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ADVANCE SHEET HEADNOTE
January 10, 2022

2022 CO 2

No. 20SC353, *Pettigrew v. People*—Jury Instructions—Reasonable Doubt—Constitutional Harmless Error.

In this case, the supreme court considers whether certain statements that the trial court made to the jury venire during voir dire lowered the prosecution's burden of proof in violation of due process. The court further considers whether the court of appeals division below erred in determining that a warrant to search defendant's cell phone and that warrant's supporting affidavit, when properly redacted to exclude all information obtained as a result of defendant's initial unlawful arrest, satisfied the Fourth Amendment's particularity requirement.

The court now concludes that there is no reasonable likelihood that the jury would have understood the trial court's statements, in the context of the instructions as a whole and the trial record, to lower the prosecution's burden of proof below the reasonable doubt standard.

In addition, assuming without deciding that the warrant and its supporting affidavit, when properly redacted, did not satisfy the Fourth Amendment's particularity requirement, the court concludes that any error in admitting at trial the evidence obtained from defendant's cell phone was harmless beyond a reasonable doubt. This evidence was cumulative of other evidence presented, and the evidence of defendant's guilt was overwhelming.

Accordingly, the court affirms the division's judgment.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 2

Supreme Court Case No. 20SC353
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 16CA1319

Petitioner:

William Scott Pettigrew,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
January 10, 2022

Attorneys for Petitioner:
Mulligan & Mulligan, PLLC
Casey J. Mulligan
Boulder, Colorado

Attorneys for Respondent:
Philip J. Weiser, Attorney General
Megan C. Rasband, Assistant Attorney General
Denver, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this case, a companion to *Tibbels v. People*, 2022 CO 1, __ P.3d __, which we also announce today, we review the court of appeals division's decision in *People v. Pettigrew*, 2020 COA 46, 490 P.3d 680, in which the division affirmed petitioner William Scott Pettigrew's judgment of conviction for pandering of a child and tampering with a witness or victim. Pettigrew asserts that the trial court's statements to the jury venire during voir dire lowered the prosecution's burden of proof in violation of due process. Additionally, he contends that the division erred in determining that a warrant to search his cell phone and the warrant's supporting affidavit satisfied the Fourth Amendment's particularity requirement. In his view, had the courts below properly redacted from the warrant all information obtained as a result of his initial unlawful arrest, the warrant would not have sufficiently described the place to be searched.[1]

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[1] Specifically, we granted certiorari to review the following issues:

1. Whether the trial court lowered the burden of proof and undermined the presumption of innocence in violation of due process by calling the legal definition of reasonable doubt "inadequate;" analogizing the beyond a reasonable doubt standard to potential doubts about a juror's birthday; stating that "we try people when there's evidence to support the charges;" and distinguishing "actual innocence" from a finding of not guilty.

¶2 We now conclude that, although a number of the trial court's comments during voir dire were problematic, on the facts presented here, there is no reasonable likelihood that the jury would have understood the court's statements, in the context of the instructions as a whole and the trial record, to lower the prosecution's burden of proof below the reasonable doubt standard. In addition, assuming without deciding that the warrant and its supporting affidavit, when properly redacted, did not satisfy the Fourth Amendment's particularity requirement, we conclude that any error in admitting at trial the evidence obtained from Pettigrew's cell phone was harmless beyond a reasonable doubt. This evidence was cumulative of other evidence presented, and the evidence of Pettigrew's guilt was overwhelming.

¶3 Accordingly, we affirm the division's judgment, albeit for somewhat different reasons.

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2. Whether the court of appeals erred in determining that the warrant to search Petitioner's cell phone and supporting affidavit satisfied the Fourth Amendment's particularity requirement, where all descriptive information about the phone except the telephone number was obtained as a result of Petitioner's unlawful arrest.

I. Facts and Procedural History

¶4 Pettigrew met the victim, K.T., in the summer of 2013. At the time, K.T. was seventeen years old. Pettigrew and K.T. began a relationship, which eventually became intimate.

¶5 At some point that fall, the two began discussing, in person, by telephone, and via text message, an arrangement whereby Pettigrew would help K.T. to engage in prostitution with men he knew from his work in the oil fields in North Dakota. During this period, K.T. also texted several sexually explicit photographs of herself to Pettigrew.

¶6 In January 2014, K.T.'s mother discovered the explicit photographs and text messages on K.T.'s cell phone and contacted the police. K.T.'s mother turned K.T.'s cell phone over to the police, and the police conducted a search of that phone and interviewed K.T. multiple times.

