SUMMARY
October 22, 2020

2020COA148

No. 17CA0807, *People v. Magana* — Arson; Criminal Law — Sentencing — Mandatory Sentences for Violent Crimes

In this criminal appeal, a division of the court of appeals addresses two issues of first impression. First, the division considers the proper unit of prosecution in an arson case. The division rejects the contention that the unit of prosecution is the number of fires set; instead, the division concludes that for first degree arson the unit of prosecution permits a separate conviction for each building or structure burned or destroyed; for second degree arson the unit of prosecution permits separate convictions where distinct property belonging to different people was damaged or destroyed; and for fourth degree arson the unit of prosecution permits a separate conviction for each person placed in danger of death or serious bodily injury.

Second, the division rejects defendant's contention that, because it's an element of first degree arson, use of fire can't also be the basis for a crime of violence sentence enhancement. Instead, the division concludes that first degree arson with fire may be charged, and a defendant may be convicted of a crime of violence under section 18-1.3-406, C.R.S. 2019, where the prosecution proves to the jury beyond a reasonable doubt that the fire set by the defendant was capable of producing death or serious bodily injury.

The division also concludes that there was sufficient evidence to support defendant's convictions for first degree arson, rejects the contention the prosecutor engaged in misconduct during closing argument, and agrees with the parties that defendant's conviction for criminal mischief must be vacated. Accordingly, the division affirms all of defendant's convictions except his conviction for criminal mischief and remands the case for resentencing

COLORADO COURT OF APPEALS **2020COA148**

Court of Appeals No. 17CA0807
Jefferson County District Court No. 16CR1252
Honorable Randall C. Arp, Judge

The People of the State of Colorado,

Plaintiff-Appellee and Cross-Appellant,

v.

Christopher Magana,

Defendant-Appellant and Cross-Appellee.

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

Division V
Opinion by JUDGE WELLING
Gomez and Rothenberg*, JJ., concur

Announced October 22, 2020

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 Defendant, Christopher Magana, appeals the judgment of conviction entered on jury verdicts finding him guilty of eighteen counts of arson and one count of criminal mischief based upon his single act of setting a car on fire — a fire that spread to another car and to a duplex that was occupied by fourteen people.

¶ 2 This appeal presents two issues of first impression in Colorado. First, we consider the proper unit of prosecution in an arson case. In doing so, we reject Magana's contention that, based on his one act of arson, he can only be convicted of one count of first degree arson (regardless of the number of buildings or occupied structures he damaged or destroyed); one count of second degree arson (regardless of the number of people whose cars he damaged or destroyed); and one count of fourth degree arson (regardless of the number of persons he placed in danger of death or serious bodily injury). Instead, we conclude that (1) Magana's two convictions for first degree arson (for the burning of a duplex) don't violate double jeopardy because the unit of prosecution under the statute allows for multiple convictions based on the number of buildings/occupied structures burned or caused to be burned by defendant; (2) his two convictions for second degree arson (for the

burning of two cars belonging to two different people) don't violate double jeopardy because the unit of prosecution under the statute allows for multiple convictions where distinct property belonging to different people was set on fire, burned, or caused to be burned by defendant; and (3) his fourteen convictions for fourth degree arson (for placing fourteen people in danger of death or serious bodily injury) don't violate double jeopardy because the unit of prosecution under the statute allows for multiple convictions based on the number of victims placed in danger of death or serious bodily injury by defendant.

¶ 3 Second, we reject Magana's contention that, because it's also an element of first degree arson, use of fire can't also be the basis for a crime of violence sentence enhancement. Instead, we conclude that first degree arson with fire may be charged, and a defendant may be convicted of a crime of violence under section 18-1.3-406, C.R.S. 2019, where, as here, the prosecution proved to the jury beyond a reasonable doubt that the fire used by the defendant was capable of producing death or serious bodily injury.

¶ 4 For the reasons explained below, we affirm all of Magana's convictions except his conviction for criminal mischief (which we vacate), and we remand the case to the trial court to resentence Magana for first degree arson in accord with the jury's crime of violence finding.

I. Background

¶ 5 The victims in this case were a family of five and a family of nine who lived in two apartments within a duplex in Lakewood, Colorado. Around 3 a.m. one morning, the families awoke to a loud noise and discovered that two cars in the driveway of their duplex were on fire: a Dodge Charger belonging to M.S-N., a member of the family of nine, and a white Toyota Corolla belonging to a member of the family of five. The families safely exited the duplex as the fire spread to the duplex and caused extensive damage to both units.

¶ 6 M.S-N. suspected her ex-boyfriend, Magana, of setting the fire. He had previously indicated he would do so, had acted violently toward her, and had been repeatedly texting her in the hours before the fire. Magana initially denied any involvement in the fire, but phone records placed him near the duplex when the fire started, and he later admitted setting fire to the Dodge Charger.

¶ 7 Magana was charged and convicted of eighteen counts of arson. He was charged and convicted of one count of first degree arson for *each apartment* damaged by the fire. He was charged and convicted of one count of second degree arson for *each car* damaged by the fire. And when the duplex caught fire, it endangered all fourteen people inside, so he was charged and convicted of one count of fourth degree arson for *each person endangered* by the fire.

