instructions.

¶ 48 Initially, we reject defendant’s contention that these instructions embodied his theory of the case and thus had to be given if the record contained any evidence that supported them. *See People v. Nunez*, 841 P.2d 261, 265 (Colo. 1992). “A proper theory of the case instruction should explain a defendant’s view of what the evidence shows, must be general and brief, and must instruct the jury on the legal effect of the explanation.” *People v. Meads*, 58 P.3d 1137, 1138 (Colo. App. 2002); *see also People v. Luu*, 813 P.2d 826, 828 (Colo. App. 1991). Neither defendant’s tendered Instruction Number 4 nor Instruction Number 6 explained how the legal statements contained therein should be applied in this case, and thus neither was a theory of the case instruction.

¶ 49 Other than regarding a defendant’s theory of the case instruction, a trial court’s refusal to give tendered written instructions will not “constitute reversible error absent manifest prejudice or a clear showing of abuse of discretion.” *People v.*

Renfro, 117 P.3d 43, 48 (Colo. App. 2004).

¶ 50 The trial court did not abuse its discretion in refusing to give defendant's Instruction Number 4 because the other instructions adequately conveyed the principles contained in that instruction. *See People v. Tweedy*, 126 P.3d 303, 307 (Colo. App. 2005). The trial court's affirmative defense instruction, Instruction Number 20, provided that it was an affirmative defense if "defendant used physical force upon another person . . . to defend himself or a third person from what he reasonably believed to be the use of unlawful physical force, and . . . he used a degree of force which he reasonably believed to be necessary for that purpose."

¶ 51 Additionally, Instruction Number 21 stated that "[t]he totality of the circumstances . . . must be considered by the jury in evaluating the reasonableness of the defendant's belief in the necessity of defensive action, and the reasonableness of the force used by him to defend against the apparent danger." These instructions encompassed the principles contained in the first two sentences of defendant's Instruction Number 4. *Cf. Hare v. People*, 800 P.2d 1317, 1319 (Colo. 1990) (concluding that a similar instruction "permitted the jury to consider from the defendant's

viewpoint whether the defendant was justified in using physical force in self-defense”).

¶ 52 As to the last sentence of defendant’s Instruction Number 4, the supreme court has explained that “[t]he General Assembly has indirectly recognized” that “in certain circumstances instinctive reaction may be considered reasonable conduct” because under the self-defense statute, “it is clear that the fact finder must weigh all relevant circumstances to determine whether a person asserting the defense of self-defense has acted as a reasonable person would act in similar circumstances.” *Sanchez v. People*, 820 P.2d 1103, 1108 (Colo. 1991). As the trial court’s instructions on self-defense were framed in the language of the statute, *see* § 18-1-704(1), those instructions adequately encompassed the principle that in certain circumstances, instinctive reaction may constitute reasonable conduct.

¶ 53 The trial court also did not err in refusing to give defendant’s tendered Instruction Number 6, because it contained an incorrect statement of law. *See Tweedy*, 126 P.3d at 307. Although a defendant acting in self-defense against one person might not be liable for an unintentional injury to another person, the result is

otherwise if under all the circumstances, including the need to defend oneself, the defendant was reckless with regard to the bystander. 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4 (2d ed. 2013); see also *Henwood v. People*, 54 Colo. 188, 194, 129 P. 1010, 1012 (1913). Instruction Number 6 thus was legally erroneous because it implied that one is never liable for unintentional injury to a bystander if acting in self-defense against another person. To the extent the trial court had an affirmative duty to cooperate with defense counsel to correct the instruction or incorporate the substance of it in an instruction drafted by the court, *Garcia*, 28 P.3d at 349 n.8, the court's self-defense instructions encompassed the principle that the jury should consider whether defendant acted as a reasonable person would act in similar circumstances, which would include the presence of bystanders.

¶ 54 Accordingly, the trial court did not err in declining to give defendant's tendered Instruction Number 4 and Instruction Number 6.

IV. Prosecutorial Misconduct

¶ 55 Defendant argues that numerous statements made by the

prosecutor in closing argument were misleading as to both the facts of this case and the law of self-defense. We agree that some of the prosecutor's statements were improper, but conclude that none constitutes reversible error.

¶ 56 “Whether a prosecutor’s statements constitute misconduct is generally a matter left to the trial court’s discretion.” *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). We will not disturb the trial court’s rulings regarding such statements absent a showing of abuse of discretion. *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010). If a defendant objected to the statements during trial, we review the trial court’s ruling under a harmless error standard. *People v. Samson*, 2012 COA 167, ¶ 28. Under a harmless error standard, reversal is required unless “there is no reasonable probability that it contributed to the defendant’s conviction.” *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008).

¶ 57 If the defendant did not object, we review the alleged prosecutorial misconduct for plain error, which requires reversal “only when there is a substantial likelihood that it affected the verdict or that it deprived the defendant of a fair and impartial trial.” *Strock*, 252 P.3d at 1153. “To constitute plain error,

prosecutorial misconduct must be flagrant or glaringly or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction.” *Id.* at 1152 (internal quotation marks omitted).

¶ 58 In reviewing a claim of prosecutorial misconduct, we engage in a two-step analysis, determining, first, whether the prosecutor’s conduct was improper based on the totality of the circumstances, and, second, whether such actions warrant reversal. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). We evaluate claims of improper argument “in the context of the argument as a whole and in light of the evidence before the jury.” *Samson*, ¶ 30. Whether prosecutorial misconduct requires reversal depends on “the severity and frequency of the misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to the defendant’s conviction.” *Strock*, 252 P.3d at 1153.

A. Misstatements of Fact

¶ 59 “A prosecutor has wide latitude to make arguments based on facts in evidence and reasonable inferences drawn from those

facts.” *Id.* at 1153. However, a prosecutor may not misstate the evidence, *Samson*, ¶ 32, nor may a prosecutor refer to facts not in evidence, *People v. McMinn*, 2013 COA 94, ¶ 62.

¶ 60 Defendant argues that the prosecutor misstated the facts by arguing that the police “may have announced” themselves before firing at defendant. Defense counsel objected, and the trial court overruled the objection, stating that “[t]he jury will determine what the facts are in this case.” The prosecutor then added, “[a]nd I would like to highlight that it’s your memory. If anybody’s testimony is different from what I’m asserting to you now, please rely on your own memory. The statements of the attorneys are not evidence.”

¶ 61 The prosecutor’s statement was not a misstatement of the evidence. The entire statement by the prosecutor to which defense counsel objected was: “Sergeant Lombardi may have announced himself [although he] said he didn’t have time to announce himself. Officer Simmons heard something being said by Sergeant Lombardi as did [one of the eyewitness].” It is an accurate description of the testimony that Officer Simmons and an eyewitness testified they heard Sergeant Lombardi say something before firing at defendant,

and “the police ‘may have announced’ themselves” is a reasonable inference from that testimony. To the extent that the statement conflicted with testimony by Sergeant Lombardi and other eyewitnesses that the police did not announce themselves, the jury was properly informed by the trial court and the prosecutor that statements by attorneys are not evidence and that the jury alone determines the facts.

¶ 62 Defendant also claims that several times during closing argument, the prosecutor misstated the evidence by implying that defendant had removed the shotgun from the trunk and brandished it before the handgun shooter fired:

If you don't think that the defendant, when he walked into the crowd and racked that gun, provoked a response by an unknown gunman, disregard provocation.