¶7 Later that month, police officers arrested Pettigrew inside his home without a warrant, and the officers transported Pettigrew to the police station, where a detective questioned him. During this interrogation, Pettigrew showed the detective some of the text messages on his cell phone.

¶8 At the conclusion of this interview, the detective seized Pettigrew's cell phone and put it into evidence at the police station. The police, however, released Pettigrew because a supervising officer had concerns about the propriety of

Pettigrew's warrantless arrest. Notwithstanding the foregoing, the police retained Pettigrew's cell phone because they knew that it contained information related to the charges that the police were investigating.

¶9 The next day, the police sought, and a magistrate issued, a warrant for Pettigrew's arrest, and the police rearrested Pettigrew. The prosecution then charged Pettigrew with, as pertinent here, soliciting for child prostitution, pandering of a child, sexual exploitation of a child, criminal attempt to commit inducement of child prostitution, and tampering with a witness or victim.

¶10 Thereafter, the police obtained a search warrant for Pettigrew's cell phone, which was still in police custody. This warrant, and the affidavit in support thereof, described the place to be searched as follows:

> [W]hite black Motorola Droid cell phone from the Verizon Network with phone number 720-[xxx-xxxx] seized from William Scott Pettigrew on 01/23/14 which is in evidence at the Brighton Police Department at 3401 E Bromley LN, Brighton[.]

¶11 The case proceeded, and prior to trial, Pettigrew moved to suppress his cell phone and all of the information that the police had obtained when they searched it. In support of this motion, Pettigrew argued that his initial warrantless arrest was unlawful and that the seizure and subsequent forensic examination of his cell phone were fruits of the unlawful arrest.

¶12 The trial court subsequently denied Pettigrew's motion, concluding that the hot pursuit exception to the warrant requirement justified Pettigrew's warrantless

arrest, and therefore the police had validly seized the cell phone incident to that arrest. The trial court further concluded that the interrogating officer had probable cause to seize the cell phone after the officer had been shown the phone and its contents during the interrogation. The court observed that the phone contained (or could have contained) evidence of criminal activity and that returning the phone to Pettigrew would have posed a significant risk of evidence destruction. The court thus concluded that the police had acted properly in retaining the phone until they obtained a warrant, at which point they also acted properly in searching that phone.

¶13 The case then advanced to trial, and during voir dire of the prospective jurors, the trial court explained what it described as some of the principles of criminal justice and trial work, to ensure that the prospective jurors understood exactly what would be expected of them. Four of the court's comments during this process are at issue in this case.

¶14 First, in a discussion with one prospective juror, the court clarified the distinction between a verdict of not guilty and a finding of the defendant's innocence:

> THE COURT: Innocent would mean that the defendant didn't do anything, all right? He was in China at the time of this event, okay? He just—he's innocent, all right? But that's not how we look at trials in this country. It's—trials in this country are a test of the prosecution's evidence. So even if you listen to the evidence and you start to think about it, you say, well, you know, he might have done

it, or he could have done it, there's some evidence there that would suggest he's involved in this, if it doesn't convince you beyond a reasonable doubt, then you have to find him not guilty. Does that make sense?

THE PROSPECTIVE JUROR: Right.

THE COURT: And that's the test of the prosecution's evidence. Their burden is to prove to your satisfaction beyond a reasonable doubt. But if you were in a situation listening to this case and you said, well, I don't think that the prosecution's evidence has convinced me, I still have a reasonable doubt about the defendant's—whether he's guilty or not, but you have some thought, well, but he could have done it, he might have done it, if your only choices were guilty and innocent, you wouldn't be able to return a verdict. Right?

THE PROSPECTIVE JUROR: Right.

THE COURT: Because part of you would be saying, well, he might have done it, so you can't find him innocent, but it's—the evidence isn't strong enough, so you can't find him guilty. And then you are left without a verdict. So we don't do that. We say not guilty means the prosecution hasn't convinced you beyond a reasonable doubt, regardless of what evidence they introduce. If you have a reasonable doubt about the guilt of the defendant, then you find him not guilty.

¶15 Second, the court criticized the pattern definition of reasonable doubt:

THE COURT: [Reasonable doubt is] pretty hard to define. The law tries to give you a definition, and one thing I learned a long time ago is you never define a word using the word. Right?

THE PROSPECTIVE JUROR: Yeah.

THE COURT: Unfortunately, the law couldn't come up with anything better, so I'm going to read it to you *even though it's a little inadequate*. Reasonable doubt means a doubt based on reason and common sense which arises from a fair and rational consideration of all of the evidence or the lack of evidence in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would

> cause reasonable people to hesitate to act in matters of importance to themselves.

