ADVANCE SHEET HEADNOTE
June 20, 2023

2023 CO 42

No. 21SC771, *People v. Vanderpauye*—Self-Serving Hearsay—Excited Utterance Hearsay Exception—CRE 803(2)—CRE 403—Harmless Error

The supreme court clarifies that Colorado law has no per se rule excluding a self-serving hearsay statement by a criminal defendant. Instead, the court holds that, like any other hearsay statement, a defendant's self-serving hearsay statement may be admissible if it satisfies a hearsay-rule exception in the Colorado Rules of Evidence.

Still, the self-serving nature of a defendant's hearsay statement, while not grounds for automatic exclusion, may be relevant in some cases to the determination of whether the statement fits within the scope of a hearsay exception in CRE 803. Of particular interest here, under the excited utterance exception in CRE 803(2), the self-serving nature of a defendant's hearsay statement may be probative of whether the statement was a spontaneous reaction, rendering

it potentially admissible, or the result of reflective thought, rendering it inadmissible.

Regardless of whether the self-serving nature of a defendant's hearsay statement affects the statement's admissibility under the particular hearsay exception in play, the trial court should consider that aspect of the statement in exercising its discretion pursuant to CRE 403.

The district court incorrectly determined that the self-serving nature of the defendant's hearsay statement rendered the statement automatically inadmissible. Further, the district court erred in alternatively ruling that the excluded statement did not meet the excited utterance exception to the hearsay rule under CRE 803(2).

The supreme court concludes that the defendant's statement, though self-serving, was admissible under the excited utterance exception. Further, the court rules that the statement satisfied the CRE 403 balancing test. Because the district court's error in excluding the statement was not harmless, the court remands for a new trial. Accordingly, the court of appeals' judgment reversing the conviction and remanding for a new trial is affirmed.

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

2023 CO 42

Supreme Court Case No. 21SC771
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA792

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Jacob Vanderpauye.

Judgment Affirmed
en banc
June 20, 2023

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, and **JUSTICE GABRIEL** joined.
CHIEF JUSTICE BOATRIGHT, joined by **JUSTICE HART**, dissented.
JUSTICE BERKENKOTTER did not participate.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 The common law prohibited anyone with a "direct pecuniary or proprietary interest" in the outcome of a case, including a party, from testifying. 1 Kenneth S. Broun et al., *McCormick on Evidence* § 65 (Robert P. Mosteller ed., 8th ed.), Westlaw (database updated July 2022). The idea was to prevent self-interested perjury. *Id.* This drastic doctrine remained in effect in England as late as the middle of the 19th century. *Id.* And it was several decades later before the United States could shake it off. *Id.*

¶2 Given the direct-interest doctrine, courts also customarily precluded a party's self-serving *hearsay* statements. 2 Kenneth S. Broun et al., *McCormick on Evidence* § 270 (Robert P. Mosteller ed., 8th ed.), Westlaw (database updated July 2022). So, when the direct-interest doctrine was abrogated by statute throughout this country, any sweeping practice regarding the inadmissibility of self-serving hearsay statements "should have been regarded as abolished by implication." *Id.* It should have been. For some reason, it wasn't. And that has bred confusion in some jurisdictions, including ours.

¶3 In this case, we deal with a self-serving hearsay statement by a criminal defendant. We now clarify that Colorado law has no per se rule excluding a self-serving hearsay statement by a defendant. Instead, we hold that, like any other hearsay statement, a defendant's self-serving hearsay statement may be

admissible if it satisfies a hearsay-rule exception in the Colorado Rules of Evidence.

¶4 A defendant's self-serving hearsay is just a form of hearsay, and as such, it is subject to the rules of evidence governing all hearsay. There are no degrees of untrustworthiness distinguishing a defendant's self-serving hearsay from other hearsay—i.e., we don't deem hearsay untrustworthy and a defendant's self-serving hearsay *really* untrustworthy.[1] Correspondingly, there are no special hearsay rules for determining the admissibility of a defendant's self-serving hearsay.