. . .

So what really happened? I submit to you that the facts support the following: that the defendant was driving out of the parking lot . . . and a man walked by, talked stuff to him and he talked stuff back which angered the defendant. He got mad. And, I'll show him. And he got out of the car, popped the trunk before getting out of the car, grabs the shotgun and goes and shows him.

. . .

He goes to the back of the trunk and, again, this is for you guys to determine. But it

sounds like the 9 millimeter went off first. Did it go off in response to the defendant going into his trunk and pulling this out? Again, that's for you to decide. But shots are fired. And his response is to pull it out, rack it, walked [sic] towards the shooter, aim . . . [and] pull the trigger.

¶ 63 We agree with defendant that, because no witness testified that he walked into the crowd racking his gun or that he removed his shotgun from the trunk before the handgun shooter started firing, some of these statements misstated the evidence or referred to facts not in evidence.

¶ 64 However, defense counsel did not object to any of these statements, and we conclude that they did not constitute plain error. Considering the general uncertainty regarding the timing of events and the conflicting testimony of the witnesses, the statements were not “flagrant or glaringly or tremendously improper.” *See Strock*, 252 P.3d at 1152. Moreover, on a number of occasions during the prosecutor’s closing argument, the trial court instructed the jury that attorney arguments are not evidence and that the jury must decide the facts based only on the evidence presented at trial. Absent an affirmative showing to the contrary, of which there is none, we must presume the jury followed these

instructions. *Moody*, 676 P.2d at 697. Under these circumstances, there was not a substantial likelihood that the prosecutor’s misstatements of the evidence affected the verdict or deprived defendant of a fair and impartial trial. *See Strock*, 252 P.3d at 1153.

¶ 65 Accordingly, although some of the prosecutor’s statements regarding the facts were improper, reversal is not required.

B. Misstatements of Law

¶ 66 “It is improper for counsel to misstate or misinterpret the law during closing argument.” *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999).

1. Initial Aggressor Exception

¶ 67 Defendant argues that the prosecutor misstated the law on the initial aggressor exception to self-defense several times by making the following statements:

[1] If you don’t believe that the defendant was the initial aggressor, the first person to start it, disregard the initial aggressor law, okay? If you don’t think he started it, then don’t worry about initial aggressor. . . . The law on initial aggressor is that self-defense doesn’t apply if you started it. You can’t pick a fight with someone physically and then claim self-defense because, you know, he hit me back.

That's kind of a basic common sense thing but it's also the law.

. . . .
[2] So self-defense isn't available to someone who started it Did the defendant start this? What did he start? Did he start the fight in the parking lot, the gunfire in the parking lot between some unknown gunmen [sic] and a shotgun? Did that end and then he started another fight with the officers? That's up to you to decide. And if he started it, the defendant can't assert self-defense. It doesn't apply.

Defense counsel objected to the first statement, claiming it was a misstatement of the law. In response, the trial court stated, "the jury should rely on the law as set forth in the Court's instructions."

¶ 68 We conclude that the prosecutor did not misstate the law regarding the initial aggressor exception. To be the initial aggressor, a defendant must initiate the physical conflict by using or threatening the imminent use of unlawful physical force. *Griffin*, 224 P.3d at 300. That a defendant "started it," without an additional showing that he or she did so by using or threatening the imminent use of force, is not sufficient to establish that the defendant was the initial aggressor.

¶ 69 However, it is not improper for an attorney in closing argument to focus on one element of an offense or defense without

addressing the other elements as long as the attorney does not suggest that those other elements are irrelevant. The prosecutor's focus on one element of the initial aggressor exception (initiating the physical conflict) did not necessarily imply that the other element (using or threatening the imminent use of force) was inapplicable or unnecessary. *Cf. People v. James*, 117 P.3d 91, 97 (Colo. App. 2004) ("The prosecutor chose to differentiate simple from aggravated robbery by the one element that the two crimes did not share . . . ; the prosecution never intimated that the other elements of the instruction were inapplicable or unnecessary."). Accordingly, the prosecutor's statements on the initial aggressor exception were not improper.

2. Self-Defense

¶ 70 Defendant also claims the prosecutor misstated the law on self-defense by defining the "reasonableness" of defendant's belief that the use of force was necessary under "an objectively reasonable person standard." Defense counsel objected and the court sustained the objection during a bench conference, stating that the standard is a reasonable person "under the circumstances." The court then instructed the jury, "the Court would again say that the

Court’s instructions of law are governing. What the lawyers may say about the law is not the law. What the Court says in its instruction is the law and that’s the only law that you should follow in this case.”

¶ 71 The affirmative defense of self-defense requires that “a reasonable person would have believed and acted as the defendant did,” and “[i]n this context, a ‘reasonable person’ means an objectively reasonable individual.” *People v. Vasquez*, 148 P.3d 326, 330 (Colo. App. 2006) (some internal quotation marks omitted). Therefore, the prosecutor did not err in defining reasonableness under an objectively reasonable person standard.

3. Duty to Retreat

¶ 72 Lastly, defendant argues that the prosecutor made multiple comments during closing that implied defendant should have retreated rather than engaging the handgun shooter. Specifically, the prosecutor argued:

And while there’s no duty to retreat, [the defendant] elected not to throw himself on his wife and wait for this substantial police presence that was in the area to take care of the problem. He decided to take care of it himself.

...

If the defendant would have just left the parking lot that night, none of us would be here. He wouldn't be sitting here. You wouldn't be in those chairs. [His cousin] wouldn't be dead. [The bystander] wouldn't have had to have that buckshot removed from her body and countless citizens from Denver wouldn't have to live with the memory of that horrible evening.

. . .
Let's talk about some of the things that the defendant said that night. . . . If I could have just left that lot, none of this would have happened, his words to you. Ladies and gentlemen, he could have left that lot that night. . . . There was nothing stopping him from getting out of that parking lot that night. He could have left. He could have kept driving, but somebody said something that pissed him off.

Defense counsel objected to some of these statements, and the trial court overruled the objections.

¶ 73 The People argue that these comments did not imply defendant had a duty to retreat but rather that they impeached defendant's testimony about what had occurred, for example, that he would have left the parking lot if he was not blocked by other cars. While this may be one way to interpret the statements, it is also reasonable to interpret them as stating that it was unreasonable for defendant to shoot at the handgun shooter rather

than leave the parking lot.

¶ 74 Under the latter interpretation, the statements are legally incorrect. In Colorado, those who are otherwise entitled to use physical force in self-defense may do so without first retreating or seeking safety by means of escape. *Cassels*, 92 P.3d at 956. Under this doctrine of no retreat, a person entitled to use self-defense “does not have to consider whether a reasonable person in the situation would opt to retreat to safety rather than resorting to physical force to defend against unlawful force.” *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000); see also *Brown v. United States*, 256 U.S. 335, 343 (1921).

