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ADVANCE SHEET HEADNOTE
January 10, 2022

2022 CO 4

No. 20SC463, *Pearson v. People*—Harassment—Self-Defense—Affirmative Defense.

In this case, the supreme court considers whether a defendant can claim self-defense as an affirmative defense to the charge of harassment (striking, shoving, kicking), under section 18-9-111(1)(a), C.R.S. (2021).

The supreme court holds that a defendant can assert self-defense as an affirmative defense to the crime of harassment so long as there is some credible evidence to allow a reasonable jury to find that the defendant acted with intent to alarm, as outlined in section 18-9-111(1)(a), as a means of self-defense. The supreme court also holds that the district court erred by affirming the trial court's determination that the defendant was not entitled to an instruction on self-defense as an affirmative defense to his harassment charge under section 18-9-111(1)(a).

Accordingly, the district court's judgment is reversed, and the case is remanded with instructions to return the matter to the trial court for further proceedings consistent with this opinion.

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

2022 CO 4

Supreme Court Case No. 20SC463
Certiorari to the District Court
Arapahoe County District Court Case No. 18CV30951

Petitioner:

Thomas Pearson,

v.

Respondent:

The People of the State of Colorado.

Judgment Reversed
en banc
January 10, 2022

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

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 Can a defendant charged with harassment (striking, shoving, kicking) claim self-defense as an affirmative defense? We address this issue in connection with our review of the district court's decision in *People v. Pearson*, No. 18CV30951 (Dist. Ct., Arapahoe Cnty., Apr. 28, 2020), affirming the county court's determination that Thomas Pearson was not entitled to a self-defense instruction, as a matter of law, with respect to his pending harassment[1] charge. We conclude that a defendant can assert self-defense as an affirmative defense to the crime of harassment so long as there is some credible evidence to allow a reasonable jury to find that they[2] acted with intent to alarm, as outlined in section 18-9-111(1)(a), C.R.S. (2021), as a means of self-defense. Accordingly, we reverse the district court's judgment and remand the case with instructions to return the matter to the trial court for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶2 On June 1, 2017, Pearson was working as a courtesy tow-truck driver, providing roadside assistance on Interstate 225 when Timothy O'Kelly, another

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[1] This opinion is limited to section 18-9-111(1)(a), C.R.S. (2021). For ease of reading, we refer to this provision of the statute as "harassment" from here forward.

[2] We are intentionally using the singular "they" and "their" throughout this opinion.

motorist, changed lanes and pulled in front of Pearson's vehicle. The two men testified at trial and provided very different accounts of what happened next.

¶3 According to Pearson, O'Kelly cut in front of Pearson's vehicle and flipped him off. Pearson then threw an air freshener at O'Kelly's car, which led O'Kelly to park in the middle of the highway and exit his vehicle. Pearson then parked behind O'Kelly's car, put on his hazard lights, and approached O'Kelly. Pearson testified that O'Kelly yelled and cursed as Pearson approached and that O'Kelly struck him in the face. Pearson recalled punching O'Kelly in the face one time in response but asserted that he did not use his full force.

¶4 According to O'Kelly, he merged into Pearson's lane and soon after heard Pearson's "angry" honk, to which O'Kelly responded by flipping Pearson the middle finger. O'Kelly testified that Pearson began to tailgate him, forcing O'Kelly to brake abruptly due to surrounding traffic. O'Kelly then saw and heard a metal object hit his car. Believing that Pearson threw an object at him, O'Kelly stopped and opened his car door to photograph Pearson's vehicle in order to later file a complaint. Upon seeing O'Kelly exit his vehicle, Pearson exited his own and rapidly approached while screaming expletives and making threatening statements. O'Kelly put his arms out to prevent Pearson from getting too close. After several attempts, Pearson punched O'Kelly in the face, injuring him.

¶5 Pearson was arrested at the scene and was charged with assault in the third degree, criminal mischief, and harassment.

