SUMMARY
February 10, 2022

2022COA15

No. 18CA0963, *People v. Walker* — Constitutional Law — Eighth Amendment — Cruel and Unusual Punishments — Proportionality Review; Appeals — Standard of Review — Plain Error

For the first time on appeal, a defendant challenges his prison sentence as grossly disproportionate under the Federal and Colorado Constitutions. Answering a novel question in Colorado, a division of the court of appeals concludes that plain error review applies to unpreserved proportionality challenges to a sentence. Considering all the circumstances, the division concludes that the trial court did not commit obvious error by failing to find that the defendant's twenty-four-year sentence raises an inference of gross disproportionality. Accordingly, plain error did not occur. Because the defendant's challenges to his conviction also fail, the division affirms the judgment and the sentence.

COLORADO COURT OF APPEALS **2022COA15**

Court of Appeals No. 18CA0963
City and County of Denver District Court No. 15CR6085
Honorable Brian R. Whitney, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Arthur Clarence Walker,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED

Division VI
Opinion by JUDGE NAVARRO
Harris and Freyre, JJ., concur

Announced February 10, 2022

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¶ 1 Defendant, Arthur Clarence Walker, appeals the judgment of conviction entered upon a jury verdict finding him guilty of second degree burglary. He also appeals the prison sentence imposed upon his adjudication as a habitual criminal, arguing that it violates the Federal and Colorado Constitutions because it is grossly disproportionate to his crimes. Walker, however, did not raise this constitutional challenge to this sentence in the trial court. As a matter of first impression in Colorado, we conclude that plain error review applies to an unpreserved proportionality challenge to a sentence. Because we discern no plain error here and we reject Walker's other challenges, we affirm the judgment and sentence.

I. Factual and Procedural History

¶ 2 Shortly after midnight on November 4, 2015, C.O. (a juvenile) heard noises from outside his house. Looking onto his neighbor's property from an upstairs window, C.O. saw a man climb over a fence into the neighbor's backyard, break a window on the neighbor's detached garage, enter through the window, exit through the window with a bicycle, throw the bicycle over the fence, and then climb over the fence and into an alley. C.O. called 911 while observing this activity.

¶ 3 Officers in a police helicopter (Air One) responded to the 911 dispatch. The Air One officers caught sight of the man whom C.O. had reported while the man was in the neighbor's backyard with the bicycle. Using a thermal imaging camera, the Air One officers recorded the man throwing the bicycle over the fence and climbing out of the backyard.

¶ 4 While recording the man's progress, the Air One officers reported their observations. Responding to that report, Officer Daniel Swanson, on foot, intercepted the man with the bicycle. The Air One camera recorded the man's movement from the backyard to his encounter with Swanson.

¶ 5 Meanwhile, another officer interviewed C.O. and took him to where Swanson had detained the man. C.O. confirmed that this man was the person whom C.O. had seen enter his neighbor's garage. This person was later identified as Walker.

¶ 6 The prosecution charged Walker with second degree burglary, a class 4 felony here, and habitual criminal counts. *See* § 18-4-203, C.R.S. 2021. A jury found Walker guilty of the burglary. The trial court adjudicated him a habitual criminal based on his prior

felony convictions. As required by statute, the court sentenced Walker to twenty-four years in prison.

II. Alleged Outrageous Governmental Conduct

¶ 7 Walker contends that the trial court erred by denying his motion to dismiss the charges on the grounds of outrageous governmental conduct.[1] According to Walker, the prosecutor's decision to request jailhouse recordings of Walker's phone conversations with an attorney violated fundamental fairness and was shocking to the universal sense of justice. Because Walker has not shown prejudice from the prosecutor's decision, however, we conclude that the court properly denied the motion to dismiss.

A. Additional Facts and Procedural History

¶ 8 In January 2016, Walker waived his right to counsel. He proceeded without an attorney until January 2017, when the court appointed one at his request.

¶ 9 In August 2017, the prosecutor obtained recordings of four jail calls between Walker and a person named Valerie Corzine. The

[1] We find it useful to address Walker's appellate issues in the order they arose in the trial court, although we acknowledge that he presents them in a different order on appeal.

calls took place in January and February 2016, while Walker was representing himself. Although Corzine had attended some pretrial proceedings in this case, the calls did not include discussions of the charges against Walker.[2] The prosecutor disclosed these recordings to the defense.

¶ 10 Defense counsel moved to suppress these recordings and to dismiss the charges on the basis that the prosecutor's "possession and use" of the recordings was outrageous governmental conduct. According to the motions, Corzine claimed to have an attorney-client relationship with Walker. The motions acknowledged that there was no discussion of the criminal case on the calls and asserted that Corzine was Walker's "civil attorney."

¶ 11 At a hearing on the motions, the prosecutor argued that, in "important cases" like this one, the prosecutor's office routinely requests recordings of a defendant's jail calls. The prosecutor said

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[2] In pretrial proceedings, Walker mentioned that two "advocate groups" assisted him with disabilities issues and that the groups' members might "sit and watch" the criminal proceedings. Corzine, apparently a member of such a group, attended some proceedings but did not enter an appearance as Walker's attorney. In fact, court staff contacted Corzine about representing Walker, but she declined because she said she could not do so.

Walker had few known associates other than Corzine, "who doesn't have a legal relationship with [Walker]." According to the prosecutor, Corzine had contacted him and had repeatedly denied representing Walker and, thus, the prosecutor had "zero reason" to believe that "any attorney-client relationship existed" between Corzine and Walker. The prosecutor also noted that Corzine had not registered as an inmate's attorney with the jail's call management system and, if she had, the calls would not have been recorded. Finally, the prosecutor argued that he had listened to the calls "in a very passive manner" and did not listen to them again after defense counsel indicated that they might contain privileged communications.

