SUMMARY
June 18, 2020

2020COA97

No. 18CA0085, *People v. Oliver* — Crimes — Possession of Contraband in the First Degree — Possession of Contraband in the Second Degree; Criminal Law — Lesser Included Offenses

As a matter of impression, a division of the court of appeals concludes that, pursuant to section 18-1-408(5)(c), C.R.S. 2019, second degree possession of contraband is a lesser included offense of first degree possession of contraband.

COLORADO COURT OF APPEALS **2020COA97**

Court of Appeals No. 18CA0085
Lincoln County District Court No. 16CR83
Honorable Robert R. Lung, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Zachary Curtis Oliver,

Defendant-Appellant.

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

Division II
Opinion by JUDGE TOW
Román and Pawar, JJ., concur

Announced June 18, 2020

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¶ 1 Defendant, Zachary Curtis Oliver, appeals his judgment of conviction entered on jury verdicts finding him guilty of first degree introduction of contraband, first degree possession of contraband, and second degree possession of contraband. As a matter of first impression, we conclude that second degree possession of contraband is a lesser included offense of first degree possession of contraband under section 18-1-408(5)(c), C.R.S. 2019. However, we discern no plain error in the trial court's failure to instruct the jury accordingly, and thus affirm the conviction for possession of contraband in the second degree. We also affirm the conviction for introduction of contraband, but we vacate the conviction for first degree possession of contraband.

I. Background

¶ 2 In April 2016, a corrections officer conducted a search of Oliver's prison cell and discovered a razor blade affixed to a toothbrush handle. Oliver admitted he had made the item but alleged he had only done so to cut holes in his prison uniform to use as pockets.

¶ 3 Oliver was charged with first degree introduction of contraband and first degree possession of contraband. At trial, the

court also instructed the jury on second degree possession of contraband as a lesser nonincluded offense of first degree possession of contraband. A jury convicted Oliver of all three charges.

¶ 4 The court imposed concurrent sentences of four years each for first degree introduction of contraband and first degree possession of contraband. The court also imposed mandatory fines and fees for the conviction for second degree possession of contraband, but later waived them due to Oliver's indigence.

II. The Trial Court's Denial of Oliver's Challenges for Cause

¶ 5 During voir dire, Oliver challenged ten potential jurors for cause. The trial court agreed as to two of them but denied the challenges to the other eight jurors. None of the eight individuals served on the jury, however, as Oliver used peremptory challenges to remove six of them and the prosecution exercised two of its peremptory challenges to remove the other two. On appeal, Oliver contends that the trial court erred by denying his challenges for cause to four of the prospective jurors, requiring Oliver to exercise a peremptory challenge to remove each potential juror.

¶ 6 We agree as to one challenge but conclude that the error was harmless.

A. Standard of Review

¶ 7 We review a trial court's ruling on a challenge for cause to prospective jurors for an abuse of discretion. *People v. Clemens*, 2017 CO 89, ¶ 13.

> This standard gives deference to the trial court's assessment of the credibility of prospective jurors' responses, recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of prospective jurors, and serves to discourage reviewing courts from second-guessing the trial court based on a cold record.

Id. A court abuses its discretion when it issues a ruling that is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues or misapplies the law. *People v. Maestas*, 2014 COA 139M, ¶ 11. When reviewing a challenge for cause, we examine the entire voir dire of the prospective juror. *Id.*

B. Applicable Law

¶ 8 "While jurors often express concern or indicate preconceived beliefs during voir dire, such concerns and beliefs do not automatically disqualify them from service." *People v. Marciano*,

2014 COA 92M-2, ¶ 8. However, where a juror "evinc[es] enmity or bias toward the defendant or the state," the trial court must sustain a challenge for cause unless "the court is satisfied, from the examination of the juror or from other evidence, that [the juror] will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." § 16-10-103(1)(j), C.R.S. 2019; *see also* Crim. P. 24(b)(1)(X).[1]

¶ 9 Given the substantial deference we afford the trial court in ruling on a challenge for cause, *see Clemens*, ¶ 13, we consider whether "a potential juror's statements compel[ed] the inference that he or she [could not] decide crucial issues fairly" in determining if a potential juror evinced "enmity or bias," *People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007). If so, "a challenge for cause must [have been] granted in the absence of rehabilitative questioning or other counter-balancing information." *Id.*

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[1] We note that while section 16-10-103(1)(j), C.R.S. 2019, and Crim. P. 24(b)(1)(X) are not entirely parallel, both the supreme court and divisions of this court have treated them as functional equivalents. *See, e.g.*, *People v. Lefebre*, 5 P.3d 295, 299 (Colo. 2000), *overruled on other grounds by People v. Novotny*, 2014 CO 18; *People v. Maestas*, 2014 COA 139M, ¶ 18. We likewise treat them as equivalent here because neither party argues any substantive difference between the two.