¶6 Before trial, defense counsel notified the trial court that Pearson wanted to argue self-defense as an affirmative defense to the harassment and assault charges. As to harassment, the trial court stated:

> I don't understand how you could use—when you look at the elements of how affirmative defense could be used—the affirmative defense of self-defense be used against an elemental that reads "with intent to harass, annoy, or alarm another person." The State—the jury will either find that he did or didn't do that because of the situation that he found himself in, but it's not a self-defense issue when it comes to that.
>
> It's not something that the State should have to disprove. It's—it's really just how is the jury going to see the evidence in terms of was there intent to harass, annoy, or alarm. It—it doesn't go to the self-defense as we all think of it . . . .
>
> [I]t doesn't compute to give an affirmative defense along with an elemental that reads that the jury would have to find that the [d]efendant acted with intent to harass, annoy, or alarm with those three things. He has to either be trying to harass, annoy, or alarm.
>
> If he's not because he is defending himself, regardless of whether or not it's given as a self—an affirmative defense, they're not going to be able to find that.

¶7 Ultimately, the court ruled that it would not allow Pearson to use the affirmative defense of self-defense with regard to the harassment charge, finding that the intent to harass, annoy, or alarm was mutually exclusive with the intent to defend oneself. Instead, the court concluded that self-defense was an element-

negating traverse to the crime of harassment that, if proven, would negate the requisite mens rea of the harassment charge. The court did, however, indicate that it would instruct the jury that self-defense was an affirmative defense to the assault charge.

¶8 At trial, Pearson took the stand in his own defense and admitted that he punched O'Kelly but stated that he did so because he "was worried [O'Kelly] was going to keep going," and that he "didn't use all [his] force." Rather, Pearson testified, he only used enough force "to make sure [O'Kelly] didn't try to push [him] again."

¶9 During the jury instruction conference, defense counsel again argued that the evidence showed that "Pearson was trying to alarm [O'Kelly] in self-defense and that's why a self-defense [affirmative defense] instruction should be given on harassment." In the alternative, due to the court's pretrial ruling, defense counsel requested an instruction stating that intent to defend oneself negates the intent to harass. The court similarly rejected that instruction, noting that such a conclusion would be "axiomatic" for the jury. Defense counsel continued his objection, arguing that, without an additional instruction, it was conceivable that a juror might vote to convict on the harassment charge while simultaneously believing that Pearson acted in self-defense.

¶10 Thus, limited by the trial court's ruling, defense counsel argued the element-negating traverse, noting during closings that the prosecution "charged [Pearson] . . . with the intent to harass, annoy, or alarm. But we know that that was not Mr. Pearson's intent. He told you, [he] was defending [himself] . . . ." The jury returned a verdict acquitting Pearson of the assault in the third degree and criminal mischief charges but convicting him of harassment.

¶11 Pearson appealed to the district court, arguing that the trial court erred by ruling that self-defense was not an affirmative defense to harassment and by failing to properly instruct the jury. Pearson additionally argued that even if the trial court was correct in ruling that self-defense was an element-negating traverse, it still erred by failing to instruct the jury on the traverse pursuant to section 18-1-704(4), C.R.S. (2021).

¶12 The district court agreed with the trial court that Pearson could not simultaneously claim that he struck O'Kelly to both defend himself *and* alarm O'Kelly. In the district court's view, the ultimate result that Pearson was seeking under the circumstances could not have been to alarm O'Kelly. Consequently, the district court reasoned that "he cannot both assert that he acted in self-defense and admit the elements of the harassment charge, something that is a necessity in affirmative defenses." In reaching this conclusion, the district court stated that it "believe[d] that 'objective' or 'intent' in the context of [the harassment statute]

means the *main or ultimate* objective or intent." The district court additionally held that the trial court was not required to provide a traverse instruction for the harassment charge because traverses generally do not require their own instructions unless the mens rea includes recklessness, criminal negligence, or extreme indifference. The district court thus affirmed the trial court's judgment.