(Emphasis added.)

¶16 Third, after describing the pattern definition of reasonable doubt as "a little inadequate," the court provided its own example to illustrate the concept:

> THE COURT: [Prospective juror], I don't want to embarrass you, but would you mind telling me what the month and date of your birth is?
>
> THE PROSPECTIVE JUROR: November 18.
>
> THE COURT: November 18. How do you know that?
>
> THE PROSPECTIVE JUROR: It's on my birth certificate.
>
> THE COURT: It's on your birth certificate, and that's an official hospital document, right?
>
> THE PROSPECTIVE JUROR: Yes, sir.
>
> THE COURT: Now, [prospective juror], this doesn't apply to you, but I have read in the paper over the years and heard reports that hospitals—some hospital somewhere has actually sent the wrong child home with the wrong set of parents. Have you ever heard that?
>
> THE PROSPECTIVE JUROR: Yes, sir.
>
> THE COURT: It's tragic. I mean, it's an absolute tragedy when something like that occurs. [Prospective juror], I would suggest to you that if a hospital can make a mistake of that magnitude, certainly some clerk downstairs in the hospital on the date you were born might have made a mistake on your birth certificate. Agreed?
>
> THE PROSPECTIVE JUROR: Yes.
>
> THE COURT: Could have, right? So maybe it isn't November—what was it, 18th?
>
> THE PROSPECTIVE JUROR: Yes, sir.

> THE COURT: Maybe it wasn't November 18. Got anything else that convinces you that it was on November 18?
>
> THE PROSPECTIVE JUROR: My parents.
>
> THE COURT: Your parents. Your parents, right?
>
> THE PROSPECTIVE JUROR: Yes, sir.
>
> THE COURT: And your mother was there, right?
>
> THE PROSPECTIVE JUROR: Yes.
>
> THE COURT: Sure. But I would suggest to you, [prospective juror], that on your—when you were born, your mother probably wasn't thinking of the date. She was probably much more concerned with what your father had done to her.
>
> THE PROSPECTIVE JUROR: True.
>
> THE COURT: Okay? So she might have gotten the date wrong as well. Do you understand where I'm going with this?
>
> THE PROSPECTIVE JUROR: Yes.
>
> THE COURT: I can throw out maybe your birth certificate is wrong, maybe your mother wasn't aware of the date. But I would suggest to you, [prospective juror], on November 18, you are going to recognize that as your birthday, aren't you?
>
> THE PROSPECTIVE JUROR: Yes, sir.
>
> THE COURT: Because I haven't created a reasonable doubt, have I?
>
> THE PROSPECTIVE JUROR: No, sir.
>
> THE COURT: That's the important thing. It's not to remove all doubt, every doubt, every vague or imaginative doubt. The burden is on the prosecution to remove all reasonable doubt.

¶17 Fourth, in response to a prospective juror's question regarding why the prosecution had not charged Pettigrew with child pornography, the court stated:

> THE COURT: Well, you will just have to listen. Maybe there's not enough evidence to charge him with that. I don't know what the evidence is going to be.
>
> THE PROSPECTIVE JUROR: So, I mean, [wondering why there are no child pornography charges is] where my mind's already going.
>
> THE COURT: I understand. But, first of all, you know, *we try people when there's evidence to support the charges, okay*?
>
> THE PROSPECTIVE JUROR: Right.
>
> THE COURT: You know, and right now he's presumed innocent because there's no evidence against him, so I can't speak to why he's not being charged with other offenses.

(Emphasis added.)

¶18 After the jury was empaneled, the court further explained the trial process. The court reminded the jury that Pettigrew was presumed innocent and that the prosecution had to prove his guilt beyond a reasonable doubt. Emphasizing this point, the court stated that Pettigrew had no burden to prove his innocence, call any witnesses, or introduce any evidence. Additionally, the court told the jury that after the presentation of the evidence in the case, the court would provide instructions regarding the law that the jury would apply in deciding whether the prosecution had proved Pettigrew's guilt beyond a reasonable doubt.

¶19 Thereafter, at trial, the prosecution argued that Pettigrew had encouraged K.T. to engage in prostitution by offering to connect her with his coworkers in the North Dakota oil fields who would pay her for sex. In support of this theory, the prosecution presented testimony from K.T. and her best friend, C.E., as well as

forensic reports that detailed text messages and photographs procured from K.T.'s and Pettigrew's cell phones, respectively. K.T. testified that she and Pettigrew had discussed the prostitution arrangement on multiple occasions, over text, by telephone, and in person, and that the plan was for Pettigrew to act as "a pimp" by finding people for K.T. to sleep with among the "[o]il field men" that he knew. K.T. further testified that Pettigrew told her that he would protect her and that she could make $300 per hour having sex with the oil field workers.