¶ 10 Relying on two Colorado Supreme Court cases, Oliver asserts that a challenge for cause must be sustained if a potential juror's impartiality is "in doubt" or "appears doubtful." *See People v. Russo*, 713 P.2d 356, 362 (Colo. 1986); *Nailor v. People*, 200 Colo. 30, 31-32, 612 P.2d 79, 79-80 (1980). However, in light of our supreme court's recent opinion in *Vigil v. People*, 2019 CO 105, we decline to follow that standard. *See id.* at ¶ 40 (Hood, J., specially concurring) (referencing *Russo* and noting that "the majority is right to tacitly reject the defendant's argument for a 'genuine doubt' standard" because the "'genuine doubt' language is . . . nowhere to be found in the challenge-for-cause statute"). Instead, we follow the plain language of section 16-10-103(1)(j). *See id.* at ¶ 41 (Hood, J., specially concurring) ("[T]he majority correctly focuses on the statute's plain language.").

¶ 11 In determining whether a potential juror can set aside any preconceived notions and render an impartial verdict, the trial court may consider a juror's assurances that he or she can serve fairly and impartially. *People v. Gilbert*, 12 P.3d 331, 334 (Colo. App. 2000). If the court is reasonably satisfied that the prospective juror can render an impartial verdict, the juror should not be

disqualified. *Id.* Hence, "[i]f the potential juror indicates that she can set aside [preconceived] beliefs and make a decision based on the evidence and the court's instructions on the law, she may still sit on the jury." *Marciano*, ¶ 8.

C. Analysis

¶ 12 Oliver contends that the trial court erred by denying his challenges for cause to the following four prospective jurors. We address each in turn.

1. Juror T.W.

¶ 13 During voir dire, Juror T.W. relayed that she had previously worked for the Department of Corrections (DOC) — including for thirteen years at the facility where Oliver was incarcerated. She also noted that she was currently working for the American Correctional Association. As pertinent here, the following exchange then occurred between defense counsel and Juror T.W.:

> [DEFENSE COUNSEL]: You wrote, I believe – if I'm remembering the right person, I think you wrote on your questionnaire that based on that experience, sometimes, it would be hard for you to believe what an inmate would say.
>
> [JUROR T.W.]: It — yes.
>
> [DEFENSE COUNSEL]: Why is that?

[JUROR T.W.]: So when I audit — and I'm the chairperson, which means I lead the audit — if an inmate has brought a complaint, it's our responsibility, as the chairperson, to investigate the complaint, and then I have to write a report on the validity. And, unfortunately, 90 percent of the time, everything else — and when I say I have to investigate, I look at records. And a lot of times, it's medical or whatever. Then I find evidence to refute what they are claiming. It's very seldom that their complaint is validated.

[DEFENSE COUNSEL]: So nine times out of ten — you said 90 percent — when an inmate makes a complaint that you have to investigate, you find evidence that they're maybe not telling the truth?

[JUROR T.W.]: Correct.

[DEFENSE COUNSEL]: They're lying?

[JUROR T.W.]: Correct.

[DEFENSE COUNSEL]: And that's your professional experience?

[JUROR T.W.]: Exactly.

[DEFENSE COUNSEL]: You can point to probably specific examples of you coming across that?

[JUROR T.W.]: Sure.

¶ 14 Defense counsel also asked the full venire if anyone wondered why the defendant was already in prison. When counsel turned to Juror T.W., this exchange followed:

> [DEFENSE COUNSEL]: [Juror T.W.], did that come across your mind at all?
>
> [JUROR T.W.]: I mean, if you're human, it does.
>
> [DEFENSE COUNSEL]: Exactly.
>
> [JUROR T.W.]: It does.
>
> [Exchange with another juror omitted.]
>
> [DEFENSE COUNSEL]: Yeah. It's sort of a big deal. If someone gets put in cuffs and put away, especially in the prison where it's longer term, it's human nature that you're going to wonder about why they are there, okay? But then this starts to clash — well, how about this. You're going to hear evidence, [Juror T.W.], today — you're going to hear an argument and evidence from the district attorney that [the defendant] did something wrong again —
>
> [JUROR T.W.]: Uh-huh.
>
> [DEFENSE COUNSEL]: — and that he had something that he wasn't supposed to have, okay? The fact that he is already in a place because he did something wrong, are you going to kind of consider that when you decide the facts today whether he did something wrong again? Is that something you're going to think about?

[JUROR T.W.]: Well, I think every one of us has done something.

[DEFENSE COUNSEL]: Yeah.

[JUROR T.W.]: I mean, you learn from mistakes.

[DEFENSE COUNSEL]: Uh-huh.

[JUROR T.W.]: So, I mean, if we all were perfect people but we're not. So he did something wrong. He's in a place where he needs to be. That doesn't — that doesn't mean everything he does is gonna be wrong.

[DEFENSE COUNSEL]: Yes.

[JUROR T.W.]: It also doesn't mean everything he does is gonna be right. I mean —

[DEFENSE COUNSEL]: Let's compare [the defendant] to somebody maybe who's sitting next to him who's never been in prison or even been in jail. If you knew [the defendant] had been to prison and the other guy hadn't, would you consider maybe [the defendant] — I'm sorry — [the defendant] as somebody more likely to be — to commit a crime than the person sitting next to him because he's already committed a crime in the past?

[JUROR T.W.]: For me, not really.

[DEFENSE COUNSEL]: Okay.

[JUROR T.W.]: I mean, I think a lot of people learn. I mean, that's just been my experience.

