SUMMARY
March 25, 2021

**2021COA38M**

**No. 18CA0007, *People v. Rodriguez* — Crimes — Murder in the First Degree — Criminal Attempt — Assault in the First Degree; Criminal Law — Sentencing — Felonies Classified — Pregnant Victim**

The defendant was found guilty by a jury of attempted first degree murder and first degree assault of his pregnant girlfriend. On appeal, he argues that the court erred by admitting evidence of the victim's pregnancy. According to the defendant, under section 18-1.3-401(13)(a)-(b), C.R.S. 2020, a sentence enhancer applies if the court, not the jury, finds that the victim was pregnant at the time of the assault and the defendant knew or should have known of the pregnancy. Thus, the defendant contends that the admission of evidence of the pregnancy was irrelevant and unduly prejudicial.

Relying on *Blakely v. Washington*, 542 U.S. 296 (2004), a division of the court of appeals holds that because the victim's pregnancy and the defendant's knowledge of it increases the penalty for first degree assault beyond the statutory maximum, those facts must be found by a jury based on proof beyond a reasonable doubt. Accordingly, the division concludes that the evidence was highly probative and therefore admissible. And because the defendant's other contentions of error do not warrant reversal, the division affirms the judgment.

COLORADO COURT OF APPEALS **2021COA38M**

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Court of Appeals No. 18CA0007
Weld County District Court No. 16CR2242
Honorable Thomas J. Quammen, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Manuel Ramos Rodriguez,

Defendant-Appellant.

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JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE HARRIS
Fox and Grove, JJ., concur

Opinion Modified
On the Court's Own Motion

Announced March 25, 2021

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Philip J. Weiser, Attorney General, Grant R. Fevurly, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Joseph Paul Hough, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

OPINION is modified as follows:

**Page 10, ¶ 20 currently reads:**

As neither party has asked us to opine on the constitutionality of section 18-1.3-403(13), we find it unnecessary to attempt to reconcile the statutory language with this constitutional limitation.

**Opinion now reads:**

As neither party has asked us to opine on the constitutionality of section 18-1.3-401(13), we find it unnecessary to attempt to reconcile the statutory language with this constitutional limitation.

¶ 1 Defendant, Manuel Ramos Rodriguez, assaulted his pregnant girlfriend, inflicting serious bodily injury. At trial, he did not dispute that he had committed an assault causing serious injuries, but he argued that he was too drunk to have formed the specific intent necessary to support a conviction for attempted first degree murder and first degree assault. The jury disagreed and found him guilty of both offenses.[1]

¶ 2 On appeal, Rodriguez contends that the trial court erred by (1) allowing an officer to testify about the content of the victim's 911 call; (2) admitting evidence that the victim was pregnant; and (3) permitting prosecutorial misconduct in the opening statement and closing argument. We reject his contentions and therefore affirm.

## I. Officer's Testimony Regarding the 911 Call

¶ 3 During the assault, which involved Rodriguez hitting and kicking the victim, and throwing weights at her head until, at one point, she lost consciousness, the victim was able to call 911. She could not speak directly to the dispatcher, as she was curled "into a ball" attempting to protect herself from the assault, but the phone

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line remained open, recording some of the interaction between Rodriguez and the victim.

¶ 4 At trial, the 911 recording was admitted during the victim's testimony. Later, the officer who had responded to the scene testified as to the statements heard on the recording. He explained that because "there were multiple voices on the call . . . noises and different things," he had listened to the recording "over and over again for some hours" while wearing noise-cancelling headphones in a quiet room.

¶ 5 The officer identified the voices on the 911 call as those of Rodriguez, the victim, and himself.[2] Then, the prosecutor played a series of clips from the 911 recording, and the officer testified to what he heard on each clip, including

- the victim screaming and asking Rodriguez to stop;
- the victim saying, "[Rodriguez], stop. You're going to kill me";
- Rodriguez saying "something to the effect of, 'I'm going to do this all night,'" and "You're going to take it again";

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- Rodriguez saying that "he's going to go put his steel toes on real quick so he can . . . kick [the victim]";
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- Rodriguez saying, "No, it ain't enough. I'm going to fuck you up all night"; and
- Rodriguez saying, "I'm going to kill you. Fuck it," the victim replying, "You really are going to kill me," and Rodriguez saying, "Yeah, that's the point."