¶ 12 The trial court denied the motion to dismiss. Referring to prior proceedings in this case, the court found that "Ms. Corzine has denied an attorney-client relationship [with Walker] either in a civil sense or in a criminal sense." Relatedly, the court found that no attorney-client relationship between Corzine and Walker existed given that "it's been specifically denied by the attorney in this case." Therefore, the court did not find outrageous governmental conduct.

The court ruled, however, that the recorded calls could not be used at trial and that the prosecutor could not disseminate them.

¶ 13 After trial, defense counsel moved for reconsideration of the motion to dismiss and, for the first time, submitted documents that purportedly showed an attorney-client relationship between Corzine and Walker. The trial court denied reconsideration. The court explained that, while it had based its ruling in part on "non-representation," it had also found that "the government's actions, in light of the questionable representation, did not violate fundamental fairness or [were] not shocking to the universal sense of justice as the prosecutor neither utilized or had undertaken to record the messages with any intent to violate the attorney client privilege."

B. Standard of Review

¶ 14 Divisions of this court have recognized that we review for an abuse of discretion a trial court's ruling on whether there has been outrageous governmental conduct. *See People v. McDowell*, 219 P.3d 332, 336 (Colo. App. 2009); *People v. Medina*, 51 P.3d 1006, 1011 (Colo. App. 2001), *aff'd sub nom. Mata-Medina v. People*, 71 P.3d 973 (Colo. 2003); *cf. People in Interest of M.N.*, 761 P.2d 1124, 1129 (Colo. 1988) (plurality opinion) (applying abuse of discretion

standard). But one division has suggested that the de novo standard of review might be a better fit for these claims because they assert due process violations. *See People v. Burlingame*, 2019 COA 17, ¶¶ 10-11. Because we do not detect error under either standard, we need not take sides in this debate. *See id.* at ¶ 11.

C. Applicable Law and Analysis

¶ 15 Colorado recognizes the due process claim of outrageous governmental conduct. *Medina*, 51 P.3d at 1011; *see Bailey v. People*, 630 P.2d 1062, 1068 (Colo. 1981). "Outrageous governmental conduct is conduct that violates fundamental fairness and is shocking to the universal sense of justice." *Medina*, 51 P.3d at 1011. Courts determine whether such conduct has occurred by reviewing the totality of the facts in the case. *Burlingame*, ¶ 10.

¶ 16 As the *Burlingame* division noted, "[i]nstances where trial courts have found outrageous government conduct in Colorado are vanishingly rare, and the threshold for such a finding appears to be exceedingly high." *Id.* at ¶ 12; *see People v. Auld*, 815 P.2d 956, 958 (Colo. App. 1991) (affirming dismissal of charges where the prosecutor perpetrated a fraud on the court and duped the court into playing an active role in the prosecutorial function).

¶ 17 We have not discovered any Colorado case considering whether the government's alleged intrusion into an attorney-client relationship constituted outrageous conduct warranting dismissal of charges. Borrowing from other jurisdictions, *see People v. Jennings*, 2021 COA 112, ¶ 22, we conclude that, to show outrageous governmental conduct in this context, a defendant must show (1) the government's objective awareness of an ongoing, personal attorney-client relationship between the third party and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice. *See United States v. Prelogar*, 996 F.3d 526, 534 (8th Cir. 2021); *United States v. Kennedy*, 225 F.3d 1187, 1195 (10th Cir. 2000); *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996); *People v. Navarro*, 41 Cal. Rptr. 3d 164, 173 (Ct. App. 2006); *cf. Auld*, 815 P.2d at 958 (concluding that no showing of prejudice to the defendant was required from the prosecution's fraud on the court, but distinguishing that situation from governmental misconduct involving the use of an attorney against their client).

¶ 18 We need not address whether Walker has satisfied the first two elements of the above test because we conclude that he has not

met the third. *See Kennedy*, 225 F.3d at 1196 ("[T]he party asserting a Fifth Amendment violation must make a showing of all three elements."). That is, Walker has not shown actual prejudice from the prosecutor's conduct. Upon being told that the calls might contain privileged information, the prosecutor did not listen to them again, distribute them, or use them at trial. In fact, the trial court granted Walker's motion to suppress the calls. And Walker does not argue that information on the calls led to evidence that was admitted at trial.

¶ 19 Because the record does not show that the calls had any bearing on this case, the trial court correctly denied the motion to dismiss. *See Prelogar*, 996 F.3d at 534 ("Prelogar has not identified any 'actual and substantial prejudice' resulting from any communications that were disclosed to the government."); *Kennedy*, 225 F.3d at 1196 ("Mr. Kennedy has not shown how the government's use of the allegedly privileged 'information infected the trial to such an extent that it resulted in a fundamentally unfair trial.'") (citation omitted); *Voigt*, 89 F.3d at 1070 ("Voigt has failed to demonstrate that he suffered any ill effects flowing from the government's allegedly improper investigative activity.").

III. Out-of-Court Identification

¶ 20 Walker contends that the trial court erred by declining to suppress evidence of C.O.'s out-of-court identification of him. We conclude that any error was harmless.

A. Additional Procedural History

¶ 21 As discussed, C.O. called 911 to report a burglary. After Officer Swanson detained Walker in a nearby alley, C.O. identified Walker as the man whom he had seen take the bicycle from his neighbor's garage.