¶ 15 On appeal, Oliver argues that Juror T.W.'s statements recounting her professional experience indicated bias sufficient to sustain a challenge for cause. Specifically, Oliver takes issue with Juror T.W.'s observation that she had found ninety percent of inmate complaints to be untruthful upon investigation. And indeed, Juror T.W. acknowledged that, given her professional experience, she "would find it hard to believe what an inmate would say."

¶ 16 Because Juror T.W.'s statements suggested she would struggle to impartially judge Oliver's credibility due to his status as an inmate, she arguably evinced bias. *See Merrow*, 181 P.3d at 321. However, in a separate exchange with defense counsel, Juror T.W. indicated that she could judge Oliver fairly even though he was incarcerated. Thus, when reviewing the entire voir dire of Juror T.W., *see Maestas*, ¶ 11, the record supports that she could render an impartial verdict notwithstanding her professional experience, *see Gilbert*, 12 P.3d at 334 ("[T]he [trial] court may consider a juror's assurances that he or she can fairly and impartially serve on the case."). The trial court's decision to deny the challenge for cause to Juror T.W., therefore, was not manifestly arbitrary, unreasonable,

or unfair, nor was it contrary to law. *See Marciano*, ¶ 8 ("If the potential juror indicates that she can set aside [preconceived] beliefs and make a decision based on the evidence and the court's instructions on the law, she may still sit on the jury."); *Merrow*, 181 P.3d at 321 (Where a potential juror evinces bias, a challenge for cause is only required to be granted "in the absence of . . . counter-balancing information."). Accordingly, we discern no abuse of discretion. *Maestas*, ¶ 11.

2. Juror J.T.

¶ 17 During voir dire, defense counsel asked the full venire if anyone would be concerned should Oliver elect to not testify. Juror J.T. was among several jurors who raised their hands. When defense counsel turned to Juror J.T., the following colloquy occurred:

> [DEFENSE COUNSEL]: If you don't hear from [the defendant], you're going to receive an instruction that says, you know, he has the right to do it or not to do it, blah-blah-blah, and that instruction says you cannot use his either testimony or not testifying against him, just the fact of whether he does or not. You certainly can listen to what he has to say and use that, you know, for or against him. But if he doesn't testify, you can't consider that

whatsoever, no way, Jose, okay? Do you think you can do that?

[Exchanges with other jurors omitted.]

[DEFENSE COUNSEL]: So you can a hundred percent put that human nature aside if you — if you receive that instruction?

[Exchanges with other jurors omitted.]

[DEFENSE COUNSEL]: [Juror J.T.]?

[JUROR J.T.]: I believe I could.

[DEFENSE COUNSEL]: You believe you could?

[JUROR J.T.]: I believe I could.

[DEFENSE COUNSEL]: A hundred percent? What gives you hesitation?

[JUROR J.T.]: I don't know. It's one of those things that, you go up there. You have to tell the truth and all that. If he doesn't want to go up, then why? Why doesn't he want to talk?

[DEFENSE COUNSEL]: Okay.

[JUROR J.T.]: There's always that thought in your head. I don't know a hundred percent that I could put that aside. I would do my best, but I can't — I can't honestly say 100 percent.

[DEFENSE COUNSEL]: Okay. Sorry if I missed you, but would you agree that's human nature just like [Juror W.M.] said?

[JUROR J.T.]: I would, yes.

¶ 18 Oliver argues that Juror J.T. evinced bias because he could not guarantee he would not use Oliver's silence against him. True, Juror J.T. indicated some uncertainty as to whether he could follow an instruction not to consider Oliver's invocation of his right to silence. In our view, though, Juror J.T.'s reluctance to declare unequivocally that he could disregard Oliver's decision not to testify did not "compel the inference that he [could not] decide crucial issues fairly." *Merrow*, 181 P.3d at 321. To the contrary, Juror J.T. expressed a belief that he could follow the instruction, and he noted that he would try his best to do so. Where a potential juror states that he will try to follow the court's instructions despite any preconceived notions, that juror may nonetheless sit on the jury. *People v. Valdez*, 183 P.3d 720, 725 (Colo. App. 2008). Thus, we discern no abuse of discretion in the trial court's denial of the challenge to Juror J.T. *Maestas*, ¶ 11.

3. Juror T.J.

¶ 19 When defense counsel questioned the full venire regarding potential curiosity as to why Oliver was already in prison, defense counsel had the following exchange with Juror T.J.:

[DEFENSE COUNSEL]: Okay. [Juror T.J.], right?

[JUROR T.J.]: Yes, sir.

[DEFENSE COUNSEL]: How do you feel about this thought that [the defendant] is in prison? Is he just kind of a bad apple that we have to take with a grain of salt?

[JUROR T.J.]: Everybody should have a second chance, but —

[DEFENSE COUNSEL]: But.

[JUROR T.J.]: — sometimes, we don't change our spots but also we do. So, I mean, every situation would be different, I would assume.

[DEFENSE COUNSEL]: Okay.

[JUROR T.J.]: You can't put everybody in a round hole.

