ADVANCE SHEET HEADNOTE
June 20, 2023

2023 CO 38

No. 21SC506, *People v. McLaughlin*—Criminal Law—Colorado Rules of Evidence—Rule of Completeness—Self-Serving Hearsay—Impeachment of a Hearsay Declarant.

The supreme court considers two issues. The first is whether self-serving hearsay is admissible under the rule of completeness, CRE 106. The second is whether admitting a defendant-declarant's self-serving hearsay under the rule of completeness authorizes the prosecution to impeach the defendant-declarant under CRE 806.

The supreme court first holds that under CRE 106, if the prosecution creates a misleading impression by excluding a defendant's statements that ought in fairness to be considered contemporaneously with the proffered evidence, then the rule of completeness requires the prosecution to introduce such statements. Second, the court holds that when a defendant-declarant's statements are admitted under the rule of completeness, the prosecution may not impeach the defendant-

declarant under CRE 806. Accordingly, the court affirms the judgment of the court of appeals.

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

2023 CO 38

Supreme Court Case No. 21SC506
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA960

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Charles Joseph McLaughlin.

Judgment Affirmed
en banc
June 20, 2023

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

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 Charles Joseph McLaughlin was arrested for driving under the influence ("DUI") after the police responded to a call and located him in a parking lot near his truck. McLaughlin's defense was that he had not been driving. At trial, the People introduced a video of the interaction between McLaughlin and the arresting officer. But they edited the video to omit statements McLaughlin made to the officer alleging that an unidentified woman was the driver of the vehicle. McLaughlin sought to introduce these statements under the rule of completeness, arguing that the redacted video created a misleading impression.

¶2 The trial court ruled that McLaughlin's statements were self-serving hearsay and, therefore, not admissible under the rule of completeness. The court further concluded that McLaughlin's statements about the unidentified woman were not admissible unless he testified, which would subject him to impeachment with his prior felony convictions under CRE 806. McLaughlin declined to testify, and as a result, his statements about the unidentified woman were never admitted. A jury found him guilty.

¶3 A division of the court of appeals reversed, holding that (1) self-serving hearsay is admissible under the rule of completeness and (2) statements from a defendant-declarant admitted under that rule are not subject to impeachment. We granted certiorari review.

¶4 We agree with the division. First, we hold that under CRE 106, if the prosecution creates a misleading impression by excluding a defendant's statements that ought in fairness to be considered contemporaneously with the proffered evidence, then the rule of completeness requires the prosecution to introduce such statements. Second, we hold that when a defendant-declarant's statements are admitted under the rule of completeness, the prosecution may not impeach the defendant-declarant under CRE 806.

I. Facts and Procedural History

¶5 A man noticed a truck driving erratically and reported it to the police. Officer Ryan Marker was dispatched to the scene and located the truck described in the 911 call in a vacant parking lot. The officer ran the license plate on the truck and learned that it was registered to McLaughlin.

¶6 Officer Marker observed the truck's lights turn on and off, and then he saw a man exit the front door on the driver's side of the truck. Officer Marker observed the man repeatedly lose his balance as he tried to get back in and out of the truck, entering and exiting through the driver's side front door. After a few minutes of observing from afar, Officer Marker approached the man and confirmed that he was McLaughlin. Throughout the interaction, McLaughlin made several statements that an unidentified woman was the one driving the truck; he maintained that he hadn't been driving. Officer Marker didn't see anyone else in

the truck or in the general area. He observed that McLaughlin had a strong odor of alcohol; slurred speech; bloodshot, watery eyes; and unsteady balance. Officer Marker subsequently arrested McLaughlin for DUI.

¶7 The People charged McLaughlin with felony DUI (DUI with three or more prior alcohol-related driving offenses), reckless driving, and a lane-change violation. At trial, the People sought to introduce a redacted version of the body-camera footage that omitted McLaughlin's statements about the unidentified woman, arguing that the statements were self-serving hearsay. McLaughlin objected to redacting these statements from the video.

¶8 Ultimately, the trial court concluded that McLaughlin's statements referencing the unidentified woman were self-serving hearsay and thus inadmissible under the rule of completeness because, per *People v. Zubiate*, 411 P.3d 757, 763 (Colo. App. 2013), there was nothing to guarantee their trustworthiness. The court further concluded that McLaughlin's statements were not admissible unless he testified, and if he did choose to testify about the unidentified woman, then the People could impeach him with his prior felony convictions.[1]

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[1] At the time of his trial, McLaughlin had at least six prior felony convictions: second degree burglary, felony menacing, possession of weapons by a previous offender, first degree criminal trespass, manufacture or sale of a controlled substance, and possession of a controlled substance.