¶ 6 Rodriguez argues that the officer's testimony as to the content of the recorded call violated the best evidence rule, *see* CRE 1002, and "CRE 701 and 702's prohibition on lay witnesses offering expert opinions." According to Rodriguez, the officer should have been endorsed and qualified as an expert in "audio forensics" or some related field.

A. Preservation and Standard of Review

¶ 7 We review the trial court's evidentiary rulings for an abuse of discretion. *People v. McFee*, 2016 COA 97, ¶ 70. Rodriguez preserved his claim that the officer's testimony was inadmissible

under CRE 1002, but not a claim that it constituted an unendorsed expert opinion in the guise of lay opinion testimony. Therefore, as to the latter claim, even if the court erred by admitting the testimony, we will not reverse unless the error was plain. "Plain error is error that is obvious and substantial, and that so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *McFee*, ¶ 71.

### B. Discussion

#### 1. Best Evidence Rule

¶ 8 Under CRE 1002, known as the "best evidence rule," in order "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph" is generally required.

¶ 9 The original 911 recording was admitted into evidence. Accordingly, "the originality requirement of CRE 1002 was satisfied." *People v. Robinson*, 908 P.2d 1152, 1156 (Colo. App. 1995) (originality requirement of CRE 1002 was satisfied where original videotape was offered and admitted into evidence), *aff'd*, 927 P.2d 381 (Colo. 1996). And CRE 1002 "does not prevent further testimony regarding the contents of" the 911 recording. *Id.*

### 2. Expert Testimony

¶ 10 A witness offers lay testimony if the witness "provides testimony that could be expected to be based on an ordinary person's experiences or knowledge." *Venalonzo v. People*, 2017 CO 9, ¶ 23. In contrast, expert testimony "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; *see also* CRE 702 (a witness qualified as an expert may testify to scientific, technical, or other specialized knowledge).

¶ 11 The officer's testimony about the content of the 911 recording was not based on any scientific, technical, or other specialized knowledge. According to the officer, he sat in a quiet room with headphones on and listened to the recording multiple times. His opinion about what he heard was not based on any expertise in "audio forensics," but instead on his own auditory perceptions and capabilities, and therefore the process of arriving at his opinion was not outside the ken of an ordinary juror. *See People v. Mollaun*, 194 P.3d 411, 419 (Colo. App. 2008) (officer's testimony that the defendant's eyes were not dilated at trial, as they had been at the

time of the arrest, did not constitute expert drug recognition testimony).

¶ 12 Even assuming Rodriguez also challenges the testimony as improper lay opinion testimony under Rule 701, and even further assuming the court erred by admitting this portion of the officer's testimony, any error was not plain, as it did not cause substantial prejudice. For one thing, the jury listened to each portion of the recording as the officer testified to what he heard, meaning the jurors could decide for themselves whether the officer's interpretation was accurate.[3] *See McFee*, ¶ 79 (no substantial prejudice in admitting detective's testimony describing defendant's statements on a recording because the jury could listen to the recording and evaluate the defendant's words for itself). As well, the victim separately recounted substantially similar statements made by Rodriguez during the assault. For example, she testified that

[3] The jury also listened to the 911 call twice during deliberations and was given the option of requesting additional opportunities to listen to the recording. It does not appear that the jury exercised that option. As the trial court stated, some parts of the recording were "easier to [hear] than other parts," but, having listened to the recording, we disagree with Rodriguez that its content is "largely unintelligible."

while Rodriguez was kicking her in the stomach, he said, "That's not hard enough. I'm going to get my steel toes," meaning his steel-toed boots. At one point he told her, "I didn't hit your face enough." When she asked him to stop "for the sake of [the baby]," he said, "Fuck the baby." She described the beating in detail and her repeated pleas for Rodriguez to stop and testified that she was "afraid for [her] life." Because the nature and content of the statements described by the officer were mostly cumulative of the victim's testimony, the admission of those statements does not amount to plain error. *See People v. Joyce*, 68 P.3d 521, 524 (Colo. App. 2002) (admission of hearsay statements was not plain error where the statements were cumulative of other evidence).