¶ 22 Walker moved to suppress evidence of C.O.'s identification. After a hearing, the trial court found the identification reliable and denied the motion. At trial, another officer testified to C.O.'s pretrial identification of Walker. C.O. was not asked to identify Walker at trial.

B. Analysis

¶ 23 Because admission of an unreliable out-of-court identification at trial implicates a defendant's right to due process, we review Walker's claim under the constitutional harmless error standard. *See People v. Campbell*, 2018 COA 5, ¶ 54. "A constitutional error is harmless when the evidence properly received against a

defendant is so overwhelming that the constitutional violation was harmless beyond a reasonable doubt." *Bartley v. People*, 817 P.2d 1029, 1034 (Colo. 1991).

¶ 24 Independent of C.O.'s identification of Walker, the prosecution presented overwhelming evidence that Walker was the person who took the bicycle from the garage. For instance, the following evidence was admitted:

- The burglar had cut himself while entering the garage and left blood on the scene, and the DNA sample from that blood matched Walker's to a 99.9% probability.
- Thermal camera video from Air One depicts a person throwing the bicycle over the fence, hopping the fence, and walking in an alley with the bicycle until stopped by the police.
- The person stopped by the police was Walker, and his hands were bleeding.
- Air One officers confirmed over the police radio that the man stopped by the police was "the party that they saw that threw the bike over the fence . . . and that there was nobody else in the alley with him."

¶ 25 In fact, Walker's identity as the person who took the bicycle was not seriously contested at trial. Given all this, we need not decide whether C.O.'s identification was properly admitted because we conclude that the People have shown that any error in admitting it was harmless beyond a reasonable doubt.

IV. Alleged Prosecutorial Misconduct

¶ 26 Walker contends that the judgment must be reversed because the prosecutor engaged in misconduct during closing and rebuttal arguments. We do not agree.

A. Standard of Review

¶ 27 When reviewing a claim of prosecutorial misconduct, we consider whether the prosecutor's conduct was improper and whether any impropriety requires reversal. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). "Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion." *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). Accordingly, we will not disturb the trial court's rulings regarding alleged misconduct absent a showing of an abuse of that discretion. *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010).

¶ 28 We review preserved claims of prosecutorial misconduct under the nonconstitutional harmless error standard. *See Hagos v. People*, 2012 CO 63, ¶ 12. Under this standard, we reverse only if the error substantially influenced the verdict or affected the fairness of the trial. *See id.*; *People v. Kern*, 2020 COA 96, ¶ 13. Where a claim of error is not preserved by contemporaneous objection, we may reverse only if plain error occurred. *Hagos*, ¶ 14. An error is plain if it is obvious and so undermined the fundamental fairness of a trial as to cast serious doubt on the reliability of the conviction. *People v. Dominguez-Castor*, 2020 COA 1, ¶ 85. Prosecutorial misconduct is plain error only if it is "flagrantly, glaringly, or tremendously improper." *Id.* at ¶ 86 (citation omitted).

B. Additional Procedural History

¶ 29 To place Walker's claims in context, we note that he endorsed voluntary intoxication as a "defense" to the second degree burglary charge, which alleged that he acted with the specific intent to commit theft in the garage. *See* §§ 18-4-203(1), -401(1)(a), C.R.S. 2021. A defendant's voluntary intoxication is not a defense to a criminal charge, but evidence of voluntary intoxication "may be offered by the defendant when it is relevant to negative the

existence of a specific intent if such intent is an element of the crime charged." § 18-1-804(1), C.R.S. 2021. The jury was instructed that it should acquit Walker if it found that he was intoxicated to such a degree that he did not act with the required mental state of the offense.

¶ 30 At trial, Walker did not testify, but he presented testimony from a doctor who had treated him for his hand injury on the night of the charged offense. The doctor said Walker had been diagnosed with "alcohol intoxication" because he smelled of alcohol and was "somewhat uncooperative" and agitated. The doctor testified that Walker appeared to have "some level of intoxication, potentially slight intoxication." The prosecution presented evidence that the officers who contacted Walker did not observe signs of intoxication.

C. Analysis

¶ 31 We first address the prosecutor's arguments that, in our view, were not misconduct. We then address the arguments that do not warrant reversal even if they were improper to some extent.

1. Arguments That Do Not Constitute Misconduct

¶ 32 In closing, the prosecutor — referring to defense counsel — argued, "He's going to say, oh, the crime was obvious. You know, if

he was sober, he would have taken steps to conceal his crime. Middle of the night, back alley, in-and-out burglary; this is how it happens." Walker, reiterating the objection his attorney raised below, says the prosecutor's comment "implied advanced knowledge of how burglaries typically occur." Walker also says the challenged comment "invoked the prosecutor's status and office" and relied on facts not in evidence. The latter two arguments were not preserved.

¶ 33 We do not discern misconduct because, while the prosecutor's argument was somewhat confusing, it seems that he was not describing how burglaries typically occur. Instead, the prosecutor was describing how *this* burglary occurred. According to the prosecutor, the burglar took steps to conceal this crime by committing it in the middle of the night from a back alley and by quickly entering and leaving the garage. *Cf. People v. Samson*, 2012 COA 167, ¶ 30 ("[B]ecause arguments delivered in the heat of trial are not always perfectly scripted, reviewing courts accord prosecutors the benefit of the doubt when their remarks are ambiguous or simply inartful.").