¶ 20 Juror T.J. also raised his hand in response to defense counsel's poll of jurors who would be concerned if Oliver did not testify. Defense counsel followed up with Juror T.J. on that issue:

[DEFENSE COUNSEL]: [Juror T.J.], if he doesn't testify when he has the opportunity to speak directly to you, what do you think about that?

[JUROR T.J.]: I'm kind of a firm believer, if you are innocent, you're gonna state it.

> [DEFENSE COUNSEL]: Okay. So that's maybe a check in the guilt column if he remains silent and —
>
> [JUROR T.J.]: I don't know if it's a check there but —
>
> [DEFENSE COUNSEL]: It's not —
>
> [JUROR T.J.]: I don't care if you're human or not. It's still back there.
>
> [DEFENSE COUNSEL]: Okay. So would it be — would it be not having a check in the innocence column, then, probably?
>
> [JUROR T.J.]: I don't know how much it weighs either way, but it would be there.
>
> [DEFENSE COUNSEL]: Okay.

¶ 21 As with Juror J.T., Oliver contends that Juror T.J. evinced bias by failing to guarantee that he would not consider Oliver's decision to remain silent. However, while Juror T.J. expressed a belief that one ought to defend oneself if accused of a crime, he would not say that Oliver's decision not to testify would be a "check in the guilt column." And significantly, Juror T.J. did not indicate he would be unable or unwilling to follow an instruction to disregard Oliver's choice to remain silent.

¶ 22 Moreover, at another point during voir dire, when asked whether Oliver was "just kind of a bad apple that we have to take

with a grain of salt," Juror T.J. replied that "everybody should have a second chance," that "sometimes we don't change our spots but also we do," and that "every situation would be different." In our view, upon examination of the full voir dire, *see Maestas*, ¶ 11, Juror T.J. did not evince enmity or bias towards Oliver. Thus, we discern no abuse of discretion in the trial court denying the challenge to Juror T.J. *Id.*

4. Juror A.R.

¶ 23 Toward the conclusion of voir dire, defense counsel questioned Juror A.R. as to whether she had any concerns about the fact that Oliver was already in prison, as well as a personal concern that followed from that question:

> [DEFENSE COUNSEL]: Do you have any thoughts about [the defendant] being in prison?
>
> [JUROR A.R.]: It's hard.
>
> [DEFENSE COUNSEL]: Okay.
>
> [JUROR A.R.]: I have a son that his mother was in prison —
>
> [DEFENSE COUNSEL]: Okay.
>
> [JUROR A.R.]: — and she had a lot of rights that she did not need to have.

[DEFENSE COUNSEL]: Okay. Does that kind of rub you the wrong way a little bit, that you —

[JUROR A.R.]: It does.

[DEFENSE COUNSEL]: — had to come here today to deal with this gentleman when prison maybe could have taken care of it itself?

[JUROR A.R.]: Yeah, probably.

[DEFENSE COUNSEL]: Okay. . . . Are you going to be having that thought, that he shouldn't have this right to take you away from your life for a day or two while you're thinking about the evidence?

[JUROR A.R.]: I don't — yeah. I mean, I had a son that was supposed to go see his mother in prison and why? I mean, she made the mistake to be there.

[DEFENSE COUNSEL]: Yeah.

[JUROR A.R.]: So why?

[DEFENSE COUNSEL]: Okay. It sounds like you're pretty emotional about that.

[JUROR A.R.]: It's very hard.

[DEFENSE COUNSEL]: Okay. And you're probably going to have that same emotion when you think about this trial here today?

[JUROR A.R.]: Yeah. I'm an emotional person.

[DEFENSE COUNSEL]: And weighing the evidence, you're going to be thinking about that stuff?

> [JUROR A.R.]: (Nodded head.)
>
> [DEFENSE COUNSEL]: For the record, [Juror A.R.] is nodding her head. Like the other ladies I spoke to, you can't bring any — there's an absolute rule — no bias, no sympathy, no prejudice into this case, okay? Like I talked about before with everybody at the start, we all have different life experiences. You've got that experience you just told us about. Do you think that's going to conflict with the jury instructions you're going to get today if you are ultimately selected to be on the jury?
>
> [JUROR A.R.]: It would probably, yes. It would, yes.
>
> [DEFENSE COUNSEL]: Okay.

¶ 24 Oliver, pointing to Juror A.R.'s acknowledgment that she would be unable to follow the court's instructions, contends that she evinced bias sufficient to sustain a challenge for cause. We agree.

¶ 25 Juror A.R. apparently indicated in the affirmative when defense counsel asked the full venire if anybody had "any ill will" or started "to question their ability to presume Mr. Oliver innocent because he's in a prison environment." She spoke of her son's mother in prison and expressed that this person "had a lot of rights that she did not need to have." She also went on to agree that Oliver "shouldn't have this right to take you away from your life for

a day or two." And, significantly, when asked directly if her personal experience would conflict with the court's instruction to set aside any bias, Juror A.R. acknowledged that "[i]t would, probably, yes. It would, yes."

