SUMMARY
April 11, 2024

2024COA34

No. 22CA0667, *People v. Martinez* — Constitutional Law — Due Process; Criminal Law — Indictment and Information — Constructive Amendment

A division of the court of appeals considers whether a defendant's due process rights are violated when the court enters a judgment of conviction on an uncharged lesser nonincluded offense — premised on the jury's answer to a verdict question presented in a special interrogatory at the close of evidence — even though the defendant knew about the fact addressed in the verdict question from the inception of the case. The division holds that, notwithstanding the defendant's knowledge of the fact, the constitution prohibits the court from relying on the jury's answer to the verdict question to enter a judgment of conviction on the uncharged lesser nonincluded offense.

In this case, the trial court erred by relying on the jury's answer to an at-risk-person verdict question to enter a judgment of conviction for the uncharged lesser nonincluded offense of criminal negligence resulting in the death of an at-risk person. This amounted to a constructive amendment and resulted in a violation of the defendant's due process rights.

Because the constructive amendment was not harmless under any standard of review, the division reverses the judgment of conviction for criminal negligence resulting in the death of an at-risk person and remands the case for the trial court to enter a judgment of conviction for criminally negligent homicide. The division affirms the judgment of conviction for second degree assault.

COLORADO COURT OF APPEALS **2024COA34**

Court of Appeals No. 22CA0667
City and County of Denver District Court No. 20CR2834
Honorable Jay S. Grant, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Stephanie Martinez,

Defendant-Appellant.

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

Division VII
Opinion by JUDGE LIPINSKY
Tow and Grove, JJ., concur

Announced April 11, 2024

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¶ 1 Our system of criminal justice does not condone forcing a defendant to guess the charges the defendant will face at trial. "The right of an accused to notice of the charges which have been made against [the accused] constitutes a fundamental constitutional guarantee and lies at the foundation of due process of law." *People v. Cooke*, 186 Colo. 44, 46, 525 P.2d 426, 428 (1974).

¶ 2 These due process principles underlie the prohibition against "constructive amendments." A constructive amendment occurs when a court "changes an essential element of the charged offense and thereby alters the substance of the charging instrument." *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996). Such a difference between the charging instrument and the judgment of conviction "contravenes a defendant's constitutional rights when it 'effectively subject[s] [the] defendant to the risk of conviction for an offense that was not originally charged.'" *Hoggard v. People*, 2020 CO 54, ¶ 24, 465 P.3d 34, 41 (quoting *Rodriguez*, 914 P.2d at 257).

¶ 3 In this case, we consider whether a defendant's due process rights are violated when the court enters a judgment of conviction on an uncharged lesser nonincluded offense — premised on the jury's answer to a verdict question presented in a special

interrogatory (the interrogatory) at the close of evidence — even though the defendant knew about the fact addressed in the verdict question from the inception of the proceedings.

¶ 4 We hold that, notwithstanding the defendant's awareness of the undisputed fact, the constitution prohibits a court from relying on the jury's answer to the interrogatory to enter a conviction on the lesser nonincluded offense because such use of the answer "effectively subject[s] [the] defendant to . . . conviction for an offense that was not originally charged." *Rodriguez*, 914 P.2d at 257 (quoting *United States v. Mosley*, 965 F.2d 906, 915 (10th Cir. 1992)). Due process protects a defendant not only from surprise regarding evidence offered at trial, but also from surprise regarding the charges for which she is prosecuted, so she can tailor her defense and trial strategy appropriately. *See Cooke*, 186 Colo. at 46, 525 P.2d at 428.

¶ 5 In the absence of guidance from our supreme court whether a constructive amendment is a structural error, requiring automatic reversal, we apply the constitutional harmless error standard of review and conclude that, in this case, the People did not prove

beyond a reasonable doubt that the constructive error was harmless.

¶ 6 Stephanie Martinez appeals the judgment of conviction for criminal negligence resulting in the death of an at-risk person and second degree assault. The jury specifically found Martinez guilty of criminally negligent homicide and that her victim was an at-risk person. We reverse Martinez's conviction for criminal negligence resulting in the death of an at-risk person but affirm her conviction for second degree assault, and we remand the case with instructions to enter a conviction for criminally negligent homicide.

I. Background

¶ 7 A jury could have reasonably found the following facts.

