SUMMARY
March 3, 2022

2022COA27

No. 19CA0011, *People v. Licona-Ortega* — Constitutional Law — Fourth Amendment — Searches and Seizures — Warrantless Search — Exigent Circumstances Exception

A division of the court of appeals applies an established rule — the exigent circumstances exception to the Fourth Amendment search warrant requirement — to a novel fact situation: a ping of a cell phone to obtain its (and presumably its owner's) real-time location. As a matter of first impression in Colorado, we hold that under the facts presented, exigent circumstances supported the warrantless ping of the defendant's cell phone to locate him.

COLORADO COURT OF APPEALS **2022COA27**

Court of Appeals No. 19CA0011
Arapahoe County District Court No. 17CR2145
Honorable Andrew C. Baum, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Miguel Angel Licona-Ortega,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE BERGER
Brown and Johnson, JJ., concur

Announced March 3, 2022

Philip J. Weiser, Attorney General, Hanna Bustillo, Assistant Attorney General Fellow, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Meredith E. O'Harris, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 A jury convicted defendant, Miguel Angel Licona-Ortega, of first degree murder. The trial court imposed the mandatory sentence of life in prison without the possibility of parole. Licona-Ortega claims on appeal that he is entitled to a reversal of his conviction because

- the trial court erroneously denied his motion to suppress all evidence arising from a warrantless ping of his cell phone to determine his whereabouts;[1]
- the court erroneously denied his *Batson* challenge; and
- prosecutorial misconduct deprived him of a fair trial.

¶ 2 As a matter of first impression in Colorado, we hold that under the facts presented, exigent circumstances supported the

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[1] A "ping" refers to a "service provider's act of proactively identifying the real-time location of the cell phone when the cell phone would not ordinarily transmit its location on its own." *United States v. Riley*, 858 F.3d 1012, 1014 n.1 (6th Cir. 2017). Licona-Ortega refers to the ping in this case as a "GPS ping," while the Attorney General refers to it simply as a "ping." There are technological differences between cell-site location information and GPS data. *See id.* (distinguishing between cell-site location information and GPS data); *see also United States v. Thorne*, Crim. A. No. 18-389 (BAH), 2021 WL 2682631, at *28-30 (D.D.C. June 30, 2021), *as corrected* (July 16, 2021). Because these differences are not relevant to our analysis, we do not further address these different technologies, and we use the more general term "ping" throughout this opinion.

warrantless ping of Licona-Ortega's cell phone to locate him. Accordingly, the trial court correctly denied his suppression motion. We also reject his other contentions of error and affirm the judgment of conviction.

I. Relevant Facts

¶ 3 Evidence admitted at trial permitted the jury to find the following facts. Licona-Ortega was seated in the dining area of a bar one summer evening when Javier Chacon-Ortega and his brother entered the bar area.

¶ 4 About a month earlier, Chacon-Ortega's brother had heard that Licona-Ortega had insulted Chacon-Ortega. When Chacon-Ortega's brother saw Licona-Ortega at the bar, he went to talk to him. Licona-Ortega told him that he "didn't want to have any problems" and lifted his shirt to show that he was carrying a gun in his waistband. Chacon-Ortega's brother texted and telephoned Chacon-Ortega to warn him that Licona-Ortega was armed.

¶ 5 Video surveillance from the bar showed Chacon-Ortega walk more than once from the bar area to the dining area where Licona-Ortega was located. Chacon-Ortega's brother testified that

Chacon-Ortega and Licona-Ortega were arguing. At one point, Licona-Ortega said, "You better leave or I'm going to empty the gun on your head." Chacon-Ortega responded, "Let's go outside." But before he agreed to take the fight outside, Licona-Ortega called for his ride and confirmed it had arrived.

¶ 6 Licona-Ortega followed Chacon-Ortega to the front door of the bar. As Chacon-Ortega stepped outside, Licona-Ortega pulled the gun from his waistband and shot Chacon-Ortega in the back of the head. Chacon-Ortega fell down the front steps of the bar. Licona-Ortega then stepped over Chacon-Ortega and shot him in the head four more times, emptying his gun. Chacon-Ortega died from the gunshot wounds.

¶ 7 Police officers responded to the bar, reviewed video surveillance, and spoke with witnesses who identified the shooter as Licona-Ortega. Internal police records revealed that the police had contacted Licona-Ortega at an Alaska Place address in Aurora about a week before the shooting. The records also contained a cell phone number for Licona-Ortega. Based on this information, the police set up surveillance at the Alaska Place address. The police saw approximately ten people in the residence. The police also

contacted T-Mobile, Licona-Ortega's cellular service provider, and requested that T-Mobile ping Licona-Ortega's cell phone to determine its location. For reasons not revealed by the record, T-Mobile denied the request.

¶ 8 The police obtained the homeowner's consent to enter the Alaska Place residence and confirmed that Licona-Ortega was not there. The police also spoke with a witness who had been in contact with Licona-Ortega via text message. The witness allowed the police to look at her phone. The text messages from Licona-Ortega had been sent from the same cell phone number that the police had in their internal records.

¶ 9 Having no other leads on Licona-Ortega's whereabouts and believing that he was still armed and dangerous because the police did not find the murder weapon at the scene, the police again requested that T-Mobile ping Licona-Ortega's cell phone to obtain its real-time location. This time T-Mobile did so, and the ping revealed that Licona-Ortega's cell phone was located at a Kenton Street address in Aurora. Officers responded to the Kenton Street address and arrested Licona-Ortega. Immediately after his arrest Licona-Ortega confessed to the murder.

II. The Trial Court Correctly Denied Licona-Ortega's Motion to Suppress

¶ 10 Licona-Ortega moved to suppress all evidence obtained from the warrantless ping of his cell phone, claiming that the warrantless ping was a search in violation of the Fourth Amendment to the United States Constitution. Licona-Ortega contended that the evidence of his interrogation and confession and all evidence resulting from the search of his apartment was the fruit of the allegedly unlawful warrantless search. The trial court denied the suppression motion, concluding that exigent circumstances justified the warrantless search.