¶13 We subsequently granted Pearson's petition for certiorari.[3]

II. Analysis

¶14 We begin by outlining the applicable standard of review. Next, we discuss the distinction between affirmative defenses and traverses and their respective burdens of proof. Then we address the statute and case law related to the charge of harassment and discuss what is required for a defendant to assert a claim of

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[3] We granted certiorari to review the following issues:

1. Whether the district court erred in finding no reversible error occurred where the trial court ruled that self-defense was not an affirmative defense to the specific-intent crime of Harassment, C.R.S. § 18-9-111(1)(a), and failed to properly instruct the jury on the affirmative defense.
2. If the trial court was correct in finding self-defense as an element-negating traverse rather than an affirmative defense, whether the district court erred in finding no reversible error occurred when the trial court failed to instruct the jury on such a traverse.

self-defense as an affirmative defense. We conclude by applying the law to the particular facts of the case before us.

A. Standard of Review

¶15 "Trial courts have a duty to instruct the jury on all matters of law applicable to the case." *Roberts v. People*, 2017 CO 76, ¶ 18, 399 P.3d 702, 704–05. And "[w]e review jury instructions de novo to determine whether the instructions accurately informed the jury of the governing law." *Id.* at ¶ 18, 399 P.3d at 705. We must consider all the instructions provided by the trial court, together, to determine whether it properly advised the jury. *People v. DeGreat*, 2018 CO 83, ¶ 15, 428 P.3d 541, 544.

¶16 In order to present an affirmative defense for the jury to consider, a defendant must offer "some credible evidence" to support the claimed defense. § 18-1-407(1), C.R.S. (2021); *People v. Garcia*, 113 P.3d 775, 783–84 (Colo. 2005). Whether a defendant has met this burden is a question of law, and we review the sufficiency of a defendant's evidence de novo. *Id.* at 784. If a defendant meets this standard, and a trial court refuses to give an affirmative defense instruction, then the prosecution's burden of proof has been impermissibly lowered, implicating a defendant's constitutional rights. *See id.* Such an error, if preserved, is subject to constitutional harmless error review. *See Griego v. People*, 19 P.3d 1, 8 (Colo. 2001) (indicating that "when a trial court misinstructs the jury on an element of an

offense, either by omitting or misdescribing that element, that error is subject to constitutional harmless" error review). These errors necessitate reversal unless the error was harmless beyond a reasonable doubt. *See Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119.

B. Affirmative Defenses and Traverses

¶17 This court, generally, has recognized two types of defenses in criminal cases: (1) affirmative defenses and (2) traverses. *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011). Ultimately, whether an asserted defense constitutes an affirmative defense or a traverse dictates the appropriate burden of proof. *Roberts*, ¶ 22, 399 P.3d at 705.

¶18 In asserting an affirmative defense, a defendant admits to the conduct that gives rise to the charged offense. *Id.* at ¶ 20, 399 P.3d at 705; *People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989). And in such a case, a defendant essentially acknowledges "presence at and participation in the event" but claims that they were legally justified in doing so, and that justification is "sufficient to render the participant exempt from criminal responsibility." *Huckleberry*, 768 P.2d at 1239. When a defendant presents evidence properly raising an affirmative defense, the defense becomes an additional element of the charged offense, requiring the trial court to provide a jury instruction indicating that the prosecution must prove the defense's inapplicability beyond a reasonable doubt. *Roberts*, ¶ 22, 399 P.3d at 705.