¶ 75 In *Cassels*, the supreme court concluded that statements during closing that were similar to those made here “characterized the events leading up to the shooting in a way that could influence a reasonable jury to infer that [the defendant] could have escaped the situation, but chose to engage in violence instead.” 92 P.3d at 958. In holding that the trial court therefore erred by failing to give an instruction on the duty of no retreat, the court implied that the prosecutor’s statements were inconsistent with the law. See *id.* Similarly, in *State v. Adams*, the Kansas Supreme Court concluded

that a statement during closing that “[t]his sure as heck would have been a different situation if the defendant had just walked away,” followed by the statement “[h]e could have gone to the bouncers, he could have run to the parking garage,” arguably implied a duty to retreat. 253 P.3d 5, 14-15 (Kan. 2011).

¶ 76 Conversely, in *People v. Martinez*, a division of this court concluded that statements made in closing that if the defendant was “so scared and he was very nervous . . . about the fact that . . . [the victim] had a black belt,” then “he could have left” were simply rebutting the defendant’s claim that he acted in self-defense because he was scared of the victim. 224 P.3d 1026, 1031-33 (Colo. App. 2009). They therefore did not implicate the no-duty-to-retreat rule. *Id.*; see also *People v. McGee*, 679 N.E.2d 796, 800 (Ill. App. Ct. 1997).

¶ 77 Although some of the statements at issue here could reasonably be interpreted as an attempt to impeach defendant’s testimony, some of the other statements do not appear to be comments on defendant’s credibility. Rather, they seem more like the statements in *Cassels* in that they suggest it was unreasonable for defendant not to retreat under the circumstances. Because the

law prohibits consideration of whether a reasonable person in a defendant's situation would have retreated when determining whether the defendant acted in self-defense, statements that give rise to such an inference are improper.

¶ 78 Still, for the following reasons, we conclude that the prosecutor's statements were harmless. The jury was specifically instructed that defendant had no duty to retreat to claim the right of self-defense. Defense counsel emphasized that instruction during closing argument and stated at least twice that defendant did not need to retreat to succeed on his self-defense claim. Additionally, during the prosecutor's closing argument, the court repeatedly instructed the jury that attorney arguments were not the law and that the jury must apply only the law given to it by the court. Thus, to the extent that the prosecutor's statements implied a duty to retreat, there was no reasonable probability that they contributed to defendant's convictions.

V. Cumulative Error

¶ 79 Defendant argues that the cumulative effect of the alleged errors discussed above, all of which relate to the jury's evaluation of his asserted affirmative defense, require reversal. We disagree.

¶ 80 “[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal is required.” *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986). However, “[a] conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant’s right to a fair trial.” *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007). In light of all the circumstances, the jury’s ability to properly evaluate defendant’s self-defense claim was not so impaired by the cumulative effect of the errors we have identified such that defendant was deprived of his right to receive a fair trial.

VI. Conclusion

¶ 81 The judgment of conviction is affirmed.

JUDGE CASEBOLT and JUDGE DAILEY concur.

Court of Appeals No. 10CA1477
City and County of Denver District Court No. 08CR3151
Honorable Shelley I. Gilman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Andres Castillo,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II

Opinion by JUDGE BERGER
Casebolt and Dailey, JJ., concur

Announced October 23, 2014

John W. Suthers, Attorney General, Brock J. Swanson, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Ned R. Jaeckle, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Andres Castillo, appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of attempted second degree murder and one count of second degree assault. Defendant argues: (1) the trial court erred in instructing the jury on the initial aggressor and provocation exceptions to self-defense; (2) the court erred in failing to include the burden of proof in its initial aggressor and provocation instructions; (3) the court erred in rejecting defendant's tendered instructions on the law of self-defense and on his theory of the case as to the second degree assault charge; (4) the prosecutor committed prosecutorial misconduct by making misstatements of fact and law during closing argument; and (5) the cumulative effect of these alleged errors deprived defendant of his right to a fair trial. After addressing and rejecting each of these arguments, we affirm.

I. Background

¶ 2 Defendant, his wife, his cousin, and three of their friends went to a club in lower downtown Denver to celebrate his wife's birthday. After they left the club, they returned to defendant's car, which was parked in a nearby parking lot. Witnesses estimated that at least one hundred people were in or around the parking lot at that time,

and some fighting had broken out.

¶ 3 While defendant and his group were waiting to exit the parking lot, an unidentified male said something to defendant through the open driver's door window. Defendant responded. No witness testified regarding what was said to defendant or what defendant replied, but one of defendant's companions testified that after the two men had exchanged some words, defendant started cursing at the other man.

¶ 4 Testimony was conflicting about what occurred next; most witnesses testified that defendant continued driving toward the exit but one witness testified that defendant stopped and got out of the vehicle. An unidentified male (who may or may not have been the same person who exchanged words with defendant) then pulled a handgun out of the waistband of his pants and fired multiple shots in defendant's direction, one of which struck defendant's car.

¶ 5 Thus, under one version of events, defendant stopped the vehicle *after* the handgun shooter began shooting, and under another, defendant stopped and got out of his vehicle *before* the handgun shooter started shooting. Under either version, however, defendant popped open the trunk before getting out of his car.

Defendant then walked to the rear of the car, removed a shotgun from the trunk, and fired several rounds at the handgun shooter.

In both versions of events, the handgun shooter began firing before defendant walked to the trunk and retrieved the shotgun.

¶ 6 Multiple police officers were in the area because of the fighting that had occurred. Two uniformed police officers, Sergeant Vincent Lombardi and Officer Jason Simmons, ran toward defendant's position and exchanged fire with defendant. One of defendant's pellets grazed Officer Simmons's stomach. Defendant was shot three times and fell to the ground. He either handed the shotgun to his cousin or his cousin took it from him. His cousin was then fatally shot by the police. The handgun shooter ran away and was never apprehended.

¶ 7 Defendant was charged with two counts of attempted first degree murder against Sergeant Lombardi and Officer Simmons, two counts of first degree assault on a peace officer, and five counts of second degree assault against bystanders who were hit with stray pellets from defendant's shotgun. Four of the second degree assault charges were later dismissed. A jury convicted defendant of two counts of the lesser included offense of attempted second

degree murder and one count of second degree assault. The jury acquitted defendant on both counts of first degree assault against a peace officer.

¶ 8 Defendant received consecutive sentences of fourteen years imprisonment on each of the attempted second degree murder charges and five years on the second degree assault charge, for a total of thirty-three years.

II. Instructions on Self-Defense Exceptions

A. Initial Aggressor Instruction

¶ 9 Defendant argues that because no evidence supported an initial aggressor instruction, the trial court erred by instructing the jury that he was not entitled to self-defense if he was the initial aggressor. We disagree.

¶ 10 As part of its instruction on the affirmative defense of self-defense, the trial court instructed the jury, over defendant's objection, that

[self-defense] is not an affirmative defense . . . if the defendant was the initial aggressor unless: (A) the defendant withdrew from the encounter, and (B) effectively communicated to the other person his intent to do so, and (C) the other person nevertheless continued or threatened the use of unlawful physical force.

¶ 11 “The trial court has a duty to correctly instruct the jury on all matters of law for which there is sufficient evidence to support giving instructions.” *Cassels v. People*, 92 P.3d 951, 955 (Colo. 2004). A trial court should instruct the jury concerning an exception to an asserted affirmative defense if some evidence supports the exception. *People v. Zukowski*, 260 P.3d 339, 347 (Colo. App. 2010). Whether sufficient evidence supports a jury instruction is a question of law we review de novo. *People v. Coughlin*, 304 P.3d 575, 587 (Colo. App. 2011). When an instruction was given, we view the evidence in the light most favorable to the giving of the instruction. *People v. Silva*, 987 P.2d 909, 914 (Colo. App. 1999).