A. Preservation and Standard of Review

¶ 11 Licona-Ortega's motion to suppress preserved this issue for appellate review. A trial court's suppression ruling presents a mixed question of fact and law. *People v. Davis*, 2019 CO 24, ¶ 14. "We accept the trial court's findings of historic fact if those findings are supported by competent evidence, but we assess the legal significance of the facts de novo." *People v. Chavez-Barragan*, 2016 CO 16, ¶ 9.

B. Applicable Law

1. The Fourth Amendment and Colorado Statutory Authority for Obtaining Real-Time Cell Phone Location Information

¶ 12 Two Colorado statutes authorize the police to request or order a wireless cellular carrier to disclose real-time cell phone location information. § 18-9-312, C.R.S. 2021; § 16-3-303.5, C.R.S. 2021.

¶ 13 Section 18-9-312(1.5)(a) allows a "supervising representative of a law enforcement agency" to

> order a previously designated security employee of a wireless telecommunications provider to provide . . . location information concerning the telecommunications device of a named person if the supervising representative has probable cause to believe that:
>
> (I) An emergency situation exists that involves the risk of death or serious bodily injury to the named person or to another person who is in the named person's company; and
>
> (II) The time required to obtain a search warrant or other court order authorizing the acquisition of the information would increase such risk.[2]

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[2] The trial court concluded, and we agree, that section 18-9-312(1.5)(a), C.R.S. 2021, did not justify the warrantless ping. But section 16-3-303.5, C.R.S. 2021, did. *See infra* Part II.C.2.b.

¶ 14 Section 16-3-303.5(3) describes a variety of grounds on which such a request may be made, including when "[t]here exist exigent circumstances such that the search would be recognized as constitutionally permissible without the warrant." § 16-3-303.5(3)(d).

¶ 15 Neither the United States Supreme Court nor the Colorado Supreme Court has held that a ping of a cell phone to determine its real-time location is a search within the meaning of the Fourth Amendment. In *Carpenter v. United States*, the Supreme Court held that extensive historical "location information obtained from Carpenter's wireless carriers" was the product of a search under the Fourth Amendment. 585 U.S. ___, ___, 138 S. Ct. 2206, 2217 (2018). But the Court expressly stated that it was not deciding the question presented in this case. *Id.* at ___, 138 S. Ct. at 2220 ("We do not express a view on matters not before us [including] real-time CSLI [cell-site location information] . . . .").

¶ 16 Last year, after the briefing was completed in this case, the United States Court of Appeals for the Seventh Circuit held that the real-time location information obtained by pinging a suspect's cell phone was *not* the product of a search within the meaning of the

Fourth Amendment. *See United States v. Hammond*, 996 F.3d 374, 391-92 (7th Cir. 2021). *But see United States v. Baker*, Crim. No. 3:19-32, 2021 WL 4317995, at *13 (M.D. Pa. Sept. 23, 2021) ("[T]he court concludes that the government's requested ping of Defendant Baker's cellphone . . . constitutes a Fourth Amendment search.").

¶ 17 Nevertheless, sections 16-3-303.5 and 18-9-312 appear to assume that real-time location information obtained by the police *is* the product of a search under Colorado law. Indeed, section 16-3-303.5(5) provides that location information obtained in violation of the statute is inadmissible in any criminal proceeding, a statutory exclusionary rule that may be broader than the exclusionary rule applicable under the Fourth Amendment.[3]

¶ 18 Perhaps because of these circumstances, the Attorney General does not argue that the location information obtained from T-Mobile was not the product of a search under the Fourth Amendment. And, for obvious reasons, Licona-Ortega accepts that implicit concession.

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[3] "Location information" is defined in section 16-3-303.5(1)(d) as the "location of an electronic device" that is "obtained by the operation of an electronic device on a cellular telephone network or location information service rather than obtained from a service provider."

¶ 19 Given the parties' positions, we assume, without deciding, that the location information obtained from T-Mobile was the product of a search within the meaning of the Fourth Amendment, and we analyze the suppression issue under Fourth Amendment principles.

2. Fourth Amendment Search Principles: Probable Cause and Exigent Circumstances

¶ 20 The United States and Colorado Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Colo. Const. art. II, § 7. A warrantless search is presumed to violate the constitutional provisions prohibiting unreasonable searches and seizures. *People v. Winpigler*, 8 P.3d 439, 443 (Colo. 1999). To overcome this presumption, the prosecution has the burden of establishing that the warrantless search was justified by one of the narrowly defined exceptions to the warrant requirement. *Id.*

¶ 21 One exception to the warrant requirement is when exigent circumstances necessitate immediate police action. *People v. Pate*, 71 P.3d 1005, 1010 (Colo. 2003). "Under the exigent circumstances exception, the prosecution must prove (1) the presence of probable cause and (2) an exigent circumstance that justifies a warrantless [search]." *Id.* The existence of probable cause and exigent

circumstances must be determined by evaluating the totality of the circumstances available to the police at the time of the warrantless search. *Winpigler*, 8 P.3d at 444.

C. Analysis

1. The Police Had Probable Cause to Request a Ping of Licona-Ortega's Cell Phone

¶ 22 Probable cause exists when the facts known to the police at the time of the search establish that reasonable grounds existed for a person of reasonable caution to believe that contraband or evidence of criminal activity was located at the place to be searched. *Id.* at 444-45; *accord People v. Miller*, 75 P.3d 1108, 1112 (Colo. 2003).

¶ 23 Before the police's second request that T-Mobile ping Licona-Ortega's cell phone, the police reviewed video surveillance from the bar, which showed a gruesome killing; witnesses identified the shooter as Licona-Ortega; and documentation from a previous contact with law enforcement showed a cell phone number and address associated with Licona-Ortega. A witness also confirmed that she had received text messages from Licona-Ortega from the same phone number.

¶ 24 Under these circumstances, it was reasonable for the police to believe that Licona-Ortega had committed a serious crime and that real-time location information from his cell phone would reveal his location. Accordingly, the police had probable cause to request a ping of Licona-Ortega's cell phone. (We don't understand Licona-Ortega to contend otherwise.)