¶19 Conversely, a traverse negates one or more elements of the offense, serving to undermine or cast doubt on the possibility that a defendant committed the charged offense. *Id.* at ¶ 21, 399 P.3d at 705. However, a defendant who presents evidence that negates one or more elements of the charged offense "is not entitled to an affirmative defense instruction." *Id.* at ¶ 22, 399 P.3d at 705 (quoting *Pickering*, 276 P.3d at 555). Though, when a defendant is not entitled to an affirmative defense instruction for self-defense, a defendant may present evidence, when relevant, that they were acting in self-defense, and "the court shall instruct the jury with a self-defense law instruction." § 18-1-704(4). Then it is up to the jury to consider the traverse evidence, along with the self-defense law instruction, to decide whether the prosecution has proven each element of the offense beyond a reasonable doubt. *Roberts*, ¶ 22, 399 P.3d at 705.

¶20 With these principles in mind, we next review the underlying charge in this case—harassment—and the requirements that a defendant must satisfy to assert a claim of self-defense as an affirmative defense.

C. Harassment and Self-Defense

¶21 Under section 18-9-111(1)(a), when a person, acting "with intent to harass, annoy, or alarm another[,] . . . [s]trikes, shoves, kicks, or otherwise touches a person or subjects [them] to physical contact," they commit the crime of harassment. To be convicted of harassment, a defendant must have the specific

intent to harass, annoy, or alarm. *See* § 18-1-501(5), C.R.S. (2021) ("All offenses defined in this code in which the mental culpability requirement is expressed as 'intentionally' or 'with intent' are declared to be specific intent offenses.").

¶22 A person acts in self-defense, under section 18-1-704(1), by "using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person." And in doing so, a person "may use a degree of force which he reasonably believes to be necessary for that purpose." *Id.* So long as a defendant "present[s] some credible evidence" to support the defense, a defendant is entitled to have the jury instructed on self-defense as an affirmative defense. *DeGreat*, ¶ 22, 428 P.3d at 545. And, as noted, the ultimate goal in presenting this affirmative defense is "to justify, excuse, or mitigate" a defendant's commission of the act. *Id.* at ¶ 21, 428 P.3d at 545.

¶23 Because a defendant must only present "some credible evidence" in support of the proffered defense, the burden is rather low. As this court has previously stated, "a defendant may satisfy this burden even if the only supporting evidence is 'highly improbable' testimony from the defendant . . . ." *Id.* at ¶ 22, 428 P.3d at 545 (quoting *Lybarger v. People*, 807 P.2d 570, 579 (Colo. 1991)). Ultimately, so long as a defendant has provided some credible evidence to allow a reasonable jury to conclude that the defendant committed the offense in

self-defense, that is sufficient to require a court to provide an affirmative defense instruction. *See id.* at ¶ 31, 428 P.3d at 546.

D. Application

¶24 So, can a person intend to alarm someone in self-defense? At first blush, the concept seems implausible, if not downright nonsensical. However, upon closer examination, we cannot conclude that the two concepts are always, in every circumstance, mutually exclusive. For example, some jurisdictions have found that a person may fire a warning shot into the air to alarm an initial aggressor while simultaneously doing so in self-defense (i.e., to prevent an altercation from escalating further). *See, e.g.*, *State v. Hill*, 433 S.E.2d 848, 849 (S.C. 1993) (holding that there was ample evidence that the defendant fired the gun into the air in self-defense to distract the alleged aggressor). Or, take for instance a circumstance in which a person kicks a car door to alarm or distract the initial aggressor so that they can then escape from an impending attack. *See, e.g.*, *People v. Coahran*, 2019 COA 6, ¶¶ 1–2, 436 P.3d 617, 619 (determining that the defendant acted in self-defense, and was thus entitled to an affirmative defense instruction, by kicking her ex-boyfriend's car door in order to escape an altercation). While those are not the particular facts before us, we are mindful that there are factual circumstances that could lead a reasonable jury to find that a defendant was acting

with the intent to defend themself by alarming their attacker. Indeed, that is what Pearson contends happened here.