¶ 12 A court may give an initial aggressor instruction “if the evidence will support a reasonable inference that the defendant initiated the physical conflict by using or threatening the imminent use of unlawful physical force.” *People v. Griffin*, 224 P.3d 292, 300 (Colo. App. 2009). The participation in the exchange of insults or verbal argument is insufficient to justify an initial aggressor instruction. *People v. Manzanares*, 942 P.2d 1235, 1241 (Colo.

App. 1996).

¶ 13 The trial court ruled that defendant's racking of the gun (inserting a round into the chamber of the gun by pulling the slide back and releasing it) when Sergeant Lombardi and Officer Simmons approached was the first significant event that occurred between defendant and the two police officers, and that this was sufficient to submit the initial aggressor issue to the jury. We disagree with the court's ruling because defendant's encounter with the police cannot be considered as a separate encounter from that with the handgun shooter.

¶ 14 "In determining whether an initial aggressor instruction is appropriate under the circumstances of a case in which hostilities begin and escalate among a group of people, the conduct of the defendant in the context of the situation must be the focus of any analysis of the defendant's right to self-defense." *Silva*, 987 P.2d at 915-16. Here, the entire incident, starting from when the handgun shooter fired his first shots until defendant was felled by police, lasted less than a minute and probably considerably less.

¶ 15 Defendant testified that he believed Sergeant Lombardi and Officer Simmons were part of the same group as the handgun

shooter and thus he did not know he was shooting at the police. Sergeant Lombardi testified that neither he nor Officer Simmons announced they were police or ordered defendant to drop his gun before they fired their weapons. Officer Simmons testified that he believed Sergeant Lombardi said something but he could not hear what he said. In these circumstances, the police entered an ongoing and uninterrupted fight between defendant and the handgun shooter. *Cf. People v. Beasley*, 778 P.2d 304, 305-06 (Colo. App. 1989) (concluding that it was error to give an initial aggressor instruction because “initial” means “first” in this context and a fight was already underway between the defendant’s associate and the victim when the defendant entered the physical conflict).

¶ 16 Despite our disagreement with the court’s ruling, “on appeal, a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court.” *People v. Eppens*, 979 P.2d 14, 22 (Colo. 1999). The People recognize that most of the witnesses testified that the handgun shooter started firing before defendant left his car. But they argue that there was

some evidence that defendant was the initial aggressor because one person in defendant's car testified, at least on direct examination, that she heard gunshots *after* defendant got out of the car and thus also after he popped open the trunk (although on cross-examination, she stated she heard gunshots *when* defendant got out of the car). This witness testified that after she heard defendant exchange words with the other man (who may or may not have been the handgun shooter), defendant put the car in park, got out, and started cursing at the other man. She then heard gunshots.

¶ 17 The People also emphasize that another of defendant's companions allegedly told the police during her initial interview that defendant got out of the car after somebody said something to defendant "that got him mad," a statement which was admitted as an inconsistent statement (and thus substantive evidence pursuant to section 16-10-201, C.R.S. 2014) because the witness testified at trial that she heard shooting *before* defendant got out of the car.

¶ 18 We acknowledge that it is a very close question whether there was sufficient evidence to support the initial aggressor instruction. However, given the testimony discussed above, the uncertainty about the sequence of events that occurred in a very short period

under very stressful circumstances, and the minimal showing that must be made by the prosecution to support an instruction on an exception to self-defense, we cannot hold that the trial court erred in giving the instruction.

¶ 19 We stress that our role is not to determine whether the evidence that supports the instruction also supports a finding beyond a reasonable doubt that defendant was the initial aggressor. Rather, our job is limited to determining whether there was some evidence that supported the instruction. The determination whether defendant was in fact the initial aggressor, and the resolution of conflicting testimony on that issue, was a question of fact for the jury to decide. *Coughlin*, 304 P.3d at 588.

¶ 20 Accordingly, we conclude that the trial court did not err in giving the initial aggressor instruction to the jury.

B. Provocation Instruction

¶ 21 The trial court also instructed the jury, over defendant's objection, that self-defense is not an affirmative defense if defendant, "with intent to cause bodily injury or death to another person, provoked the use of unlawful physical force by that person." We agree with defendant that this instruction should not have been

given because there was no evidence to support it.

¶ 22 “An instruction on provoking the victim . . . should be given if (1) self-defense is an issue in the case; (2) the victim makes an initial attack on the defendant; and (3) the defendant’s conduct or words were intended to cause the victim to make such attack and provide a pretext for injuring the victim.” *Silva*, 987 P.2d at 914. Thus, in order for a defendant to forfeit self-defense under the provocation exception, the defendant must act with the intent to provoke the victim into attacking first. *See id.*

¶ 23 No evidence was presented that defendant’s words or actions were intended to provoke the handgun shooter into attacking first in order to provide a pretext for defendant to use physical force. There also was no evidence that defendant intended to provoke the police into shooting at him so that he could shoot back. The trial court therefore should not have given the jury an instruction on the provocation exception to self-defense.

¶ 24 We review a preserved objection to a jury instruction for harmless error. *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001); *see also Kaufman v. People*, 202 P.3d 542, 561 n.21 (Colo. 2009).

“Under a harmless error standard, reversal is required if the error

affected the substantial rights of the defendant.” *People v. Gordon*, 160 P.3d 284, 288 (Colo. App. 2007). An error thus requires reversal if it “create[d] a reasonable probability that the jury could have been misled in reaching a verdict” or otherwise contributed to the defendant’s conviction. *Zukowski*, 260 P.3d at 343; *Garcia*, 28 P.3d at 344.

¶ 25 In *Kaufman*, the Colorado Supreme Court held that the giving of an instruction on an exception to self-defense when the evidence did not warrant it was error. 202 P.3d at 562. The supreme court explained that “[d]uring deliberations, it is possible that the jury may have wondered why it was given the instruction, decided that it must have been for some purpose, and forced the evidence to fit the instruction, thereby denying [the defendant] his claim to self-defense.” *Id.* However, the supreme court explicitly stated that because it was reversing the defendant’s convictions on other grounds, it considered this issue “purely in an attempt to provide guidance to the court upon retrial” and it did “not address whether the error . . . was sufficiently prejudicial to require reversal.” *Id.* at 561 n.21. Therefore, although *Kaufman* provides useful guidance in analyzing this issue, it does not necessarily require reversal here.

¶ 26 Under the same rationale quoted above from *Kaufman*, divisions of this court have held that giving an unwarranted instruction on an exception to self-defense required reversal because it “create[d] a reasonable possibility that the jury could have been misled.” *Silva*, 987 P.2d at 915. For example, in *Silva*, the division concluded:

Although the giving of an instruction even if there is no evidence to support it may be considered harmless error if no reasonable possibility exists that the jury was misled, such is not the case here. If, as here, the lack of any evidence to support the giving of an instruction [on an exception to self-defense] creates a situation in which it would be misleading and confusing for the trial court to ask the jury to resolve an issue that does not exist, then the error cannot be considered harmless.