¶ 34 Walker also challenges the following arguments of the prosecutor:

(1) Walker "was alert and oriented. His eyes — and again, common sense — you see it on TV, we see it in the real world. One of the things police officers check to see if you can drive a car is how your eyes work."

(2) "His eyes were fine. I mean, you listen to this doctor's testimony, and there wasn't even evidence that would support a driving-while-ability-impaired conviction . . . ."

Walker contends that these arguments were improper because they referenced the horizontal gaze nystagmus (HGN) test even though there was no testimony about HGN.

¶ 35 Walker is mistaken, however, because the doctor who examined him at the hospital testified about HGN in a person's pupils and how it can indicate alcohol intoxication. The doctor confirmed that, in Walker's medical records from the examination, there was a place to note observations about his pupils, but nystagmus was not listed. Walker also asserts that the prosecutor's comment about driving while ability impaired was misleading because Walker was not charged with that crime. But Walker does not elaborate on how the jury might have been misled, and we see no reasonable likelihood that the jury misunderstood the charge.

As a result, we will not address this contention any further. *See People v. Venzor*, 121 P.3d 260, 264 (Colo. App. 2005) (reviewing court may decline to address issues presented in a "perfunctory or conclusory manner").

¶ 36 Walker draws our attention next to the prosecutor's comment about what it means to be "[s]o drunk you can't have a conscious objective to achieve a specific result," which referred to the definition of "with intent." *See* § 18-1-501(5), C.R.S. 2021. The prosecutor argued that "[i]t doesn't mean that half of the folks that come into [a hospital] at 2 o'clock in the morning on Saturday can't be guilty of certain crimes." For the first time on appeal, Walker says this argument improperly implied that "the prosecutor knows what constitutes certain defenses and invokes the status of his office." Walker's contention is not entirely clear, but he cites to *Domingo-Gomez*, which held that a prosecutor's reference to a "screening process" before charges are filed is generally improper. 125 P.3d at 1052. The challenged comment here, however, did not mention such a process. So, given Walker's underdeveloped appellate claim and the fact that he bears the burden to show plain

error, we cannot find plain error in the prosecutor's comment. *See People v. Vigil*, 127 P.3d 916, 929-30 (Colo. 2006).

¶ 37 The prosecutor also argued that not every crime is excused "if there's just a scintilla of evidence that there's some intoxication. Everything would go haywire if these facts triggered that." Defense counsel objected, arguing, "It calls for violation of the punishment instruction, also public policy argument." After the court overruled the objection, the prosecutor continued, "It would, wouldn't it? Haywire. That's what your common sense tells you." Walker now maintains that these comments inflamed the jury's passions and implored it to consider the "wishes and fears of 'the community.'"

¶ 38 We disagree. The prosecutor was correct that a scintilla of evidence of intoxication does not excuse every crime. *See* § 18-1-804(1). Even in the case of a specific intent crime, voluntary intoxication is not a true element-negating defense because it is possible for an intoxicated person to form specific intent. *People v. Stone*, 2020 COA 23, ¶ 4. The prosecutor's "haywire" comment, while hyperbolic, did not directly appeal to the fears of "the community," unlike in the cases Walker cites. *See People v. Adams*, 708 P.2d 813, 815-16 (Colo. App. 1985) (invoking the "nightmare of

L.S.D. in our elementary schools in our community"); *People v. McBride*, 228 P.3d 216, 223 (Colo. App. 2009) (asking the jury to "do justice for other strangers"); *People v. Gallego*s, 260 P.3d 15, 27-28 (Colo. App. 2010) (asking the jury to "send a message" to the community). Moreover, a prosecutor may employ rhetorical devices and engage in oratorical embellishment. *Strock*, 252 P.3d at 1153.

¶ 39 Next, Walker challenges the prosecutor's rebuttal argument addressing "[t]he broken window and the lost bike for a few minutes. That's the harm that he claims. He wants to minimize the offense. It's an invasion of somebody's property, right? They could've been inside of the garage." Defense counsel objected on the ground that the prosecutor was "[i]nflaming the jury," and Walker renews that objection on appeal.

¶ 40 The prosecutor, however, was responding to defense counsel's closing argument. To argue, apparently, that Walker was not sober, defense counsel listed items that were or might have been in the garage but that Walker did not take. Hence, the prosecutor reacted to the suggestion that the crime was not very serious. And, although the garage was detached, it was close to the residence, and the owners were at home on the night in question.

Importantly, after the trial court overruled defense counsel's objection to the prosecutor's rebuttal, the prosecutor stressed that the jury must focus on the evidence in this case, saying, "A jury trial is about what happens right there, not the creation of an imaginary, potential, alternate narrative. . . . [W]hat defense was trying to do was draw your attention from the evidence in this case, and the evidence in this case was that the defendant committed the crime." Overall, then, the prosecutor's argument was not out of bounds. *See People v. Lovato*, 2014 COA 113, ¶ 63 ("In considering whether prosecutorial remarks are improper, the reviewing court must weigh the effect of those remarks on the trial, and also take into account defense counsel's 'opening salvo.'") (citation omitted); *Strock*, 252 P.3d at 1153 ("A prosecutor has wide latitude to make arguments based on facts in evidence and reasonable inferences drawn from those facts.").