2. Exigent Circumstances Justified the Warrantless Ping of Licona-Ortega's Cell Phone

¶ 25 The Colorado Supreme Court has recognized the exigent circumstances exception in the following three situations: (1) the hot pursuit of a fleeing suspect; (2) the risk of immediate destruction of evidence; and (3) a colorable claim of an emergency threatening the life or safety of another.[4] *Winpigler*, 8 P.3d at

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[4] A separate doctrine premised on the police's community caretaking function, as opposed to its crime-fighting function — the emergency aid exception to the warrant requirement — also requires a "colorable claim of an emergency threatening the life or safety of another." *People v. Pate*, 71 P.3d 1005, 1011 (Colo. 2003) (quoting *People v. Hebert*, 46 P.3d 473, 479 (Colo. 2002)); *see Caniglia v. Strom*, 593 U.S. ___, ___, 141 S. Ct. 1596, 1599 (2021). "However, unlike the exigent circumstances exception, the emergency aid exception requires the prosecution to prove the existence of 'an immediate crisis and the probability that [police] assistance will be helpful.'" *Pate*, 71 P.3d at 1011 (quoting *People v. Amato*, 193 Colo. 57, 60, 562 P.2d 422, 424 (1977)). The

443-44. The Attorney General does not argue that the warrantless ping of Licona-Ortega's cell phone was justified by the hot pursuit of a fleeing suspect or the risk of immediate destruction of evidence.

¶ 26 Addressing the applicability of the exigent circumstances exception based on a colorable claim of emergency, the Colorado Supreme Court has articulated a two-part test to determine "whether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable." *People v. Brunsting*, 2013 CO 55, ¶ 31 (quoting *Storey v. Taylor*, 696 F.3d 987, 992-93 (10th Cir. 2012)).

¶ 27 The supreme court has identified a broad set of factors relevant to determining whether there exists a colorable claim of an emergency threatening the life or safety of another. *Id.* at ¶ 30. These factors include

- the gravity or violent nature of the offense involved;

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emergency aid exception does not require a showing of probable cause. *Id.* Here, it is obvious that the police were acting to prevent crime and apprehend a person who had committed a crime. Therefore, we do not further address the emergency aid exception or whether the Supreme Court's decision in *Caniglia v. Strom* precludes the application of that exception to the facts of this case.

- whether the suspect is reasonably believed to be armed;
- a clear showing of probable cause to believe that the suspect committed the crime;
- strong reason to believe that the suspect is in the premises being entered;
- likelihood that the suspect will escape if not swiftly apprehended; and
- the circumstances of the entry.

Id.

a. The Police Had an Objectively Reasonable Basis to Believe There was an Immediate Need to Protect the Safety of Others

¶ 28 The police responded to a report of a shooting at a bar. Video surveillance revealed that Licona-Ortega shot Chacon-Ortega in the back of the head, stepped over his body, and then shot Chacon-Ortega four more times in the head. Chacon-Ortega died from the gunshot wounds. Captain Stephen Redfearn described the shooting, which occurred in public and in broad daylight, as one of the most brazen crimes he had ever seen.

¶ 29 In addition to the grave and violent nature of the offense, the police did not find a gun at the scene, giving them reason to believe

that Licona-Ortega remained armed. These circumstances gave the police reasonable grounds to believe that the public was endangered as long as Licona-Ortega remained at large.

¶ 30 Licona-Ortega argues that the trial court ignored the type of gun involved in the shooting, as well as the apparent fact that Licona-Ortega emptied the revolver at the scene when he killed the victim. According to Licona-Ortega, these facts negate an inference that Licona-Ortega remained armed and dangerous. We reject this argument because the police had no reason to believe that Licona-Ortega did not have additional ammunition. The police knew only that there was no gun at the murder scene. In testimony implicitly credited by the trial court, Captain Redfearn testified that "[u]ntil the time the defendant was taken into custody, we were under the belief that he was armed the entire time."

¶ 31 As discussed above, there was a clear showing of probable cause to believe that Licona-Ortega committed a serious crime.

¶ 32 The next *Brunsting* factor considers whether the police had strong reason to believe that the suspect was in the premises being entered. *Id.* The exigent circumstances exception to the warrant requirement has traditionally been used to justify a warrantless

entry into a home. *See id.* at ¶¶ 34-35; *see also People v. Aarness*, 150 P.3d 1271, 1279-80 (Colo. 2006). In *Aarness*, for example, the police had strong reason to believe that the suspect was in the premises being entered when they received an anonymous tip that he was in the apartment and when they knocked on the door of the apartment and saw the suspect though the open doorway. 150 P.3d at 1279.

¶ 33 By contrast, this case involves a warrantless ping to a cell phone. Based on evidence previously discussed that law enforcement had at the time Licona-Ortega was at large, the police had strong reason to believe that the cell phone number belonged to Licona-Ortega and that a ping of that cell phone would reveal Licona-Ortega's real-time location.

¶ 34 Captain Redfearn did not testify about the likelihood that Licona-Ortega would escape if not swiftly apprehended, and unlike other Colorado cases analyzing exigent circumstances, this case does not involve a warrantless entry into a home. Therefore, the last two *Brunsting* factors do not bear on our inquiry.

¶ 35 While Colorado appellate courts have not confronted this precise situation, at least one other court in another jurisdiction

has. In *Commonwealth v. Almonor*, 120 N.E.3d 1183, 1198 (Mass. 2019), the Supreme Judicial Court of Massachusetts concluded that a warrantless ping to the defendant's cell phone was justified by exigent circumstances. The defendant in *Almonor* "shot the victim in the daytime in the presence of others, and thus he likely knew that his crime was likely to attract the attention of the authorities. He was also undoubtedly aware that there were at least two witnesses who could identify him." *Id.* The *Almonor* court concluded that exigent circumstances justified the warrantless ping to the defendant's cell phone because the police had reason to believe that the defendant was still in possession of a sawed-off shotgun ("a dangerous and per se illegal weapon") and because the defendant had "brutally murdered a person without an apparent motive." *Id.* at 1199.

¶ 36 Because Licona-Ortega shot Chacon-Ortega in the head in broad daylight just outside a crowded bar, he likely knew that his crime would attract the attention of the authorities. Licona-Ortega, who had just been dining with his girlfriend and speaking with Chacon-Ortega's brother, was also undoubtedly aware that there were at least two witnesses who could identify him. Unlike a

sawed-off shotgun, a revolver is not a per se illegal weapon. But, as discussed, the police had reason to believe that Licona-Ortega was still in possession of the revolver.