## II. Evidence of the Victim's Pregnancy

¶ 13 Before trial, defense counsel moved to exclude evidence that the victim was twenty-six weeks pregnant at the time of the assault, asserting that the evidence was irrelevant and unduly prejudicial. The trial court denied the motion because the fact of a victim's pregnancy is a sentence enhancer for first degree assault, and, consistent with *Blakely v. Washington*, 542 U.S. 296 (2004), and

*Apprendi v. New Jersey*, 530 U.S. 466 (2000), the fact had to be determined by the jury.

¶ 14 On the morning of trial, defense counsel objected to a photograph of the victim that showed her "pregnant stomach," arguing that the photo was an appeal to the sympathies of the jury. The prosecution countered that the photograph was evidence that Rodriguez knew or should have known that the victim was pregnant at the time of the assault. The court overruled the objection, concluding that the photograph was relevant and not overly prejudicial.

¶ 15 On appeal, Rodriguez insists that evidence of the victim's pregnancy was irrelevant because the statutory sentence enhancer directs the trial court, not the jury, to make findings as to the victim's pregnancy and the defendant's knowledge of it. Therefore, he says, given the lack of probative value, the evidence was unfairly prejudicial under CRE 403 and should have been excluded.

A. Standard of Review

¶ 16 As we have noted, we review a trial court's evidentiary rulings for an abuse of discretion. *McFee*, ¶ 17. To the extent those rulings

turn on the trial court's interpretation of a statute, we review its interpretation de novo. *People v. Lee*, 2020 CO 81, ¶ 11.

B. Discussion

¶ 17 Section 18-1.3-401(13)(a)-(b), C.R.S. 2020, provides that if a defendant is convicted of first degree assault, and the "court makes . . . findings on the record" that the victim was pregnant at the time of the assault and the defendant knew or reasonably should have known that the victim was pregnant, then the court must sentence the defendant in the aggravated range — at least the midpoint, but not more than twice the maximum, of the presumptive range.

¶ 18 Relying on the phrase "if the court makes . . . findings," Rodriguez says that the fact of the victim's pregnancy and his knowledge of it were for the court to determine, not the jury, and therefore the evidence of the victim's pregnancy had no probative value at trial.

¶ 19 But we agree with the trial court that section 18-1.3-401(13) must be construed in accordance with constitutional precedent. Under *Blakely*, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301

(quoting *Apprendi*, 530 U.S. at 490); *see also Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005) ("[F]acts supporting the increase of a sentence beyond the 'statutory maximum' must be admitted by the defendant or tried to a jury and proved beyond a reasonable doubt, unless the defendant has specifically stipulated to judicial fact-finding."). Thus, unless the defendant admits to these facts or stipulates to judicial fact-finding on these issues, the fact of a victim's pregnancy and the defendant's knowledge of it must be found by a jury based on proof beyond a reasonable doubt.

¶ 20 As neither party has asked us to opine on the constitutionality of section 18-1.3-401(13), we find it unnecessary to attempt to reconcile the statutory language with this constitutional limitation. Suffice it to say, the statutory provision cannot override a constitutional mandate, and therefore the pregnancy sentencing enhancer had to be submitted to the jury. *See Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (Where a statute and the constitution are in conflict, "the constitution is paramount law.").

¶ 21 Rodriguez says that even if the evidence was admissible for this purpose, it should nonetheless have been excluded, as the trial court could have "simply accept[ed] the defense's proposed waiver of

a jury's finding (in effect, a stipulation)" that the victim was pregnant. The defense, though, never proposed a waiver; in fact, at a pretrial hearing, defense counsel specifically rejected that idea, stating that Rodriguez was "certainly . . . not going to stipulate to the fact that [the victim] is pregnant."