¶ 8 Martinez was sitting on a bench in downtown Denver next to George Black, an eighty-year-old man. A surveillance video showed that Martinez struck Black several times, they became entangled and fell to the ground, and a bystander intervened and chased Martinez away. Black had a heart attack and was pronounced dead less than two hours after the altercation.

¶ 9 Martinez was arrested. As law enforcement officers attempted to place her into a holding cell at the Denver jail, Martinez spat in the face of Officer Kenneth Bridges, who was wearing a face mask.

¶ 10 Martinez was charged with two counts of first degree murder of Black, pursuant to section 18-3-102(1)(a) and (d), C.R.S. 2023; second degree assault of Officer Bridges, pursuant to section 18-3-203(1)(h), C.R.S. 2023; and violation of bail bond conditions, pursuant to section 18-8-212(1), C.R.S. 2023. (The charge for violation of bail bond conditions was later dismissed.)

¶ 11 At the conclusion of trial, the jury acquitted Martinez of first degree murder but found her guilty of the lesser included offense of criminally negligent homicide. It also found that Black was an at-risk person. Based on those findings, the court entered a conviction for criminal negligence resulting in the death of an at-risk person under section 18-6.5-103(2)(a), C.R.S. 2023. Applying the crime of violence sentencing framework, the court sentenced Martinez to fourteen years in the custody of the Department of Corrections.

¶ 12 Additionally, the court entered a judgment of conviction based on the jury's verdict finding Martinez guilty of second degree assault

(bodily fluids), pursuant to section 18-3-203(1)(h). The court sentenced Martinez to two years in the custody of the Department of Corrections on that charge, with the sentences to run consecutively.

II. Analysis

¶ 13 On appeal, Martinez contends that (1) the court violated her due process and statutory rights by entering a conviction on and sentencing her for an uncharged, lesser nonincluded offense over her objection — amounting to a constructive amendment of the information; (2) there was insufficient evidence to support a finding that she had the intent to infect, injure, or harm Officer Bridges and, therefore, to sustain the second degree assault conviction; and (3) the court reversibly erred by excluding evidence that Martinez asked law enforcement personnel if she was "going to detox." We agree with her first argument and disagree with her second and third arguments.

A. Constructive Amendment

1. Additional Facts

¶ 14 Three days after the incident, the prosecution filed an information charging Martinez with two counts of first degree

murder pursuant to section 18-3-102 under subsection (1)(a) (after deliberation) and subsection (1)(d) (extreme indifference). The information did not allege that the victim — Black — was an at-risk person, refer to Black's age, or allege a separate count for a crime of violence.

¶ 15 At a pretrial conference, defense counsel indicated that she would likely seek jury instructions for all the lesser included homicide offenses. The prosecution did not move to amend the information under Crim. P. 7(e).

¶ 16 On the last day of trial, the prosecutor asked the court to provide the jury with an at-risk-person interrogatory "because of the nature of the lesser includeds that the Defense has asked for." The prosecutor explained that the jury's answer to the interrogatory would then "make those counts crimes of violence," or could otherwise be used as an aggravating factor at sentencing. The court allowed the interrogatory over defense counsel's objection. In addition to instructions for first degree murder (after deliberation) and (extreme indifference), the court also gave the jury instructions and verdict questions for the lesser included offenses of second

degree murder, reckless manslaughter, and criminally negligent homicide.

¶ 17 The jury acquitted Martinez of first degree murder but found her guilty of the lesser included offense of criminally negligent homicide, a class 5 felony under section 18-3-105, C.R.S. 2023, with a presumptive sentencing range of one to three years' imprisonment. *See* § 18-1.3-401(1)(a)(V)(A.1), C.R.S. 2023. It also found that Black was an at-risk person.

¶ 18 The prosecution filed a post-trial motion requesting that the court sentence Martinez for criminal negligence resulting in the death of an at-risk person, a class 4 felony under section 18-6.5-103(2)(a), and a crime of violence as defined by section 18-1.3-406(2)(a)(I), C.R.S. 2023, with a sentencing range of five to sixteen years imprisonment. *See* § 18-1.3-406(1)(a); § 18-1.3-401(1)(a)(V)(A.1), (10)(a). The prosecution conceded that it had not charged Martinez under the crimes against at-risk persons statute. However, the prosecution asserted that a judgment of conviction for the lesser nonincluded offense would not raise due process concerns because it requested the interrogatory "only after [Martinez] requested several lesser included offenses."