¶5 Still, the self-serving nature of a defendant's hearsay statement, while not grounds for automatic exclusion, may be relevant in some cases to the determination of whether the statement fits within the scope of a hearsay exception in CRE 803. Of particular interest here, under the excited utterance

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[1] Distinguishing between untrustworthy hearsay and *really* untrustworthy hearsay would be akin to distinguishing between objecting and *strenuously* objecting. *See A Few Good Men* (Columbia Pictures 1992) (After her objection is overruled, Lieutenant Commander Joanne Galloway persists by "strenuously" objecting. The judge overrules her objection again, this time more emphatically. During the next recess, Lieutenant Sam Weinberg, Galloway's co-counsel, remarks to Galloway, "'I strenuously object?' Is that how it works? Hm? 'Objection.' 'Overruled.' 'No, no, no, no, I strenuously object.' 'Oh, well, if you strenuously object, then I should take some time to reconsider.'").

exception in CRE 803(2), the self-serving nature of a defendant's hearsay statement may be probative of whether the statement was a spontaneous reaction, rendering it potentially admissible, or the result of reflective thought, rendering it inadmissible.

¶6 Regardless of whether the self-serving nature of a defendant's hearsay statement affects the statement's admissibility under the particular hearsay exception in play, the trial court should consider that aspect of the statement in exercising its discretion pursuant to CRE 403. Of course, the general rule is that the balance inherent in CRE 403 should be struck in favor of admissibility. *People v. Dist. Ct.*, 869 P.2d 1281, 1286 (Colo. 1994).

¶7 In this case, the district court determined that a hearsay statement by the accused, Jacob Vanderpauye, was automatically inadmissible because it was self-serving. In the alternative, it found, as pertinent here, that Vanderpauye's hearsay statement did not meet the excited utterance exception to the hearsay rule under CRE 803(2). A division of the court of appeals disagreed on both fronts and reversed the judgment of conviction. *People v. Vanderpauye*, 2021 COA 121, ¶¶ 2–4, 500 P.3d 1146, 1149.

¶8 We affirm. First, the self-serving nature of Vanderpauye's hearsay statement didn't render the statement automatically inadmissible. Second, the statement, though self-serving, fit within the scope of the excited utterance

exception in CRE 803(2) because it was a spontaneous reaction by Vanderpauye to a startling event that rendered his normal reflective thought processes inoperative. Third, the statement satisfied the CRE 403 balancing test. And finally, the district court's error in excluding the statement was not harmless. Accordingly, we remand with instructions to return the case to the district court for a new trial.

I. Facts and Procedural History

¶9 While attending the University of Colorado's Boulder campus as an undergraduate student, L.S. went out with friends one Saturday afternoon and consumed alcoholic beverages. She and her friends visited a restaurant, her neighbor's party, and a bar before returning to her residence. Later that evening, she and some of those friends went out to another bar, where she was spotted by Vanderpauye, whom she had met in a class the previous academic year. Vanderpauye made small talk with L.S. and joined her group. At some point, L.S. and Vanderpauye left with one of L.S.'s friends and went to two more bars. When L.S.'s friend went home and L.S. and Vanderpauye were by themselves, they flirted with each other; she was admittedly attracted to him. L.S. then accompanied Vanderpauye to meet his friends at another bar. There, she told him she was drunk and very tired. Vanderpauye told her she could stay at his apartment if she wished, and she agreed to spend the night there.

¶10 As Vanderpauye and L.S. walked to his apartment, she told him that she was not going to have sex with him. Vanderpauye appeared offended by this statement and told her that he didn't want her to think of him that way. L.S. apologized. Upon arriving at Vanderpauye's apartment, the two sat on his bed as they watched television because he didn't have a couch. They engaged in affectionate kissing for a while, but she eventually told him she was drunk and tired and needed to get some sleep. And he responded that she should get some sleep.