¶ 41 Walker also challenges the prosecutor's rebuttal comment that "[t]he defense attorney said that the officers had to prop [Walker] up. Ask them that question. He didn't ask them that question." Walker says this remark attempted to shift the burden of proof to the defense. Again, however, the prosecutor was responding to

defense counsel's argument addressing the officers' handling of Walker during the identification process near the scene. Defense counsel asked, "[W]hy do they have two police officers holding each arm? Is it because he's actually resisting and fleeing? No. It's because they kind of propped him up." As the prosecutor then pointed out, no one had asked the officers at trial whether they propped up Walker and, if so, why. The prosecutor essentially argued that no testimony supported the defense theory that the officers had to prop up Walker. Commenting on the lack of evidence supporting a defense theory does not shift the burden of proof. *People v. Esquivel-Alaniz*, 985 P.2d 22, 23 (Colo. App. 1999).

2. Other Prosecutorial Arguments

¶ 42 As noted, the prosecutor addressed the definitions of "with intent" and "intoxication," both of which the court gave to the jury. The prosecutor said the relevant question was whether a person was "[s]o drunk" that they "can't have a conscious objective to achieve the specific result." The prosecutor used an analogy of a person's taking Ambien and then sleepwalking while not conscious of what they are doing. The prosecutor argued that drinking a large quantity of alcohol could cause similar effects. Such a "drunk"

person, the prosecutor maintained, could mistakenly enter the wrong home and take orange juice from the refrigerator — all the while with "[n]o idea it wasn't their house, no idea it wasn't their orange juice." Defense counsel objected, arguing that the prosecutor's argument was a misstatement of the law because "[t]hat is voluntary act and it's involuntary intoxication." The trial court overruled the objection.

¶ 43 In reply to defense counsel's argument that Walker was too intoxicated to commit burglary, the prosecutor argued, "[I]f you were to follow the defense attorney's theory, then any car break-in today at the grocery store, at the shopping mall would be defensible. Just too stupid. Nobody would do that." Defense counsel objected on the ground that "this is calling for the jury to exercise a verdict based on some precedential value that doesn't exist." The court overruled the objection.

¶ 44 We assume for purposes of our analysis that the above arguments were improper. *See, e.g.*, *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010) (recognizing that a prosecutor may not state or imply that "defense counsel has presented the defendant's case in bad faith or otherwise make remarks for the purpose of

denigrating defense counsel"). Even so, we are not convinced that reversal is required.

¶ 45 The prosecutorial arguments at issue addressed intoxication, and Walker presented some evidence of his intoxication. To reiterate, however, voluntary intoxication was, at most, a "partial defense" to the burglary charge because it is possible for an intoxicated person to form specific intent. *See Stone*, ¶ 4. And the evidence that Walker was intoxicated to such a degree that he did not form the specific intent required for the burglary offense — i.e., the intent to commit theft in the garage — was weak.

¶ 46 The doctor who said Walker had been diagnosed with intoxication due to the odor of alcohol and his agitation also testified that Walker did not exhibit other indicia of intoxication. According to Walker's medical records as recounted by the doctor, Walker had normal and spontaneous motor responses; was alert and oriented to person, place, and time; did not have slurred speech; did not display HGN in his pupils; did not have bloodshot or watery eyes; did not exhibit memory problems; did not vomit; did not display inhibition to feeling pain; and did not mention that he had been drinking alcohol. The doctor also explained that, when he

smells alcohol on a patient, he diagnoses alcohol intoxication even if the patient does not exhibit most of the other signs of intoxication. In sum, the doctor opined that Walker had "some level of intoxication, potentially slight intoxication," as opposed to "indications of extraordinary intoxication."

¶ 47 As mentioned, the officers who arrested Walker did not observe any signs of intoxication. Additionally, as the prosecutor recited in closing argument, the details of the incident were strongly corroborative of Walker's intent to commit theft in the garage:

> [W]e look at all of the specific, individual acts that this defendant engaged in. When they want to say that he's so drunk that he can't act with a goal, he goes to a house, crime of opportunity; it's dark, he finds the garage; crosses the fence multiple times; uses an item, the trash can, moves it instead of crossing the fence is easier. Acting consistent with a goal to achieve a common act. Over the fence time and time again. You saw one of the times; he got over there pretty well.
>
> And then think about getting into this window. It's quite a task. I mean, 6 feet tall, maybe more. Brick wall, no ladder. Small window; maybe 2 feet, maybe 3 feet. Managed to get into that with only a little cut, and then sober enough to know "I don't want to get cut on that, so I'm going to use my jacket." All of those acts are consistent with having a goal and achieving a result.

> Putting a bike over fence. Walking a straight line.

¶ 48 Consistent with our understanding of the record, the trial court denied Walker's motion for a new trial based on the prosecutor's arguments. The court explained that, because there was "overwhelming evidence against intoxication to a level to nullify intent," the prosecutor's comments were not likely to have affected the jury's view of that issue.

¶ 49 Given all this, as well as the fact that the prosecutorial arguments at issue were relatively brief and confined to a small part of the prosecutor's closing, *see People v. Carter*, 2015 COA 24M-2, ¶ 60, we conclude that the alleged improprieties were not so egregious as to warrant reversal. *See Dominguez-Castor*, ¶ 92 (prosecutor's argument did not require reversal given the strength of the evidence against the defendant); *Esquivel-Alaniz*, 985 P.2d at 24 ("Although the prosecutor's comment might be considered somewhat overstated, when viewed under the totality of the entire closing argument, it is not so improper as to warrant a new trial.").

V. Alleged Disproportionality in Sentencing

¶ 50 Walker contends that his twenty-four-year prison sentence is grossly disproportionate and thus constitutes cruel and unusual punishment under the Federal and Colorado Constitutions. He did not raise this claim in the trial court. Answering a novel question in Colorado, we conclude that plain error review applies to an unpreserved contention that a defendant's sentence is unconstitutionally disproportionate. Reviewing Walker's claim, we do not discern plain error.