¶ 37 Licona-Ortega argues that the police did not have a reasonable basis to believe that there was an immediate risk to the safety of others because at the time of the second ping request they knew that Chacon-Ortega's murder was motivated, at least in part, by the argument between Chacon-Ortega and Licona-Ortega at the bar. Even assuming this case is distinguishable from *Almonor* because Licona-Ortega had a specific motive to kill Chacon-Ortega, Licona-Ortega did not just shoot the victim once. Instead, after the victim was disabled, Licona-Ortega shot him four more times. Considering the totality of these circumstances, the trial court correctly concluded that the police had an objectively reasonable belief there was an immediate risk to public safety.

b. The Manner and Scope of the Search was Reasonable

¶ 38 "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Therefore, in applying the exigent circumstances exception, courts must also consider whether the warrantless intrusion was reasonable. That inquiry

turns on the manner and scope of the intrusion. *See Brunsting*, ¶ 31.

¶ 39 Virtually all relevant cases address police intrusions into a person's home. *See, e.g.*, *Aarness*, 150 P.3d at 1279. Those cases make clear that such an intrusion requires the highest degree of protection under the Fourth Amendment. "Unreasonable 'physical entry of the home' is the 'chief evil' against which the Fourth Amendment is directed." *People v. Mendoza-Balderama*, 981 P.2d 150, 166 (Colo. 1999) (citation omitted).

¶ 40 In contrast, the intrusion here was not of Licona-Ortega's home. Rather, this case involved a ping to Licona-Ortega's cell phone to determine its real-time location, a far lesser intrusion.

¶ 41 In *Carpenter*, the United States Supreme Court addressed a warrantless search of cell phone location records. 585 U.S. at ___, 138 S. Ct. at 2217. However, unlike the cell-site location information obtained in *Carpenter*, which spanned 127 days of cell phone records, here the ping of Licona-Ortega's cell phone was intended only to locate and apprehend him. *Id.* at ___, 138 S. Ct. at 2217-18. The limited nature of this intrusion supports our conclusion that this search was reasonable in manner and scope.

¶ 42 Licona-Ortega argues that the trial court erroneously considered the fact that the police saw approximately ten people in the Alaska Place residence to justify the second ping request. He argues this was error because the police requested the second ping after confirming that Licona-Ortega was not in the Alaska Place residence. But the trial court relied on the fact that the police had reason to believe that Licona-Ortega was "in the home with multiple people" to conclude that the *first* ping request (denied by T-Mobile) was justified under section 18-9-312. The trial court did not rely on this fact when it concluded that the *second* ping was justified by exigent circumstances. Therefore, this argument fails.

¶ 43 Licona-Ortega also argues that the trial court got it right when it concluded that section 18-9-312(1.5)(a) did not justify the warrantless ping because it was not clear at the time of the second ping request that there was a "risk of death or serious bodily injury to another person in the named person's company because they don't know where he's at, they don't know who he is with." We agree that the trial court's conclusion in this regard was correct, but that determination, in no way, prevented the trial court from applying the exigent circumstances exception. Indeed, section

16-3-303.5(3)(d) specifically authorizes the police to obtain location information of an electronic device without a warrant when "[t]here exist exigent circumstances such that the search would be recognized as constitutionally permissible without the warrant."

¶ 44 Licona-Ortega finally argues that the trial court erred in its exigent circumstances analysis by presuming that a request for a warrant would have resulted in a delay. *Winpigler* requires the court to examine the "delay likely to be occasioned by obtaining a warrant . . . and the potential risk posed to other persons from any unnecessary delay." 8 P.3d at 446. Although the prosecutor did not elicit testimony from Captain Redfearn about the delay likely to be occasioned by the process of obtaining a warrant, there is no question that some delay in the apprehension of Licona-Ortega would have occurred while awaiting the process of obtaining a search warrant and, as discussed above, that delay (indeed any delay) could have jeopardized the lives and safety of numerous persons.

¶ 45 This conclusion is supported by *People v. Higbee*, where a police bomb squad leader testified that "the threat of injury to himself and fellow officers upon entering the building to neutralize

any explosive device connected to a timer increased with each moment of delay." 802 P.2d 1085, 1090-91 (Colo. 1990). A bomb and an armed killer on the loose are factually distinguishable. Nevertheless, *Higbee* illustrates the application of the exigent circumstances doctrine. Captain Redfearn testified that the police believed Licona-Ortega was still armed and that there was a "risk of him continuing on a violent path" at the time of the second ping request. These facts permitted the trial court to conclude that any delay was a threat to public safety, as in *Higbee*.

¶ 46 For all these reasons, we conclude that, under the specific facts presented by this case, exigent circumstances justified the warrantless ping of Licona-Ortega's cell phone. Accordingly, the trial court correctly denied Licona-Ortega's motion to suppress.

¶ 47 We do not hold that the police always will have an objectively reasonable belief that there is an immediate risk to public safety anytime a violent crime is committed, or that exigent circumstances will always excuse the failure to obtain a warrant in these circumstances. We hold only that under the specific facts of this case, and considering the nature of the intrusion on Licona-Ortega's rights — a ping of a cell phone as opposed to a

forced entry into a residence — the police had an objectively reasonable belief that there was an immediate risk to public safety and that exigent circumstances excused the procuring of a search warrant.

III. The Trial Court Did Not Clearly Err by Denying Licona-Ortega's *Batson* Challenge

¶ 48 Licona-Ortega next argues that the trial court reversibly erred by denying his challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986).

A. Additional Facts

¶ 49 The prosecutor engaged in the following colloquy with Juror 83 during voir dire:

> [Prosecutor]: Do you feel like law enforcement are people you are more or less likely to believe?
>
> [Juror 83]: I mean, they are -- no, not necessarily.
>
> [Prosecutor]: They are people too, right?
>
> [Juror 83]: Yeah.

