SUMMARY
April 1, 2021

2021COA41

No. 18CA1747, People v. Bowers — Crimes — Assault in the First Degree — Extreme Indifference — Serious Bodily Injury

A division of the court of appeals considers whether evidence of strangulation is sufficient to support a conviction for first degree assault with extreme indifference. The division concludes that photographic and testimonial evidence, including expert testimony opining that the victim's neck bruising evinced direct sustained pressure on her neck that created a substantial risk of death, was sufficient to support a finding of serious bodily injury. In so concluding, the division held that *Stroup v. People*, 656 P.2d 680 (Colo. 1982), does not govern the analysis, in part because *Stroup* interpreted a now superseded definition of serious bodily injury.

The division also concludes that any error in allowing certain opinion testimony and prosecutorial closing argument was not reversible.

COLORADO COURT OF APPEALS **2021COA41**

Court of Appeals No. 18CA1747
Arapahoe County District Court No. 16CR1743
Honorable Phillip L. Douglass, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Scott Michael Bowers,

Defendant-Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE RICHMAN
Lipinsky and Vogt*, JJ., concur

Prior Opinion Announced February 18, 2021, WITHDRAWN

OPINION PREVIOUSLY ANNOUNCED AS "NOT PUBLISHED PURSUANT TO C.A.R. 35(e)" ON FEBRUARY 18, 2021, IS NOW DESIGNATED FOR PUBLICATION

Announced April 1, 2021

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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. 2020.

¶ 1 Defendant, Scott Michael Bowers, appeals the judgment of conviction entered on a jury verdict finding him guilty of first degree assault with extreme indifference for strangulation of his girlfriend, K.B. We affirm.

I. Background

¶ 2 According to defendant, he and K.B. were fighting on March 11, 2016, because he was "paranoid" about things he saw on social media. Earlier that night, K.B. went out with a friend to play pool, and she consumed four to six drinks before the 2 a.m. closing time. K.B. returned to the home she shared with defendant at around 3:30 a.m., after he had been "blowing up" her phone (by repeatedly calling). Defendant grabbed her arm and pulled her inside. K.B. told him that she didn't need him and didn't love him, and then she ran outside. Defendant followed.

¶ 3 According to the prosecution's evidence, during the ensuing events in the street, K.B.'s car, and the house, defendant placed his hands around K.B.'s neck and applied sustained, direct pressure, resulting in severe neck bruising concentrated at the location of her carotid arteries, which transport oxygen to the brain. He also restricted her airway, making it hard for her to breathe. K.B.

suffered additional injuries when defendant grabbed her arms, causing significant bruising, and headbutted her, causing a laceration above her eye that required four stitches to close.

¶ 4 Between 5 and 6 a.m., defendant took K.B. to the hospital for treatment of the laceration. There, someone called the police to report a possible domestic violence incident. When officers arrived, they saw that K.B. was dazed, was giving slow and incomplete responses, and had "a thousand-yard stare." According to expert testimony, this condition could have been caused by deprivation of oxygen to the brain due to strangulation.

¶ 5 Defendant reported that K.B.'s injuries arose from throwing herself on the ground and an accidental headbutt. K.B. could not provide a clear picture of the events causing her injuries, but she told the treating physician and an officer that defendant had grabbed her by the neck, had headbutted her, and had "bear-hugged" her. The treating physician signed a serious bodily injury determination form provided by the police, stating that in her professional medical opinion, due to compression of her airway or interruption of the flow of blood to her brain, K.B. had suffered a

"bodily injury, which either at the time of the actual injury or at a later time, involve[d] a substantial risk of death."

¶ 6 A grand jury indicted defendant on two counts of first degree assault (under theories of (1) extreme indifference and (2) by means of a deadly weapon); one count of second degree assault; one count of menacing; and two counts of third degree assault.[1]

¶ 7 Ultimately, the People tried defendant on two counts of first degree assault, as indicted, and three counts of crime of violence sentence enhancers. After a trial in which defendant testified, the jury returned a guilty verdict on only one count of first degree assault (extreme indifference). In special interrogatories, the jury further found that defendant had caused serious bodily injury and that he had committed an act of domestic violence.