¶ 26 In our view, Juror A.R.'s statements "compel[ed] the inference that [she could not] decide crucial issues fairly." *Merrow*, 181 P.3d at 321. Because our review of the entire voir dire reveals no counterbalancing information or rehabilitative questioning as to her ability to act impartially, we conclude that the trial court was obligated to grant Oliver's challenge to Juror A.R. § 16-10-103(1)(j); *Merrow*, 181 P.3d at 321. Thus, the trial court abused its discretion by refusing to do so. *Maestas*, ¶ 11.

¶ 27 This does not end our inquiry, however. Having concluded that the trial court erred by denying the challenge for cause, we must now turn to whether the error warrants reversal. We conclude that it does not.

¶ 28 Recall that Oliver used a peremptory challenge to remove Juror A.R. Where a defendant uses a peremptory challenge to correct the court's erroneous failure to dismiss a juror for cause, it

cannot be said that the defendant's right to an impartial jury has been violated as a result of the court's error. *Vigil*, ¶ 15.

¶ 29 Thus, in such cases we apply "an appropriate[,] case specific, outcome-determinative analysis" to determine whether the court's error requires reversal. *People v. Novotny*, 2014 CO 18, ¶ 27; *see also People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 22. Because, in this context, the harm to be evaluated is a deprivation of the nonconstitutional right to exercise peremptory challenges, we review for ordinary harmless error. *People v. Wise*, 2014 COA 83, ¶¶ 24-27; *see also Abu-Nantambu-El*, ¶ 22 ("[A] reviewing court should apply 'the proper outcome-determinative test' when analyzing an error that merely deprived the defendant of a peremptory challenge, 'as distinguished from an actual Sixth Amendment violation.'" (quoting *Novotny*, ¶¶ 23, 27)).[2]

¶ 30 Thus, we must disregard the court's error unless we determine it affected Oliver's substantial rights — an inquiry that requires us

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[2] Oliver suggests that, notwithstanding *Novotny*, a trial court's erroneous denial of multiple challenges for cause ought to constitute automatic reversible error. But because we conclude that the trial court here only erred as to one challenge for cause, we need not address this argument.

to evaluate "the likelihood that the outcome of the proceedings in question were affected by the error." *Novotny*, ¶ 20. We will reverse only if there is a reasonable possibility that the error contributed to the verdict. *Pernell v. People*, 2018 CO 13, ¶ 22; *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009). To do so, we must conclude that, as a result of the trial court's error, a biased or incompetent juror sat on the jury. *Maestas*, ¶ 12.

¶ 31 But the record does not reflect that a biased or incompetent juror served on the jury. Indeed, Oliver does not assert that one did. Rather, Oliver only contends that, because he was forced to use a peremptory challenge on Juror A.R. and exhausted his peremptory challenges, he was unable to remove Juror P.D., whom Oliver describes as "undesirable."

¶ 32 As relevant here, Juror P.D. stated during voir dire that, in his experience as a prior employee of DOC, inmates occasionally lied "to take the heat off themselves." True, his background in DOC may have rendered him "undesirable" from Oliver's perspective, but Juror P.D.'s statements did not evince bias — he did not indicate that he would be unable to act impartially or that he harbored bias towards Oliver because of Oliver's previous conviction. Indeed,

Oliver's trial counsel apparently recognized that Juror P.D.'s statement did not demonstrate bias, as Juror P.D. was not one of the ten jurors whom Oliver sought to excuse for cause. *See People v. Pernell*, 2014 COA 157, ¶ 21 (finding no reversible error "because defendant did not challenge for cause any prospective jurors who ultimately sat on the jury at trial"), *aff'd on other grounds*, 2018 CO 13.

¶ 33 Ultimately, the fact that Juror P.D. may have been "undesirable" to Oliver cannot establish that Oliver was harmed by the trial court's erroneous denial of the challenge to Juror A.R. "[B]ecause neither the prosecution nor the defendant is granted any right in this jurisdiction, by constitution, statute, or rule, to shape the composition of the jury through the use of peremptory challenges, the defendant could not have been harmed by the deprivation of any such right." *Vigil*, ¶ 25. The sole measure of harm in this context is whether a biased or incompetent juror sat on the jury. There being no indication in the record that any such juror sat on Oliver's jury, we conclude that the trial court's failure to excuse Juror A.R. for cause was harmless. *Maestas*, ¶ 12.

III. Expert Testimony

¶ 34 Next, Oliver argues that the prosecution's witnesses improperly gave expert testimony in the guise of lay witness opinion. By allowing the testimony, he argues, the trial court plainly erred. We disagree.

A. Additional Facts

¶ 35 At trial, the prosecution presented testimony from two witnesses, neither of whom had been qualified as experts. The first witness, Matthew Smith, was the correctional officer who found the contraband. As relevant here, Smith testified as follows:

> [PROSECUTOR]: And based on your education, training, and experience as a correctional officer, is this an item that's capable of causing bodily injury?
>
> [SMITH]: Yes.
>
> [PROSECUTOR]: Is it capable of causing death?
>
> [SMITH]: Yes.
>
> [PROSECUTOR]: And is it capable of causing fear of bodily injury or death?
>
> [SMITH]: Yes.