¶ 8 The People tried Magana on the counts described above, plus fourteen counts of attempted murder in the first degree and a lesser included offense of criminal mischief. The jury acquitted him of the attempted murder charges but found him guilty of all other counts.

II. Issues on Appeal

¶ 9 Magana raises four issues on appeal. First, he contends that there was insufficient evidence to support his convictions for first degree arson. Second, he contends that the prosecutor engaged in prosecutorial misconduct by misstating the definition of "knowingly" during closing argument. Third, he contends that the unit of prosecution for arson is the number of fires set, so his convictions for multiple counts of first, second, and fourth degree arson violated his right to be free from double jeopardy. Fourth, he

contends that his criminal mischief conviction should have been merged into one of his arson convictions.

¶ 10 The People cross-appeal, contending that the trial court erred in refusing to sentence Magana pursuant to the crime of violence statute notwithstanding the jury's finding that both crimes involved the use of a deadly weapon.

¶ 11 We address each issue, in turn, below.

A. Sufficiency of the Evidence

¶ 12 Magana first contends his convictions for first degree arson should be reversed because there was insufficient evidence for the jury to conclude that he knowingly caused the duplex to be burned. We are not persuaded.

1. Standard of Review

¶ 13 We review sufficiency of the evidence claims de novo to determine "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *People v. Donald*, 2020 CO 24, ¶ 25 (quoting *People v. Bennett*, 183 Colo. 125, 130, 515 P.2d

466, 469 (1973)). We may not reweigh the evidence or substitute our judgment for that of the jury, *People v. Rivas*, 77 P.3d 882, 891 (Colo. App. 2003), and we must "give the prosecution the benefit of every reasonable inference which might be fairly drawn from the evidence," *People v. Perez*, 2016 CO 12, ¶ 25 (quoting *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983)).

2. Applicable Law

¶ 14 A person commits first degree arson if he "knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent." § 18-4-102(1), C.R.S. 2019. The mental state of "knowingly" is defined as follows:

> A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

§ 18-1-501(6), C.R.S. 2019.

¶ 15 The People asserted at trial that Magana *knowingly caused* the duplex to be burned. This theory addressed the result of his conduct, which, under section 18-1-501(6), only required that he was aware that his conduct was practically certain to cause the duplex to catch on fire. The term "[p]ractical certainty" has been used interchangeably with the phrase "more than merely a probable result." *People v. Marcy*, 628 P.2d 69, 79 (Colo. 1981) (quoting *People v. DelGuidice*, 199 Colo. 41, 44, 606 P.2d 840, 842 (1979)).

3. Analysis

¶ 16 We conclude the following evidence was sufficient to support Magana's convictions for first degree arson:

- The People's experts testified that there were three points of ignition on the Dodge. In other words, Magana set the Dodge on fire in three places.
- The Dodge was parked in the driveway just two and a half feet from the front of the garage of the duplex.
- One of the fires Magana set was started on the front hood of the car, close to the duplex. Although the hood of the car wasn't directly under the eaves of the duplex, it was close enough to set the eaves on fire, and the People's experts

explained how the fire resulted in extensive damage to the duplex and endangered the residents.

¶ 17 A reasonable person hearing this evidence could conclude that Magana was aware that his conduct in igniting a car in three places that close to the duplex was practically certain to cause the duplex to catch on fire. Hence, we conclude there was sufficient evidence to show he knowingly caused the duplex to be burned.

¶ 18 Magana contends that because the People relied on experts to explain how the fire transferred from the Dodge to the duplex — and those experts couldn't definitively explain exactly how it transferred — there was necessarily insufficient evidence for the jury to conclude that Magana — a lay person without any such expertise — could have acted "knowingly" with respect to the burning of the duplex. We aren't persuaded.

¶ 19 The experts weren't uncertain as to *whether* the fire from the Dodge caused the duplex to catch on fire; they just weren't certain about exactly *how* it happened because there were multiple viable explanations. And in order for the prosecution to prove that Magana acted "knowingly" with respect to the burning of the duplex, it didn't have to prove that he understood the scientific

principles explaining how fire can transfer from one object to another. After all, the car he set on fire in three places was just two and a half feet from the front of the duplex. That was sufficient evidence to support the jury's verdict on the first degree arson charges, the experts' equivocal testimony notwithstanding.

B. Alleged Prosecutorial Misconduct

¶ 20 Next, Magana contends that the prosecutor committed misconduct and violated his due process rights by misstating the definition of "knowingly" during closing argument. We don't agree that the prosecutor engaged in prosecutorial misconduct, and, in any event, we conclude that any misconduct was harmless beyond a reasonable doubt.