¶ 50 After the prosecutor's questioning, defense counsel asked Juror 83 if she had anything to add. The following colloquy occurred:

> [Juror 83]: No. I just agree, like I don't think a drug dealer can be a murderer. I think like what other people have said, you're innocent until proven guilty. I think it is important to give people the benefit of the doubt in any situation, just because we don't know what was going on through his mind, we don't know what was going through the other person's mind. We don't know the situation.
>
> [Defense counsel]: Are you comfortable holding the prosecution to their burden to prove what is going through his mind?
>
> [Juror 83]: Yes.

¶ 51 The prosecutor exercised her fifth peremptory challenge against Juror 83. Defense counsel objected to the strike based on *Batson*:

> Judge, at this time we would raise a challenge under *People vs. Batson* as to the release of [Juror 83]. . . . Your Honor, I would note for the Court that [Juror 83] is one of -- is the only Hispanic juror still in the presumptive panel at this point. [Juror 83] in her questions said that she would not be more likely to believe officers, she didn't think that -- she said that -- she said she believed you were innocent until proven guilty. Her questions were not different from any of the other jurors' questions, so we believe that we have met step one of *Batson*.

¶ 52 The trial court initially found that Licona-Ortega made a prima facie showing that the peremptory challenge to Juror 83 was based

on race. Given an opportunity to provide a race-neutral explanation for the strike, the prosecutor responded as follows:

> Judge, our concern was that in response to the question she said that you never -- I think she said it to both me and the defense. She said you never know what -- you can't know what is going through people's minds. My concern is she is going to increase the burden to meet the mens rea, and additionally she is probably going to be inclined to speculate. And so in light of those factors, and frankly that one comment, I truly have concerns about her being a fair juror for the People.

¶ 53 Defense counsel argued that the prosecutor's reason was not credible, stating:

> I don't believe that her comments were that different from other jurors who have not been kicked. She said that she is comfortable with holding the prosecution to their burden, she said you are innocent until proven guilty, she basically agreed with various tenets of the law, as other jurors did, and in saying that you don't know what is going through his mind, she didn't say that she would require any additional burden. It was not a comment that was different from what other people made.

¶ 54 The trial court denied the *Batson* challenge, finding:

> Specifically as to [Juror 83]'s responses regarding not being able to tell what is going through a person's mind as related to this particular case, I will note that I struck other jurors for cause, including No. 8 and No. 89,

> because they essentially could not or were unwilling to consider the mens rea. The fact that [Juror 83] has a problem or has expressed a concern determining what someone's -- what someone is thinking based on their actions is a race-neutral reason related to the case. It didn't rise to a challenge for cause, but I do find that under the second step that the People have come forward with a race-neutral explanation that is related to this particular case to be tried, so I will deny the challenge as to *Batson*.[5]

B. Applicable Law and Standard of Review

¶ 55 The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits racial discrimination in jury selection. U.S. Const. amend. XIV; Colo. Const. art. II, §§ 16, 25; *Batson*, 476 U.S. at 85-86; *see also People v. Beauvais*, 2017 CO 34, ¶ 20.

¶ 56 In *Batson*, the United States Supreme Court created a three-step framework for trial courts to use when determining whether the striking party excused a potential juror on a discriminatory basis. *Beauvais*, ¶ 21; *People v. Madrid*, 2021 COA 70, ¶ 7.

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[5] Although the trial court's oral ruling did not specify that it was making the *Batson* step three determination, the context makes clear that it was.

¶ 57 First, the objecting party must make a prima facie showing that the striking party exercised a peremptory challenge on a discriminatory basis. *Madrid*, ¶ 7.

¶ 58 Second, if the objecting party makes out a prima facie case, the burden shifts to the striking party to offer a race-neutral reason for the peremptory strike. *People v. Ojeda*, 2022 CO 7, ¶ 23. The explanation must be "related to the particular case to be tried," but it need not be "persuasive, or even plausible," as long as it does not deny equal protection. *People v. Rodriguez*, 2015 CO 55, ¶ 11 (citations omitted).

¶ 59 Third, after the objecting party has a chance to rebut the striking party's race-neutral explanation, the "trial court must decide the ultimate question: whether the [objecting party] has established purposeful discrimination." *Id.* at ¶ 12. The "trial court's step-three ruling should be based on its evaluation of the prosecutor's credibility and the plausibility of his explanation." *Id.*

¶ 60 On appeal, Licona-Ortega challenges the trial court's step-three determination. "[T]he trial court's step-three determination as to the existence of racial discrimination is an

issue of fact to which an appellate court should defer, reviewing only for clear error." *Id.* at ¶ 13.

C. Analysis

¶ 61 Licona-Ortega argues that the trial court clearly erred by denying his *Batson* challenge because the prosecutor barely spoke to Juror 83, mischaracterized Juror 83's comments, and did not seek to remove other white jurors who made comments similar to Juror 83's comments. He also argues that the trial court clearly erred by finding that Juror 83 had a "problem or . . . concern determining . . . what someone is thinking based on their actions" and by comparing the comments of Juror 83 to those of Jurors 89 and 8. We address and reject Licona-Ortega's arguments, concluding that the trial court did not clearly err by denying his *Batson* challenge.

1. The Prosecutor's Limited Questioning of Juror 83

¶ 62 Licona-Ortega argues that the trial court clearly erred by denying his *Batson* challenge because the prosecutor barely spoke to Juror 83 during voir dire.

¶ 63 In *People v. Gabler*, the prosecutor initially declined to exercise his remaining peremptory challenges, accepting an all-white panel.

958 P.2d 505, 507 (Colo. App. 1997). "The defense then continued exercising its peremptory challenges which resulted in two African-Americans joining the panel." *Id.* The prosecutor struck both of the new jurors, even though he had not questioned either of them. *Id.* at 507-08. Unlike in *Gabler*, the prosecutor here spoke to Juror 83 during voir dire. True, the conversation between the prosecutor and Juror 83 was brief, but that fact alone does not support a conclusion that the trial court's step-three determination was clearly erroneous. *Gabler* is also distinguishable because there, unlike here, the prosecutor struck two jurors of the same race after having accepted a previous all-white panel.