¶ 36 The prosecution's second witness, Corey Fox, was an employee of DOC who investigated the incident. On direct examination, after

detailing his twenty years of experience in law enforcement, the following exchange occurred:

> [PROSECUTOR]: Based on your education, training, and experience, what would be the purpose of wrapping that rag around the toothbrush?
>
> [FOX]: To get a proper handle on it. The razor blade is attached to a piece of plastic that looks to be part of an actual razor. So the handle would fit within your hand versus trying to hold the razor blade by your fingers.

¶ 37 Shortly thereafter, the prosecutor questioned Fox as to his experience investigating similar types of contraband:

> [PROSECUTOR]: Investigator Fox, during the course of your tenure as a law enforcement officer, have you had occasion to investigate assaults within the Colorado Department of Corrections?
>
> [FOX]: I have.
>
> [PROSECUTOR]: And based on your experience as well as your education and training, is — have you ever seen an object similar to the one [here] used to cause bodily injury or death?
>
> [FOX]: I have.
>
> [PROSECUTOR]: Approximately — can you give an estimate of how many cases you have investigated that involved similar type of weapons?

> [FOX]: I would say I have had at least probably 20 assault investigations at Limon alone involving weapons.
>
> [PROSECUTOR]: And have you seen similar weapons being used to cause serious bodily injury or death?
>
> [FOX]: I have.

B. Standard of Review

¶ 38 We review a trial court's evidentiary decisions for an abuse of discretion. *Venalonzo v. People*, 2017 CO 9, ¶ 15. However, Oliver concedes, and the record supports, that this issue was not preserved. Thus, we will reverse only for plain error. *Hagos v. People*, 2012 CO 63, ¶ 14.

¶ 39 "[P]lain error occurs when there is (1) an error, (2) that is obvious, and (3) that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Cardman v. People*, 2019 CO 73, ¶ 19. The defendant has the burden of establishing each element. *People v. Boykins*, 140 P.3d 87, 95 (Colo. App. 2005).

¶ 40 An error is obvious if, at the time the issue arose, "it was so clear cut and so obvious that a trial judge should have been able to avoid it without benefit of an objection." *People v. Conyac*, 2014

COA 8M, ¶ 54; *accord Cardman*, ¶ 34; *Scott v. People*, 2017 CO 16, ¶ 16. "For an error to be this obvious, the action challenged on appeal ordinarily 'must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law.'" *Scott*, ¶ 16 (quoting *People v. Pollard*, 2013 COA 31M, ¶ 40).

¶ 41 An error so undermines the fairness of the trial such that reversal is warranted if "a reasonable possibility exists that [the error] . . . contributed to [the] conviction." *Cardman*, ¶ 39 (quoting *People v. Lozano-Ruiz*, 2018 CO 86, ¶ 5). Yet "the error must impair the reliability of the judgment of conviction to a greater degree than under harmless error," *Hagos*, ¶ 14, as we will only reverse to correct particularly egregious errors. *See id.* ("[The plain error] standard was formulated to permit an appellate court to correct 'particularly egregious errors.'" (quoting *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987))).

C. Applicable Law

¶ 42 Here, whether the trial court erred turns on whether witnesses Smith and Fox improperly offered lay testimony under CRE 701 that instead fell within the scope of CRE 702. *See People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002) ("[CRE 701], which governs

the admission of opinion testimony by a lay witness, but not [CRE] 702, which addresses expert witness testimony, applies since the prosecution did not seek to qualify the officer as an expert witness.").

¶ 43 Under CRE 701, a witness not qualified as an expert may only testify in the form of an opinion or inference if it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [CRE] 702." Testimony falls within the scope of CRE 702 if it is based on "scientific, technical, or other specialized knowledge." CRE 702.

¶ 44 In determining whether a witness's opinion testimony constitutes lay testimony under CRE 701 or expert testimony under CRE 702, we look to the basis for the opinion. *Venalonzo*, ¶ 16. In doing so, we consider "the nature of the experiences that could form the opinion's basis" rather than simply asking whether a witness has drawn on personal experience to inform her testimony. *Id.* at ¶ 22.

¶ 45 "If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony." *Id.* at ¶ 16. The inquiry here is whether "ordinary citizens can be expected to know certain information or to have had certain experiences." *Id.* at ¶ 22 (quoting *People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2005)). "Expert testimony, by contrast, is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have." *Id.* at ¶ 22. Hence, if "the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony." *Id.* at ¶ 16.

D. Analysis

¶ 46 The testimony at issue encompassed three distinct assertions, each of which, Oliver contends, constituted improper lay witness testimony.

¶ 47 First, Oliver argues that Smith offered improper testimony by opining that the contraband at issue was capable of instilling fear

of, or causing, bodily injury or death.[3] But deducing that the contraband — a razor blade affixed to a toothbrush — had such capabilities did not require specialized knowledge or experience. Rather, in our view, an ordinary citizen can be expected to know that a razor blade could cause bodily injury, death, or the fear of either. Thus, because the basis of Smith's opinion was within the realm of the ordinary person's experience and knowledge, it was not outside the scope of CRE 701. *Venalonzo*, ¶ 16.