¶ 8 On appeal, defendant contends that (1) there was insufficient evidence of serious bodily injury to support his conviction; (2) the court plainly erred by allowing expert testimony in the guise of lay opinion; and (3) the prosecution made flagrantly improper

[1] One count of third degree assault arose from a separate incident in which the grand jury found that defendant had slammed K.B.'s head into a car window causing a large laceration on her head. Evidence of this incident was admitted at trial.

statements during the presentation of evidence and in closing, requiring reversal. He also requests correction of the mittimus. We address each contention in turn.

II. Evidence of Serious Bodily Injury

¶ 9 Relying on *Stroup v. People*, 656 P.2d 680 (Colo. 1982), defendant contends that there was insufficient evidence of first degree assault because his alleged conduct — strangling K.B. — is irrelevant to a serious bodily injury determination, and the injury caused — bruising on her neck — does not meet the definition of serious bodily injury under the relevant statutes. We disagree that *Stroup* governs our analysis, and we conclude that there was sufficient evidence of serious bodily injury to support a conviction.

A. Standard of Review

¶ 10 We review de novo claims of insufficient evidence. *People v. Donald*, 2020 CO 24, ¶ 18. To determine whether the prosecution presented sufficient evidence to support a conviction, we consider "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." *Id.* (quoting *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010)). In doing so, we give the prosecution the benefit of all reasonable inferences supported by a logical connection between the facts established and the conclusion inferred. *Id.* at ¶ 19.

¶ 11 When a sufficiency claim depends on our interpretation of a statute, we also review that issue de novo. *People v. McCoy*, 2019 CO 44, ¶ 37. In interpreting statutes, our primary purpose is to discern the legislature's intent. *Id.* We look first to the language of the statute, ascribing to the words and phrases their plain and ordinary meanings. *Id.* We also consider the words in the context of the statute and of the legislative scheme as a whole. *Id.* at ¶¶ 37, 38. In doing so, we give "consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Id.* at ¶ 38.

B. Applicable Law

¶ 12 The definition of first degree assault (extreme indifference) is as follows: "A person commits the crime of assault in the first degree if: . . . (c) Under circumstances manifesting extreme

indifference to the value of human life, he knowingly engages in conduct which creates a grave risk of death to another person, and thereby causes serious bodily injury to any person . . . ."

§ 18-3-202(1)(c), C.R.S. 2020.

¶ 13 "Serious bodily injury" is

> bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.

§ 18-1-901(3)(p), C.R.S. 2020. And the definition of "bodily injury" is "physical pain, illness, or any impairment of physical or mental condition." § 18-1-901(3)(c).

C. *Stroup*'s Interpretation of Serious Bodily Injury

¶ 14 Applying a then contemporaneous, but now superseded, version of the serious bodily injury statute in *Stroup*, our supreme court considered whether a trial court should have admitted expert testimony that a stab wound to the victim's forehead "created a 'substantial risk of death' because the knife would have penetrated the brain had the point of entry been a fraction of an inch to the

right or left." *Stroup*, 656 P.2d at 686. The court concluded that the testimony was erroneously admitted because

> [w]hile such testimony as to the gravity of the risk created by the defendant's conduct may be relevant as circumstantial evidence of his intent to inflict serious bodily injury, such evidence is irrelevant to prove that the defendant's acts caused a substantial risk of death to the victim *based on the actual injuries inflicted*.

Id. (emphasis added) (footnote omitted).

¶ 15 In so concluding, the court observed that "[t]he plain language of the 'serious bodily injury' and 'bodily injury' definitions focuses on *the injury the victim actually suffered* rather than the risk to the victim posed by the defendant's conduct." *Id.* at 685 (emphasis added).