¶ 19 The court granted the motion. As noted above, it entered a judgment of conviction for criminal negligence resulting in the death of an at-risk person, and sentenced Martinez to fourteen years on that charge.

¶ 20 On appeal, Martinez contends that, by entering a conviction and sentencing her on this uncharged, lesser nonincluded offense, the court violated her constitutional right to due process. We agree.

2. Relevant Law and Standard of Review

¶ 21 "The U.S. and Colorado Constitutions guarantee defendants the right to be notified of the charges against them." *Hoggard*, ¶ 22, 465 P.3d at 40. An information serves this constitutional interest by "provid[ing] the defendant with notice of the offense charged, as well as the factual circumstances surrounding the offense so that the defendant can adequately defend . . . herself." *Fisher v. People*, 2020 CO 70, ¶ 14, 471 P.3d 1082, 1086 (quoting *People v. Williams*, 984 P.2d 56, 60 (Colo. 1999)). "The notice given must be sufficient to advise the accused of the charges, to give [her] a fair and adequate opportunity to prepare [her] defense, and to ensure that [s]he is not taken by surprise because of evidence offered at the time of trial." *Cooke*, 186 Colo. at 46, 525 P.2d at 428.

¶ 22 Notice of a charged offense also provides adequate notice of uncharged lesser *included* offenses. *People v. Duran*, 272 P.3d 1084, 1095 (Colo. App. 2011). An offense is a lesser included one if it is "established by proof of the same or less than all the facts required to establish the commission of the offense charged." § 18-1-408(5)(a), C.R.S. 2023.

¶ 23 "The prosecution cannot constitutionally require a defendant to answer a charge not contained in the charging instrument." *Rodriguez*, 914 P.2d at 257. Thus, the constitution prohibits constructive amendments, which effectively subject the defendant to the risk of conviction for an uncharged offense. *Id.*

¶ 24 We "review de novo whether a constructive amendment occurred." *People v. Carter*, 2021 COA 29, ¶ 35, 486 P.3d 473, 481.

3. The Court Violated Martinez's Right to Due Process by Constructively Amending the Information

¶ 25 The court constructively amended the information when it entered a conviction for a lesser nonincluded offense for which Martinez was never charged — criminal negligence resulting in the death of an at-risk person. (We do not consider whether an *actual*

amendment occurred because the parties only argue the issue of constructive amendment.)

¶ 26 In the information, the prosecution charged Martinez with the first degree murder of Black — a crime for which Black's characteristics were not an essential element. Specifically, the information put Martinez on notice that the prosecution would seek to prove that Martinez,

- "[a]fter deliberation and with the intent to cause the death of a person other than [herself], . . . cause[d] the death" of Black, § 18-3-102(1)(a); or
- "[u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, . . . knowingly engage[d] in conduct which create[d] a grave risk of death to a person, or persons, other than [herself], and thereby cause[d] the death" of Black. § 18-3-102(1)(d).

The prosecution could secure a conviction under either provision without proving anything about Black, apart from his death.

¶ 27 However, the court deviated from the information when it entered a conviction under the crimes against at-risk persons

statute, which renders the victim's characteristics an essential element of the offense. *See* § 18-6.5-103(2)(a). Conviction under this provision required proof that Martinez's "conduct amount[ed] to criminal negligence" and that "such negligence result[ed] in the death of an at-risk person." § 18-6.5-103(2)(a). As relevant here, an at-risk person includes "any person who is seventy years of age or older." § 18-6.5-102(2), C.R.S. 2023.

¶ 28 While certain of the elements of first degree murder overlap with those of criminal negligence resulting in the death of an at-risk person, the latter offense requires an element that the former does not — that the victim be an at-risk person. As noted above, nothing in the information referred to Black's age or otherwise indicated that he was an at-risk person. Thus, because the interrogatory "expanded the bases" upon which Martinez could be convicted beyond first degree murder and its lesser included offenses, the court's entry of a judgment of conviction in reliance on the jury's answer to the interrogatory constructively amended the information. *People v. Deutsch*, 2020 COA 114, ¶ 27, 471 P.3d 1266, 1273. The judgment of conviction that the court entered premised on the jury's interrogatory answer did not result in a

simple variance, as the People contend. *See People v. Pahl*, 169 P.3d 169, 177 (Colo. App. 2006) ("A simple variance occurs when the charged elements are unchanged, but the evidence presented at trial proves facts materially different from those alleged in the indictment.").