1. Standard of Review and Applicable Law

¶ 21 When reviewing a claim of prosecutorial misconduct, we engage in a two-step process. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, we determine whether, based on the totality of the circumstances, the prosecutor's conduct was improper. *Id.* Second, we determine whether the conduct warrants reversal under the appropriate standard of review. *Id.* Magana preserved this argument by objecting, and because the alleged misconduct

supposedly lowered the prosecution's burden of proof, we review any error under the constitutional harmless error standard. *See Hagos v. People*, 2012 CO 63, ¶ 11. We reverse only if there is a reasonable possibility the error contributed to the conviction. *Id.*

¶ 22 A prosecutor may not misstate or misinterpret the law. *People v. Cevallos-Acosta*, 140 P.3d 116, 122 (Colo. App. 2005). But we evaluate a prosecutor's statements in the context of the argument as a whole, and we recognize that arguments delivered in the heat of trial are not always perfectly scripted. *People v. McKinn*, 2013 COA 94, ¶ 60. We "accord prosecutors the benefit of the doubt when their remarks are ambiguous or simply inartful." *Id.*

2. Analysis

¶ 23 While she was arguing to the jury why Magana was guilty of attempted murder, the prosecutor said: "Should you know that it can catch that house on fire when you're less than three feet away?" Considered in isolation, the prosecutor's statement was incorrect because a person who *should* know his or her conduct will cause a result doesn't necessarily act knowingly with respect to the result of his conduct. *See Oram v. People*, 255 P.3d 1032, 1038 (Colo. 2011) ("Circumstances where a defendant should reasonably be aware

that his conduct is of such a nature or that such circumstances exist are insufficient to fulfill the knowingly mental state.").

¶ 24 However, the prosecutor continued, stating:

> And what that means under the law — *and you'll have this in your jury instructions* — is that he acts with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such a nature or that such a circumstance exists.
>
> When you light a car on fire, can you be practically certain? That's part two. You're aware that your conduct is practically certain to cause the result. You light this car on fire and in three different places with accelerant, with flame. Can you be practically certain? Should you know that it can catch the house on fire when you're less than 3 feet away?

(Emphasis added.)

¶ 25 Viewed in context, we conclude the limited use of the word "should" didn't constitute misconduct because the prosecutor accurately stated the definition of "knowingly" under section 18-1-501(6).

¶ 26 In any event, any possible misconduct was harmless beyond a reasonable doubt. The comment was an isolated one, and the jurors were given instructions that accurately stated the law. *See*

People v. Hogan, 114 P.3d 42, 55 (Colo. App. 2004) (In determining whether a new trial is warranted, we evaluate "the severity and frequency of 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."). We, therefore, conclude that there was no reasonable possibility that this alleged error contributed to Magana's conviction.

C. Magana's Multiple Arson Convictions Didn't Violate His Right to Be Free from Double Jeopardy

¶ 27 Magana next contends the trial court violated his right to be free from double jeopardy by entering multiple convictions for first, second, and fourth degree arson, even though he was only accused of setting one car on fire. He maintains that the unit of prosecution for each level of arson depends on the number of *acts* that he committed, not the number of premises or vehicles that were burned or the number of persons whom he endangered. We disagree.

1. Applicable Law and Standard of Review

¶ 28 Magana raised this double jeopardy argument for the first time on appeal. Thus, we reverse only if any error was obvious and substantial, and if it "cast[s] serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶ 14 (quoting *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003)); *see also Reyna-Abarca v. People*, 2017 CO 15, ¶ 47 ("[W]e conclude that an appellate court may review an unpreserved double jeopardy claim and that the court should ordinarily review such a claim for plain error.").

¶ 29 The Colorado Supreme Court explained the limited scope of the Double Jeopardy Clause in *Woellhaf v. People*:

> [T]he Double Jeopardy Clause does not prevent the General Assembly from specifying multiple punishments based upon the same criminal conduct. However, if the General Assembly has not conferred specific authorization for multiple punishments, double jeopardy principles preclude the imposition of multiple sentences. In this respect, the Double Jeopardy Clause simply embodies the constitutional principle of separation of powers by ensuring that courts do not exceed their own authority by imposing multiple punishments not authorized by the legislature.
>
> . . . .

> It is the province of the legislature to establish and define offenses by prescribing the allowable unit of prosecution. The unit of prosecution is the manner in which a criminal statute permits a defendant's conduct to be divided into discrete acts for purposes of prosecuting multiple offenses.
>
> . . . .
>
> To determine the unit of prosecution, we look exclusively to the statute. In construing a statute, we must ascertain and effectuate the legislative intent.

105 P.3d 209, 214-15 (Colo. 2005) (citations omitted) (citing *Whalen v. United States*, 445 U.S. 684, 688 (1980)).

¶ 30 We review de novo whether a conviction violates a defendant's constitutional protection against double jeopardy. *People v. Arzabala*, 2012 COA 99, ¶ 19. We also review a statute de novo to determine the unit of prosecution that the General Assembly intended. *See id.* at ¶ 23.

¶ 31 Our primary purpose when construing a statute is to "ascertain and give effect to the legislature's intent." *McCoy v. People*, 2019 CO 44, ¶ 37. "[W]e look first to the language of the statute, giving its words and phrases their plain and ordinary meanings." *Id.* We view words and phrases in context, reading the

scheme as a whole to give consistent, harmonious, and sensible effect to all its parts. *Id.* at ¶¶ 37-38. In doing so, "we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Id.* at ¶ 38.

2. Analysis

¶ 32 Magana relies heavily on *Lucero v. People*, 2012 CO 7, *Arzabala*, and *Woellhaf* to support his argument that the unit of prosecution under the relevant arson statutes is the number of *acts* of arson that he committed. However, those cases — none of which addressed the unit of prosecution in an arson case — are readily distinguishable.