¶ 16 We conclude that the analysis in *Stroup*, assuming it is still good law, is not dispositive here for two reasons. First, the facts of this case differ materially from the facts in *Stroup* and in subsequent cases relying on *Stroup*. And second, the statutory definition of serious bodily injury has been amended since *Stroup* was decided, so that it now focuses more on risks posed by

injurious conduct and encompasses a substantially broader range of injuries.

1. Materially Different Facts

¶ 17 As noted above, the opinion in *Stroup* emphasizes the medical expert's opinion that the stab wound created a substantial risk of death "because the knife would have penetrated the brain had the point of entry been a fraction of an inch to the right or left." *Id.* at 686. *Stroup* concludes that this opinion was irrelevant because it assumed facts not in evidence.

¶ 18 In *People v. Tyler*, 728 P.2d 314, 315-17 (Colo. App. 1986), a division of this court held that there was insufficient evidence of serious bodily injury where the victim suffered a gunshot wound to the chest that did not damage any vital organs and required only a one-night hospital stay. Relying on *Stroup*, the division concluded that expert testimony was improperly admitted because it focused on the "great *potential* for serious bodily injury" to the victim rather than the resultant injury the victim actually suffered. *Id.* at 316.

¶ 19 In *People v. Webster*, a division of this court interpreted *Stroup* to mean that the risk of death "must be a risk resulting from the injuries actually sustained, not a speculative risk based *on different*

circumstances . . . ." 987 P.2d 836, 843 (Colo. App. 1998) (emphasis added). Again, we read this case to state that the risk cannot emanate from a different set of facts than those in evidence in the case. Because the risk of death in *Webster* was "speculative based on alternative facts," that testimony did not suffice to show serious bodily injury. *Id.*

¶ 20 Conversely, in *People v. Covington*, 988 P.2d 657, 663 (Colo. App. 1999), *rev'd on other grounds*, 19 P.3d 15 (Colo. 2001), a division of this court affirmed the finding of serious bodily injury because the "wound actually inflicted involved a substantial risk of death," unlike the stab wound in *Stroup*, and the physician's testimony "did not discuss the risks associated with a different wound or a wound in a different location." Because the expert's opinion rested on the existing facts, it supported a finding of substantial risk of death.

¶ 21 In this case, unlike in *Stroup*, *Tyler*, and *Webster*, the doctor's expert testimony by no means relied on a risk emanating from "different circumstances" or from "an alternative set of facts" or from a different wound (or injury). And here, there was no objection

that the doctor's expert testimony was irrelevant because it addressed alternative facts.

¶ 22 Rather, the doctor testified that K.B.'s observed condition indicated that, at the time of her injury, direct sustained manual strangulation caused a substantial risk of death because it resulted in impeding her breathing and blood flow, causing a loss of oxygen to her brain. Because this testimony applies to the injuries indicated by K.B.'s actual medical condition, we do not interpret *Stroup* to compel a conclusion that there was insufficient evidence of serious bodily injury here.

2. Expanded Definition of Serious Bodily Injury

¶ 23 *Stroup* and *Tyler* applied the following definition of serious bodily injury: "bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." § 18-1-901(3)(p), C.R.S. 1978; *see Stroup*, 656 P.2d at 685; *Tyler*, 728 P.2d at 316. However, the General Assembly has since made significant changes to the definition of serious bodily injury.

¶ 24 First, in 1985, the General Assembly changed the definition of serious bodily injury to "bodily injury which involves a substantial

risk of death, *a substantial risk of* serious permanent disfigurement, or *a substantial risk* of protracted loss or impairment of the function of any part or organ of the body."[2] Ch. 149, sec. 1, § 18-1-901(3)(p), 1985 Colo. Sess. Laws 664 (emphasis added); *see Tyler*, 728 P.2d at 316 (acknowledging the change but noting that it was not effective when the defendant was convicted). A mere three years after *Stroup* held that the plain language of the "serious bodily injury" definition "focuse[d] on the *injury* the victim actually suffered rather than the *risk* to the victim posed by the defendant's conduct," the General Assembly modified the definition to emphasize "risk" by stating it three times. *Stroup*, 656 P.2d at 685; 1985 Colo. Sess. Laws at 664.