2. The Prosecutor's Misstatement of Juror 83's Comments

¶ 64 During voir dire, Juror 83 said "we *don't* know what was going on through his [a defendant's] mind, we *don't* know what was going through the other person's mind. We *don't* know the situation." (Emphasis added.) By contrast, when the prosecutor proffered her race-neutral reason for the strike she characterized Juror 83's comment as "you *can't* know what is going through people's minds." (Emphasis added.)

¶ 65 A prosecutor's mischaracterization of a potential juror's voir dire statements may suggest a race-based motive for the strike. *See Miller-El v. Dretke*, 545 U.S. 231, 244-45 (2005) ("[The prosecutor] represented that [the prospective juror] said he would not vote for death if rehabilitation was possible, whereas [the prospective juror] unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation."). On the other hand, *Batson*'s purpose is to expose and prevent racial discrimination in jury selection, not to test a prosecutor's memory. *See People v. Wilson*, 2015 CO 54M, ¶ 18. In *Wilson*, the prosecutor said that she had excused the potential juror because of his discomfort with DNA evidence and his inability to return a guilty verdict without eyewitness identification. *Id.* at ¶ 19. The division in *Wilson* held that the trial court erred by denying Wilson's *Batson* challenge because "the prosecutor's account of [the prospective juror]'s responses conflicted with the transcript of voir dire." *Id.* at ¶ 20.

¶ 66 The supreme court reversed the court of appeals' analysis and judgment, reasoning that the "prosecutor's possible erroneous recollection" did not necessarily demonstrate the purposeful discrimination that *Batson* prohibits. *Id.* at ¶ 23. A mistake by the

prosecutor was insufficient to prove that race motivated her decision to strike the potential juror. *Id.* Instead, the supreme court in *Wilson* emphasized that the trial court, not the appellate court, observed the prosecutor's demeanor firsthand and that the trial court's finding that the prosecutor was credible deserved deference because the "trial judge is the judicial officer who watches and listens as voir dire unfolds, and who can discern the presence or absence of discriminatory intent." *Id.* (quoting *Valdez v. People*, 966 P.2d 587, 599 (Colo. 1998) (Kourlis, J., dissenting)). Credibility and demeanor determinations lie peculiarly within a trial judge's province. *Beauvais*, ¶ 21.

¶ 67 As in *Wilson*, the prosecutor here mischaracterized (albeit not to the same extent as in *Miller-El*) Juror 83's comments by replacing the word "don't" with the word "can't." The prosecutor also stated that Juror 83 made this comment to both the prosecutor and defense counsel when, in fact, she only made the statement to defense counsel.

¶ 68 The substitution of the word "can't" for "don't" arguably changed the meaning of Juror 83's statement. But, as in *Wilson*, neither this discrepancy nor the fact that Juror 83 only made this

statement in response to defense counsel's question warrants rejection of the trial court's factual determinations. Importantly, the trial court, not us, observed Juror 83's comments and the prosecutor's demeanor when she gave this race-neutral reason for the strike.

3. The Prosecutor's Failure to Strike White Jurors Whose Comments were Similar to Juror 83's Comments

¶ 69 To the extent a comparative analysis of jurors is not precluded by *Beauvais*, Licona-Ortega further argues that the prosecutor's failure to remove other jurors who made comments similar to Juror 83's comments evidences disparate treatment, rendering the trial court's denial of his *Batson* challenge clearly erroneous.[6]

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[6] Relying on *People v. Beauvais*, 2017 CO 34, ¶ 56, the Attorney General argues that "isolated similarities do not automatically render two jurors 'similarly situated' for purposes of deciding a *Batson* challenge." Licona-Ortega counters that argument by contending that at least that portion of *Beauvais* was overruled by the United States Supreme Court's later decision in *Flowers v. Mississippi*, 588 U.S. ___, ___, 139 S. Ct. 2228, 2249 (2019). Whether *Flowers* implicitly overruled or casts doubt on any part of *Beauvais* is a question to be decided by either the Colorado Supreme Court or the United States Supreme Court, not this court. In the absence of a clear, constitutionally based decision by the United States Supreme Court overruling or undermining *Beauvais*, we remain bound by it. *See In re Estate of Ramstetter*, 2016 COA 81, ¶ 40. *Flowers* does not clearly overrule any part of *Beauvais*.

¶ 70 During voir dire, Juror 32 said, in response to a hypothetical about someone running a red light, "They could have something else going on, but I don't know all of the situation. Don't try to spend my day trying to figure out what is going on in everyone else's head." Juror 32 served on the jury.

¶ 71 To the extent that Juror 32's first statement was similar to Juror 83's statement "We don't know the situation," that statement was not the basis of the prosecutor's race-neutral reason for the peremptory strike of Juror 83. Accordingly, any similarity in those two statements does not bear on our analysis.

¶ 72 Despite the similarity between Juror 32's second statement and Juror 83's statement that formed the basis for the prosecutor's race-neutral reason for the peremptory strike, for two reasons we conclude that the similarity between these two stray comments does not support a conclusion that the trial court clearly erred.

¶ 73 First, the statements were made in response to different questions. Juror 32 was commenting on a red-light hypothetical, whereas Juror 83 was offering her thoughts relating to whether she could presume a drug dealer innocent — facts far closer to those at issue in this case than the red-light hypothetical. Juror 32's

comment — "Don't try to spend my day trying to figure out what is going on in everyone else's head" — reflected his day-to-day experiences. Juror 83's comment was in response to a conversation about the presumption of innocence, which was directly related to trial. Accordingly, Juror 32's comments did not raise the same burden of proof and speculation concerns that Juror 83's comments did.

¶ 74 Second, the prosecutor's race-neutral reason for striking Juror 83 was that Juror 83 might hold the prosecution to an increased burden and speculate. Having observed Juror 83 and the prosecutor firsthand, the trial court concluded that the prosecutor stated a race-neutral reason related to the case and denied the *Batson* challenge. The imprecise nature of Juror 83's comments require deference to the trial court's factual findings. *See Wilson*, ¶ 23.

¶ 75 Licona-Ortega next points to Juror 27, who served on the jury after saying he was "comfortable with holding the People to their burden to prove not only the act, but also the mental state." True, Juror 83 similarly said that she was "comfortable holding the

prosecution to their burden to prove what is going through [the defendant's] mind."