Id. (citation omitted). Similarly, the division in *Beasley* held that the giving of an unwarranted initial aggressor instruction was reversible because

inasmuch as there was no basis for the jury to find that [the] defendant initiated the physical conflict, it was misleading to instruct the jurors on the “initial aggressor” concept. By giving such an instruction, the [trial] court may have induced the jurors to characterize the defendant as the first aggressor even though another individual actually started the

conflict and thereby unjustifiably to conclude that [the] defendant lost his right of self-defense.

778 P.2d at 306.

¶ 27 Conversely, in *Manzanares*, the division held that erroneously giving an instruction on the initial aggressor exception was harmless because, “in the circumstances presented,” no reasonable possibility existed that the jury was misled. 942 P.2d at 1241. The division emphasized that there was no evidence that the defendant initiated or was involved in the initial altercation and the prosecutor did not make any attempt to characterize the defendant as the initial aggressor. *Id.* Thus, according to the division, it was likely that the jury simply discarded the instruction rather than forced the evidence to fit into the instruction. *Id.*

¶ 28 We are unable to reconcile *Silva* and *Beasley* with *Manzanares*. Although the *Silva* division cites *Manzanares* (“the giving of an instruction even if there is no evidence to support it may be considered harmless error if no reasonable possibility exists that the jury was misled,” *Silva*, 987 P.2d at 915 (citing *Manzanares*, 942 P.2d 1235)), it does not explain why its facts are distinguishable from the facts of *Manzanares* such that a

reasonable possibility existed that the jury would be misled in *Silva* but not in *Manzanares*. We cannot discern any reason why *Manzanares* reached a different result than *Beasley* and *Silva* given that all three cases explicitly based their reversal analysis on the fact that no evidence supported the instruction. *Silva*, 987 P.2d at 915; *Manzanares*, 942 P.2d at 1241; *Beasley*, 778 P.2d at 306. Thus, divisions of this court are split regarding whether and in what circumstances the giving of an unwarranted instruction on a self-defense exception is misleading to the jury and therefore reversible error.

¶ 29 The holdings in *Silva* and *Beasley* are fundamentally inconsistent with the ordinary application of the harmless error rule. We do not understand why the erroneous giving of an unwarranted self-defense exception instruction essentially requires automatic reversal,¹ but numerous other types of trial errors do not.

¹ *People v. Silva* seems to recognize the possibility that the giving of an unwarranted self-defense exception will be harmless error, but it also states that “[i]f, as here, the lack of any evidence to support the giving of an instruction [on an exception to self-defense] creates a situation in which it would be misleading and confusing for the trial court to ask the jury to resolve an issue that does not exist, then the error cannot be considered harmless.” 987 P.2d 909, 915 (Colo. App. 1999). When the giving of a self-defense exception instruction

In this respect, we note the supreme court’s recent overruling of its precedents that required automatic reversal when, during the jury selection process, an “erroneous ruling on a challenge for cause adversely impact[ed] the defendant’s ability to shape the jury through peremptory challenges.” *People v. Novotny*, 2014 CO 18, ¶ 14. The supreme court stated that “reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate or an appropriate case specific, outcome-determinative analysis, can no longer be sustained.” *Id.* at ¶ 27.

¶ 30 Therefore, we agree with the rationale of *Manzanares* and hold that unless a defendant demonstrates the required level of prejudice under a harmless error or plain error standard, the giving of an unsupported instruction on a self-defense exception does not necessarily warrant reversal. To the extent that *Silva* and *Beasley* are inconsistent with this holding, we decline to follow them. *See, e.g., People v. Smoots*, 2013 COA 152, ¶ 20 (one division of the court of appeals is “not obligated to follow the precedent established

is erroneous, it is precisely because there is no evidence to support it. This statement from *Silva* thus seems to require reversal anytime a self-defense exception instruction is given erroneously. Accordingly, *Silva* appears to apply a rule of automatic reversal rather than harmless error.

by another division”) (*cert. granted in part on other grounds* June 30, 2014).²

¶ 31 Nor, as discussed above, do we read *Kaufman* to require us to follow the rationale of *Silva* and *Beasley*. Rather, a careful reading of *Kaufman*, 202 P.3d at 562, reveals that when the supreme court stated that the jury “may have wondered why it was given the instruction . . . and [thus] forced the evidence to fit the instruction,” it was explaining why the giving of the unwarranted instruction was error, rather than creating a rule of automatic reversal.

¶ 32 Under the circumstances of this case, we discern no reasonable probability that the provocation instruction misled the jury or otherwise improperly contributed to defendant’s convictions. There is no evidence in the record that gives rise to an inference that this jury was misled by the provocation instruction or generally confused. To the contrary, the jury acquitted defendant on the most serious charges and convicted him on the lesser offenses. This does not demonstrate jury confusion.

² While we recognize that decisions of other divisions of this court are entitled to deference, when two or more divisions are split on an issue like they are here, it is impossible for us to defer to each division that has addressed that issue.

¶ 33 Moreover, absent evidence to the contrary, a jury is presumed to follow the trial court's instructions. *See, e.g., People v. Moody*, 676 P.2d 691, 697 (Colo. 1984). The jury was instructed that it should consider all of the evidence in the case and that, as to the affirmative defense, the prosecution had the burden of proving the guilt of defendant beyond a reasonable doubt. There was no evidence presented that defendant provoked the use of physical force by the handgun shooter or police *with the intent* to cause bodily injury or death to another person. We thus must presume that the jury disregarded the provocation exception rather than forced the evidence to fit into it.

¶ 34 Accordingly, we conclude that while the trial court erred in instructing the jury on the provocation exception to self-defense, the error was harmless.

C. Burden of Proof Instructions

¶ 35 Defendant argues that the trial court erred in failing to explicitly instruct the jury that to reject his claim of self-defense under the self-defense exceptions, the prosecution had the burden to prove beyond a reasonable doubt that defendant was the initial aggressor or provoked the use of unlawful force by another person.

We disagree.

¶ 36 The trial court's affirmative defense instruction on self-defense provided:

(1) It is an affirmative defense to the crimes of Criminal Attempt to Commit Murder in the First Degree, Criminal Attempt to Commit Murder in the Second Degree, Assault in the First Degree, and Assault in the Second Degree that the defendant used physical force upon another person: (A) in order to defend himself or a third person from what he reasonably believed to be the use of unlawful physical force, and (B) he used a degree of force which he reasonably believed to be necessary for that purpose. Defendant was not required to retreat in order to claim the right to employ force in his own defense.

(2) It is not an affirmative defense that the Defendant used physical force upon another person as set out in paragraph (1) of this instruction if the defendant was the initial aggressor unless: (A) the defendant withdrew from the encounter, and (B) effectively communicated to the person his intent to do so, and (C) the other person nevertheless continued or threatened the use of unlawful physical force.

(3) It is not an affirmative defense that the defendant used physical force upon another person as set out in paragraph (1) of this instruction if the defendant, with intent to cause bodily injury or death to another person, provoked the use of unlawful physical force by that person.

¶ 37 Defendant tendered defense Instruction Number 3, which the trial court declined to give. Defendant’s proposed instruction included the same language as the court’s instruction, but additionally stated, at the end of paragraph (2), that “[t]he prosecution must prove beyond a reasonable doubt that defendant was the initial aggressor. If the prosecution does not prove beyond a reasonable doubt that defendant was the initial aggressor, you must consider whether the defendant was acting in self-defense.” Defendant’s tendered instruction added the same statements at the end of paragraph (3) but substituted “provoked the use of unlawful physical force” for “was the initial aggressor.” Defendant argues that the trial court erred in refusing to give his tendered instruction because without the added language, the jury simply did not know what burden of proof, if any, to apply.