¶ 25 Second, in 1991, the General Assembly enacted "An Act Concerning the Strengthening of Substantive Criminal Law," adding the words "either at the time of the actual injury or at a later time" and incorporating breaks, fractures, and second and third degree burns into the definition of serious bodily injury that we still use today. Ch. 73, sec. 8, § 18-1-901(3)(p), 1991 Colo. Sess. Laws 405;

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[2] Before the amendment, "substantial risk" had been interpreted to modify only "death" and not the succeeding terms. *See People v. Sheldon*, 198 Colo. 519, 521, 602 P.2d 869, 870 (1979).

compare § 18-1-901(3)(p), C.R.S. 1991, *with* § 18-1-901(3)(p), C.R.S. 2020. The addition of the language "either at the time of the actual injury or at a later time" clarified a supreme court ruling by defining the breadth of time when the quantum of risk could be measured. *See People v. Martinez*, 189 Colo. 408, 410, 540 P.2d 1091, 1093 (1975) ("The quantum of risk involved is to be determined as of the time of the act, not at some point later in time.").

¶ 26 We conclude that the interpretation of serious bodily injury in *Stroup* does not apply to the current statute because of the legislative changes recounted above. When the General Assembly modified the definition of serious bodily injury to encompass more types of injuries, involving various serious risks that could occur during a broad range of time, it changed the gist of the statute. We interpret the new statute to focus on the *risks posed by an injury*, rather than "the injury the victim actually suffered." *Cf. Stroup*, 656 P.2d at 685.

¶ 27 Case law applying updated standards supports this conclusion. In *People v. Thompson*, the supreme court concluded that expert testimony established sufficient evidence of serious bodily injury when, at the time of the injury, there was a twenty to

thirty percent chance of permanent disability. 748 P.2d 793 (Colo. 1988). And in *People v. Rodriguez*, a division of this court concluded that there was sufficient evidence of serious bodily injury when a physician testified that the victim was at substantial risk of protracted loss or impairment of his leg after a bullet wound, holding that "[t]he fact that the victim healed well and made a good recovery is not relevant to the determination that he suffered a serious bodily injury." 888 P.2d 278, 289 (Colo. App. 1994).

D. Evidence Presented

¶ 28 At trial, the prosecution presented photographic evidence of bruising all around K.B.'s neck, bruising on her arms, the laceration above her eye, scrapes on her elbow, and the shattered driver's side window of K.B.'s car that defendant admitted he punched out. The serious bodily injury determination form signed by K.B.'s treating physician, discussed in Part I, was also admitted into evidence.

¶ 29 K.B. testified that defendant had choked and strangled her, that as a result she had had a hard time breathing and talking, and that she had large gaps in her memory of the night. K.B.'s treating

physician testified that symptoms of strangulation include disorientation and the inability to recall events.

¶ 30 The physician further testified that the extensive bruises on K.B.'s neck indicated sustained, direct pressure by someone's hands on her carotid artery, which carries oxygenated blood to the brain, and that K.B. had been in jeopardy of losing oxygen to her brain. Based on K.B.'s injuries, it was the doctor's opinion that K.B. had been at substantial risk of death and had therefore suffered serious bodily injury.

¶ 31 Because *Stroup* does not apply, we interpret the meaning of serious bodily injury from the plain language of the statutory definition in effect when defendant was charged in this case. Reading the plain language of the first degree assault (extreme indifference) statute in tandem with the definitions of bodily injury and serious bodily injury, we conclude that, in this case, the prosecution had to provide evidence that

- under circumstances manifesting extreme indifference to the value of human life;
- defendant knowingly engaged in conduct;
- which created a grave risk of death to another person;

- and thereby caused bodily injury (physical pain, illness, or any impairment of physical or mental condition);
- which, either at the time of the actual injury or at a later time, involved a substantial risk of death or a substantial risk of protracted loss or impairment of the function of any part or organ of the body.

See § 18-3-202(1)(c); § 18-1-901(3)(c), (p).