¶ 29 The People also argue that the court did not err because Black's at-risk status was "indisputably established pretrial"; Martinez "had proper notice of Mr. Black's age and its import"; and in any event, Martinez was "strictly liable for Mr. Black's at-risk status." These arguments miss the mark because, regardless of whether Martinez knew of Black's at-risk status, the prosecution could not "constitutionally require [her] to answer a charge not contained in the charging instrument." *Rodriguez*, 914 P.2d at 257. Even if Martinez was "not taken by surprise because of evidence offered at the time of trial," the information still needed to "be sufficient to advise [Martinez] of the *charge[s]*" against her and give her "a fair and adequate opportunity to prepare [her] defense" against those charges. *Cooke*, 186 Colo. at 46, 525 P.2d at 428 (emphasis added).

¶ 30 In preparing her defense, Martinez was entitled to rely on the prosecution's decision to charge her with only first degree murder. *Fisher*, ¶ 21 n.3, 471 P.3d at 1088 n.3. Her awareness of Black's at-risk status does not mean she was on notice that she needed to prepare a defense against any potential uncharged offense arising out of that status. *See id.* In other words, the key question is not whether Martinez knew Black's at-risk status; rather, it is whether she knew she was being *prosecuted* for a crime based on that status. As explained above, she did not know that she was being prosecuted for an offense under the crimes against at-risk persons statute until the last day of trial, when the prosecution requested the interrogatory.

¶ 31 We also reject the People's argument that Martinez "strategically consented to the at-risk instruction." As the People acknowledge, Martinez's counsel only requested that the court provide the jury with instructions on the lesser *included* offenses for first degree murder, including criminally negligent homicide. It was the prosecution who requested the interrogatory. Martinez's attorney contemporaneously objected to the interrogatory to the extent that it subjected Martinez to conviction for the lesser

nonincluded offense of criminal negligence resulting in the death of an at-risk person. *See People v. Naranjo*, 2017 CO 87, ¶ 17, 401 P.3d 534, 538 (explaining that a lesser nonincluded offense "is a lesser offense that requires proof of at least one element not contained in the charged offense").

¶ 32 We are not aware of any authority entitling the prosecution to a jury instruction for the purpose of convicting the defendant on a lesser nonincluded offense merely because "there exists a rational basis in the evidence to simultaneously acquit the defendant of the greater charged offense and convict the defendant of the lesser offense"; that right belongs to the defendant. *Id.* at ¶ 2, 401 P.3d at 535. If the prosecution believed, as the People argue on appeal, that a lesser nonincluded offense "fit the facts of the case" better than the lesser included offenses did, it should have included that offense in the information or in an amended information before trial, *see* Crim. P. 7(e), and not raised it on the last day of trial through a verdict question and post-trial motion that led to a constructive amendment of the information. *See Rodriguez*, 914 P.2d at 257 ("The prosecution cannot constitutionally require a

defendant to answer a charge not contained in the charging instrument.").

¶ 33 We also disagree with the People that "there was no way that the prosecution could have plead[ed] and proven a crime of violence" before Martinez requested the lesser included offense instructions. "Prosecutorial discretion to bring or not bring charges is extraordinarily wide." *People v. Weiss*, 133 P.3d 1180, 1189 (Colo. 2006). Nothing prevented the prosecution from charging Martinez with a crime of violence in the information, based on Black's at-risk status, in addition to the first degree murder charge.

¶ 34 In support of their argument, the People point to *People v. Garcia*, in which the Colorado Supreme Court concluded that the trial court did not err by instructing the jury on a lesser nonincluded offense over the defendant's objection. 940 P.2d 357, 363 (Colo. 1997). However, in reaching that conclusion, the *Garcia* court reasoned that the defendant "clearly had *notice through the charging instruments* of the prosecution's intent to prove" the additional element — that the defendant had entered a "dwelling" — of what the court characterized as a lesser nonincluded offense. *Id.* (emphasis added).