¶20 During K.T.'s testimony, the prosecution also introduced a forensic report produced from data stored on K.T.'s cell phone that detailed text message exchanges between K.T. and Pettigrew in which the two discussed the prostitution arrangement. This report included sexually explicit photographs that K.T. had sent to Pettigrew, at his request, via text message, three of which K.T. sent in the context of a conversation regarding the prostitution arrangement. The forensic report did not indicate the presence of any problems with the transmission of these text messages or photographs from K.T.'s cell phone to Pettigrew's cell phone.

¶21 To corroborate K.T.'s testimony, the prosecution called C.E., who testified that K.T. and Pettigrew had come up with a plan whereby K.T. and C.E. would go over to Pettigrew's house and have sex with his oil field friends for money. C.E. explained that, as part of this plan, Pettigrew would be the one to bring his oil field friends over. Additionally, C.E. testified that K.T. had texted her some of the

details of the plan, specifically that they could make $300 per hour prostituting themselves.

¶22 The prosecution also introduced three forensic reports produced from information on Pettigrew's cell phone. These reports, which compiled text messages and photographs that Pettigrew and K.T. had exchanged during the time period at issue, generally matched the report produced from K.T.'s phone, although the analysis of Pettigrew's phone reflected that he had retained some but not all of the photographs that K.T. had sent him. The detective who prepared the reports testified that he believed Pettigrew had received all of the photographs but that Pettigrew may have subsequently deleted some of them, because nothing indicated that an error had occurred when K.T. sent the photographs to Pettigrew and the program used to create the particular report did not extract deleted data from the phone.

¶23 At the close of the evidence, the trial court correctly instructed the jury on the prosecution's burden of proof and on the presumption of innocence afforded defendants in criminal cases. The jury ultimately convicted Pettigrew of pandering of a child and tampering with a witness or victim but acquitted him of the other charges.

¶24 Pettigrew appealed, arguing, among other things, that (1) the above-quoted statements that the trial court had made during the jury selection process had

lowered the prosecution's burden of proof and (2) the court had erred in admitting evidence from Pettigrew's cell phone because the police had obtained that information in violation of Pettigrew's Fourth Amendment rights. *Pettigrew*, ¶ 1, 490 P.3d at 683.

¶25 In a unanimous, unpublished order, a division of the court of appeals rejected the trial court's conclusion that the hot pursuit exception to the warrant requirement justified the police officers' entry into Pettigrew's home and, in turn, validated the subsequent seizure of Pettigrew's cell phone incident to Pettigrew's arrest. *People v. Pettigrew*, No. 16CA1319, slip op. at 9 (Feb. 27, 2019). The division, however, proceeded to consider whether the independent source exception to the Fourth Amendment's exclusionary rule separately applied to justify the trial court's admission of the evidence obtained from Pettigrew's cell phone. *Id.* at 11, 14. After redacting from the warrant affidavit the information that the division believed the officers had obtained as a result of Pettigrew's unlawful arrest, the division concluded that the affidavit still established probable cause to believe that Pettigrew's cell phone would contain relevant information. *Id.* at 15–16. The question thus became whether the initial search of the cell phone tainted the detective's decision to seek the warrant. *Id.* at 16. The division concluded that this question required additional factual findings and thus remanded the case for further proceedings. *Id.*

¶26 On remand, the trial court found that the detective's decision to seek a warrant for Pettigrew's cell phone was not prompted by the evidence that the police had obtained as a result of the initial illegal arrest. The court therefore concluded that the evidence from Pettigrew's cell phone was admissible under the independent source exception.

¶27 The matter was then recertified to the court of appeals, and a different division addressed and rejected Pettigrew's contentions on their merits. Specifically, as to Pettigrew's argument that the trial court's statements to the jury during voir dire improperly lowered the prosecution's burden of proof, the division concluded that they did not, regardless of whether they could be considered formal instructions to the jury. *Pettigrew*, ¶¶ 13–28, 490 P.3d at 684–86. As to Pettigrew's contentions regarding the warrant, the division concluded that (1) the detective's decision to obtain a search warrant for Pettigrew's cell phone was not affected by the illegally gathered evidence; and (2) even after redacting from the warrant the cell phone's physical description, which Pettigrew claimed was discovered solely as a result of his initial unlawful arrest, the warrant satisfied the Fourth Amendment's particularity requirement because it "authorized the search of Pettigrew's cell phone that was tied to one specific phone number." *Id.* at ¶¶ 36–43, 490 P.3d at 687–88. The division thus affirmed Pettigrew's judgment of conviction. *Id.* at ¶ 47, 490 P.3d at 688.