E. Discussion

¶ 32 Defendant does not dispute that there was sufficient evidence to prove the first three elements above. He argues only that K.B. did not sustain an actual injury involving a substantial risk of death. Relying on outdated case law and two faulty premises, defendant argues a flawed conclusion. He argues that because (1) his conduct was "strangling" and the injury must be separate from the conduct, and (2) K.B.'s injury must be "sustained" or lasting, K.B.'s injury was simply "bruising."

¶ 33 In this case, strangulation is defendant's conduct, and that conduct caused bodily injury by constricting the carotid artery or the windpipe. According to the prosecution's evidence, defendant's conduct was putting his hands around K.B.'s throat and applying

sustained and direct pressure to her carotid artery, and this conduct caused K.B.'s injury — an impairment of her mental condition via the interruption of blood flow to her brain. The injury need not be a lasting one; it may continue only for the duration of the conduct. And according to the expert testimony, the interruption of blood flow to the brain caused by direct sustained pressure involves a substantial risk of death. *See People v. Lee*, 2020 CO 81, ¶ 26 ("[I]n a strangulation, the instrument . . . will always be at least capable of causing serious bodily injury or death . . . .").[3]

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[3] In 2016, effective after defendant strangled K.B., the General Assembly added subsection (1)(g) to the first degree assault statute, section 18-3-202. Ch. 327, sec. 1, § 18-3-202(1)(g), 2016 Colo. Sess. Laws 1327. This subsection defines first degree assault in the context of strangling. It provides that

> (1) A person commits the crime of assault in the first degree if:
>
> . . . .
>
> (g) With the intent to cause serious bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes serious bodily injury.

¶ 34 The bruising around K.B.'s carotid artery was not her serious bodily injury; it was merely evidence of the injury. It was direct evidence that K.B. had been strangled and the nature of the strangulation. Expert testimony provided evidence that the constriction of K.B.'s carotid artery resulting from the strangulation had placed K.B. at a substantial risk of death. Moreover, the jury could reasonably infer from K.B.'s altered state and memory loss that her brain had been deprived of oxygen for a time.

¶ 35 Viewing this evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to support a jury finding that K.B. suffered serious bodily injury. *See People v. Baker*, 178 P.3d 1225, 1233 (Colo. App. 2007) (concluding that evidence of serious bodily injury was sufficient when the victim was choked, lost consciousness, and had bruises on her neck, and a physician opined that the victim suffered serious bodily injury).

¶ 36 We further note that, although at trial and on appeal, defendant's arguments focus on the "substantial risk of death" aspect of serious bodily injury, there was sufficient evidence at trial for the jury to find serious bodily injury because a disruption of oxygen to the brain "involve[d] . . . a substantial risk of protracted

loss or impairment of the function of any part or organ of the body." *See* § 18-1-901(3)(p). In the special interrogatory containing a finding of serious bodily injury, the jury did not specify the mechanism of the injury. The treating physician testified that strangulation affects the heart and the brain and can cause carotid hematomas, stroke, and cardiac arrest — conditions that do not always result in death, but that cause a substantial risk of protracted impairment of those parts of the body.

III. Opinion Testimony

¶ 37 Defendant next contends that reversal is required due to several statements that three law enforcement witnesses made at trial. We do not perceive any error meriting reversal.

A. Standard of Review and Applicable Law

¶ 38 Defendant did not object at trial to any statement he now alleges to be expert testimony in the guise of lay opinion. Whether an opinion is lay testimony under CRE 701 or expert testimony under CRE 702 depends on the basis for the opinion. *Venalonzo v. People*, 2017 CO 9, ¶ 23. "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.* But if

the witness "provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony." *Id.*

¶ 39 We review a trial court's decision to admit lay opinion testimony for an abuse of discretion. *Id.* at ¶ 24. Because defendant did not preserve this issue at trial, we will reverse only if admitting the testimony was plain error. *Hagos v. People*, 2012 CO 63, ¶ 14. Plain error is error that is obvious and so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Id.*

B. Opinions About K.B.'s Disorientation

¶ 40 Defendant argues that two lay witnesses improperly offered expert testimony that K.B. was disoriented because she had been strangled. We are not persuaded.