¶ 76 But, unlike Juror 27, Juror 83 also opined that "we don't know what was going on through his mind, we don't know what was going through the other person's mind." This statement, which served as the basis for the prosecutor's race-neutral explanation for the peremptory strike, distinguishes Juror 83 from Juror 27.

¶ 77 Licona-Ortega also points out that all jurors who served agreed to apply the law just as Juror 83 did. Again, these jurors are readily distinguishable from Juror 83 because of the statements Juror 83 made to defense counsel that served as the basis for the prosecutor's race-neutral explanation.

4. Portions of the Trial Court's Reasoning are Not Supported by the Record

¶ 78 The trial court found that Juror 83 had a "problem or . . . concern determining . . . what someone is thinking based on their actions." But Juror 83 did not make such a statement. Nevertheless, Juror 83's actual comment was imprecise. And, depending on extra-record factors (like Juror 83's demeanor) that may not be readily apparent from a transcript, it may have been

possible to interpret Juror 83's statements to defense counsel as expressing a concern about determining what someone is thinking based on that person's actions, as both the trial court and prosecutor apparently interpreted them.

5. The Trial Court's Comparison of Juror 83's Comments to the Comments of Jurors 89 and 8

¶ 79 During voir dire, Juror 89 agreed that if a gun was used to kill someone, "it must have been with intent and after deliberation." Defense counsel challenged Juror 89 for cause, the prosecutor agreed, and the court excused Juror 89.

¶ 80 Juror 8, on the other hand, said that "pulling the trigger is a pretty big decision that you think about before you do it, so I don't think I would care" if the prosecution proves what was going through his mind. Juror 8 also said it would be difficult for her to follow an instruction "that the use of a deadly weapon in and of itself does not prove after deliberation and with intent." Defense counsel challenged Juror 8 for cause. The prosecutor objected. She argued that the court had not yet read the mental state instructions when Juror 8 made her comments and that Juror 8 did not have a chance to respond after the instructions were read.

She further argued that pointing a gun at someone and pulling the trigger are indicia of intent. The trial court granted the challenge for cause.

¶ 81 We reject Licona-Ortega's argument that the trial court clearly erred by comparing the comments of Juror 83 to the comments of Jurors 89 and 8 because all three jurors expressed opinions related to the mental state element.

¶ 82 Licona-Ortega further argues that the prosecutor's strong resistance to the for-cause challenge to Juror 8 compared with the prosecutor's peremptory strike of Juror 83 proves racial discrimination. We disagree. The opinions expressed by Jurors 8 and 89 were favorable to the prosecution, whereas the statements by Juror 83 were favorable to the defense. This race-neutral distinction between the views expressed by Jurors 8 and 89 and Juror 83 reveals that the prosecutor's reason for striking Juror 83 was based on nondiscriminatory trial strategy. *See Wilson*, ¶ 21. Additionally, we agree with the trial court that a prosecutor's race-neutral explanation "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97.

¶ 83 The court's ultimate determination that Licona-Ortega did not prove by a preponderance of the evidence that Juror 83 was excluded because of race is supported by the record. Accordingly, the trial court did not clearly err by denying Licona-Ortega's *Batson* challenge.

IV. The Prosecutor Did Not Engage in Reversible Misconduct

¶ 84 Licona-Ortega finally contends that prosecutorial misconduct deprived him of a fair trial.

A. Applicable Law

¶ 85 We engage in a two-step analysis when reviewing claims of 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. *Id.* Second, we decide whether the misconduct warrants reversal under the applicable standard. *Id.*

¶ 86 Preserved claims of prosecutorial misconduct that "specifically and directly offend[s]" a constitutional right are reviewed for constitutional harmless error. *Id.* at 1097. Under constitutional harmless error review, reversal is required unless there is no

reasonable possibility that the error might have contributed to the conviction. *Zoll v. People*, 2018 CO 70, ¶ 18.

¶ 87 Preserved claims of prosecutorial misconduct that does not specifically and directly offend a constitutional right are reviewed for harmless error. *People v. Rhea*, 2014 COA 60, ¶ 42. Under harmless error review, we will disregard the error unless it "substantially influenced the verdict or affected the fairness of the trial proceedings." *Hagos v. People*, 2012 CO 63, ¶ 12 (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)).

¶ 88 Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v. Rediger*, 2018 CO 32, ¶ 40. To constitute plain error, any prosecutorial misconduct must be obvious and "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).

B. Analysis

¶ 89 Licona-Ortega argues that the prosecutor committed reversible misconduct in voir dire by conflating "after deliberation" with intent, trivializing the element of "after deliberation," and lowering the

prosecutor's burden. He further argues that the prosecutor committed misconduct in closing argument by conflating "after deliberation" with the word "deliberate" and by arguing that "after deliberation" could be proved with evidence of volitional acts. Licona-Ortega also argues that the prosecutor misrepresented evidence, mischaracterized the heat of passion mitigator, and misstated the required mens rea for first degree murder.

1. Voir Dire

¶ 90 During voir dire, the prosecutor attempted to illustrate the meaning of "after deliberation" by asking the jurors about the steps they would take before exiting the highway. Initially, the trial court permitted the use of the exiting-the-highway analogy. But, during closing argument, when the prosecutor revisited this analogy, the trial court instructed the jury to disregard it.

¶ 91 Thus, prior to deliberations, the court specifically instructed the jury to disregard the exiting-the-highway analogy. "Absent a showing to the contrary, we must presume that the jury understood and followed the trial court's instructions." *People v. Bass*, 155 P.3d 547, 552 (Colo. App. 2006). Licona-Ortega has not pointed to any evidence suggesting that the jury misunderstood or did not

follow the trial court's instruction to disregard the exiting-the-highway analogy. But he argues, based on *People v. Fortson*, 2018 COA 46M, that the instruction to disregard the analogy was too late.

¶ 92 In *Fortson*, "the prosecutor engaged in misconduct by repeatedly referencing uncharged sexual assaults by Fortson." *Id.* at ¶ 65. Given the highly prejudicial nature of the prosecutor's statements, which "risked a guilty verdict based on considerations other than the evidence of the charged acts presented at trial," the *Fortson* division concluded that this misconduct warranted reversal even though the jury was properly instructed. *Id.* at ¶¶ 67-69.