¶28 Pettigrew thereafter petitioned this court for a writ of certiorari, and we granted his petition.

II. Analysis

¶29 We begin by considering whether the trial court's statements during voir dire effectively lowered the prosecution's burden of proof in violation of due process, and we conclude that they did not. We then turn to the search warrant issue and conclude that even if the warrant did not satisfy the Fourth Amendment's particularity requirement, any error in admitting evidence from Pettigrew's cell phone was harmless beyond a reasonable doubt.

A. Trial Court's Statements During Voir Dire

¶30 We begin our analysis of the trial court's statements to the prospective jurors by addressing our standard of review. We then address the applicable law, discussed more fully in *Tibbels*, ¶¶ 23–43, which we also announce today, and we apply those principles to the facts before us.

1. Standard of Review

¶31 We review de novo the question of whether a trial court accurately instructed the jury on the law. *Johnson v. People*, 2019 CO 17, ¶ 8, 436 P.3d 529, 531. Instructions that lower the prosecution's burden of proof below the reasonable doubt standard constitute structural error and require automatic reversal. *Id.*; *accord Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993).

¶32 We note that the People argue that the trial court's statements to the jury in this case did not amount to instructions and instead were merely comments to the venire that we should review for plain error because Pettigrew did not object to them. For the reasons set forth in *Tibbels*, ¶¶ 37–43, we need not determine whether the court's statements here rose to the level of formal jury instructions because the test for determining whether a court has properly instructed the jury is a functional one that accounts for the content and context of the statements at issue with reference to the instructions as a whole and the trial record. By its very nature then, the test encapsulates consideration of the contested statements' form and function, which removes the need to determine, as a preliminary matter, whether the court's statements to the jury constituted formal instructions.

2. Applicable Law

¶33 The Due Process Clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *accord Vega v. People*, 893 P.2d 107, 111 (Colo. 1995). The Supreme Court has thus made clear that the reasonable doubt standard is "indispensable" in criminal prosecutions. *See Winship*, 397 U.S. at 364.

¶34 Intrinsically related to this standard is the presumption of innocence afforded criminal defendants. *See Delo v. Lashley*, 507 U.S. 272, 278 (1993) (per

curiam) (observing that the presumption of innocence "operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt"). As the Supreme Court has stated, "The [reasonable doubt] standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

¶35 In light of the foregoing, the court must properly instruct the jury on—and, as the fact finder, the jury must apply—the reasonable doubt standard. *Johnson*, ¶ 13, 436 P.3d at 533. In this regard, trial courts retain some flexibility in defining for the jury what constitutes a reasonable doubt. *Id.* at ¶ 10, 436 P.3d at 532; *see also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.") (citation omitted). Nonetheless, both this court and the Supreme Court have repeatedly cautioned that attempts by trial courts to define "reasonable doubt" in ways beyond the long-established pattern instructions seldom clarify the term, *see, e.g.*, *Holland v. United States*, 348 U.S. 121, 140 (1954); *Johnson*, ¶¶ 13, 19, 436 P.3d at 532, 534, and

that trial courts must guard against defining "reasonable doubt" in a way that allows the jury to convict on a lesser showing than due process requires, *see Victor*, 511 U.S. at 22; *Johnson*, ¶ 13, 436 P.3d at 532. The trial courts' decisions not to heed this admonition in both this case and in *Tibbels*, ¶¶ 10–13, have again placed before us the question of whether a trial court's efforts to define "reasonable doubt" violated a defendant's due process rights.

¶36 As discussed at greater length in *Tibbels*, ¶¶ 2, 26–43, 59, to determine whether a trial court incorrectly instructed the jury as to the reasonable doubt standard, we employ a functional test. Specifically, we ask whether there is a reasonable likelihood that the jury understood the court's statements, in the context of the instructions as a whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt. *Id.* at ¶¶ 2, 43, 59; *accord Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Johnson*, ¶ 14, 436 P.3d at 533. In this way, even statements made to the venire during voir dire can, in context, have the effect of instructing the jury on the law to be applied, and the reviewing court must determine whether such statements operated to reduce the prosecution's burden of proof. *Tibbels*, ¶¶ 2, 38–43; *see also Johnson*, ¶¶ 15–18, 436 P.3d at 533–34 (considering whether a trial court's statement to a jury in voir dire regarding the meaning of reasonable doubt operated to lower the prosecution's burden of proof and concluding that it did not because the court gave a proper reasonable doubt

instruction both before and after the challenged statement and the court's statement was too "nonsensical" for the jury to understand).