¶ 38 A trial court has the duty to correctly instruct the jury on all matters of law applicable to the case. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009); *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). “We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of

the governing law.” *Lucas*, 232 P.3d at 162. In making this determination, we consider all of the instructions given by the trial court together. *Riley v. People*, 266 P.3d 1089, 1083 (Colo. 2011). No reversible error occurs if the jury instructions, read together, adequately informed the jury of the law. *People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005).

¶ 39 Colorado law provides that “[i]f the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.” § 18-1-407(2), C.R.S. 2014. Thus, once a defendant meets his or her burden of going forward with a defense, “the prosecution has the burden of disproving the claimed affirmative defense beyond a reasonable doubt.” *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005).

¶ 40 As a logical corollary of this proposition, the prosecution must prove beyond a reasonable doubt an exception to self-defense (provided in section 18-1-704(3), C.R.S. 2014) for the jury to reject a defendant’s claim of self-defense on that basis. In rejecting tendered Instruction Number 3, the trial court found that the jury was informed of this requirement because the court had

“appropriately and on more than one occasion advised the jury of the burden of proof as to affirmative defenses.” The court noted that in each of the elemental instructions where the affirmative defense applied to the offense charged (attempted first degree murder, attempted second degree murder, and first degree and second degree assault) one of the listed elements was “without the affirmative defense.” And, in each of these instructions, the jury was instructed that, to find defendant guilty, it had to decide that the prosecution had proved each element beyond a reasonable doubt. The court also pointed to Instruction Number 19, which provided:

The evidence presented in this case has raised an affirmative defense. The prosecution has the burden of proving the guilt of the defendant as to your satisfaction beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged. After considering the evidence concerning the affirmative defense, with all the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant’s guilt, you must return a verdict of not guilty.

¶ 41 Likewise, the People argue that the jury was sufficiently advised on the prosecution’s burden of proof as to the exceptions to

self-defense. The People emphasize that the jury was instructed multiple times in the court's instructions, including Instruction Number 4 on the presumption of innocence, that the burden of proof was upon the prosecution to prove to the jury's satisfaction beyond a reasonable doubt the existence of all of the elements, including the absence of self-defense, necessary to constitute the crimes charged.

¶ 42 Although the instructions could have been clearer that the exceptions had to be proved beyond a reasonable doubt, we ultimately agree with the trial court and the People that the jury was sufficiently informed regarding the burden of proof to apply to the self-defense exceptions.³ In reaching this conclusion, we rely on the instructions discussed above as well as the fact that defense counsel explicitly argued during closing, without objection or contradiction by the prosecutor, that the prosecution had to prove

³ The latest version of the Colorado pattern criminal jury instructions, which was not available at the time of the trial in this case, more explicitly instructs the jury that the jury's determinations regarding the exceptions to self-defense must be made beyond a reasonable doubt by including language that the prosecution must disprove beyond a reasonable doubt that the defendant did not provoke the use of unlawful physical force by the other person and the defendant was not the initial aggressor. COLJI-Crim. H:11, H:12 (2014).

beyond a reasonable doubt that defendant was the initial aggressor to negate the claim of self-defense. *Cf. People v. Dore*, 997 P.2d 1214, 1222 (Colo. App. 1999) (in determining whether the jury has been adequately informed of the defendant's theory of defense, a reviewing court may consider whether defense counsel's closing argument fairly represented defendant's theory to the jury).

¶ 43 Therefore, the trial court did not err in declining to give defendant's tendered Instruction Number 3 or refusing to modify its own instruction to explicitly include the burden of proof applicable to the initial aggressor and provocation exceptions.

III. Defendant's Tendered Instructions

¶ 44 Defendant tendered two instructions that he claims the trial court erroneously rejected. Defendant's Instruction Number 4 stated:

In determining whether the Defendant acted reasonably, you are instructed that a reasonable person is defined as a reasonable person in the Defendant's situation and circumstances. Furthermore, in determining whether Defendant reasonably believed that the victim's use of unlawful force was imminent, you must consider the circumstances surrounding the Defendant's actions as they appeared to him at the time and not with the benefit of hindsight. In

certain circumstances, instinctive reaction may be considered reasonable conduct.

Defendant's Instruction Number 6 provided that "[w]here a person unintentionally harms a bystander while acting in self-defense against another person, he is not culpable for the injury to the bystander." We disagree with defendant that the court erred in refusing to give these instructions.

¶ 45 Initially, we reject defendant's contention that these instructions embodied his theory of the case and thus had to be given if the record contained any evidence that supported them. *See People v. Nunez*, 841 P.2d 261, 265 (Colo. 1992). "A proper theory of the case instruction should explain a defendant's view of what the evidence shows, must be general and brief, and must instruct the jury on the legal effect of the explanation." *People v. Meads*, 58 P.3d 1137, 1138 (Colo. App. 2002); *see also People v. Luu*, 813 P.2d 826, 828 (Colo. App. 1991). Neither defendant's tendered Instruction Number 4 nor Instruction Number 6 explained how the legal statements contained therein should be applied in this case, and thus neither was a theory of the case instruction.

¶ 46 Other than regarding a defendant's theory of the case

instruction, a trial court's refusal to give tendered written instructions will not "constitute reversible error absent manifest prejudice or a clear showing of abuse of discretion." *People v. Renfro*, 117 P.3d 43, 48 (Colo. App. 2004).

¶ 47 The trial court did not abuse its discretion in refusing to give defendant's Instruction Number 4 because the other instructions adequately conveyed the principles contained in that instruction. See *People v. Tweedy*, 126 P.3d 303, 307 (Colo. App. 2005). The trial court's affirmative defense instruction, Instruction Number 20, provided that it was an affirmative defense if "defendant used physical force upon another person . . . to defend himself or a third person from what he reasonably believed to be the use of unlawful physical force, and . . . he used a degree of force which he reasonably believed to be necessary for that purpose."

¶ 48 Additionally, Instruction Number 21 stated that "[t]he totality of the circumstances . . . must be considered by the jury in evaluating the reasonableness of the defendant's belief in the necessity of defensive action, and the reasonableness of the force used by him to defend against the apparent danger." These instructions encompassed the principles contained in the first two

sentences of defendant's Instruction Number 4. *Cf. Hare v. People*, 800 P.2d 1317, 1319 (Colo. 1990) (concluding that a similar instruction "permitted the jury to consider from the defendant's viewpoint whether the defendant was justified in using physical force in self-defense").

¶ 49 As to the last sentence of defendant's Instruction Number 4, the supreme court has explained that "[t]he General Assembly has indirectly recognized" that "in certain circumstances instinctive reaction may be considered reasonable conduct" because under the self-defense statute, "it is clear that the fact finder must weigh all relevant circumstances to determine whether a person asserting the defense of self-defense has acted as a reasonable person would act in similar circumstances." *Sanchez v. People*, 820 P.2d 1103, 1108 (Colo. 1991). As the trial court's instructions on self-defense were framed in the language of the statute, *see* § 18-1-704(1), those instructions adequately encompassed the principle that in certain circumstances, instinctive reaction may constitute reasonable conduct.