A. Further Procedural History

¶ 51 In addition to the second degree burglary charge, the prosecution filed seven habitual criminal counts against Walker. After the jury convicted him of burglary, Walker's case proceeded to a habitual criminal trial in April 2018.

¶ 52 At that trial, the trial court found that the prosecution had proved five habitual criminal counts, which established that Walker had six prior felony convictions. Those convictions are for the following offenses:

- attempted pandering of a child, a class 4 felony;
- second degree assault with a deadly weapon, a class 4 felony;

- attempted second degree sexual assault, a class 5 felony;
- distribution of a Schedule II controlled substance, a class 3 felony, and possession of a Schedule II controlled substance, a class 4 felony;[3] and
- failure to register as a sex offender, a class 6 felony.

The court elected not to decide whether the prosecution had proved the other two habitual criminal counts because the court deemed them moot in light of its other findings.

¶ 53 Because Walker had at least three prior felony convictions, the trial court was required to sentence him to four times the maximum term in the presumptive range for the second degree burglary offense, for a total of twenty-four years. *See* § 18-1.3-801(2)(a)(I)(A), C.R.S. 2021; § 18-1.3-401(1)(a)(V)(A), C.R.S. 2021.

[3] These drug convictions resulted from charges in the same case and the same trial. Therefore, they do not qualify as two separate prior convictions under the habitual criminal statute. *See* § 18-1.3-801(2)(a)(I), C.R.S. 2021 (pertaining to a person "who has been three times previously convicted, *upon charges separately brought and tried*, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony") (emphasis added). Going forward, we disregard the drug possession conviction.

B. Standard of Review and Standard of Reversal

¶ 54 We review de novo whether Walker's sentence was grossly disproportionate. *See Wells-Yates v. People*, 2019 CO 90M, ¶ 35.

¶ 55 The parties agree that Walker did not allege in the trial court that his sentence was grossly disproportionate. The parties disagree about the standard of reversal applicable to this unpreserved claim. Walker advocates for de novo review (which is not truly a standard of reversal, as we will explain), while the People assert that plain error analysis applies.

¶ 56 Our research reveals only one Colorado decision in which an appellate court reviewed a claim that a sentence was grossly disproportionate where it is clear that the claim was raised for the first time on appeal. *See People v. Loris*, 2018 COA 101, ¶ 8. The *Loris* division did not address, however, whether plain error review should apply. The division did not reach the question whether an error warranted reversal because the division found no error. *See id.* at ¶¶ 28-32. So *Loris* does not stand for the proposition that plain error review is inapplicable to these claims.

¶ 57 Still, we are not without guidance on whether plain error review should apply to an unpreserved claim that a sentence is

unconstitutionally disproportionate. Our supreme court has repeatedly recognized that, aside from structural error (which Walker does not assert), "we review all other errors, constitutional and nonconstitutional, that were not preserved by objection for plain error." *Hagos*, ¶ 14; *see People v. Delgado*, 2019 CO 82, ¶ 13; *Scott v. People*, 2017 CO 16, ¶ 12; *Reyna-Abarca v. People*, 2017 CO 15, ¶ 37; *People v. Davis*, 2015 CO 36M, ¶ 32; *Martinez v. People*, 2015 CO 16, ¶ 13.[4] In particular, Colorado appellate courts have applied plain error review to unpreserved claims that a sentence is unconstitutional. *See, e.g.*, *People v. Sandoval*, 2018 CO 21, ¶ 11 (reviewing an unpreserved claim that a sentence was unconstitutional because it was aggravated based on judicial factfinding); *People v. Sabell*, 2018 COA 85, ¶¶ 46-47 (reviewing an unpreserved Eighth Amendment challenge to a sentence imposed under the Sex Offender Lifetime Supervision Act of 1998).

[4] We acknowledge that plain error review does not apply to a sufficiency of the evidence claim raised for the first time on appeal. *See McCoy v. People*, 2019 CO 44, ¶ 2. Such a claim, however, is not truly unpreserved because "a defendant effectively challenges the sufficiency of the evidence presented at trial by contesting that evidence at the trial." *Id.* at ¶ 22.

¶ 58 We see no license to depart from this approach in the context of an unpreserved claim that a sentence is unconstitutionally disproportionate. Indeed, several other jurisdictions apply plain error review to such a claim. *See United States v. Sherrill*, 972 F.3d 752, 772-75 (6th Cir. 2020); *United States v. Sumter*, 801 F. App'x 195, 195 (4th Cir. 2020) (per curiam); *Unites States v. Garth*, 929 F.3d 967, 968-69 (8th Cir. 2019); *United States v. Blodgett*, 872 F.3d 66, 71-72 (1st Cir. 2017); *United States v. Burnett*, 773 F.3d 122, 136-38 (3d Cir. 2014); *United States v. Woods*, 576 F. App'x 309, 309 (5th Cir. 2014) (per curiam); *United States v. Ousley*, 698 F.3d 972, 974-76 (7th Cir. 2012); *United States v. Cunningham*, 191 F. App'x 670, 672 (10th Cir. 2006); *United States v. Raad*, 406 F.3d 1322, 1323-24 (11th Cir. 2005); *United States v. Carter*, 110 F. App'x 165, 166 (2d Cir. 2004); *Malloy v. State*, 568 A.2d 1072, 1989 WL 154706, at *2 (Del. Dec. 1, 1989) (unpublished table decision); *People v. Gunn*, 2020 IL App (1st) 170542, ¶¶ 144-148; *People v. Lewis*, No. 353116, 2021 WL 1941750, at *4 (Mich. Ct. App. May 13, 2021) (unpublished opinion); *cf. Woodward v. State*, 123 So. 3d 989, 1029-32 (Ala. Crim. App. 2011) (reviewing an unpreserved Eighth Amendment challenge to a death sentence for plain error).