¶11 L.S. fell asleep on her side with her clothes on. After sleeping for a while, she woke up on her back and discovered Vanderpauye on top of her. Her shirt and bra were off, her skirt was up, her underwear was pulled down, and she could feel Vanderpauye's penis penetrating her vagina. She yelled, "What are you doing? You're raping me! I was passed out! What are you doing?" He immediately responded, "I thought you said I could do anything to you." According to Vanderpauye, at some point before L.S. fell asleep, while she was capable of appraising the nature of her conduct, she consented to have sexual intercourse with him.

¶12 L.S. pushed Vanderpauye off her, collected her clothes, ran out of his apartment, and called for an Uber. Vanderpauye ran after her with her bra, which she had inadvertently left behind. Handing the bra to her, he apologized. She

responded, "f*** you, you raped me!" In tears, she told the Uber driver that Vanderpauye had just raped her.

¶13 Once home, L.S. woke her friend and told him she'd been raped. She then went to sleep for a few hours. When she woke up, she told several other friends, her mother, and her aunt that she'd been raped. Later that day, she underwent a sexual assault medical forensic examination and made a report to the police.

¶14 The prosecution subsequently accused Vanderpauye of sexually assaulting L.S. under three different statutory provisions: (1) sexual assault—inflicting sexual intrusion or sexual penetration on L.S., knowing that she didn't consent, *see* § 18-3-402(1)(a), C.R.S. (2022), hereinafter "sexual assault (no consent)"; (2) sexual assault—inflicting sexual intrusion or sexual penetration on L.S., knowing that she was incapable of appraising the nature of her conduct, *see* § 18-3-402(1)(b), hereinafter "sexual assault (incapable of appraising)"; and (3) sexual assault—inflicting sexual intrusion or sexual penetration on L.S., who was physically helpless, while knowing that she was physically helpless and did not consent, *see* § 18-3-402(1)(h), hereinafter "sexual assault (physically helpless)." Before trial, the prosecution dismissed the first of these counts, the sexual assault (no consent) charge, and proceeded on the other two counts.

¶15 The prosecution alleged that Vanderpauye had committed sexual assault (physically helpless) while L.S. was asleep, and that he had committed sexual

assault (incapable of appraising) while L.S. was waking up. The defense's theory, in turn, was three-pronged: The prosecution couldn't prove Vanderpauye had formed the requisite culpable mental state (knowingly) because he believed L.S. had consented to having sexual intercourse with him, and L.S.'s conduct and the physical evidence corroborated his belief; L.S. had exaggerated her level of intoxication; and L.S. had pursued these charges because of her longstanding preoccupation with sexual assault.[2]

¶16 Vanderpauye filed a pretrial motion seeking to admit into evidence his statement to L.S., "I thought you said I could do anything to you." Acknowledging that the statement was hearsay, he argued that it satisfied two exceptions to the hearsay rule—the excited utterance exception under CRE 803(2) and the then-existing state of mind exception under CRE 803(3). The prosecution didn't deny

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[2] In positing that L.S. was preoccupied with sexual assault, Vanderpauye asserted that: She was angry that multiple friends had failed to report to the police that they had been raped; she'd publicly confronted two alleged rapists; she regularly binge-watched the television show *Law & Order: SVU*; she watched many crime documentaries and had recently watched one about sexual assaults on college campuses; her aunt is a rape counselor; she purportedly had a "secret obsession with the criminal justice system"; she was "excited" to have visible injuries on her knees following the incident in question; and her mother had said that L.S. had the power to make Vanderpauye suffer and that L.S. would make "an amazing witness" at trial. (The trial court did not allow into evidence the opinion held by L.S.'s mom regarding the type of witness L.S. would make.)

that Vanderpauye had made the statement in question, but it nevertheless opposed his request.