¶ 33 In *Lucero* the statute at issue — the theft statute — made the unit of prosecution quite clear. Specifically, the theft statute in effect at the time of the offense required that "all thefts committed by the same person within a six-month period . . . be joined and prosecuted *as a single felony*." *Lucero*, ¶ 21 (emphasis added) (quoting *Roberts v. People*, 203 P.3d 513, 516 (Colo. 2009)) (citing § 18-4-401(4), C.R.S. 2000). The arson statute is not similarly clear, at least not in the way Magana urges.

¶ 34 In *Arzabala*, the division addressed the unit of prosecution for the offense of leaving the scene of an accident, a motor vehicle offense under Title 42. Arzabala left the scene of an accident in which two victims suffered serious bodily injuries. The People charged him with two counts, one for each victim at the scene of the accident, but the division concluded that "the legislatively prescribed unit of prosecution is the number of accident scenes, not the number of victims involved in the accident." *Arzabala*, ¶ 26. In so holding, the division relied on language in the statute referring to "an accident" — in the singular — and "any person" as indicating that the duty of the driver "remains the same, regardless of the number of persons who sustain injury in the accident." *Id.* at ¶ 29 (citing § 42-4-1603, C.R.S. 2019 ("The driver of any vehicle involved in an accident resulting in injury to, serious bodily injury to, or death of any person or damage to any vehicle which is driven or attended by any person . . . ."]). The division also found it "instructive that the offense of leaving the scene of an accident is listed as a motor vehicle offense under Title 42, rather than a crime against a person under Title 18." *Id.* at ¶ 31 (citing *Commonwealth v. Constantino*, 822 N.E.2d 1185, 1188 (Mass. 2005)). Both the

language of the arson statutes and the nature of the offense distinguish it from the statute at issue in *Arzabala*.

¶ 35 *Woellhaf* addressed the unit of prosecution for sexual assault on a child. The People in that case charged Woellhaf with five counts of sexual assault on a child, all arising from a single incident; he was charged with one count for each discrete *type* of sexual contact that was alleged to have occurred during the single incident. 105 P.3d at 212-13. The Colorado Supreme Court held that the convictions violated the Double Jeopardy Clause, reasoning that the phrase "any sexual contact" in section 18-3-405(1), C.R.S. 2019 (criminalizing sexual assault on a child), and section 18-3-405.5(1), C.R.S. 2019 (criminalizing sexual assault on a child by one in a position of trust), was "an unlimited, non-restrictive phrase that generally encompasses a multitude of types of sexual contacts." 105 P.3d at 215-16. Again, this sort of language isn't contained in the arson statutes — and the arson statutes aren't structured similarly — so we don't view *Woellhaf*'s interpretation of the sexual assault on a child statute as particularly instructive with respect to determining the unit of prosecution for arson.

¶ 36 Although no published Colorado appellate decisions have addressed the issue before us — the unit of prosecution for arson — several other jurisdictions have done so. And we will discuss some of those cases below as we address the three arson statutes at issue. But before we do, it's instructive to examine the overall statutory scheme for arson, as it points in a different direction than Magana urges on appeal.

¶ 37 In Colorado, arson is divided into four different degrees. The chart below summarizes the four degrees of arson, the prohibited conduct for each, and the corresponding level of each offense:

Offense	Prohibited Conduct	Level of Offense
First degree arson, § 18-4-102	Damages or destroys "any building or occupied structure of another."	Class 3 felony
Second degree arson, § 18-4-103, C.R.S. 2019	Damages or destroys "any property of another . . . other than a building or occupied structure."	Class 4 felony if the damage is one hundred dollars or more; class 2 misdemeanor if the damage is less than one hundred dollars
Third degree arson, § 18-4-104, C.R.S. 2019	"[I]ntentionally damages any property with intent to defraud."	Class 4 felony

Offense	Prohibited Conduct	Level of Offense
Fourth degree arson, § 18-4-105, C.R.S. 2019	"[P]laces another in danger of death or serious bodily injury"; or "places any building or occupied structure in danger of damage."	Class 4 felony "if a person is thus endangered"; class 2 misdemeanor "if only property is thus endangered and the value of the property is one hundred dollars or more"; and class 3 misdemeanor "if only property is thus endangered and the value of the property is less than one hundred dollars."

¶ 38 As illustrated above, the statutory framework is divided into offenses involving damage or destruction, on the one hand, and endangerment, on the other hand. Specifically, first, second, and third degree arson criminalize the *damage or destruction* of property, with first degree arson addressing buildings or occupied structures; second degree arson addressing property other than buildings or occupied structures; and third degree arson addressing the motive behind setting the blaze that causes the damage. Fourth degree arson, on the other hand, criminalizes placing people, buildings, or occupied structures *in danger*, with it being a more serious offense to place a person in danger of death or serious bodily injury than to place only a building or occupied structure in danger of damage.

¶ 39 This framework provides important insight into the unit of prosecution. Except for third degree arson (a provision not at issue here), the gravamen of each offense is what or who is damaged or endangered — not the number of fires set. If the unit of prosecution were, in fact, tethered to the number of fires set, then one would expect one arson charge and conviction per fire. But that's not how the statute is structured. And not even Magana argues for such a construction. Indeed, under Magana's interpretation, one fire can still result in multiple charges, but only if different things are damaged or endangered. To put a sharper point on it, under Magana's construction, if three different defendants each set a single fire, one burning three dwellings, another burning three cars, and the third endangering three people, each is subject to just a single felony (the first a class 3 felony and the latter two a class 4 felony for second and fourth degree arson, respectively). But, under that same interpretation, if a fourth defendant sets a single fire that burns a dwelling and a car and endangers one person, that defendant is subject to three felonies (one class 3 felony and two class four felonies). An odd result, indeed.