¶ 22 Accordingly, because evidence of the victim's pregnancy was highly probative, the trial court did not abuse its discretion in admitting it.

## III. Prosecutorial Misconduct

¶ 23 In opening statement, the prosecutor told the jury that, at the time of the assault, the victim was twenty-six weeks pregnant; that during the assault, she "begged [Rodriguez] to stop for the sake of their daughter" and Rodriguez responded, "Fuck the baby"; and that the victim experienced a "fear that her unborn child will not get to take her first breath." The prosecutor showed a picture of the pregnant victim. And, at one point during the opening statement, the prosecutor referred to the responding officer as a "hero."

¶ 24 In closing argument, the prosecutor did not mention the victim's pregnancy, but he again referred to the officer as a "hero" and a "hero to [the victim]."

¶ 25 Rodriguez argues that the prosecutor's comments "improperly pandered to the jury's sympathies and emotions with irrelevant but highly prejudicial matters."

A. Standard of Review

¶ 26 When reviewing a claim of prosecutorial misconduct, we engage in a two-step analysis. First, we determine whether the prosecutor's conduct was improper based on the totality of the circumstances, and second, we determine whether the prosecutor's actions warrant reversal according to the proper standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

¶ 27 "The determination of whether a prosecutor's statements constitute inappropriate prosecutorial argument is an issue within the trial court's discretion . . . ." *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010). Thus, "we will not disturb its rulings . . . in the absence of a showing of gross abuse of discretion resulting in prejudice and a denial of justice." *Id.*

¶ 28 Because Rodriguez preserved his claim, if we discern an error, we will reverse unless the error was harmless — that is, unless "there is no reasonable probability that it contributed to the defendant's conviction." *Id.*

### B. Discussion

¶ 29 "[D]uring opening statement, a prosecutor may refer to evidence that subsequently will be adduced at trial and draw inferences from that evidence." *People v. Estes*, 2012 COA 41, ¶ 23. Because, as we have concluded, evidence of the victim's pregnancy was relevant to the sentence enhancer, the prosecutor's comments concerning the pregnancy properly foreshadowed "evidence [that] the prosecutor explained would be developed at trial." *Id.* at ¶ 24.

¶ 30 Moreover, the victim later testified, without objection, that she curled up because she "wanted to protect [her] baby," and that she told officers she thought she was going to die and she "just wanted to go to the hospital so that [she] could check on [her] baby." Thus, we conclude that the court did not abuse its discretion by allowing the prosecutor to comment during opening statement on the victim's pregnancy or her fear for her unborn child. *See id.*

¶ 31 To be sure, the few references to the officer as a "hero" are somewhat dramatic, but a prosecutor has "wide latitude in the language and presentation style used" during closing argument. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). And a prosecutor "may employ rhetorical devices and engage in oratorical

embellishment and metaphorical nuance." *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003). It is only when the prosecutor's flourishes and embellishments induce the jury to determine guilt on the basis of passion or prejudice or when they become a vehicle for injecting irrelevant issues into the case that the prosecutor's comments cross the line into misconduct. *See People v. Marko*, 2015 COA 139, ¶ 206, *aff'd on other grounds*, 2018 CO 97.

¶ 32 Here, the brief references to the officer as a "hero" were not an obvious attempt by the prosecutor to invite the jury to decide the case on anything other than the admissible evidence. *See, e.g.*, *People v. Lovato*, 2014 COA 113, ¶¶ 74-75 (prosecutor's statement that the sexual assault was "the epitome of what sexual abuse would be to a man by targeting that area of a man" was proper argument, using appropriate oratorical embellishment).