¶9 At trial, the People played a redacted version of Officer Marker's body-camera footage over McLaughlin's objection. The recreation below shows the difference between the unredacted footage and the redacted footage. A transcript of the unredacted footage is on the left, and a transcript of the redacted footage shown to the jury is on the right. Additionally, statements contained in the unredacted version that were omitted from the redacted version are italicized.

¶10 McLaughlin first mentioned the woman when responding to the officer's question about the condition of the truck:

Unredacted		**Redacted**	
Officer:	What happened to your truck?	Officer:	What happened to your truck?
McLaughlin:	*She, uh, split* –	McLaughlin:	[No response.]

¶11 McLaughlin then referenced the unidentified woman when describing how his truck ended up in the parking lot:

Unredacted		**Redacted**	
Officer:	So why did you pull into here and park?	Officer:	So why did you pull into here and park?
McLaughlin:	I didn't.	McLaughlin:	I didn't.
Officer:	So how did the truck just end up here?	Officer:	So how did the truck just end up here?
McLaughlin:	It just ended up here.	McLaughlin:	It just ended up here.

Officer:	It just ended up here?	Officer:	It just ended up here? Sir, I—when I pulled in and parked right here, you were parking. And you yourself already admitted to me you've been here for a couple minutes and you drove here. You told me you've been trying to get your truck started—
McLaughlin:	*Because she—uh so.*		
Officer:	Sir, I—when I pulled in and parked right here, you were parking. And you yourself already admitted to me you've been here for a couple minutes and you drove here. You told me you've been trying to get your truck started—	McLaughlin:	I didn't say I drove anything.
McLaughlin:	I didn't say I drove anything.		

¶12 McLaughlin referenced the unidentified woman for the last time when asserting that he did not drive the truck:

Unredacted		**Redacted**	
Officer:	Are you really gonna lie to me right now?	Officer:	Are you really gonna lie to me right now?
McLaughlin:	Listen, man . . . whatever you're thinking, I—I don't know. All that matters is that I didn't drive anything. I'm	McLaughlin:	Listen, man . . . whatever you're thinking, I—I don't know. All that matters is that I didn't drive anything. I'm

sitting here trying to figure out what's going on with this *when she walked away and over there –*	sitting here trying to figure out what's going on with this.

¶13 McLaughlin declined to testify. In closing argument, the People claimed that accepting McLaughlin's defense that he wasn't driving was tantamount to "suspend[ing] reality," stated that there was "no evidence of anyone else around driving," and emphasized the absence of other potential drivers on PowerPoint slides.[2] Ultimately, the jury found McLaughlin guilty of all charges.

¶14 McLaughlin appealed, arguing that the trial court should have admitted his redacted statements under the rule of completeness and that the trial court erred by conditioning the admission of those statements on "his being subject to impeachment with his prior criminal history." *People v. McLaughlin*, No. 19CA960, ¶ 9 (May 27, 2021).

¶15 The division concluded that the rule of completeness applied to McLaughlin's redacted statements because "the exclusion of the redacted portions of the video created a misleading impression." *Id.* at ¶ 14. Specifically, the division concluded that the redacted video gave the impression that McLaughlin

[2] For example, one of the People's slides read: "How else did he get there? No evidence of *anyone* else around or driving."

either ignored, was unable to respond to, or gave illogical answers to Officer Marker's questions. *Id.* at ¶ 17. The division further concluded that, whereas the unredacted footage showed McLaughlin claiming that another person drove his truck, the redacted footage "left the jury with the impression that McLaughlin had no explanation for how the truck got there." *Id.* at ¶¶ 17–18.

¶16 Next, the division held that even if McLaughlin's statements were self-serving hearsay, they were still admissible under the rule of completeness. *Id.* at ¶ 22. In reaching this conclusion, the division relied on the analysis of another division of the court of appeals in *People v. Short*, 2018 COA 47, 425 P.3d 1208. *McLaughlin*, ¶ 22. The division agreed with *Short* that it was fundamentally unfair to allow the proponent of evidence to omit information and create a misleading impression when "the opponent is prevented by an exclusionary rule from presenting that information." *Id.* (citing *Short*, ¶ 46, 425 P.3d at 1220). In agreeing with *Short*'s reasoning, the division here acknowledged that it was declining to follow contrary opinions from other divisions of the court of appeals in *People v. Davis*, 218 P.3d 718, 731 (Colo. App. 2008), and *Zubiate*, ¶ 33, 411 P.3d at 764. *McLaughlin*, ¶ 22.