¶ 35 *Garcia*'s logic does not apply here. Martinez did not receive prior notice of the prosecution's intent to prove that Black was an at-risk person because the information did not allege he was at risk, reference the statute governing crimes against at-risk victims, or plead a separate count for a crime of violence. (We agree with Martinez that *Garcia*'s precedential value on this issue is tenuous for the additional reason that the supreme court implicitly overruled it when the court announced a new standard for evaluating whether a crime is a lesser included offense in *Reyna-Abarca v. People*, 2017 CO 15, 390 P.3d 816, and *People v. Rock*, 2017 CO 84, 402 P.3d 472. *See People v. Snelling*, 2022 COA 116M, ¶ 55, 523 P.3d 477, 490; *see also Whiteaker v. People*, No. 22SC673, 2023 WL 3008052, at *1 (Colo. Apr. 17, 2023) (unpublished order granting certiorari on the issue of whether *Garcia* has been abrogated).)

¶ 36 Lastly, we reject the People's argument that "finding error here would frustrate the General Assembly's clear purpose with the at-risk statute." Regardless of whether the People are correct that "this is the exact type of case where the at-risk statute was intended to have force," under due process principles, the

prosecution needed to properly charge Martinez if it wished to prosecute her under that statute.

¶ 37 In sum, the court erred by relying on the jury's answer to the interrogatory to enter the judgment of conviction for criminal negligence resulting in the death of an at-risk person. (Having determined that this error resulted in a violation of Martinez's due process rights, we need not consider Martinez's additional argument that it also violated her right under section 18-1.3-406(5). *See* § 18-1.3-406(5) ("In any case in which the accused is charged with a crime of violence . . . the indictment or information shall so allege in a separate count . . . .").)

4. The Error Requires Reversal of Martinez's Conviction for Criminal Negligence Resulting in the Death of an At-Risk Person

¶ 38 The Colorado Supreme Court has left open the question of "whether a constructive amendment amounts to structural error," therefore requiring automatic reversal without a harmlessness analysis. *See People v. Rediger*, 2018 CO 32, ¶ 47 n.4, 416 P.3d 893, 903 n.4. Divisions of this court have split on this question. *Compare, e.g.*, *Carter*, ¶¶ 36-49, 486 P.3d at 481-83 (analyzing United States and Colorado Supreme Court precedent and

concluding that "a constructive amendment isn't structural error"), *with People v. Counterman*, 2021 COA 97, ¶ 94, 497 P.3d 1039, 1054 (collecting cases where divisions of this court have held that "constructive amendments are per se reversible"), *vacated and remanded on other grounds sub nom. Counterman v. Colorado*, 600 U.S. 66 (2023). The supreme court has agreed to review this issue. *See Bock v. People*, No. 23SC97, 2023 WL 7312725, at *1 (Colo. Sept. 5, 2023) (unpublished order granting certiorari to determine whether a constructive amendment "constituted structural error, or, alternatively, plain, reversible error").

¶ 39 We need not take a side in this debate, however, because we conclude that, even if the error was not structural, it was an error "of constitutional dimension that [was] preserved by objection," and the People have not met their burden under the constitutional harmless error standard to show the error was "harmless beyond a reasonable doubt." *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119. Thus, reversal is required regardless of which standard applies.

¶ 40 The People contend that Martinez was not "prejudiced" because she "was not surprised by Mr. Black's age or its import and

could not dispute it," and "nothing about [Martinez's] defense could have, would have, or should have changed" if the information had disclosed a charge for criminal negligence resulting in the death of an at-risk person. (Because the People argue that the entry of the judgment of conviction for criminal negligence resulting in the death of an at-risk person was, at most, a simple variance, rather than a constructive amendment, they frame their argument as whether Martinez was "prejudiced" and not whether any error was harmless. *See People v. Gallegos*, 260 P.3d 15, 25-26 (Colo. App. 2010) ("A simple variance between the charge in the indictment and the jury instructions does not constitute reversible error unless a defendant's substantial rights are prejudiced.").)

¶ 41 The People ignore the fact that, absent the constructive amendment, Martinez would not have been convicted of a class 4 felony crime of violence, and the court could not have sentenced Martinez to fourteen years' imprisonment under the crime of violence sentencing framework. Instead, the court would have entered a judgment of conviction on the verdict finding Martinez guilty of the class 5 felony of criminally negligent homicide, § 18-3-105, which has a presumptive sentence range of one to three

years. *See* § 18-1.3-401(1)(a)(V)(A.1). At a maximum, the court could have sentenced Martinez to six years — eight years less than the sentence she actually received — if the court concluded that "extraordinary . . . aggravating circumstances" were present. *See* § 18-1.3-401(6). The court's error not only *contributed* to Martinez's conviction for a class 4 felony crime of violence, *see Hagos*, ¶ 11, 288 P.3d at 119, but Martinez would not have been convicted of the graver offense absent the error.