¶ 40 With this overall structure in mind, we turn to the unit of prosecution for each of the three arson offenses at issue in this case.

a. First Degree Arson

¶ 41 A person commits first degree arson if he "knowingly sets fire to, burns, causes to be burned, or by the use of any explosives damages or destroys, or causes to be damaged or destroyed, *any building or occupied structure* of another without his consent." § 18-4-102(1) (emphasis added). Section 18-4-101, C.R.S. 2019, defines "building" and "occupied structure" and provides that, "[i]f a building is divided into units for separate occupancy, any unit not occupied by the defendant is the 'building of another.'" The language in section 18-4-101 is a compelling indication of the legislature's intent to make the unit of prosecution each building or occupied structure burned or destroyed. Had the General Assembly intended for a defendant to receive only one first degree arson conviction regardless of whether he or she burned one unit in an apartment building or burned the entire building, there would be little need to include this provision.

¶ 42 This interpretation is consistent with the reasoning underlying decisions in several other jurisdictions that have considered the issue. For example, in *Passerin v. State*, 419 A.2d 916, 923-25 (Del. 1980), one of the defendant's grounds for reversal was "that he may not be charged with multiple counts of arson when only one fire had been allegedly set — even though five separately occupied building units . . . were burned"; or, as the Delaware court noted, "[i]n effect, defendant contends, one match, one arson." *Id.* at 923-24.

¶ 43 The court in *Passerin* observed that the "gravamen" of the state's arson statute was the "'intentionally damag(ing) (of) a building by starting a fire or causing an explosion,'" and that "each unit of a building which 'consists of two or more units separately secured or occupied . . . shall be deemed a separate building.'" *Id.* at 924 (quoting the Delaware arson statute).

> It seems clear to us that the legislature intended by our arson statutes to provide for just the situation at hand whereby five separately occupied units, i.e., buildings, have been damaged by the starting of a fire. Hence we agree with the Court below that "the legislative intent was to establish separate offenses for each unit of a building that is

> separately secured or occupied, and set on fire or damaged by an explosion."

Id. at 925.

¶ 44 Similarly, in *Commonwealth v. DeCicco*, 688 N.E.2d 1010, 1021 (Mass. App. Ct. 1998), the Massachusetts Court of Appeals described the common law offense of arson as "a heinous, life-threatening crime" and concluded that "the intended unit of prosecution of the offense of arson is each dwelling house or each building used as dwellings as defined in the statute. It follows that the two arson indictments against the defendant were permissible."

¶ 45 And these jurisdictions aren't alone. *See, e.g.*, *Richmond v. State*, 604 A.2d 483, 484-88 (Md. 1992) (determining that the phrase "any dwelling house" permitted a separate arson charge for each unit burned); *People v. Barber*, 659 N.W.2d 674, 677-78 (Mich. Ct. App. 2003) (finding no plain error, under double jeopardy principles, with respect to defendant's convictions of three separate offenses stemming from a single fire in which three houses were burned); *Schwartz v. Commonwealth*, 594 S.E.2d 925, 926-27 (Va. 2004) (holding that the unit of prosecution is each dwelling and vehicle burned by a single fire).

¶ 46 We recognize that a few other courts have reached a contrary conclusion. For example, the Tennessee Supreme Court held that a defendant's multiple arson convictions for burning one building with multiple units violated double jeopardy where the arson statute precluded knowingly damaging "any structure." *State v. Lewis*, 958 S.W.2d 736, 738 (Tenn. 1997); *see also State v. Westling*, 40 P.3d 669, 671-72 (Wash. 2002) (holding that only one conviction for arson could be sustained where one fire damaged multiple automobiles).

¶ 47 We are persuaded, however, by those jurisdictions that have concluded that the unit of prosecution is the number of dwellings or structures burned. Thus, we conclude Magana was properly charged and convicted of two counts of first degree arson for having damaged two distinct occupied structures.

b. Second Degree Arson

¶ 48 A person commits second degree arson if he "knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, *any property of another* without his consent, other than a building or occupied structure." § 18-4-103(1) (emphasis added). Because the

term "property" is more amorphous than "building" or "occupied structure," determining the precise unit of prosecution for second degree arson is more challenging than ascertaining it for first degree arson. Magana urges us to conclude that because there was only one criminal act, he can't be separately charged for the two cars he damaged. But based on our discussion of the overall structure of the arson statute, as well as the approach we adopted for first degree arson (which is similarly worded), we reject the contention that the unit of prosecution for second degree arson is the number of fires a defendant set.