¶25 This court, in *Roberts*, did not address whether the charge of harassment, as a matter of law, is always inconsistent with self-defense, or whether the affirmative defense of self-defense could never apply to harassment. ¶ 29, 399 P.3d at 706. Similarly, the district court here concluded that, because Pearson's case was seemingly identical to *Roberts*, an interpretation as to the general applicability of self-defense as an affirmative defense to harassment was not necessary. *See id.*

¶26 In reaching this conclusion, the district court reasoned that because Pearson did not admit that he struck O'Kelly with the *main or ultimate intent* to alarm him, rather than with the *main or ultimate intent* to defend himself, he did not properly admit every element of the offense. However, that was not this court's conclusion in *Roberts*. We have never required such an intent to subordinate the other; rather, we merely require both to be present and for one to justify, excuse, or mitigate the other. *See, e.g.*, *DeGreat*, ¶ 21, 428 P.3d at 545 (holding that asserting the intent to act in self-defense as an affirmative defense "seeks to justify, excuse, or mitigate" the intent required of the act, as well as other elements of the charge); *Roberts*, ¶ 20, 399 P.3d at 705 (same); *Pickering*, 276 P.3d at 555 (same); *Huckleberry*, 768 P.2d at 1238 (same).

¶27 Though the district court likened Pearson's case to *Roberts* in concluding that Pearson was not entitled to an affirmative defense instruction, we note some key distinctions. In *Roberts*, the defendant was charged with harassment following an incident with her estranged husband, in which she struck him in the face several times. ¶ 3, 399 P.3d at 703. Roberts's defense counsel, at the close of evidence, tendered a jury instruction providing that self-defense constituted an affirmative defense to the charge of harassment, which the trial court rejected. *Id.* at ¶¶ 8–10, 399 P.3d at 703–04. This was the correct ruling because, during trial, Roberts expressly *denied* striking her husband *with the intent* to harass, annoy, or alarm him. *Id.* at ¶ 7, 399 P.3d at 703. Rather, she stated that her *only* intent was "just to get as far away from him as [she] could." *Id.* (alteration in original).

¶28 In this case, in contrast, Pearson testified that although he struck O'Kelly in the face, he did so "to make sure [O'Kelly] didn't try to push [him] again," and he purposely tempered the amount of force that he used. Defense counsel reiterated this point in closing argument. And while Pearson did not expressly testify that he struck O'Kelly because he intended to defend himself by alarming O'Kelly, the trial court had already rejected defense counsel's argument that the jury should be instructed as to self-defense in connection with the harassment charge, so admitting that particular element outright would have been at Pearson's peril.

¶29 The practical effect of this pretrial ruling was to box Pearson in, requiring that he either rely on self-defense as a traverse or not at all. That is, if Pearson admitted to possessing the intent to alarm, he couldn't also argue, as an element-negating traverse, that he didn't possess the intent to alarm. Thus, Pearson had no real alternative but to completely reverse course on his theory of the case.

¶30 If Pearson had not been forced to change course, his testimony as to his intent in hitting O'Kelly would have been more than sufficient to warrant providing a self-defense as an affirmative defense instruction as to the harassment charge. We are also persuaded that, despite being strategically confined from arguing at trial that Pearson struck O'Kelly with the express intent to alarm him, Pearson presented sufficient evidence—satisfying his burden to present some credible evidence—to require the trial court to provide an instruction on self-defense as an affirmative defense to harassment. *See DeGreat*, ¶ 31, 428 P.3d at 546. Pearson testified that, as he approached, O'Kelly was yelling and cursing at him and attempted to hit him. Pearson explained that he "was worried [O'Kelly] was going to keep going"; and so he "didn't use all [his] force" when he struck O'Kelly, just a reasonable degree of force "to make sure [O'Kelly] didn't try to push [him] again." Because Pearson can satisfy this burden even by way of his own testimony—despite how probable or improbable that testimony might be—this

evidence, alone, would be enough to afford Pearson the right to an affirmative defense instruction. *Id.* at ¶ 22, 428 P.3d at 545.