¶ 42 In addition, the People provide only a conclusory response to Martinez's argument that the charges in the information shaped the defense's trial strategy. At the sentencing hearing, Martinez's trial counsel asserted that knowing about the crime of violence charge before trial "would have changed a lot of how the [d]efense looked at" the case and "could have changed decisions made by the [d]efense," including which defenses to raise and whether to request jury instructions on the lesser nonincluded offenses.

¶ 43 We need not consider whether the defense's trial strategy would have been different had the prosecution charged Martinez with the class 4 felony crime of violence because the imposition of a harsher sentence is a sufficient showing of prejudice.

¶ 44 Thus, the People have failed to show that the error was harmless, and we must reverse. *See id.* On remand, the court should enter a judgment of conviction on the jury's verdict finding Martinez guilty of criminally negligent homicide and impose an appropriate sentence. (Martinez does not point to any error that would have undermined the jury's verdict on that charge.)

B. Sufficient Evidence Supported the Second Degree Assault Conviction

¶ 45 Martinez challenges her second degree assault conviction on the ground that the evidence was insufficient to establish that she acted with the requisite intent. We are not persuaded.

¶ 46 "When a defendant challenges the sufficiency of the evidence, '[w]e review the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the defendant's conviction.'" *Johnson v. People*, 2023 CO 7, ¶ 13, 524 P.3d 36, 40 (quoting *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010)). To sustain a conviction, we consider whether the relevant evidence, "when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of

the charge beyond a reasonable doubt." *Id.* (quoting *Clark*, 232 P.3d at 1291). While we "give the prosecution the benefit of all reasonable inferences that might fairly be drawn from the evidence," there must be a "logical and convincing connection between the facts established and the conclusion inferred." *People v. Donald*, 2020 CO 24, ¶ 19, 461 P.3d 4, 7 (quoting *People v. Perez*, 2016 CO 12, ¶ 25, 367 P.3d 695, 701). We will not sustain a verdict that is based on a mere modicum of relevant evidence or guessing, speculation, or conjecture. *See id.* (citing *Perez*, ¶ 25, 367 P.3d at 701).

¶ 47 As relevant here, to convict Martinez of second degree assault, the jury had to find the intent element of the offense beyond a reasonable doubt — specifically, that she spat on Officer Bridges with the "intent to infect, injure, or harm" him. § 18-3-203(1)(h). Intent to "harm" means "intent to cause prolonged damage — whether physical, psychological, emotional, or some combination of all three — rather than temporary shock or minor discomfort." *Plemmons v. People*, 2022 CO 45, ¶ 43, 517 P.3d 1210, 1220. The "harm" includes "prolonged psychological or emotional harm that

stems from the possibility that an officer has been infected by or could become a vector of disease." *Id.* at ¶ 3, 517 P.3d at 1214.

¶ 48 The jury heard the following testimony from Officer Bridges:

- As he and other officers were directing Martinez to the holding cell, "she threw herself back and stopped moving forward and refused to enter the cell."
- As they "pushed her more towards the cell, she turned over to the left of her shoulder and spit saliva right at" Officer Bridges.
- The spitting did not appear to be a sneeze or an accident.
- Officer Bridges "could clearly feel her saliva land on [his] face and mask."
- He "was wearing a mask at the time because it was during the COVID pandemic, a couple months after it kicked off" and at "the height" of the pandemic.
- Officer Bridges "wiped some [saliva] from near [his] eye because [he] wanted to lessen the risk of transmission of anything."

¶ 49 The jury watched Officer Bridges's body camera footage of the incident and viewed a photo of him wearing a face mask, with overlaid arrows and circles to indicate where the saliva landed.

¶ 50 Martinez does not direct us to any evidence contradicting Officer Bridges's testimony. Instead, she lists hypothetical facts that might have permitted an inference as to her intent, but for which the prosecution introduced no evidence. For example, she notes the prosecution did not produce evidence that Martinez used threatening language, that she was sick or manifested symptoms of illness, or that she was aware of COVID-19 infection rates at the time.