¶17 The division next held that the trial court shouldn't have conditioned the admission of McLaughlin's redacted statements on his being subject to impeachment with his prior felony convictions. *Id.* at ¶ 23. Again relying on *Short*,

the division held that CRE 806 doesn't apply when self-serving hearsay is used to cure a misleading impression under the rule of completeness. *Id.* at ¶¶ 24–26. Specifically, the division concluded that because the *People* were required to introduce McLaughlin's statements under CRE 106, the statements became nonhearsay party-opponent admissions (i.e., statements made by McLaughlin and offered by the People) under CRE 801(d)(2)(A). *Id.* at ¶ 24. And because such statements aren't hearsay, the division determined that they aren't subject to impeachment under Rule 806. *Id.*

¶18 Finally, the division concluded that these errors required reversal. *Id.* at ¶ 27. The division noted that the trial court's error forced McLaughlin into a dilemma: Either admit his redacted statements subject to impeachment or leave the jury with the misleading impression that he didn't know how the truck arrived at the parking lot. *Id.* at ¶ 29. Thus, because McLaughlin's defense rested entirely on his assertion that he was not the one driving the truck, his apparent lack of explanation for how the truck got to the scene in the redacted video significantly undermined that defense. *Id.* at ¶ 30.

¶19 The division also noted the People's extensive reliance on the misleading impression created by the redacted video. *Id.* at ¶ 31. Specifically, the People continually stated that McLaughlin had no explanation for how his truck arrived at the scene; repeatedly referenced the most misleading segments of the video; and

included the misleading, redacted quotes from the video on a PowerPoint during closing argument. *Id.* The division concluded that "[i]n effect, the People suppressed McLaughlin's statements, and then affirmatively argued in closing that no such statements existed." *Id.* at ¶ 32. Accordingly, the division deemed the error not harmless and reversed McLaughlin's convictions. *Id.*

¶20 We granted certiorari review.[3]

II. Analysis

¶21 We begin by describing the appropriate standards of review. We next discuss the applicable law under CRE 106 and hold that if the prosecution creates a misleading impression by excluding a defendant's statements that ought in fairness to be considered contemporaneously with the proffered evidence, then the rule of completeness requires the prosecution to introduce such statements. We then hold that when a defendant-declarant's statements are admitted under

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

1. Whether the court of appeals erred by splitting from *People v. Davis*, 218 P.3d 718 (Colo. App. 2008)[,] and *People v. Zubiate*, 2013 COA 69[, 411 P.3d 757,] in holding that self-serving hearsay is admissible under the rule of completeness.
2. Whether the court of appeals erred by holding that the impeachment rule regarding the admission of hearsay, [CRE] 806, does not apply to self-serving hearsay that is admitted under the rule of completeness.

the rule of completeness, the prosecution may not impeach the defendant-declarant under CRE 806. We thus affirm the division's judgment.

A. Standards of Review and Principles of Interpretation

¶22 We review a trial court's evidentiary rulings for abuse of discretion. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993). A trial court abuses its discretion when it misapplies the law or when its decision is manifestly arbitrary, unreasonable, or unfair. *People v. Jefferson*, 2017 CO 35, ¶ 25, 393 P.3d 493, 498–99. But we review a trial court's interpretation of the law governing the admissibility of evidence de novo. *People v. Johnson*, 2021 CO 35, ¶ 15, 486 P.3d 1154, 1158.

¶23 In construing a court rule, we "employ the same interpretive rules applicable to statutory construction." *People v. Angel*, 2012 CO 34, ¶ 17, 277 P.3d 231, 235 (quoting *People v. Fuqua*, 764 P.2d 56, 58 (Colo. 1988)). We look to the language of the rule, interpreting it consistently with its plain and ordinary meaning. *Id.* If the rule is unambiguous, we apply it as written. *Id.* Moreover, we "do not add words to or subtract words from a [rule]." *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 12, 488 P.3d 1140, 1143 (quoting *People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560).