¶31 While we cannot know how the jury might have viewed an affirmative defense instruction as to the harassment charge, we do know that the jury acquitted Pearson of the assault charge on which it did receive such an instruction. And though we do not express any opinion on the merits of Pearson's defense, we conclude that Pearson presented some credible evidence to allow a reasonable jury to find that he struck O'Kelly in the face with the intent to alarm and that he was justified in using such force, which he claimed to have tempered in self-defense. Thus, the trial court should have provided the jury with an instruction on self-defense as an affirmative defense to Pearson's harassment charge. And because such an error improperly lowered the prosecution's burden of proof, it was not harmless beyond a reasonable doubt. *See Garcia*, 113 P.3d at 784.

¶32 Under the circumstances of this case, we determine that the trial court should have instructed the jury on self-defense as an affirmative defense to the harassment charge, thus we need not address Pearson's contention as to a traverse instruction.

III. Conclusion

¶33 We conclude that a defendant can assert self-defense as an affirmative defense to the crime of harassment so long as there is some credible evidence to

allow a reasonable jury to find that they acted with intent to alarm, as outlined in section 18-9-111(1)(a), as a means of self-defense. We also conclude that the district court erred by affirming the trial court's determination that Pearson was not entitled to an instruction on self-defense as an affirmative defense to the harassment charge under section 18-9-111(1)(a). Accordingly, we reverse the district court's judgment and remand the case with instructions that the district court return the matter to the trial court for further proceedings consistent with this opinion.

CHIEF JUSTICE BOATRIGHT dissents.

CHIEF JUSTICE BOATRIGHT, dissenting.

¶34 As Mike Tyson famously said: "Everybody has a plan until they get punched in the mouth."[1] That is because getting hit in the mouth evokes a myriad of emotions: fear, confusion, apprehension, anger, shock, and possibly many other emotions, including alarm. But make no mistake, when Thomas Pearson punched Timothy O'Kelly, Pearson's conscious objective was to stop O'Kelly from attacking him. He was not, as the majority posits, intending only to alarm O'Kelly. At that moment, Pearson wanted O'Kelly to get a new plan.

¶35 Pearson testified that he punched O'Kelly because O'Kelly hit him in the face and he "was worried [O'Kelly] was going to keep going." But Pearson also testified that he "didn't use all [his] force," only "enough to make sure [O'Kelly] didn't try to push [him] again." If his testimony is to be believed, then Pearson's punch was intended to deter O'Kelly from continuing his attack.

¶36 However, in concluding otherwise—that Pearson's intent was to merely alarm O'Kelly—the majority holds that a "defendant can assert self-defense as an

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[1] Mike Berardino, *Mike Tyson Explains One of His Most Famous Quotes*, SunSentinel, (Nov. 9, 2012), https://www.sun-sentinel.com/sports/fl-xpm-2012-11-09-sfl-mike-tyson-explains-one-of-his-most-famous-quotes-20121109-story.html [https://perma.cc/DVK4-SJ5L].

affirmative defense to harassment, so long as there is some credible evidence to allow a reasonable jury to find that they acted with intent to alarm." Maj. op. ¶ 1. While I follow the logic of the majority, I disagree. Because I understand Pearson's conscious objective was to stop O'Kelly, his defense is not an affirmative defense to harassment. Rather, the defense traverses the intent element of harassment such that it negates the mens rea, effectively refuting the possibility that the defendant could be convicted of harassment. In my view, the trial court and district court correctly identified Pearson's defense as a traverse.

¶37 As the majority accurately explained, this court has long-settled definitions of the two main defenses to criminal charges: affirmative defenses and traverses. *See People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) ("There are, generally speaking, two types of defenses to criminal charges . . . 'affirmative' defenses . . . [and] 'traverses' . . . ."); *see also People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989). Affirmative defenses "admit the defendant's commission of the elements of the charged act, but seek to justify, excuse, or mitigate the commission of the act," while traverses "effectively refute the possibility that the defendant committed the charged act by negating an element of the act." *Pickering*, 276 P.3d at 555.