¶ 93 The prosecutor's exiting-the-highway analogy bears no resemblance to the highly prejudicial misconduct in *Fortson*. So we follow the general rule and presume that the jury understood and followed the trial court's instruction to disregard the prosecutor's exiting-the-highway analogy. Accordingly, we need not further address the propriety of the exiting-the-highway analogy.

2. Closing Argument

¶ 94 During closing argument, the prosecutor argued that "after deliberation" was proved because of the individual "deliberate" steps

Licona-Ortega took toward killing the victim. The parties apparently agree that this claim of error was preserved for appeal.

¶ 95 Licona-Ortega argues that the prosecutor's use of the word "deliberate" instead of the phrase "after deliberation" minimized the "after deliberation" element. To the extent we understand this argument, we reject it.

¶ 96 During closing argument, prosecutors have "wide latitude in the language and presentation style used to obtain justice." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). Additionally, "because 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." *People v. Samson*, 2012 COA 167, ¶ 30. We conclude that the prosecutor's use of the word "deliberate" to describe the element "after deliberation" was not improper.

¶ 97 Licona-Ortega also argues that the prosecutor minimized the "after deliberation" element by arguing that it could be proved by Licona-Ortega's volitional actions. "The element of deliberation, like intent, can rarely be proven other than through circumstantial or indirect evidence." *People v. Dist. Ct.*, 926 P.2d 567, 571 (Colo.

1996). Instead, indirect proof that the defendant acted after deliberation "may include the use of a deadly weapon, the manner in which it was used, and the existence of hostility between the accused and the victim." *Id.* Accordingly, the prosecutor did not commit misconduct by arguing that "after deliberation" could be proved by Licona-Ortega's volitional actions.

¶ 98 Even assuming the prosecutor's arguments regarding "after deliberation" were improper, they were harmless under any standard of review. First, the jury was properly instructed on the element of "after deliberation." As discussed, absent evidence to the contrary (of which there is none here) we presume the jury understood and followed the trial court's instructions. *Bass*, 155 P.3d at 552.

¶ 99 Second, evidence that Licona-Ortega killed Chacon-Ortega with intent after deliberation was overwhelming. *See People v. Daley*, 2021 COA 85, ¶ 99 (an error may be harmless if there was overwhelming evidence of guilt). Evidence presented at trial allowed the jury to find that Licona-Ortega showed his gun to Chacon-Ortega's brother, threatened to empty his gun on Chacon-Ortega's head, called for his ride and confirmed it had

arrived before agreeing to take the fight outside, followed Chacon-Ortega to the exit of the bar, and shot Chacon-Ortega in the head five times.

¶ 100 Licona-Ortega also contends the prosecutor's argument that Licona-Ortega "waited" four times "for the cylinder to move to the next chamber" because "this isn't an automatic weapon" misrepresented the evidence.

¶ 101 At trial, the prosecutor called Dale Higashi, who was qualified as an expert in the field of firearms and tool mark examination. Higashi testified that the revolver Licona-Ortega used was a double-action revolver, meaning that "each time you pull the trigger, it rotates a cylinder and you can fire another round."

¶ 102 In light of the overwhelming, above-cited evidence that Licona-Ortega killed Chacon-Ortega after deliberation, we conclude that even if Licona-Ortega preserved this claim of error for review and even if the prosecutor's closing argument did not accurately capture the expert's testimony as to how the revolver functioned, any error was harmless.

¶ 103 Licona-Ortega finally argues that the prosecutor mischaracterized the "heat of passion" mitigator and other lesser homicide offenses during closing argument.

¶ 104 During closing argument, the prosecutor argued that just because Licona-Ortega may have been "scared, angry, upset, [or] humiliated, that doesn't equal a defense, that equals deliberation and intent." Licona-Ortega contends that this argument (and a related PowerPoint slide) mischaracterized the heat-of-passion mitigator as a defense to first degree murder.

¶ 105 The prosecutor's use of the word "defense" when referring to heat of passion was inaccurate. *See* § 18-3-103(3)(b), C.R.S. 2021 (explaining that "murder in the second degree is a class 3 felony where the act causing the death was performed upon a sudden heat of passion"). But, as we already mentioned above, reviewing courts accord prosecutors the benefit of the doubt when their remarks are ambiguous or simply inartful. *People v. McMinn*, 2013 COA 94, ¶ 60.

¶ 106 Though inaccurate, this argument by the prosecutor was harmless under any standard. As discussed above, the jury was properly instructed on the meaning of "after deliberation," and

Licona-Ortega has not pointed to any evidence suggesting that the jury misunderstood or did not follow this instruction. Accordingly, we must presume that the jury followed the trial court's "after deliberation" instruction. *See Bass*, 155 P.3d at 552. And, as discussed above, the evidence that Licona-Ortega killed Chacon-Ortega after deliberation (and not in a heat of passion) was overwhelming.

¶ 107 During rebuttal closing argument, the prosecutor characterized Licona-Ortega's mental state during the shooting as "way more than knowingly" to argue that the prosecution had proved first (versus second) degree murder.

¶ 108 In addition to first degree murder, the jury was instructed on second degree murder. Second degree murder requires a knowing mental state, whereas first degree murder requires a mental state of after deliberation and with intent. *Compare* § 18-3-103(1)(a), *with* § 18-3-102(1)(a), C.R.S. 2021. When a knowing mental state is required, evidence that the person acted intentionally necessarily establishes that the person also acted knowingly. Model Penal Code § 2.02(5) (Am. L. Inst. 1985). We also afford prosecutors considerable latitude in responding to defense counsel's arguments.

Samson, ¶ 30. Accordingly, while possibly inartful, the prosecutor's statement that she had proved that Licona-Ortega acted with a "way more than knowingly" mental state was not improper.

¶ 109 For these reasons, we conclude that the prosecutor did not commit reversible misconduct.

V. Disposition

¶ 110 The judgment of conviction is affirmed.

JUDGE BROWN and JUDGE JOHNSON concur.