¶ 59 We disagree with Walker that plain error analysis is inappropriate because constitutional proportionality is a legal question we review de novo. Those two standards are not incompatible. De novo review applies to whether legal error occurred, which is the first step in plain error review of an unpreserved claim. *See Cardman v. People*, 2019 CO 73, ¶ 19 ("[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."). Hence, Colorado decisions considering an unpreserved claim have recognized that, even where an appellate court reviews de novo whether an error occurred, the court cannot reverse unless the error constitutes plain error. *See Delgado*, ¶ 13; *People v. Pellegrin*, 2021 COA 118, ¶ 60; *People v. Luna*, 2020 COA 123M, ¶¶ 8-9; *People v. Welborne*, 2018 COA 127, ¶ 7.

¶ 60 Consequently, we hold that an unpreserved claim that a sentence is unconstitutionally disproportionate is subject to plain error analysis.

C. Proportionality Review in Colorado

¶ 61 The Federal and Colorado Constitutions prohibit the infliction of cruel and unusual punishment. *See* U.S. Const. amend. VIII; Colo. Const. art. II, § 20. This prohibition includes a proportionality principle requiring the sentence to fit the crime. *See Solem v. Helm*, 463 U.S. 277, 284 (1983); *Wells-Yates*, ¶ 10; *People v. Deroulet*, 48 P.3d 520, 523 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, 2019 CO 90M. But the guarantee of proportionality "is a narrow one," *Close v. People*, 48 P.3d 528, 532 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, 2019 CO 90M, because it forbids only "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 288). As a result, "[i]t is 'exceedingly rare' for a sentence to be deemed so extreme that it is grossly disproportionate to the crime." *Wells-Yates*, ¶ 5 (citation omitted).

¶ 62 To determine whether a sentence is grossly disproportionate, a Colorado court follows a two-step analysis. At step one, a court conducts an "abbreviated proportionality review," which itself has two subparts. *Id.* at ¶¶ 10-11. A court assesses (1) the gravity or

seriousness of the offense and (2) the harshness of the sentence imposed. *Id.* at ¶ 11.

¶ 63 Regarding the first subpart, certain offenses are inherently (or per se) grave or serious, meaning they are grave or serious "in every potential factual scenario." *Id.* at ¶¶ 13, 63. For such an offense, a court proceeds directly to assessing the harshness of the penalty. *Id.* at ¶ 13. For an offense that is not per se grave or serious, a court considers whether it is grave or serious under the circumstances, taking into account the harm caused or threatened to the victim or society and the offender's culpability. *Id.* at ¶ 12.

¶ 64 Regarding the second subpart, a court must consider parole eligibility. *Id.* at ¶ 14. "[W]hether a sentence is parole eligible is relevant during an abbreviated proportionality review because parole can reduce the actual period of confinement and render the penalty less harsh." *Id.*

¶ 65 In the context of a habitual criminal sentence, an abbreviated proportionality review includes consideration of the defendant's history of felony recidivism. *Id.* at ¶ 23. A court analyzes (1) the gravity or seriousness of all the offenses in question (the triggering

offense and the predicate offenses[5]) and (2) the harshness of the sentence imposed on the triggering offense. *Id.* A court "must scrutinize the triggering offense and the predicate offenses and determine whether in combination they are so lacking in gravity or seriousness so as to suggest that the sentence is unconstitutionally disproportionate to the crime, taking into account the defendant's eligibility for parole." *Id.*

¶ 66 Only if an abbreviated proportionality review gives rise to an inference of gross disproportionality will a court proceed to step two: an extended proportionality review. *Id.* at ¶ 15. In habitual criminal cases, just as in other cases, "an abbreviated proportionality review will almost always yield a finding that the sentence is not unconstitutionally disproportionate, thereby protecting 'the primacy of the General Assembly in crafting sentencing schemes.'" *Id.* at ¶ 21 (citation omitted).

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[5] The new conviction for which the defendant is sentenced is known as the "triggering offense," and the prior convictions on which the habitual criminal adjudication is based are the "predicate offenses." *See Wells-Yates v. People*, 2019 CO 90M, ¶ 2 n.1.

D. Application

¶ 67 Although Walker generally maintains that his sentence is grossly disproportionate, he argues more specifically that "his offenses when taken together and compared to his mandatory 24-year prison sentence gives rise to an inference of gross disproportionality," such that the trial court should have conducted an extended proportionality review. So the court's threshold error, according to Walker, was its failure to conclude that a comparison of his offenses (the triggering and predicate offenses) to his sentence raises an inference of gross disproportionality.

¶ 68 To constitute plain error, however, "an error must 'be so obvious' at the time it is made 'that a trial judge should be able to avoid it without the benefit of an objection.'" *Cardman*, ¶ 34 (citation omitted); *see Scott*, ¶ 17 ("[A]n error is generally not obvious when nothing in Colorado statutory or prior case law would have alerted the trial court to the error."). 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. *Cardman*, ¶ 34.