¶ 49 We find the rationale of the Virginia Supreme Court in *Schwartz* persuasive. In *Schwartz*, the defendant contended the trial court erred in finding him guilty of three counts of arson "when the evidence revealed there was only one point of ignition, a pick-up truck, which later spread to another vehicle and the residence." 594 S.E.2d at 926. He contended that because "there was only 'one discrete criminal act'" he couldn't be "convicted and punished for three offenses." *Id.* The Virginia Supreme Court rejected this argument, stating:

> In separate statutes, the legislature has criminalized the arson of an occupied dwelling, on the one hand, and the arson of personal property, on the other. *The personal property here was two distinct, different vehicles that were separately identified and parked outside the dwelling.* The dwelling and the two vehicles occupied different locations. Thus, we hold the legislature intended that, under these circumstances, there should be three units of prosecution, *viz.,* for the burning of the dwelling and for the burning of each vehicle.

Id. at 926–27 (emphasis added) (citation omitted).

¶ 50 Certainly, the use of the term "any property" in our second degree arson statute indicates that there may be an aggregate component to a second degree arson charge — that is, every separately identifiable piece of property damaged may not necessarily support its own charge. But the use of those words in conjunction with "of another" demonstrates legislative intent that the unit of prosecution may be each person whose property is damaged or destroyed. *Cf. People v. Manzanares*, 2020 COA 140, ¶ 46. But we don't need to definitively resolve all of the possible permutations and possible limitations on the unit of prosecution for second degree arson. Here, the evidence established that Magana's action resulted in damage to two vehicles belonging to two different

people. We conclude that these facts support two charges and two convictions for second degree arson, even if the precise contours of the unit of prosecution for this offense remain subject to further clarification. Accordingly, we reject Magana's contention that his two convictions for second degree arson violated his right to be free from double jeopardy.

c. Fourth Degree Arson

¶ 51 The fourth degree arson statute provides:

> (1) A person who knowingly or recklessly starts or maintains a fire or causes an explosion, on his own property or that of another, and by so doing *places another in danger* of death or serious bodily injury or places any building or occupied structure of another in danger of damage commits fourth degree arson.
>
> (2) Fourth degree arson is a class 4 felony if *a person is thus endangered*.
>
> (3) Fourth degree arson is a class 2 misdemeanor if only property is thus endangered and the value of the property is one hundred dollars or more.
>
> (4) Fourth degree arson is a class 3 misdemeanor if only property is thus endangered and the value of the property is less than one hundred dollars.

§ 18-4-105 (emphasis added).

¶ 52 The statute makes fourth degree arson a class 4 felony if "a person" is endangered, but just a misdemeanor if only property is endangered. *Id.* We conclude that, by making this distinction and using this language — "places another in danger" and "if a person is thus endangered" — the General Assembly intended to permit a separate charge of fourth degree arson charge for each person placed in danger by a defendant's fire or explosion. *See id.* This conclusion is consistent with the overall structure of the statute and the conclusions we reached for first and second degree arson. Accordingly, we conclude that the trial court didn't err in entering fourteen convictions where, as here, the evidence established that Magana's actions placed fourteen people in danger of death or serious bodily injury.

d. Summary

¶ 53 In the final analysis, we are persuaded that the reasoning of the courts in Delaware, Massachusetts, Virginia, Michigan, and Maryland is consistent with the plain language of our statutes defining arson, and that the results reached by these courts generally align with the intent of our legislature. Therefore, we conclude Magana's right to be free from double jeopardy wasn't

violated in this case with respect to any of the arson counts charged.

D. Criminal Mischief

¶ 54 Magana next contends, and the People concede, the trial court erred by failing to merge his conviction for criminal mischief into one of his convictions for first degree arson because criminal mischief is a lesser included offense of first degree arson. *See People v. Welborne*, 2018 COA 127, ¶ 22. We agree and vacate Magana's conviction for criminal mischief. *See id.* at ¶ 26. On remand, the court shall correct the mittimus accordingly. This conclusion obviates any need for us to address Magana's argument that the People failed to introduce sufficient evidence showing the value of the property damaged to support a felony criminal mischief conviction.

E. Crime of Violence Sentencing

¶ 55 Finally, on cross-appeal, the People contend that the trial court imposed an illegal sentence when it refused to sentence Magana pursuant to the crime of violence statute for his first degree arson convictions notwithstanding the jury's findings that both offenses involved the use of a "deadly weapon." The trial court

declined to do so because it concluded that evidence of the use of fire can't be both an element of the offense and the basis for imposing a crime of violence sentence enhancement. The People contend, however, that the trial court's refusal to sentence Magana pursuant to the crime of violence statute and in accord with the jury's deadly weapon finding constituted an illegal sentence. We agree with the People.

1. Additional Background

¶ 56 Both of Magana's first degree arson charges included crime of violence sentence enhancers for use of a deadly weapon. Consistent with the model jury instructions and the statutory definition, the jury was instructed that a deadly weapon is defined as "a knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury."

¶ 57 During deliberations the jury asked whether "fire itself" could be a deadly weapon in a first degree arson charge. The court responded, "Fire can be a deadly weapon" and referred the jury to the instruction defining deadly weapon. After receiving that

response to its question, the jury returned guilty verdicts on the first degree arson counts, answering "yes" to the crimes of violence special interrogatory for both counts.