¶ 48 Oliver also takes issue with Fox's testimony that he had seen similar types of contraband used to cause bodily injury or death. However, Fox, by simply recounting what he had perceived, was not offering testimony that ran afoul of CRE 701. Though Fox's observations took place in his capacity as an investigator, the ordinary citizen can be expected to recognize that bodily injury or death had occurred. In other words, the basis of Fox's observations

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[3] In order to prove first degree possession of contraband and first degree introduction of contraband, the prosecution was required to prove that the contraband at issue was a "dangerous instrument." *See* § 18-8-203(1)(a), C.R.S. 2019; § 18-8-204.1(1), C.R.S. 2019. A dangerous instrument is defined in part as any "device, instrument, material, or substance which is readily capable of causing or inducing fear of death or bodily injury, the use of which is not specifically authorized." § 18-8-203(4).

did not require specialized experience, knowledge, or training. Thus, we discern no violation of CRE 701. *Venalonzo*, ¶ 16; *see Stewart*, 55 P.3d at 123 ("[P]olice officers regularly, and appropriately, offer testimony under [CRE] 701 based on their perceptions and experiences.").

¶ 49 Finally, Oliver argues that Fox's testimony as to the purpose of the rag was also improper. But after examining photographs of the contraband in the record, we cannot say Fox's observation was beyond the realm of common experience. True, an ordinary citizen may not be expected to have an understanding of how prison weaponry is crafted. However, in this instance, an ordinary person could deduce, without the need for specialized knowledge or training, that the purpose of the rag was to provide a proper handle. Thus, Fox's statement was not outside the scope of CRE 701. *Venalonzo*, ¶ 16.

¶ 50 Thus, we conclude that neither Smith nor Fox improperly offered expert testimony in the guise of lay witness opinion. Accordingly, we discern no abuse of discretion in that regard. *See Maestas*, ¶ 11. However, Oliver directs us to another possible violation of CRE 701.

¶ 51 As we concluded above, the testimony was not beyond the scope of CRE 701 because it was within the realm of an ordinary person's experience or knowledge. But for that same reason, Oliver argues, the testimony violated CRE 701(b)'s requirement that lay witness opinion testimony be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." As Oliver points out, because the contraband was submitted to the jury as physical evidence, the testimony could not have been helpful considering that any ordinary person could draw the same conclusions from their own examination of the contraband.

¶ 52 But that same logic, in turn, leads us to conclude there was no plain error. Because the testimony merely stated the obvious, we cannot say that its admission was fundamentally unfair or had any impact on the reliability of the conviction. Thus, any error in admitting the testimony was not plain. *See Cardman*, ¶ 19.

IV. Double Jeopardy Violation

¶ 53 Oliver asks us to vacate his conviction for first degree possession of contraband. The People concede Oliver's argument in light of *People v. Jamison*, 2018 COA 121. In *Jamison*, a division of this court held that first degree possession of contraband is a lesser

included offense of first degree introduction of contraband under section 18-1-408(5)(a) and the Double Jeopardy Clauses of the United States and Colorado Constitutions. *Id.* at ¶¶ 44, 50, 61. We agree with the division in *Jamison*. Because Oliver was convicted of both offenses, we vacate the conviction for first degree possession of contraband and remand to the trial court to correct the mittimus. *See Reyna-Abarca v. People*, 2017 CO 15, ¶ 81 ("[W]hen a defendant's double jeopardy rights are violated for failure to merge a lesser included offense into a greater offense, such a violation requires a remedy."); *Jamison*, ¶ 62.

V. Lesser Included Offense Instruction

¶ 54 Finally, Oliver argues that the trial court plainly erred by failing to instruct the jury that second degree possession of contraband is a lesser included offense of first degree possession of contraband. We disagree.

A. Additional Background

¶ 55 At trial, Oliver argued that second degree possession of contraband is a lesser included offense of first degree possession of contraband, and he requested that the court instruct the jury accordingly. The trial court, rejecting Oliver's argument, declined to

do so. Instead, per Oliver's request, the trial court agreed to add an additional count of second degree possession of contraband as a lesser nonincluded offense. Thus, the court instructed the jury as to first and second degree possession of contraband, and the jury returned a verdict convicting Oliver of both offenses.

B. Preservation and Standard of Review

¶ 56 Oliver argued below that by establishing the elements of first degree possession of contraband, one necessarily establishes the elements of second degree possession of contraband. Therefore, he argued, second degree possession of contraband is a lesser included offense under the "strict elements test" as articulated in *Reyna-Abarca*, ¶¶ 3, 64, and embodied in section 18-1-408(5)(a). *See People v. Rock*, 2017 CO 84, ¶ 12 ("[T]he statutory or strict elements test [is] embodied in section 18-1-408(5)(a).").

¶ 57 But Oliver advances a new argument on appeal, positing for the first time that second degree possession of contraband is a lesser included offense of first degree possession of contraband under an alternative test enumerated in section 18-1-408(5)(c). However, Oliver concedes, and we agree, that his argument was not preserved. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d

1182, 1188 n.4 (Colo. App. 2011) (only the specific arguments a party pursued before the district court are preserved).

¶ 58 We review de novo whether an offense is a lesser included offense of another. *People v. Zweygardt*, 2012 COA 119, ¶ 10. But because Oliver's contention was not preserved, we review only for plain error. *Hagos*, ¶ 14.