¶17 The district court denied the motion, ruling that Vanderpauye's out-of-court statement was inadmissible because it was self-serving hearsay. In other words, in the court's view, whether the statement met either of the two exceptions listed in Vanderpauye's motion (or any other hearsay exception for that matter) was of no consequence because the self-serving nature of the statement required the statement's exclusion:

> So I think that the . . . first threshold that I think I have to cross is whether or not it's self-serving hearsay. It's a statement that . . . defendant made. . . . And, obviously, the concern is that defendants sometimes make things up and paint things in a color that's more beneficial to them. And there's abundant case law that self-serving hearsay is not admissible. It strikes me that this statement falls squarely within that area of concern. . . . And so I don't see any way to not be concerned about whether or not this statement would be trustworthy. And . . . so for that reason, I'm going to find that it's not admissible . . . .

¶18 In the alternative, the court concluded that Vanderpauye's statement didn't satisfy either the excited utterance exception or the then-existing state of mind exception. The court thus reasoned that, even if the self-serving nature of the statement didn't automatically render the statement inadmissible, the statement still had to be excluded:

> Beyond that, I don't think that . . . it's either an excited utterance or a statement of present sense impression. If anything was startling to Mr. Vanderpauye, it was L.S. either waking up and stopping him or

> for some other reason stopping him, but what was startling to him, it was not that statement. It was some other event that happened. Similarly, the state of mind that's relevant to this case is not a state of mind at the time that he made that statement. It would be his state of mind at the time that he . . . began, I guess, engaging in this alleged sex act. . . . So for all of those reasons, I'm going to find that the statement is not admissible.

¶19 At trial, shortly after L.S. testified that, upon waking up, she yelled at Vanderpauye that he was raping her and asked him what he was doing, defense counsel renewed his request to introduce Vanderpauye's response as an excited utterance.[3] Vanderpauye's counsel correctly noted that L.S. had just acknowledged on the stand that Vanderpauye seemed very startled when she accused him of raping her. Counsel reiterated that Vanderpauye's statement was an excited utterance that had been made "in direct response" to a startling event—her accusation that he was raping her. The court was unmoved, however:

> [R]egardless of whether it's an excited utterance or not, I still find it's self-serving hearsay. I am not changing my ruling. . . . [T]he analysis that because it's self-serving hearsay, it's not inherently reliable, I think that that trumps the excited utterance exception if it is an excited utterance, but I'm not finding it is an excited utterance, so my ruling stands.

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[3] Vanderpauye did not renew his argument pursuant to the state of mind exception in CRE 803(3).

¶20 Although the jury was unable to reach a verdict on sexual assault (incapable of appraising), it returned a guilty verdict on sexual assault (physically helpless). The court later sentenced Vanderpauye to sex offender intensive supervision probation for an indeterminate term with a minimum of at least twenty years and a potential maximum of the rest of his life.

¶21 Vanderpauye appealed, and a division of the court of appeals reversed. *Vanderpauye*, ¶¶ 3–4, 500 P.3d at 1149. First, the division held that neither the Colorado Rules of Evidence nor our court's jurisprudence can support "a per se rule prohibiting the admission of self-serving hearsay by a criminal defendant." *Id.* at ¶ 3, 500 P.3d at 1149. Instead, concluded the division, "a criminal defendant's self-serving hearsay is admissible, subject to the principles contained in CRE 403, if, but only if, the statement satisfies a hearsay-rule exception" in our rules of evidence. *Id.* Second, the division held that Vanderpauye's statement was admissible under the excited utterance exception in CRE 803(2).[4] *Id.* at ¶¶ 2, 4,

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[4] Both before the trial court and the division, Vanderpauye maintained that there was not a second layer of hearsay within his statement—L.S.'s alleged statement "[you can] do anything to [me]." *Vanderpauye*, ¶¶ 11, 35, 500 P.3d at 1150, 1154; *see also* CRE 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."). Vanderpauye contended that this part of his statement was not hearsay because it was offered for its effect on the listener—i.e., to show his belief that L.S. had consented to sexual intercourse—not for the truth of the matter asserted. *Vanderpauye*, ¶ 11, 500 P.3d at 1150. The

500 P.3d at 1149. Thus, ruled the division, the district court erred in excluding the statement.[5] *Id.* And because the division determined that the error was not harmless, it reversed Vanderpauye's conviction and remanded the case for a new trial.[6] *Id.*

¶22 The prosecution then sought certiorari in our court, and we granted its petition.[7] Before we analyze the issues before us, we must first set forth the standard governing our review.