B. CRE 106 and Self-Serving Hearsay

¶24 CRE 106 codifies the common law rule of completeness. *People v. Melillo*, 25 P.3d 769, 775 n.4 (Colo. 2001). Rule 106 provides that "[w]hen a writing or

recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part . . . which ought in fairness to be considered contemporaneously with it." Because Rule 106 is similarly worded to Fed. R. Evid. 106, federal cases and authorities interpreting the federal rule are highly persuasive in construing CRE 106. *Cf. Warne v. Hall*, 2016 CO 50, ¶ 12, 373 P.3d 588, 592 ("[W]e have always considered it preferable to interpret our own rules of civil procedure harmoniously with our understanding of similarly worded federal rules of practice."). Rule 106's purpose "is to prevent a party from misleading the jury by allowing into the record relevant portions of a writing or recorded statement which clarify or explain the part already received." *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (quoting *United States v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004)).

¶25 The People argue that self-serving hearsay (i.e., a hearsay declaration made by a defendant in the defendant's own favor) is inadmissible under the rule of completeness because nothing guarantees the trustworthiness of such statements. But this argument depends on whether the defendant-declarant's statements are hearsay in the first place.

¶26 Again, CRE 106 provides that when a statement "is introduced by a party, an adverse party may require *him* at that time to introduce any other part . . . which ought in fairness to be considered contemporaneously with it." (Emphasis added.)

Note that the rule refers to the individual seeking to *cure* a misleading impression as the "adverse party." Further, it specifies that such adverse party may require "him"—referring back to the original proponent of the statement—to introduce other evidence that should be considered contemporaneously with it. Put differently, because the adverse party "may require" the *proponent* to introduce additional evidence that should be considered contemporaneously, the proponent of the original evidence necessarily becomes the proponent of the *additional* evidence.

¶27 If CRE 106 meant for the adverse party, instead of the original proponent, to introduce the evidence that cures the misleading impression, the rule would have stated so. Instead, the rule states that the "adverse party *may require him at that time to introduce*" the other evidence. CRE 106 (emphasis added). The drafters could have instead provided that the "adverse party may introduce" the evidence. But they didn't. And we do not add words to or subtract words from rules. *See Nieto*, ¶ 12, 488 P.3d at 1143. Therefore, by its plain language, CRE 106 contemplates that the proponent of the original evidence that creates a misleading impression is also the proponent of the additional evidence that ought in fairness to be considered contemporaneously with the original evidence.

¶28 Here, the People introduced the video of McLaughlin and Officer Marker, but because the redactions implied that McLaughlin provided no explanation for

how his car ended up in the parking lot, the proffered evidence was misleading. In response, McLaughlin sought to present the excised portions under the rule of completeness—evidence that "ought in fairness to be considered contemporaneously" with the proffered footage—to cure this misleading impression. Thus, under the rule, McLaughlin was the adverse party, and the People, by the plain language of the rule, became the proponents of the additional evidence (i.e., McLaughlin's remarks about the unidentified woman).

¶29 With this in mind, we next turn to whether McLaughlin's statements, which were introduced by the People, are considered hearsay. CRE 801(c) defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. CRE 801(d), however, provides that certain out-of-court statements are *not* hearsay, regardless of whether they are offered for their truth. Specifically, Rule 801(d)(2)(A) provides that a statement is not hearsay if the "statement is offered against a party" and the statement is "the party's own statement in either an individual or a representative capacity."

¶30 As discussed, here the People were the proponents of the redacted video and were thus the party required to introduce the portions of the video where McLaughlin refers to the unidentified woman. Accordingly, the People were required to introduce a "statement . . . offered against a party" that was "the party's own statement." Such statements, by definition, are not hearsay under

CRE 801(d)(2)(A); therefore, they cannot be self-serving hearsay. As a result, because the People introduced the misleading body-camera footage from this incident, they were required to introduce McLaughlin's statements from the footage as well, and the statements cannot be excluded on hearsay grounds.

¶31 Our holding is consistent with the touchstone of the rule of completeness: fairness. *See Melillo*, 25 P.3d at 775 (noting that the rule of completeness is "based on principles of fairness and completeness"); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 1:42, at 283 (4th ed. 2015) ("The purpose [of federal Rule 106] is to insure that evidence of a written or recorded statement is presented in a way that reflects the statement accurately and fairly."); 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* § 106.02, at 106-6 (11th ed. 2015) ("A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness."). Here, this concern was especially manifest: The People excluded McLaughlin's statements about the unidentified woman and then argued at trial that no evidence supporting McLaughlin's theory of another driver existed.