¶ 41 Two officers, Officer Nicholas Brugardt and Officer Bridget Johnson, testified about K.B.'s mental and physical condition that they observed at the hospital. At one point, Officer Johnson described her conversation with K.B. as follows: "I believed that she wasn't intentionally withholding information. I feel like because of the alcohol and her injuries, she was disoriented. She wasn't able

to give me a time frame on what exactly happened . . . ." During cross-examination, defense counsel asked each of the officers about K.B.'s intoxication. And during redirect, the prosecution asked each officer whether K.B.'s mental condition could also have resulted from strangling. The relevant exchanges were transcribed as follows:

> PROSECUTOR: And defense counsel talked with you about potentially some of the victim's . . . actions being consistent with someone who consumed alcohol. Could it also be consistent with someone who had just been strangled?
>
> *OFFICER Brungardt*: I believed that to be entirely possible at that time.
>
> . . . .
>
> PROSECUTOR: You said that she was exhibiting signs of intoxication. Can those signs also be similar to someone who has just been strangled?
>
> *OFFICER Johnson*: Yeah. I would think so.

¶ 42 We are hesitant to classify these belief, feeling, and thought statements as any sort of opinion testimony, but our classification does not matter. Any error in the admission of these statements was not obvious, and would be harmless, because the statements are cumulative of the treating physician's properly admitted expert

opinion that injury resulting from strangling can cause disorientation and an inability to recall events, as recounted in Part II.D. *See People v. Douglas*, 2015 COA 155, ¶ 41 ("Where the improperly admitted lay testimony is cumulative of properly admitted expert testimony, there is no plain error.").

C. Officer Johnson's Opinion on the Extent of K.B.'s Bruising

¶ 43 On cross-examination, defense counsel asked Officer Johnson if she recalled the bruising on K.B.'s neck. The officer responded, "What I do recall is my reaction to those bruises, because they were the worst I have ever seen. And I see strangulation cases probably once a month, and these were the worst."

¶ 44 This statement certainly reflects Officer Johnson's specialized knowledge and experience, qualifying the testimony as expert. *See Venalonzo*, ¶ 23. However, this statement was elicited by the defense and defense counsel did not object to the statement's admission. If the district court had struck the testimony sua sponte, it might have drawn the jury's attention to this testimony, to defendant's detriment. *See People v. Gladney*, 194 Colo. 68, 72, 570 P.2d 231, 234 (1977) (considering that defense counsel, for strategic reasons, might choose to avoid drawing special attention

to harmful evidence). Accordingly, we cannot conclude that the district court abused its discretion by allowing the statement.

D. Criminal Investigator Opinions

¶ 45 The prosecution called an investigator from the district attorney's office as its ninth and final witness. Although defendant did not raise a single objection to the investigator's testimony at trial, he now asserts that five separate exchanges constituted improper expert testimony that should have been obvious to the court and struck sua sponte. Before these exchanges, the prosecution elicited testimony that the investigator had worked in law enforcement for fifteen years and as a criminal investigator in the domestic violence unit for at least two years, and he had seen about sixty strangulation cases. He then proceeded to testify based on those specialized experiences — testimony now challenged on appeal.

¶ 46 Even if the testimony offered by the investigator amounted to expert testimony, in the absence of an objection by defense counsel, we review only for plain error. We address each exchange in turn.

¶ 47 First, the prosecution asked if strangulation injuries were always the same in the cases the investigator had seen. The

investigator responded, "No. A lot of times with strangulation cases, in my experience, you don't see injuries at all, no lasting injuries. Just visible to the human eye." And second, in a related exchange, the prosecution asked whether the photographs of K.B.'s injuries showed typical injuries for a strangulation case. The investigator answered no, and explained, "The severity of these injuries, I would certainly characterize this as the most severe bruising, obvious signs of a strangulation that I've ever seen." Because this testimony was cumulative of (1) testimony from other witnesses as to the severity of the victim's strangulation and (2) the photographs in evidence, it did not undermine the fairness of the trial. *See Douglas*, ¶ 41.