¶ 51 While such evidence may have bolstered the prosecution's case for second degree assault based on Martinez's intent to infect Officer Bridges, the lack of the evidence does not mean there was insufficient evidence to prove she intended to harm him psychologically or emotionally. The prosecution established that Martinez spat on Officer Bridges's face and mask only two months after the COVID-19 pandemic "kicked off." From this circumstantial evidence, the jury could reasonably infer that Martinez intended to cause Officer Bridges "fear of disease because

of uninvited exposure" to Martinez's saliva. *Id.* at ¶ 45, 517 P.3d at 1221; *see also People v. Kessler*, 2018 COA 60, ¶ 12, 436 P.3d 550, 554 ("[A]n actor's state of mind is normally not subject to direct proof and must be inferred from his or her actions and the circumstances surrounding the occurrence . . . ."). We reject Martinez's assertion that the jury could have only reached such conclusion by conjecture, guessing, or speculation.

¶ 52 Therefore, the evidence was sufficient to sustain Martinez's assault conviction.

C. The Court's Exclusion of Circumstantial Evidence of Intoxication Does Not Warrant Reversal

¶ 53 Martinez argues that the court improperly excluded as hearsay two pieces of evidence that were "relevant to negative the existence of [the] specific intent" element for the assault charge based on self-induced intoxication. § 18-1-804(1), (5), C.R.S. 2023. First, the court ruled that defense counsel could not ask Trooper Charles Kornhauser whether he recalled Martinez asking "if she was being taken to detox." Second, when defense counsel attempted to elicit similar information, the court sustained the prosecutor's objection to defense counsel's question, "[Martinez] expressed a lack of

awareness for why she was being contacted?" posed to Officer James Brooks.

¶ 54 Hearsay is "a statement other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." CRE 801(c). It is inadmissible unless an exception to the hearsay rule applies. CRE 802. One such exception allows the admission of statements reflecting "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief." CRE 803(3). We review the trial court's application of hearsay law de novo. *People v. Dominguez*, 2019 COA 78, ¶ 14, 454 P.3d 364, 368.

¶ 55 Assuming, without deciding, that the court misapplied hearsay law in both instances, we conclude that the errors do not warrant reversal because they did not substantially influence the verdict or affect the fairness of the trial proceedings. *See Hagos*, ¶ 12, 288 P.3d at 119.

¶ 56 The court instructed the jurors that they could consider whether evidence of Martinez's self-induced intoxication negated the

"intent" element for the assault charge. And as Martinez acknowledges, the jury heard testimony from at least four other witnesses suggesting that she was intoxicated:

- Teri Vanderhoof, who witnessed the altercation between Martinez and Black, testified, "[J]ust because of my past and drugs, I'm assuming . . . that drugs were in control of [Martinez] because she just wouldn't stop . . . hitting [Black] no matter what happened."
- Sarah Bensman, another witness to the altercation, testified that she "thought that something might be wrong" but "didn't know what," and that she believed she told the 911 operator that she did not know if Martinez was "on drugs or what."
- In response to defense counsel's question whether Martinez was "pretty clearly intoxicated," Trooper Jason Morales, who arrested Martinez, responded, "I could smell alcohol, yeah." He also agreed that Martinez "was not reacting to the situation as [he] would expect a sober person to."

- Officer Bridges testified that Martinez urinated "all over" her booking cell.

Despite hearing this testimony, the jury rejected the defense's argument that the evidence showed Martinez was too intoxicated to form an intent to infect, injure, or harm Officer Bridges when she spat at him.

¶ 57 Even assuming Trooper Kornhauser and Officer Brooks would have testified that Martinez asked whether she was "going to detox," we do not believe the absence of the testimony "impair[s] the reliability of the judgment" or that its admission would have substantially influenced the verdict. *Id.* While their testimony regarding this question could be considered circumstantial evidence that Martinez recognized others might perceive her as intoxicated — or at most, that she believed she was intoxicated — it provides little insight into the degree of her alleged intoxication. Further, to the extent the testimony provides evidence of intoxication, it is more attenuated than the testimony the court permitted, which the jury found insufficient to negate Martinez's intent.

¶ 58 Thus, even if it was error, the court's exclusion of the evidence was harmless.

III. Disposition

¶ 59 We reverse the judgment of conviction under section 18-6.5-103(2)(a) and remand with instructions for the court to enter a judgment of conviction for criminally negligent homicide under section 18-3-105 and resentence Martinez accordingly. We affirm the judgment of conviction for second degree assault. We do not disturb those portions of the judgment not challenged on appeal.

JUDGE TOW and JUDGE GROVE concur.