¶32 The People nevertheless argue that the purpose of Rule 801(d)(2) is to further our adversary system, meaning it "never applies where a party seeks to admit his or her own hearsay statement." But our plain-language interpretation

of Rule 801(d)(2)(A) does not, as the People assert, "divorce" Rule 801(d)(2) from its adversarial context. That's because a defendant-declarant isn't seeking to admit their own statements independently; instead, they are seeking to cure the misleading impression that the People have *created* by proffering incomplete evidence.

¶33 Additionally, this interpretation does not create, as the People argue, "a categorical rule" that a defendant's statements are "always admissible under the rule of completeness if [they are] needed to correct a misleading impression." Evidence admitted under the rule of completeness remains "subject to the considerations of relevance and prejudice required under CRE 401 and CRE 403." *Melillo*, 25 P.3d at 775; *see also Callis v. People*, 692 P.2d 1045, 1053 (Colo. 1984) (holding that despite the rule of completeness, part of the defendant's confession referencing his probationary status should be excluded because its probative value was substantially outweighed by a danger of unfair prejudice); Mueller & Kirkpatrick, *supra*, § 1:42, at 284 ("Rule 106 connects with Rule 403, which authorizes the court to exclude evidence whose prejudicial effect outweighs its probative value, since offering the remainder of a statement may bring new risks of prejudice, confusion, or misleading the jury.").

¶34 Therefore, we agree with the division that the trial court abused its discretion when it ruled that McLaughlin's statements were self-serving hearsay and thus inadmissible under the rule of completeness.

C. Impeachment of a Defendant-Declarant Under CRE 806

¶35 Next, the People argue that the division erred by holding that the trial court could not condition the admission of McLaughlin's self-serving statements on his being subject to impeachment with his prior felony convictions.

¶36 CRE 806 provides that when either a hearsay statement or a nonhearsay statement as defined in CRE 801(d)(2)(C), (D), or (E) "has been admitted in evidence, the credibility of the declarant may be attacked" and supported "by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." But CRE 806 does not refer to statements admitted under CRE 801(d)(2)(A): admissions by party opponents when "[t]he statement is offered against a party and is . . . the party's own statement in either an individual or a representative capacity." *See also United States v. Herrera*, 51 F.4th 1226, 1287 (10th Cir. 2022) (applying the negative-implication canon of statutory interpretation to Fed. R. Evid. 806 because it "includes a list of relevant statutory provisions," and concluding that "Rule 806's inclusion of subsections (C), (D), and (E) appears to imply the exclusion of subsection (A), the provision governing an admission of a party opponent").

¶37 As discussed, a defendant-declarant's statements introduced under the rule of completeness to cure a misleading impression are not hearsay under CRE 801(d)(2)(A). Because CRE 806, by its own terms, does not reference these statements, the People may not use their admission as a basis for impeaching the defendant-declarant's credibility.

¶38 Again, this construction is consistent with CRE 106's purpose of promoting fairness. *See* Mueller & Kirkpatrick, *supra*, § 1:45, at 306 ("[I]n this setting it is no more unfair that the accused cannot be cross examined than it is in criminal cases in general: Defendants have a right not to take the stand that cannot be compromised because the prosecutor decides to use their statements against them."); Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 Tex. L. Rev. 51, 94 (1996) (arguing that construing Fed. R. Evid. 806 to preclude impeachment "must be the right result because the exercise of the completeness motion should not subject the opponent to any impeachment that would not have been allowed if the proponent had presented the entirety of the statement in the first place, as it was his duty to do").

¶39 Therefore, we agree with the division that the trial court abused its discretion when it concluded that McLaughlin's statements were not admissible unless he testified subject to impeachment with his prior felony convictions.

III. Conclusion

¶40 For the foregoing reasons, we first hold that under CRE 106, if the prosecution creates a misleading impression by excluding a defendant's statements that ought in fairness to be considered contemporaneously with the proffered evidence, then the rule of completeness requires the prosecution to introduce such statements. Second, we hold that when a defendant-declarant's statements are admitted under the rule of completeness, the prosecution may not impeach the defendant-declarant under CRE 806. We therefore affirm the judgment of the court of appeals.