¶37 With these principles in mind, we turn to the statements at issue here.

3. Application

¶38 The first statement at issue involves the trial court's differentiation between a finding of a defendant's innocence and a finding that the defendant is not guilty. Although Pettigrew contends that the court's comments here lowered the prosecution's burden of proof by minimizing the presumption of innocence, we disagree. Indeed, in our view, the court's comments were helpful to Pettigrew because they made clear that to find Pettigrew not guilty, the jurors did not have to decide that he was actually innocent. Rather, the jurors only needed to find that the prosecution had not proved his guilt beyond a reasonable doubt. The court then concluded these comments with a correct statement of the reasonable doubt standard: "We say not guilty means the prosecution hasn't convinced you beyond a reasonable doubt, regardless of what evidence they introduce. If you have a reasonable doubt about the guilt of the defendant, then you find him not guilty." Based on the foregoing, we conclude that the court's statements regarding the differences between "innocent" and "not guilty" do not require reversal.

¶39 The second and third contested statements—in which the court criticized the pattern definition of reasonable doubt and then attempted to explain the

concept of reasonable doubt by using an example that involved a prospective juror's birthday—are intertwined, so we will address them together.

¶40 As noted above, the trial court began its discussion by criticizing the pattern instruction on reasonable doubt, observing to a prospective juror that the instruction was "a little inadequate" because it attempts to "define a word using the word." The court nonetheless proceeded to read that pattern instruction, after which it purported to explain further the concept of "reasonable doubt" by using the birthday example.

¶41 The court's comments in this regard raise several concerns. First, by stating that the established pattern instruction on reasonable doubt was "a little inadequate," the court undermined the very instruction that it later advised the jurors that they were to follow, making it far more likely that the jurors would rely instead on the court's birthday example as the standard for reasonable doubt. Second, the birthday example was confusing at best and is arguably the type of commonplace example that Justices of the Supreme Court and courts in this jurisdiction have repeatedly warned are not proper substitutes for the legal definition of reasonable doubt. *See, e.g.*, *Victor*, 511 U.S. at 24 (Ginsburg, J., concurring in part and concurring in the judgment) (agreeing that "decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and

risk-taking," and such decisions "are wholly unlike the decisions jurors ought to make in criminal cases") (quoting Fed. Jud. Ctr., Pattern Crim. Jury Instr. 18–19 (1987) (commentary on instruction 21)); *People v. Knobee*, 2020 COA 7, ¶¶ 39–40, 490 P.3d 543, 550 (collecting cases). Third, in the course of providing its example, the court at one point referenced the fact that it had not "created a reasonable doubt," which at least raised the prospect of a juror's believing that Pettigrew had some obligation to create a reasonable doubt.

¶42 Despite these concerns, when read in context, we cannot say that the court's comments lowered the prosecution's burden of proof. The court ended its discussion by correctly stating, "The burden is on the prosecution to remove all reasonable doubt." Indeed, the court said this immediately after its rhetorical question as to whether it had created a reasonable doubt. Accordingly, we perceive no risk that the prospective jurors would have interpreted the court's statement as placing any burden on Pettigrew. This is particularly true here, given that (1) in its comments regarding the distinction between "innocent" and "not guilty," the court had made clear that the prosecution had the burden of convincing the jurors beyond a reasonable doubt of Pettigrew's guilt; (2) after the jury was empaneled, the court thoroughly explained the reasonable doubt standard and the presumption of innocence in correct and clear terms; and (3) in its final instructions, the court correctly advised the jury on the concepts of the

prosecution's burden of proof, the presumption of innocence, and reasonable doubt. And given the clarity and succinctness of the court's repeated statements that the prosecution bore the burden of proving Pettigrew's guilt beyond a reasonable doubt, in contrast to its confusing birthday example, we cannot conclude that there is a reasonable likelihood that the jury understood the court's statements to have lowered the prosecution's burden of proof.

¶43 Lastly, we turn to the court's reply to a prospective juror's expression of concern regarding the absence of child pornography charges in the case. As noted above, the court responded that the prosecution may not have brought such charges against Pettigrew because of a lack of supporting evidence, explaining that "we try people when there's evidence to support the charges."