¶ 69 We conclude that the trial court did not commit obvious error by failing to discern an inference of gross disproportionality in Walker's sentence as compared to his offenses. Accordingly, any error by the court was not plain. *See People v. Vigil*, 251 P.3d 442, 447 (Colo. App. 2010) ("Under this standard, we need not decide whether the court actually erred if it is clear that the alleged error was not obvious.").

¶ 70 We first examine the gravity or seriousness of Walker's triggering offense — second degree burglary. At the time of his habitual criminal adjudication in 2018, it was well settled that burglary, including second degree burglary, was a per se grave or serious crime. *See Wells-Yates*, ¶¶ 13, 65; *Deroulet*, 48 P.3d at 524; *People v. Session*, 2020 COA 158, ¶ 44. Since then, *Wells-Yates* and subsequent cases have called into question whether second degree burglary remains a per se grave or serious offense. *See Wells-Yates*, ¶ 65; *Session*, ¶¶ 44-49 (rejecting that proposition); *People v. Tran*, 2020 COA 99, ¶¶ 98-101. In plain error review, however, we must consider the alleged error "at the time it is made." *Cardman*, ¶ 34. Thus, in assessing whether the trial court committed obvious error by not discerning an inference of gross

disproportionality, we treat Walker's burglary conviction as a per se grave or serious offense. *Cf. Scott*, ¶ 17 ("[A]n error will not ordinarily be deemed 'obvious' when either this court or a division of the court of appeals has previously rejected an argument being advanced by a subsequent party who is asserting plain error.").[6]

¶ 71 Next, we consider Walker's predicate offenses. The parties agree that his conviction for distribution of a controlled substance is per se grave or serious. *See Wells-Yates*, ¶¶ 65-66.

¶ 72 As for the conviction for failure to register as a sex offender, divisions of this court have differed as to whether this offense is per se grave or serious. *See People v. Foster*, 2013 COA 85, ¶ 62; *People v. Green*, 2012 COA 68M, ¶ 51. Because a division has concluded that this offense is inherently grave or serious and the law is unsettled, the trial court could have viewed the failure to register as a sex offender as per se grave or serious, and such a view would not

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[6] Walker does not argue that we should follow *Johnson v. United States*, 520 U.S. 461 (1997), or *Henderson v. United States*, 568 U.S. 266 (2013), and assess plain error by reference to the law at the time of appeal. And our supreme court has so far declined to adopt such a rule. *See, e.g.*, *Campbell v. People*, 2020 CO 49, ¶¶ 37-38. So we follow the court's existing precedent.

have been obviously wrong. *See People v. Tun*, 2021 COA 34, ¶¶ 45-48; *People v. Wambolt*, 2018 COA 88, ¶¶ 70-71.

¶ 73 Therefore, at the time of Walker's habitual criminal adjudication, the trial court could have reasonably concluded that he had been convicted of at least three per se grave or serious offenses: the triggering offense (second degree burglary) and two predicate offenses (distribution of a controlled substance and failure to register as a sex offender).[7] In addition, Walker had three other felonies (attempted pandering of a child, second degree assault with a deadly weapon, and attempted second degree sexual assault), and his sentence was subject to parole. *See People v. McNally*, 143 P.3d 1062, 1064 (Colo. App. 2005).

¶ 74 Under these circumstances, we do not conclude that the trial court committed obvious error by failing to find that Walker's twenty-four-year sentence raises an inference of gross disproportionality. After all, any review of the penalty as compared to the gravity or seriousness of the offenses "is substantially

[7] We need not consider whether Walker's other predicate offenses were grave or serious because, even if they were not, our holding would not change.

circumscribed because the legislature's establishment of the harshness of the penalty deserves great deference." *Well-Yates*, ¶ 62. Therefore, "[a] finding of gross disproportionality is 'hen's-teeth rare,' especially outside the capital punishment milieu." *Blodgett*, 872 F.3d at 72 (citation omitted). Indeed, Colorado appellate courts have rejected proportionality challenges to sentences similar to — or more severe than — Walker's sentence under similar circumstances. *See Rutter v. People*, 2015 CO 71, ¶¶ 25-26 (ninety-six-year sentence where only the triggering offense was grave or serious); *People v. Gee*, 2015 COA 151, ¶ 65 (forty-eight-year sentence supported by two convictions for grave or serious crimes); *People v. Cooper*, 205 P.3d 475, 481 (Colo. App. 2008) (eighteen-year sentence where neither triggering nor predicate offenses were individually grave or serious), *abrogated on other grounds by Scott v. People*, 2017 CO 16; *McNally*, 143 P.3d at 1064 (twenty-four-year sentence where only two predicate offenses were grave or serious); *cf. United States v. Marshall*, 584 F. App'x 926, 927 (11th Cir. 2014) (discerning no plain error in the defendant's sentence, in part because the defendant did not cite any controlling precedent finding an Eighth Amendment violation in similar

circumstances); *United States v. Wright*, 196 F. App'x 812, 816 (11th Cir. 2006) (same).[8]

¶ 75 Because we do not perceive plain error, we leave Walker's sentence undisturbed.

VI. Conclusion

¶ 76 The judgment and sentence are affirmed.

JUDGE HARRIS and JUDGE FREYRE concur.

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[8] In light of the precedent cited above, the trial court did not obviously err by failing to discern an inference of gross disproportionality in the sentence even if Walker had committed only two per se grave or serious crimes (as well as his other offenses). Therefore, even if we applied the law at the time of appeal in assessing plain error and we decided that second degree burglary is not per se grave or serious, our holding would be the same.