¶ 33 But even if the "hero" comments veered into improper territory, we discern no basis for reversal. The comments were brief, *see People v. Douglas*, 2012 COA 57, ¶ 68 (harmless error where comments represented a small part of the prosecutor's argument), they did not relate to any contested issue in the case, and the evidence of guilt was overwhelming, *see People v. Trujillo*,

2018 COA 12, ¶ 45 (prosecutor's improper comments constituted harmless error where "significant evidence corroborated the jury's finding of guilt").

## IV. Conclusion

¶ 34 The judgment is affirmed.

JUDGE FOX and JUDGE GROVE concur.

SUMMARY
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Relying on *Blakely v. Washington*, 542 U.S. 296 (2004), a division of the court of appeals holds that because the victim's pregnancy and the defendant's knowledge of it increases the penalty for first degree assault beyond the statutory maximum, those facts must be found by a jury based on proof beyond a reasonable doubt. Accordingly, the division concludes that the evidence was highly probative and therefore admissible. And because the defendant's other contentions of error do not warrant reversal, the division affirms the judgment.

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## I. Officer's Testimony Regarding the 911 Call

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- the victim screaming and asking Rodriguez to stop;
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¶ 14 On the morning of trial, defense counsel objected to a photograph of the victim that showed her "pregnant stomach," arguing that the photo was an appeal to the sympathies of the jury. The prosecution countered that the photograph was evidence that Rodriguez knew or should have known that the victim was pregnant at the time of the assault. The court overruled the objection, concluding that the photograph was relevant and not overly prejudicial.

¶ 15 On appeal, Rodriguez insists that evidence of the victim's pregnancy was irrelevant because the statutory sentence enhancer directs the trial court, not the jury, to make findings as to the victim's pregnancy and the defendant's knowledge of it. Therefore, he says, given the lack of probative value, the evidence was unfairly prejudicial under CRE 403 and should have been excluded.

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turn on the trial court's interpretation of a statute, we review its interpretation de novo. *People v. Lee*, 2020 CO 81, ¶ 11.

B. Discussion

¶ 17 Section 18-1.3-401(13)(a)-(b), C.R.S. 2020, provides that if a defendant is convicted of first degree assault, and the "court makes . . . findings on the record" that the victim was pregnant at the time of the assault and the defendant knew or reasonably should have known that the victim was pregnant, then the court must sentence the defendant in the aggravated range — at least the midpoint, but not more than twice the maximum, of the presumptive range.

¶ 18 Relying on the phrase "if the court makes . . . findings," Rodriguez says that the fact of the victim's pregnancy and his knowledge of it were for the court to determine, not the jury, and therefore the evidence of the victim's pregnancy had no probative value at trial.

¶ 19 But we agree with the trial court that section 18-1.3-401(13) must be construed in accordance with constitutional precedent. Under *Blakely*, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301

(quoting *Apprendi*, 530 U.S. at 490); *see also Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005) ("[F]acts supporting the increase of a sentence beyond the 'statutory maximum' must be admitted by the defendant or tried to a jury and proved beyond a reasonable doubt, unless the defendant has specifically stipulated to judicial fact-finding."). Thus, unless the defendant admits to these facts or stipulates to judicial fact-finding on these issues, the fact of a victim's pregnancy and the defendant's knowledge of it must be found by a jury based on proof beyond a reasonable doubt.

¶ 20 As neither party has asked us to opine on the constitutionality of section 18-1.3-403(13), we find it unnecessary to attempt to reconcile the statutory language with this constitutional limitation. Suffice it to say, the statutory provision cannot override a constitutional mandate, and therefore the pregnancy sentencing enhancer had to be submitted to the jury. *See Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (Where a statute and the constitution are in conflict, "the constitution is paramount law.").

¶ 21 Rodriguez says that even if the evidence was admissible for this purpose, it should nonetheless have been excluded, as the trial court could have "simply accept[ed] the defense's proposed waiver of

a jury's finding (in effect, a stipulation)" that the victim was pregnant. The defense, though, never proposed a waiver; in fact, at a pretrial hearing, defense counsel specifically rejected that idea, stating that Rodriguez was "certainly . . . not going to stipulate to the fact that [the victim] is pregnant."