¶44 Of the statements at issue here, this one is perhaps the most troubling because a prospective juror could have interpreted it as the court's aligning itself with the prosecution, even if, in context, the court intended "we" to refer to society in general. Moreover, the statement arguably suggested that the prosecution had at least some evidence to support the charges against Pettigrew.

¶45 Although this statement is concerning and the court should not have made it, we cannot conclude that, when read in context, it warrants reversal. The court mitigated the problematic implications of its statement because it immediately added, "[R]ight now [Pettigrew is] presumed innocent because there's no evidence

against him." Furthermore, the fact that the court's comment came in the course of a colloquy designed to tease out a particular prospective juror's possible bias—rather than as part of the court's general explanation of the law either during voir dire or after the jury was empaneled—reduces the statement's potential impact as an erroneous instruction of law.

¶46 To be sure, some of the court's above-described comments were problematic and, perhaps, ill-advised, even though they were undoubtedly well-intentioned. Nevertheless, for the foregoing reasons, on the facts presented here, we conclude that there is no reasonable likelihood that the jury understood the trial court's contested statements, in the context of the instructions as a whole and the trial record, as lowering the prosecution's burden of proof below the reasonable doubt standard, in violation of Pettigrew's due process rights. Accordingly, we further conclude that none of the statements at issue constitutes structural error requiring reversal.

¶47 We wish to emphasize that our disposition today should in no way be interpreted as condoning the trial court's statements. This case illustrates yet again why we and divisions of our court of appeals have repeatedly cautioned trial courts against attempting to define "reasonable doubt" by using examples and analogies. *See, e.g.*, *Johnson*, ¶ 19, 436 P.3d at 534; *People v. Vialpando*, 2020 COA 42, ¶¶ 85–86, 490 P.3d 648, 661, *cert. granted*, No. 20SC343, 2020 WL 6037070 (Colo.

Oct. 12, 2020). These efforts, at best, provide no additional clarity and, at worst, create needless litigation that jeopardizes otherwise valid convictions. *See Johnson*, ¶ 19, 436 P.3d at 534. Once again, we respectfully counsel trial courts to avoid attempting to define "reasonable doubt" in such ways.

B. Cell Phone Search Warrant

¶48 Turning next to Pettigrew's assertions regarding the constitutional validity of the search warrant for his cell phone, we start by addressing the appropriate standard of review. We then briefly discuss the applicable law, and we conclude that, in the circumstances presented here, any constitutional error in the admission of evidence derived from Pettigrew's cell phone was harmless beyond a reasonable doubt.

1. Standard of Review

¶49 A trial court's ruling on a motion to suppress presents a mixed question of fact and law. *People v. Hyde*, 2017 CO 24, ¶ 9, 393 P.3d 962, 965. We therefore "defer to the trial court's findings of fact that are supported by the record, but we assess the legal effect of those facts de novo." *Id.* We likewise review de novo whether a redacted search warrant and supporting affidavit complied with the Fourth Amendment's particularity requirement. *See People v. Hebert*, 46 P.3d 473, 481 (Colo. 2002) (observing that the supreme court reviews de novo whether a redacted affidavit is sufficient to establish probable cause).

¶50 We review preserved trial errors of constitutional dimension, including the admission of evidence obtained in violation of the Fourth Amendment, for constitutional harmless error. *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119 (noting the general rule); *see also People v. Omwanda*, 2014 COA 128, ¶ 31, 338 P.3d 1145, 1150 (noting that the constitutional harmless error standard applies to the admission of evidence obtained through an unconstitutional search). Under this standard, reversal is required unless the reviewing court can conclude that the error was harmless beyond a reasonable doubt. *Hagos*, ¶ 11, 288 P.3d at 119. In other words, we will reverse if "there is a reasonable *possibility* that the [error] might have contributed to the conviction." *Id.* (alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

2. Applicable Law

¶51 The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures. U.S. Const. amend. IV. To effectuate this protection, the Supreme Court has adopted an exclusionary rule under which evidence obtained as a result of an illegal search or seizure is inadmissible against a criminal defendant. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Even so, the government may introduce such evidence if an exception to the exclusionary rule applies. *People v. Schoondermark*, 759 P.2d 715, 718 (Colo. 1988).