¶ 48 Third, the investigator testified that doctors sign serious bodily injury forms only sparingly, when they are confident that the injury constitutes a legal serious bodily injury. This statement is also cumulative. The treating physician testified that she signed the form "[b]ecause the risk of death in the injuries [K.B.] had [was] substantial"; she would "not just . . . see bruising around the neck and say that's a serious bodily injury"; and she does not use the

form in her "everyday practice." Accordingly, its admission was not reversible error. *Id.*

¶ 49 In a fourth exchange, the prosecution sought to rebut testimony on cross-examination that the investigator did not have medical training by asking if he had training related to strangulation. The investigator replied that he had been trained in "carotid artery restraint," a "use of force technique" considered to be deadly force, that is "essentially choking someone to the point where they are unable to fight you." He further testified that he had been choked to the point of unconsciousness in training, and he did not have significant bruising. While this was expert testimony, it was tangential to the disputed issues in this case. To the extent that the testimony about impeding blood flow of the carotid artery was relevant to K.B.'s bruising around her carotid artery, it was cumulative of the properly admitted and extensive testimony on this topic by the treating physician.

¶ 50 Finally, the prosecution asked the investigator if, in his experience, domestic violence victims tend to avoid law enforcement and to minimize their injuries to keep their partner out of trouble. The investigator said yes to each inquiry. Because K.B. was

forthcoming about her injuries at trial, to the extent she remembered them, and her testimony comports with the expert's testimony, we conclude that this exchange was unnecessary to explain K.B.'s testimony, and it did not substantially influence the verdict.

¶ 51 There was no plain error in the admission of any challenged opinion testimony, because any erroneously admitted opinion testimony did not so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos*, ¶ 14. In addition, failing to endorse a witness as an expert is not plain error if the witness is otherwise qualified to offer the challenged opinions. *See People v. Conyac*, 2014 COA 8M, ¶ 67.

IV. Prosecutorial Misconduct

¶ 52 Finally, defendant contends that the prosecution engaged in misconduct throughout the trial. Because his attorney did not object on this ground at any time, this issue is not preserved for appeal. We do not discern plain error.

A. Standard of Review

¶ 53 We engage in a two-step analysis when reviewing claims for prosecutorial misconduct. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, we determine whether the prosecutor's conduct was improper based on the totality of the circumstances, and second, we decide whether such actions warrant reversal under the proper standard of review. *Id.* Because this issue was not preserved for appeal, we review under a plain error standard. *See* Crim. P. 52(b); *People v. Munoz-Casteneda*, 2012 COA 109, ¶ 23.

¶ 54 To constitute plain error, any prosecutorial misconduct "must be flagrant or glaring or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *People v. Weinreich*, 98 P.3d 920, 924 (Colo. App. 2004), *aff'd*, 119 P.3d 1073 (Colo. 2005).

B. Alleged Misconduct During the Presentation of Evidence

¶ 55 Defendant contends that the prosecution improperly elicited expert testimony from lay witnesses. As to only the investigator, we agree with defendant that the prosecution's examination was

improper. However, this conduct does not warrant reversal for the reasons explained in Part III.

C. Alleged Misconduct in Closing Argument

¶ 56 Defendant asserts several instances of misconduct in closing. He argues that the prosecution (1) erroneously explained the constitutional burden of proof and improperly appealed to community sentiment; (2) misstated the law concerning serious bodily injury; (3) referred to improperly admitted expert testimony from lay witnesses; and (4) argued a "cycle of violence" that was not part of the record. These statements do not warrant reversal, individually or cumulatively.

1. Legal Authority

¶ 57 We evaluate claims of improper argument in the context of the argument as a whole and in light of the evidence before the jury. *People v. McMinn*, 2013 COA 94, ¶ 60. "During closing argument, a prosecutor has wide latitude and may refer to the strength and significance of the evidence, conflicting evidence, and reasonable inferences that may be drawn from the evidence." *People v. Walters*, 148 P.3d 331, 334 (Colo. App. 2006).