C. Applicable Law and Analysis

1. Second Degree Possession of Contraband is a Lesser Included Offense of First Degree Possession of Contraband

¶ 59 As noted above, in arguing second degree possession of contraband is a lesser included offense of first degree possession of contraband, Oliver now invokes only section 18-1-408(5)(c). That statute provides that an offense is lesser included if "[i]t differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission." § 18-1-408(5)(c). Thus, we begin by reviewing the conduct proscribed by each offense.

¶ 60 Under section 18-8-204.1(1), C.R.S. 2019, "[a] person being confined in a detention facility commits the crime of possession of

contraband in the first degree if he knowingly obtains or has in his possession contraband as listed in section 18-8-203(1)(a)." On the other hand, "[a] person being confined in a detention facility commits the crime of possession of contraband in the second degree if he knowingly obtains or has in his possession contraband as defined in section 18-8-204(2)[, C.R.S. 2019]." § 18-8-204.2(1), C.R.S. 2019.

¶ 61 Significantly, section 18-8-204(2) enumerates that it "does not include any article or thing referred to in section 18-8-203." Thus, the second degree statute only criminalizes the possession of contraband not encompassed by the first degree statute. *See* § 18-8-204.1. The two offenses, therefore, differ only as to the type of contraband each proscribes, with the first degree statute prohibiting items that tend to pose a higher risk of physical injury. *See* § 18-8-203(1)(a), (4) (referencing, e.g., any "device, instrument, material, or substance which is readily capable of causing or inducing fear of death or bodily injury").

¶ 62 Moreover, the second degree statute prohibits, in part, the possession of "[a]ny article or thing that poses or may pose a threat to the security of the detention facility as determined by the

administrative head of the detention facility if reasonable notice is given that such article or thing is contraband." § 18-8-204(2)(*l*). Therefore, the second degree offense, in effect, functions as a catchall of the first degree offense: it prohibits anything not encompassed by the first degree statute that could conceivably be considered contraband. *See id.*

¶ 63 Thus, the statutory scheme suggests that the second degree statute does not proscribe a different type of harm than the first degree statute. Rather, the two offenses differ only as to the severity or risk of injury posed by the type of contraband each proscribe. Accordingly, we agree with Oliver that second degree possession of contraband is a lesser included offense of first degree possession of contraband under section 18-1-408(5)(c).

2. Plain Error

¶ 64 Having concluded that second degree possession of contraband is a lesser included offense of first degree possession of contraband, we turn to whether the trial court plainly erred by not instructing the jury accordingly. We conclude that it did not.

¶ 65 First, the parties do not dispute the trial court's finding that there was a rational basis to support a verdict convicting Oliver of

second degree possession of contraband. *See People v. Naranjo*, 2017 CO 87, ¶ 15 (holding that a defendant is entitled to an instruction on a lesser nonincluded offense "so long as a rational evidentiary basis exists to simultaneously acquit him of the charged offense and convict him of the lesser offense"). Therefore, we assume without deciding that Oliver was entitled to a lesser included offense instruction on second degree possession of contraband. *See People v. Brown*, 218 P.3d 733, 736 (Colo. App. 2009) ("The evidentiary burden is not heavy: 'a defendant is entitled to an instruction on a lesser included offense if there is any evidence, however slight, to establish the lesser included offense.'" (quoting *Jones v. People*, 711 P.2d 1270, 1278 (Colo. 1986))), *aff'd*, 239 P.3d 764 (Colo. 2010).

¶ 66 Furthermore, "it is error to instruct the jury on an offense as a lesser non-included offense when the offense actually constitutes a lesser included offense." *People v. Duran*, 272 P.3d 1084, 1096 (Colo. App. 2011); *see* § 18-1-408(1)(a) (a defendant cannot be convicted of a crime charged and a lesser included offense of that charge).

¶ 67 However, we cannot say that the error was obvious. Neither this court nor our supreme court has addressed the specific issue presented here. And notably, there is an appellate decision holding that second degree introduction of contraband is *not* a lesser included offense of first degree introduction of contraband, albeit not under section 18-1-408(5)(c), but rather under the strict elements test as it existed before *Reyna-Abarca*. *People v. Borrego*, 538 P.2d 1339, 1342 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)). While *Borrego* was not selected for publication, and thus was not binding precedent, the decision was nevertheless publicly available. Thus, under the circumstances, we conclude that the error was not so obvious as to constitute plain error. *See Conyac*, ¶ 54 (An error is obvious if "it was so clear cut and so obvious that a trial judge should have been able to avoid it without benefit of an objection."); *see also People v. Robles*, 302 P.3d 269, 283 (Colo. App. 2011) (Webb, J., specially concurring) (concluding that an error was not obvious when it involved an issue of first impression and the jurisprudence in the area was conflicting), *aff'd*, 2013 CO 24.

VI. Conclusion

¶ 68 The judgment is affirmed in part and vacated in part. We affirm the judgment of conviction for first degree introduction of contraband and second degree possession of contraband. However, we vacate the conviction for first degree possession of contraband, and we remand for the trial court to correct the mittimus.

JUDGE ROMÁN and JUDGE PAWAR concur.