¶52 One such exception is the so-called "independent source doctrine," which permits the admission of unconstitutionally obtained evidence "if the prosecution can establish that it was also discovered by means independent of the illegality." *Id.* For example, a subsequent search pursuant to a warrant can constitute an independent source if the police department's decision to seek the warrant was not prompted by what the police officers saw during an illegal entry and if the information obtained as a result of the prior illegality did not affect the magistrate's decision to issue the warrant. *Murray v. United States*, 487 U.S. 533, 542 (1988). To determine whether the independent source exception applies in circumstances such as these, we must decide whether, after redacting the illegally obtained information from the warrant and its supporting affidavit, the warrant satisfied the Fourth Amendment's requirements that search warrants be supported by probable cause and describe with particularity "the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.; *People v. Arapu*, 2012 CO 42, ¶ 26, 283 P.3d 680, 685–86.

3. Constitutional Harmless Error

¶53 Here, Pettigrew argues that the division below erred in concluding that the independent source exception justified the admission at trial of the evidence obtained from his cell phone. According to Pettigrew, a properly redacted version of the search warrant and its supporting affidavit would have included only

Pettigrew's cell phone number because all other descriptive information about the cell phone, such as the phone's make, model, and color, was illegally obtained during the initial warrantless arrest and seizure of the phone. Pettigrew thus asserts that a properly redacted search warrant could not have satisfied the Fourth Amendment's particularity requirement and, therefore, the illegally obtained information must have affected the magistrate's decision to issue the warrant, making the independent source exception inapplicable here.

¶54 On the record before us, we need not decide this issue because, assuming without deciding that the warrant did not satisfy the Fourth Amendment's particularity requirement and that the People therefore could not establish the applicability of the independent source exception, the admission of the evidence obtained from Pettigrew's cell phone was harmless beyond a reasonable doubt.

¶55 The evidence obtained from Pettigrew's cell phone related only to his conviction for pandering of a child, which required the prosecution to prove that Pettigrew, for money or other thing of value, knowingly arranged or offered to arrange a situation in which a child may practice prostitution. § 18-7-403(1)(b), C.R.S. (2021).

¶56 As to the charge of pandering, the constitutionally admissible evidence establishing Pettigrew's guilt was overwhelming. K.T. testified that she and Pettigrew had discussed on numerous occasions, by text message, by telephone,

and in person, a plan that would enable K.T. to engage in prostitution. K.T. explained that, as part of this arrangement, Pettigrew would act as her pimp by connecting her with his coworkers from the North Dakota oil fields, who would pay K.T. for sex at a rate of $300 per hour. In addition, a forensic report compiled from K.T.'s cell phone detailing text messages and photographs exchanged between K.T. and Pettigrew corroborated K.T.'s testimony. This report included multiple conversations between Pettigrew and K.T. in which the two discussed prostitution and Pettigrew encouraged K.T. to get involved in the prostitution business. In the context of one such conversation included in the report, K.T. sent Pettigrew sexually explicit photographs of herself after he requested them. Further corroborating K.T.'s story, K.T.'s best friend, C.E., testified that K.T. and Pettigrew had developed a plan whereby Pettigrew would identify coworkers from the oil fields who would pay to have sex with K.T.

¶57 Although the forensic reports produced from Pettigrew's cell phone also supported his involvement in the prostitution arrangement by demonstrating that he had received the text messages discussing prostitution and some of the sexually explicit photographs that K.T. had sent him, the evidence contained in those reports was cumulative of K.T.'s detailed testimony explaining the prostitution arrangement and the report produced from her cell phone.

¶58 We are not persuaded otherwise by the fact that the prosecution briefly referenced evidence obtained from Pettigrew's cell phone during its opening statement and closing argument. Even without the evidence from Pettigrew's phone, the prosecution still could have told the jury during its opening that the jurors would have the opportunity to evaluate text messages exchanged between K.T. and Pettigrew, as well as the photographs that K.T. had sent to Pettigrew, because the evidence relating to K.T.'s cell phone supported such a statement. Likewise, the evidence from K.T.'s cell phone and the reasonable inferences that the jurors could have drawn therefrom would have entitled the prosecution to argue in closing that Pettigrew's having the photographs on his cell phone (which the evidence showed K.T. sent to Pettigrew) would have allowed him to advertise K.T. to his coworkers.

¶59 Accordingly, we conclude that the admission of any evidence derived from Pettigrew's cell phone was harmless beyond a reasonable doubt.

III. Conclusion

¶60 For the foregoing reasons, we conclude that the trial court's statements to the jury venire during voir dire did not, in light of the instructions as a whole and the trial record, lower the prosecution's burden of proof in violation of due process. We further conclude that the admission at trial of evidence obtained from Pettigrew's cell phone was harmless beyond a reasonable doubt.

¶61 Accordingly, we affirm the judgment of the division below.