2. Burden of Proof and Community Sentiment

¶ 58 Wrapping up initial closing argument, the prosecution argued as follows.

> [R]easonable doubt is a doubt based on your *reason and common sense*. It's not vague, speculative, or imaginary. Essentially it is *kind of a gut feeling*, it's who do you believe, is that belief based on your *reason and common sense*. It's not beyond all doubt. You are allowed to have questions. I want you to ask questions. Discuss among yourselves, and I am confident that as a collective group with your *reason and common sense*, you will see. You will come back with a verdict that shows the defendant strangled and beat [K.B.]. Rage. Not self-defense. I'm asking you to hold him accountable on these charges.

(Emphases added.)

¶ 59 Citing out-of-state authority, defendant argues that the prosecution's single reference to a "gut feeling" was an improper interpretation of reasonable doubt. We need not decide that question because, reading the argument as a whole, we perceive that the prosecution properly emphasized "reason and common sense" and the passing mention of "kind of a gut feeling" was not "flagrant or glaring or tremendously improper." *Weinreich*, 98 P.3d at 924.

¶ 60 Defendant also argues that it was improper for the prosecution to ask the jury to hold defendant accountable. There is some Colorado authority supporting this position. *See, e.g.*, *People v. Carian*, 2017 COA 106, ¶ 47. But we are not aware of any authority holding that this statement constitutes plain error, and defendant does not cite any. *See id.* (holding that admission of such a statement "does not warrant reversal under either plain or harmless error review"). We therefore reject this argument.

3. Serious Bodily Injury Law

¶ 61 Next, defendant argues that the prosecution misstated the law on serious bodily injury when, in rebuttal closing, it argued against defendant's contention that K.B.'s injuries were only the cut and the bruises. The prosecution argued that "the act itself" could support a first degree assault charge. As we explained in Part II.E, the act of strangulation includes both conduct and injury. We perceive no impropriety in this statement.

4. Reference to Improper Testimony

¶ 62 Defendant argues that the prosecution improperly referred to the testimony of Officer Brungardt, Officer Johnson, and the investigator in rebuttal closing. The prosecution's reference to the

investigator's testimony was only "[y]ou heard from Investigator . . ., how quickly strangulation can occur." This argument was cumulative of the initial closing argument referring to the doctor's testimony that strangulation could happen in fourteen to seventeen seconds. Accordingly, this argument was harmless.

5. Cycle of Violence

¶ 63 Lastly, defendant asserts that the prosecution referred to facts not in evidence when it argued in rebuttal closing as follows:

> This is control. This is the cycle of violence that [K.B.] was going through throughout the relationship. And she told you on the stand through her tears that she loves him to this day, despite what she continues to go through with him. She does not want him to get in trouble. That is why she doesn't think he intended to hurt her, yet this time was the worst time. She had to go to an emergency room this time, and yet still she loves him. She is deep in that domestic violence cycle of violence.

¶ 64 Our review of the record reflects substantial testimony to support this argument. K.B., her mother, and her sister each testified to multiple acts of domestic violence. And K.B.'s testimony acknowledged that the violence was followed by a loving period, then cycled back to violence. We perceive no impropriety in this

argument. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005) ("Final argument may properly include the facts in evidence and any reasonable inferences drawn therefrom.").

V. Correction of the Mittimus

¶ 65 Defendant asks for remand to correct the mittimus, which currently reflects that he pleaded guilty to the crime of first degree assault with extreme indifference. We agree that remand is required. *See People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011) ("When the mittimus is incorrect, we must remand to allow the trial court to correct it.").

VI. Conclusion

¶ 66 The judgment of conviction is affirmed. The case is remanded to the district court for correction of the mittimus to reflect that defendant was found guilty by a jury.

JUDGE LIPINSKY and JUDGE VOGT concur.