¶ 50 The trial court also did not err in refusing to give defendant's tendered Instruction Number 6, because it contained an incorrect

statement of law. *See Tweedy*, 126 P.3d at 307. Although a defendant acting in self-defense against one person might not be liable for an unintentional injury to another person, the result is otherwise if under all the circumstances, including the need to defend oneself, the defendant was reckless with regard to the bystander. 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4 (2d ed. 2013); *see also Henwood v. People*, 54 Colo. 188, 194, 129 P. 1010, 1012 (1913). Instruction Number 6 thus was legally erroneous because it implied that one is never liable for unintentional injury to a bystander if acting in self-defense against another person. To the extent the trial court had an affirmative duty to cooperate with defense counsel to correct the instruction or incorporate the substance of it in an instruction drafted by the court, *Garcia*, 28 P.3d at 349 n.8, the court's self-defense instructions encompassed the principle that the jury should consider whether defendant acted as a reasonable person would act in similar circumstances, which would include the presence of bystanders.

¶ 51 Accordingly, the trial court did not err in declining to give defendant's tendered Instruction Number 4 and Instruction Number

6.

IV. Prosecutorial Misconduct

¶ 52 Defendant argues that numerous statements made by the prosecutor in closing argument were misleading as to both the facts of this case and the law of self-defense. We agree that some of the prosecutor's statements were improper, but conclude that none constitutes reversible error.

¶ 53 “Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion.” *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). We will not disturb the trial court's rulings regarding such statements absent a showing of abuse of discretion. *People v. Stock*, 252 P.3d 1148, 1152 (Colo. App. 2010). If a defendant objected to the statements during trial, we review the trial court's ruling under a harmless error standard. *People v. Samson*, 2012 COA 167, ¶ 28. Under a harmless error standard, reversal is required unless “there is no reasonable probability that it contributed to the defendant's conviction.” *Cridler v. People*, 186 P.3d 39, 42 (Colo. 2008).

¶ 54 If the defendant did not object, we review the alleged prosecutorial misconduct for plain error, which requires reversal

“only when there is a substantial likelihood that it affected the verdict or that it deprived the defendant of a fair and impartial trial.” *Stock*, 252 P.3d at 1153. “To constitute plain error, prosecutorial misconduct must be flagrant or glaringly or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction.” *Id.* at 1152 (internal quotation marks omitted).

¶ 55 In reviewing a claim of prosecutorial misconduct, we engage in a two-step analysis, determining, first, whether the prosecutor’s conduct was improper based on the totality of the circumstances, and, second, whether such actions warrant reversal. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). We evaluate claims of improper argument “in the context of the argument as a whole and in light of the evidence before the jury.” *Samson*, ¶ 30. Whether prosecutorial misconduct requires reversal depends on “the severity and frequency of the misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to the defendant’s conviction.” *Stock*, 252 P.3d at 1153.

A. Misstatements of Fact

¶ 56 “A prosecutor has wide latitude to make arguments based on facts in evidence and reasonable inferences drawn from those facts.” *Id.* at 1153. However, a prosecutor may not misstate the evidence, *Samson*, ¶ 32, nor may a prosecutor refer to facts not in evidence, *People v. McMinn*, 2013 COA 94, ¶ 62.

¶ 57 Defendant argues that the prosecutor misstated the facts by arguing that the police “may have announced” themselves before firing at defendant. Defense counsel objected, and the trial court overruled the objection, stating that “[t]he jury will determine what the facts are in this case.” The prosecutor then added, “[a]nd I would like to highlight that it’s your memory. If anybody’s testimony is different from what I’m asserting to you now, please rely on your own memory. The statements of the attorneys are not evidence.”

¶ 58 The prosecutor’s statement was not a misstatement of the evidence. The entire statement by the prosecutor to which defense counsel objected was: “Sergeant Lombardi may have announced himself [although he] said he didn’t have time to announce himself. Officer Simmons heard something being said by Sergeant Lombardi

as did [one of the eyewitness].” It is an accurate description of the testimony that Officer Simmons and an eyewitness testified they heard Sergeant Lombardi say something before firing at defendant, and “the police ‘may have announced’ themselves” is a reasonable inference from that testimony. To the extent that the statement conflicted with testimony by Sergeant Lombardi and other eyewitnesses that the police did not announce themselves, the jury was properly informed by the trial court and the prosecutor that statements by attorneys are not evidence and that the jury alone determines the facts.

¶ 59 Defendant also claims that several times during closing argument, the prosecutor misstated the evidence by implying that defendant had removed the shotgun from the trunk and brandished it before the handgun shooter fired:

If you don't think that the defendant, when he walked into the crowd and racked that gun, provoked a response by an unknown gunman, disregard provocation.

. . .

So what really happened? I submit to you that the facts support the following: that the defendant was driving out of the parking lot . . . and a man walked by, talked stuff to him and he talked stuff back which angered the defendant. He got mad. And, I'll show him.

And he got out of the car, popped the trunk before getting out of the car, grabs the shotgun and goes and shows him.

. . .
He goes to the back of the trunk and, again, this is for you guys to determine. But it sounds like the 9 millimeter went off first. Did it go off in response to the defendant going into his trunk and pulling this out? Again, that's for you to decide. But shots are fired. And his response is to pull it out, rack it, walked [sic] towards the shooter, aim . . . [and] pull the trigger.

¶ 60 We agree with defendant that, because no witness testified that he walked into the crowd racking his gun or that he removed his shotgun from the trunk before the handgun shooter started firing, some of these statements misstated the evidence or referred to facts not in evidence.

¶ 61 However, defense counsel did not object to any of these statements, and we conclude that they did not constitute plain error. Considering the general uncertainty regarding the timing of events and the conflicting testimony of the witnesses, the statements were not “flagrant or glaringly or tremendously improper.” *See Stock*, 252 P.3d at 1152. Moreover, on a number of occasions during the prosecutor’s closing argument, the trial court instructed the jury that attorney arguments are not evidence and

that the jury must decide the facts based only on the evidence presented at trial. Absent an affirmative showing to the contrary, of which there is none, we must presume the jury followed these instructions. *Moody*, 676 P.2d at 697. Under these circumstances, there was not a substantial likelihood that the prosecutor’s misstatements of the evidence affected the verdict or deprived defendant of a fair and impartial trial. *See Stock*, 252 P.3d at 1153.

¶ 62 Accordingly, although some of the prosecutor’s statements regarding the facts were improper, reversal is not required.

B. Misstatements of Law

¶ 63 “It is improper for counsel to misstate or misinterpret the law during closing argument.” *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999).

1. Initial Aggressor Exception

¶ 64 Defendant argues that the prosecutor misstated the law on the initial aggressor exception to self-defense several times by making the following statements:

[1] If you don’t believe that the defendant was the initial aggressor, the first person to start it, disregard the initial aggressor law, okay? If you don’t think he started it, then don’t worry about initial aggressor. . . . The law on initial

aggressor is that self-defense doesn't apply if you started it. You can't pick a fight with someone physically and then claim self-defense because, you know, he hit me back. That's kind of a basic common sense thing but it's also the law.