¶ 22 Accordingly, because evidence of the victim's pregnancy was highly probative, the trial court did not abuse its discretion in admitting it.

## III. Prosecutorial Misconduct

¶ 23 In opening statement, the prosecutor told the jury that, at the time of the assault, the victim was twenty-six weeks pregnant; that during the assault, she "begged [Rodriguez] to stop for the sake of their daughter" and Rodriguez responded, "Fuck the baby"; and that the victim experienced a "fear that her unborn child will not get to take her first breath." The prosecutor showed a picture of the pregnant victim. And, at one point during the opening statement, the prosecutor referred to the responding officer as a "hero."

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A. Standard of Review

¶ 26 When reviewing a claim of prosecutorial misconduct, we engage in a two-step analysis. First, we determine whether the prosecutor's conduct was improper based on the totality of the circumstances, and second, we determine whether the prosecutor's actions warrant reversal according to the proper standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

¶ 27 "The determination of whether a prosecutor's statements constitute inappropriate prosecutorial argument is an issue within the trial court's discretion . . . ." *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010). Thus, "we will not disturb its rulings . . . in the absence of a showing of gross abuse of discretion resulting in prejudice and a denial of justice." *Id.*

¶ 28 Because Rodriguez preserved his claim, if we discern an error, we will reverse unless the error was harmless — that is, unless "there is no reasonable probability that it contributed to the defendant's conviction." *Id.*

### B. Discussion

¶ 29 "[D]uring opening statement, a prosecutor may refer to evidence that subsequently will be adduced at trial and draw inferences from that evidence." *People v. Estes*, 2012 COA 41, ¶ 23. Because, as we have concluded, evidence of the victim's pregnancy was relevant to the sentence enhancer, the prosecutor's comments concerning the pregnancy properly foreshadowed "evidence [that] the prosecutor explained would be developed at trial." *Id.* at ¶ 24.

¶ 30 Moreover, the victim later testified, without objection, that she curled up because she "wanted to protect [her] baby," and that she told officers she thought she was going to die and she "just wanted to go to the hospital so that [she] could check on [her] baby." Thus, we conclude that the court did not abuse its discretion by allowing the prosecutor to comment during opening statement on the victim's pregnancy or her fear for her unborn child. *See id.*

¶ 31 To be sure, the few references to the officer as a "hero" are somewhat dramatic, but a prosecutor has "wide latitude in the language and presentation style used" during closing argument. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). And a prosecutor "may employ rhetorical devices and engage in oratorical

embellishment and metaphorical nuance." *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003). It is only when the prosecutor's flourishes and embellishments induce the jury to determine guilt on the basis of passion or prejudice or when they become a vehicle for injecting irrelevant issues into the case that the prosecutor's comments cross the line into misconduct. *See People v. Marko*, 2015 COA 139, ¶ 206, *aff'd on other grounds*, 2018 CO 97.

¶ 32 Here, the brief references to the officer as a "hero" were not an obvious attempt by the prosecutor to invite the jury to decide the case on anything other than the admissible evidence. *See, e.g.*, *People v. Lovato*, 2014 COA 113, ¶¶ 74-75 (prosecutor's statement that the sexual assault was "the epitome of what sexual abuse would be to a man by targeting that area of a man" was proper argument, using appropriate oratorical embellishment).

¶ 33 But even if the "hero" comments veered into improper territory, we discern no basis for reversal. The comments were brief, *see People v. Douglas*, 2012 COA 57, ¶ 68 (harmless error where comments represented a small part of the prosecutor's argument), they did not relate to any contested issue in the case, and the evidence of guilt was overwhelming, *see People v. Trujillo*,

2018 COA 12, ¶ 45 (prosecutor's improper comments constituted harmless error where "significant evidence corroborated the jury's finding of guilt").

## IV. Conclusion

¶ 34 The judgment is affirmed.

JUDGE FOX and JUDGE GROVE concur.