¶ 58 Magana contended that he shouldn't be sentenced for first degree arson pursuant to the crime of violence statute because fire itself can't be the basis for imposing an enhanced sentence for that crime. The court initially rejected Magana's argument. But, after seeking additional briefing from the parties and reconsidering the issue, the trial court reversed its ruling, reasoning that fire cannot be a deadly weapon in an arson because permitting such would make every first degree arson a crime of violence. The trial court also reasoned that a defendant convicted of committing first degree arson by the use of any explosive was required to be sentenced by the court in accordance with the crime of violence sentencing statute, a provision that wouldn't be necessary if every first degree arson was already a crime of violence. For these reasons, the trial court refused to sentence Magana for first degree arson pursuant to the crime of violence statute.

2. Standard of Review

¶ 59 Pursuant to section 18-1.3-406(2)(a), a person who commits first degree arson using, possessing, or threatening to use a deadly weapon must be sentenced for a crime of violence. We review de novo whether a sentence is illegal. *People v. Wiseman*, 2017 COA 49M, ¶ 22. When a sentence is illegal, it may be corrected at any time, even if challenged for the first time on appeal. *See id.* at ¶ 21; *see also People v. Cattaneo*, 2020 COA 40, ¶ 42. Because resolving the People's contention requires us to interpret the criminal code to determine whether the use of fire can be a deadly weapon for purposes of a first degree arson charge, we must engage in statutory interpretation. In doing so, we apply the principles we discussed above in Part II.C.1.

3. Analysis

¶ 60 Magana's argument is that, because the use of fire is an element of first degree arson, the use of fire itself cannot also be the basis for a deadly weapon crime of violence sentence enhancer, as doing so would effectively render every first degree arson a crime of

violence — something the legislature didn't intend.[1] While this contention certainly has some intuitive appeal, the Colorado Supreme Court has repeatedly rejected similar contentions and uniformly held that the same evidence can support both an element of an offense and a deadly weapon crime of violence sentence enhancer. *See, e.g.*, *People v. Terry*, 791 P.2d 374, 378-79 (Colo. 1990) (holding that, because the defendant was convicted of second degree assault with a deadly weapon, the trial court was required to

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[1] We don't necessarily agree with the premise of Magana's argument — namely, that permitting fire alone to be the deadly weapon that enhances a first degree arson conviction renders all first degree arsons crimes of violence. We are dubious of this contention because, to establish a crime of violence in a non-explosives first degree arson case, the prosecution must also prove beyond a reasonable doubt that the fire used by the defendant was, in fact, capable of producing death or serious bodily injury. § 18-1-901(3)(e)(II), C.R.S. 2019; § 18-1.3-406(2)(a)(I)(A), (II)(G), C.R.S. 2019. And not all fires necessarily fall into that category. For example, it would be unlikely that a small fire in an unoccupied structure would support a crime of violence deadly weapon finding. But, more importantly, even if it were true that allowing fire to be the deadly weapon for a crime of violence sentence enhancer would render all first degree arsons crimes of violence, as discussed below, that wouldn't change our analysis or conclusion. *See, e.g.*, *People v. Collins*, 730 P.2d 293, 300 (Colo. 1986) (rejecting defendant's contention that "he was illegally sentenced in the aggravated range for a crime of violence based on the use of a deadly weapon, because one of the elements of the underlying offense of first degree assault was the use of a deadly weapon").

sentence him pursuant to the crime of violence statute); *People v. Montoya*, 736 P.2d 1208, 1210 (Colo. 1987) (holding that requiring all those convicted of committing first degree assault to be sentenced pursuant to the crime of violence statute doesn't violate equal protection, as "it is not unconstitutional for the legislature to mandate more severe penalties for use of a deadly weapon during the commission of a crime"); *People v. Goodman*, 733 P.2d 1204, 1204-05 (Colo. 1987) (rejecting the contention that a crime of violence enhancement based on the use of a deadly weapon violated double jeopardy when the substantive crime included as an element the use or threatened use of a deadly weapon); *People v. Collins*, 730 P.2d 293, 300 (Colo. 1986); *People v. Mozee*, 723 P.2d 117, 127-29 & n.11 (Colo. 1986) (holding that "conviction of and sentencing for first degree assault and a crime of violence does not violate the guaranty of equal protection of the laws"); *People v. Haymaker*, 716 P.2d 110, 114-19 (Colo. 1986) (holding that it wasn't a violation of a defendant's rights to equal protection and against double jeopardy to sentence him pursuant to the crime of violence statute because of his use of a deadly weapon when the underlying conviction was for first degree sexual assault by use of a

deadly weapon). Those decisions control our analysis here. *See, e.g.*, *Pella Windows & Doors, Inc. v. Indus. Claim Appeals Office*, 2020 COA 9, ¶ 37 ("[A]lthough our goal in statutory analysis is to give effect to the legislature's intent, we are also bound to follow the supreme court where it has determined the legislature's intent.") (citation omitted).

¶ 61 Magana nevertheless contends that the legislative history of the first degree arson statute distinguishes this case and makes this case law inapplicable. Specifically, Magana contends that by making first degree arson "by the use of any explosive" a per se crime of violence, *see* § 18-4-102(3), the legislature intended that, in a non-explosives case, fire alone cannot be the deadly weapon supporting a crime of violence sentence enhancement. We are not persuaded.