. . . .
[2] So self-defense isn't available to someone who started it Did the defendant start this? What did he start? Did he start the fight in the parking lot, the gunfire in the parking lot between some unknown gunmen [sic] and a shotgun? Did that end and then he started another fight with the officers? That's up to you to decide. And if he started it, the defendant can't assert self-defense. It doesn't apply.

Defense counsel objected to the first statement, claiming it was a misstatement of the law. In response, the trial court stated, "the jury should rely on the law as set forth in the Court's instructions."

¶ 65 We conclude that the prosecutor did not misstate the law regarding the initial aggressor exception. To be the initial aggressor, a defendant must initiate the physical conflict by using or threatening the imminent use of unlawful physical force. *Griffin*, 224 P.3d at 300. That a defendant "started it," without an additional showing that he or she did so by using or threatening the imminent use of force, is not sufficient to establish that the defendant was the initial aggressor.

¶ 66 However, it is not improper for an attorney in closing argument to focus on one element of an offense or defense without addressing the other elements as long as the attorney does not suggest that those other elements are irrelevant. The prosecutor’s focus on one element of the initial aggressor exception (initiating the physical conflict) did not necessarily imply that the other element (using or threatening the imminent use of force) was inapplicable or unnecessary. *Cf. People v. James*, 117 P.3d 91, 97 (Colo. App. 2004) (“The prosecutor chose to differentiate simple from aggravated robbery by the one element that the two crimes did not share . . . ; the prosecution never intimated that the other elements of the instruction were inapplicable or unnecessary.”). Accordingly, the prosecutor’s statements on the initial aggressor exception were not improper.

2. Self-Defense

¶ 67 Defendant also claims the prosecutor misstated the law on self-defense by defining the “reasonableness” of defendant’s belief that the use of force was necessary under “an objectively reasonable person standard.” Defense counsel objected and the court sustained the objection during a bench conference, stating that the

standard is a reasonable person “under the circumstances.” The court then instructed the jury, “the Court would again say that the Court’s instructions of law are governing. What the lawyers may say about the law is not the law. What the Court says in its instruction is the law and that’s the only law that you should follow in this case.”

¶ 68 The affirmative defense of self-defense requires that “a reasonable person would have believed and acted as the defendant did,” and “[i]n this context, a ‘reasonable person’ means an objectively reasonable individual.” *People v. Vasquez*, 148 P.3d 326, 330 (Colo. App. 2006) (some internal quotation marks omitted). Therefore, the prosecutor did not err in defining reasonableness under an objectively reasonable person standard.

3. Duty to Retreat

¶ 69 Lastly, defendant argues that the prosecutor made multiple comments during closing that implied defendant should have retreated rather than engaging the handgun shooter. Specifically, the prosecutor argued:

And while there’s no duty to retreat, [the defendant] elected not to throw himself on his wife and wait for this substantial police

presence that was in the area to take care of the problem. He decided to take care of it himself.

. . .
If the defendant would have just left the parking lot that night, none of us would be here. He wouldn't be sitting here. You wouldn't be in those chairs. [His cousin] wouldn't be dead. [The bystander] wouldn't have had to have that buckshot removed from her body and countless citizens from Denver wouldn't have to live with the memory of that horrible evening.

. . .
Let's talk about some of the things that the defendant said that night. . . . If I could have just left that lot, none of this would have happened, his words to you. Ladies and gentlemen, he could have left that lot that night. . . . There was nothing stopping him from getting out of that parking lot that night. He could have left. He could have kept driving, but somebody said something that pissed him off.

Defense counsel objected to some of these statements, and the trial court overruled the objections.

¶ 70 The People argue that these comments did not imply defendant had a duty to retreat but rather that they impeached defendant's testimony about what had occurred, for example, that he would have left the parking lot if he was not blocked by other cars. While this may be one way to interpret the statements, it is

also reasonable to interpret them as stating that it was unreasonable for defendant to shoot at the handgun shooter rather than leave the parking lot.

¶ 71 Under the latter interpretation, the statements are legally incorrect. In Colorado, those who are otherwise entitled to use physical force in self-defense may do so without first retreating or seeking safety by means of escape. *Cassels*, 92 P.3d at 956. Under this doctrine of no retreat, a person entitled to use self-defense “does not have to consider whether a reasonable person in the situation would opt to retreat to safety rather than resorting to physical force to defend against unlawful force.” *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000); *see also Brown v. United States*, 256 U.S. 335, 343 (1921).

¶ 72 In *Cassels*, the supreme court concluded that statements during closing that were similar to those made here “characterized the events leading up to the shooting in a way that could influence a reasonable jury to infer that [the defendant] could have escaped the situation, but chose to engage in violence instead.” 92 P.3d at 958. In holding that the trial court therefore erred by failing to give an instruction on the duty of no retreat, the court implied that the

prosecutor's statements were inconsistent with the law. *See id.*

Similarly, in *State v. Adams*, the Kansas Supreme Court concluded that a statement during closing that “[t]his sure as heck would have been a different situation if the defendant had just walked away,” followed by the statement “[h]e could have gone to the bouncers, he could have run to the parking garage,” arguably implied a duty to retreat. 253 P.3d 5, 14-15 (Kan. 2011).

¶ 73 Conversely, in *People v. Martinez*, a division of this court concluded that statements made in closing that if the defendant was “so scared and he was very nervous . . . about the fact that . . . [the victim] had a black belt,” then “he could have left” were simply rebutting the defendant’s claim that he acted in self-defense because he was scared of the victim. 224 P.3d 1026, 1031-33 (Colo. App. 2009). They therefore did not implicate the no-duty-to-retreat rule. *Id.*; *see also People v. McGee*, 679 N.E.2d 796, 800 (Ill. App. Ct. 1997).

¶ 74 Although some of the statements at issue here could reasonably be interpreted as an attempt to impeach defendant’s testimony, some of the other statements do not appear to be comments on defendant’s credibility. Rather, they seem more like

the statements in *Cassels* in that they suggest it was unreasonable for defendant not to retreat under the circumstances. Because the law prohibits consideration of whether a reasonable person in a defendant's situation would have retreated when determining whether the defendant acted in self-defense, statements that give rise to such an inference are improper.

¶ 75 Still, for the following reasons, we conclude that the prosecutor's statements were harmless. The jury was specifically instructed that defendant had no duty to retreat to claim the right of self-defense. Defense counsel emphasized that instruction during closing argument and stated at least twice that defendant did not need to retreat to succeed on his self-defense claim. Additionally, during the prosecutor's closing argument, the court repeatedly instructed the jury that attorney arguments were not the law and that the jury must apply only the law given to it by the court. Thus, to the extent that the prosecutor's statements implied a duty to retreat, there was no reasonable probability that they contributed to defendant's convictions.

V. Cumulative Error

¶ 76 Defendant argues that the cumulative effect of the alleged

errors discussed above, all of which relate to the jury's evaluation of his asserted affirmative defense, require reversal. We disagree.

¶ 77 “[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal is required.” *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986). However, “[a] conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant’s right to a fair trial.” *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007). In light of all the circumstances, the jury’s ability to properly evaluate defendant’s self-defense claim was not so impaired by the cumulative effect of the errors we have identified such that defendant was deprived of his right to receive a fair trial.

VI. Conclusion

¶ 78 The judgment of conviction is affirmed.

JUDGE CASEBOLT and JUDGE DAILEY concur.