¶38 Practically speaking, if the presented evidence raises the issue of self-defense as an affirmative defense, "the affirmative defense effectively becomes an

additional element," and the prosecution must prove each element of the charged offense beyond a reasonable doubt. *Id.* Additionally, the "trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable." *Id.* However, if the "presented evidence raises the issue of an elemental traverse, the jury may consider the evidence in determining whether the prosecution has proven the element implicated by the traverse beyond a reasonable doubt." *Id*. Thus, for a traverse, the jury may consider whether the evidence presented creates a reasonable doubt that an element of the charged offense has not been met.

¶39 Here, the element implicated is the mens rea required for a harassment conviction. Harassment is, by definition, a specific intent crime because "the mental culpability requirement is expressed as 'intentionally' or 'with intent.'" *See* § 18-1-501(5), C.R.S. (2021); § 18-9-111(1)(a), C.R.S. (2021) ("[A] person commits harassment if, *with intent* to harass, annoy, or alarm another person" that person "[s]trikes, shoves, kicks, or otherwise touches a person . . . ." (emphasis added)). "A person acts 'intentionally' or 'with intent' when his *conscious objective* is to cause the specific result proscribed by the statute defining the offense," § 18-1-501(5) (emphasis added), or when the person's "purpose [is] to accomplish a particular result," *In re Roose*, 69 P.3d 43, 48 (Colo. 2003). Therefore, for the prosecution to prove the mens rea element of harassment beyond a reasonable doubt, it must

show that a person's "conscious objective" must be to harass, annoy, or alarm another person. And for the affirmative defense to apply, Pearson's intent in striking O'Kelly must have been to harass, annoy, or alarm O'Kelly.

¶40 As such, the main inquiry thus becomes: What "particular result" did Pearson intend when he punched O'Kelly? More specifically, did Pearson intend his punch to result in O'Kelly stopping his attack? Or did Pearson intend his punch to only result in O'Kelly feeling alarmed? The answer to these questions, I submit, is the difference between an affirmative defense and a traverse.

¶41 Although Pearson and O'Kelly each say the other struck first, at some point, it is undisputed that Pearson punched O'Kelly. Pearson testified that his purpose in punching O'Kelly was self-defense because he was worried that O'Kelly would strike him again. Further, Pearson testified that he only used enough force to ensure O'Kelly did not try to push him again. In short, Pearson testified that his *conscious objective* was to deter O'Kelly from continuing his attack. That was the *result* that Pearson intended.

¶42 Hence, I believe the majority conflates Pearson's ultimate conscious objective when it states that Pearson "struck O'Kelly in the face with the intent to alarm . . . in self-defense." Maj. op. ¶ 31. He wasn't trying to merely alarm O'Kelly. Sure, by punching O'Kelly in the face, he *may* have, in fact, alarmed

O'Kelly[2]—but that was not his goal. Frankly, I believe that Pearson did not care what emotion O'Kelly felt when he was punched, so long as O'Kelly stopped his alleged attack. Or as Mike Tyson might put it: Pearson wanted O'Kelly to come up with a different plan.

¶43 For that reason, I cannot agree with the majority that Pearson's conscious objective in this case was to alarm O'Kelly. Rather, in my view, Pearson's objective was ultimately to stop O'Kelly. Under my rationale, Pearson could present the exact same defense that he did at trial. The only difference would be how the jury is instructed.

¶44 In sum, I disagree with the majority's holding that self-defense is an affirmative defense to harassment. Rather, self-defense traverses the intent element of harassment, such that it effectively refutes the possibility that the defendant could be convicted of harassment because it negates the mens rea.

¶45 For the above reasons, I respectfully dissent. Accordingly, I would affirm the trial court and remand the case for further proceedings.

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[2] In my view, alarming an attacker alone does not guarantee that an attack will stop. In fact, alarming someone may escalate the situation. That is why the response to a stressful event, like getting punched in the face, is called the fight-or-flight response.