¶ 62 Subsection (3) of the first degree arson statute provides that "[a] defendant convicted of committing first degree arson by the use of any explosive shall be sentenced by the court in accordance with the provisions of section 18-1.3-406." § 18-4-102(3). This subsection was added in 1986 as part of an omnibus crime bill — House Bill 86-1008 — in which the General Assembly made nine

criminal offenses per se crimes of violence. Ch. 138, sec. 8, § 18-4-102(3), 1986 Colo. Sess. Laws 777. Before the adoption of H.B. 86-1008, all nine of those offenses were treated as crimes of violence for sentencing purposes upon a separate finding that a deadly weapon was involved or that death or serious bodily injury resulted. § 16-11-309(2)(a)(I), C.R.S. 1985.

¶ 63 In 1985, however, a division of this court held that it was a violation of equal protection and double jeopardy for a court to rely on the same evidence to prove an element of an offense and to enhance a sentence. *People v. Montoya*, 709 P.2d 58, 62 (Colo. App. 1985) (*Montoya I*), *rev'd*, 736 P.2d 1208 (Colo. 1987) (*Montoya II*), and *disapproved of by Haymaker*, 716 P.2d at 118. In November 1985, the Colorado Supreme Court granted certiorari in *Montoya I*. *See People v. Montoya*, (Colo. No. 85SC328, Nov. 11, 1985) (unpublished order).

¶ 64 When H.B. 86-1008 was introduced, *Montoya I* was pending before the Colorado Supreme Court but had not yet been decided. And a review of the legislative history of H.B. 86-1008 makes it clear that the bill was a direct response to — and based on the legislature's dissatisfaction with — the decision reached in

Montoya I.[2] Testimony on the bill began before the House Judiciary Committee with Representative Don Mielke, the committee's chairman and a primary sponsor of the bill, explaining the purpose of the bill as follows:

> What we're doing here is hopefully rewriting our statute to conform to the *Montoya [I]* decision. To anticipate our supreme court upholding the *Montoya [I]* decision, we felt, and the [Interim Committee on Sentencing and Criminal Justice] felt this summer, that we needed to rewrite the crimes of violence statute specifically setting forth and allowing the enhanced penalties in that area . . . .

Hearing on H.B. 1008 before the H. Judiciary Comm., 55th Gen. Assemb., 2d Reg. Sess. (Jan. 14, 1986).

¶ 65 The next witness to testify was Stan Peek, an elected district attorney and the president of the Colorado District Attorneys'

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[2] The legislative history here is brief and focused. The debate before the House Judiciary Committee lasted less than twenty minutes (with three speakers), and the debate before the Senate Judiciary Committee lasted less than eight minutes (with two speakers). All five speakers made it clear that the purpose of the bill was to address concerns raised by *Montoya I*. The floor debate on the bill was even more perfunctory, and the only speaker in each chamber was the chamber's primary sponsor, each of whom explained that the purpose of the bill was to address the concerns raised by *Montoya I*.

Council. He explained how the bill achieved its purpose of limiting the impact of the court of appeals' decision in *Montoya I* as follows:

> The [*Montoya I*] decision says that . . . under the mandatory sentencing provision you're finding, for instance in this case, that a deadly weapon was used. That is not a finding that is in addition to any other finding that had to be made under the original charge, and they say that's a denial of equal protection. *So, what you're doing with this bill is saying, all right, we're just going to make the penalty for this class of crime the same as if it would . . . have been a penalty under [section 18-1.3-406]. There's no additional finding required because you're just essentially charging the penalty for the crime.* You have, you have that power to set the penalty for the crime.

Id. (emphasis added).

¶ 66 And that's exactly what the bill did. For arson specifically, under the holding of *Montoya I*, the fire or explosive used to burn or destroy the structure and prove the first degree arson offense couldn't *also* be used to support a crime of violence sentence enhancement. *See Montoya I*, 709 P.2d at 62. However, H.B. 86-1008 clarified and ensured that first degree arson by use of an explosive could still be prosecuted and sentenced as a crime of violence. *See* Ch. 138, sec. 8, § 18-4-102(3), 1986 Colo. Sess. Laws 777.

¶ 67 Contrary to Magana's contention, the legislature's action ensuring that first degree arson by use of an explosive could still be sentenced as a crime of violence didn't mandate — implicitly or otherwise — that the prosecution present separate proof to impose a crime of violence sentence enhancer under other circumstances. After all, the purpose of the bill was to *limit* the scope of *Montoya I* if the supreme court affirmed it — not enshrine it in the event it was reversed.

¶ 68 Indeed, thirteen months after H.B. 86-1008 was signed into law, *Montoya I* was reversed by *Montoya II*. In the ensuing thirty-seven years, the legislature hasn't taken any steps to exclude fire as the type of deadly weapon that can be used to enhance first degree arson and to require sentencing under the crime of violence statute. And we have no basis for inferring such an exception. The legislative history of the first degree arson statute doesn't support the conclusion that it's any different than the other statutes that permit the same evidence to support an element and a crime of violence sentence enhancer.

¶ 69 For these reasons, we conclude the trial court imposed an illegal sentence by refusing to sentence Magana under the crime of

violence act in accordance with the jury's findings. Accordingly, we remand for resentencing pursuant to section 18-1.3-406.

III. Conclusion

¶ 70 Magana's conviction for criminal mischief is vacated, but his other convictions are affirmed, and the case is remanded to the trial court for resentencing and correction of the mittimus.

JUDGE GOMEZ and JUDGE ROTHENBERG concur.