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division agreed, *id.* at ¶¶ 35–37, 500 P.3d at 1154, and the prosecution has impliedly conceded the point in our court.

[5] Having found that Vanderpauye's statement was admissible under the excited utterance exception in CRE 803(2), the division did not consider whether the statement was also admissible under the then-existing state of mind exception in CRE 803(3), *Vanderpauye*, ¶ 34 n.5, 500 P.3d at 1153 n.5, and that issue is not before us.

[6] The division did not analyze the admissibility of Vanderpauye's statement under CRE 403, deferring the matter to the district court on remand. *Vanderpauye*, ¶ 51 n.8, 500 P.3d at 1155 n.8.

[7] We agreed to review the following two questions:

1. Whether, or under what circumstances, a criminal defendant's self-serving hearsay is inadmissible.
2. Whether the court of appeals erred in holding the defendant's statement fit under the excited utterance exception to the hearsay rule and exclusion of that statement warranted reversal of his rape conviction.

II. Standard of Review

¶23 We review a trial court's evidentiary rulings for an abuse of discretion. *Russell v. People*, 2017 CO 3, ¶ 5, 387 P.3d 750, 752. A trial court abuses its discretion when it misapplies the law or when its ruling is manifestly arbitrary, unreasonable, or unfair. *People v. Baker*, 2021 CO 29, ¶ 29, 485 P.3d 1100, 1106.

III. Analysis

¶24 We begin by clarifying that there is no per se rule in Colorado excluding a self-serving hearsay statement by a defendant. We then consider whether Vanderpauye's statement was admissible as an excited utterance despite its self-serving nature. Because we determine that it was, we proceed to explore its admissibility pursuant to CRE 403. And because we conclude that the statement passed muster under CRE 403, we hold that the district court erred in excluding it. Lastly, we rule that this error was not harmless and warrants a new trial.

A. There Is No Per Se Rule Barring a Defendant's Self-Serving Hearsay Statement

¶25 The jumping-off point of our analysis lies in the Colorado Rules of Evidence. These rules define hearsay as a statement other than one made by the declarant while testifying at trial that is offered into evidence to prove the truth of the matter asserted. CRE 801(c). A hearsay statement is presumptively untrustworthy because the declarant is not present in the courtroom to explain the statement in context. *Blecha v. People*, 962 P.2d 931, 937 (Colo. 1998). The truthfulness of such a

statement is also suspect because the declarant can't be subjected to the crucible of cross-examination. *Id.* Given their inherent unreliability, hearsay statements are generally inadmissible at trial. *See* CRE 802. This is what's commonly known as the hearsay rule. But this rule is not absolute. Far from it, Rule 802 explicitly states that hearsay is inadmissible "except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado." *Id.* CRE 803 contains numerous exceptions to the hearsay rule, including the excited utterance exception.[8] The proponent of the evidence bears the burden of establishing a hearsay exception. *People v. Garcia*, 826 P.2d 1259, 1264 (Colo. 1992).

¶26 The district court, however, was under the impression that the exceptions to the hearsay rule in CRE 803 did not apply because Vanderpauye's statement was self-serving. It reasoned that a defendant's self-serving hearsay was too untrustworthy to ever be admissible. But all hearsay is presumptively untrustworthy—that's why we have the hearsay rule. *See* CRE 802. And there are no degrees of untrustworthiness distinguishing a defendant's self-serving hearsay from other hearsay—that is, we don't view hearsay as untrustworthy and a

[8] Our focus is CRE 803; there is no argument that any other rule of evidence, procedural rule, or statute applies.

defendant's self-serving hearsay as *really* untrustworthy. Rather, as relevant here, a hearsay statement may be admissible if it meets one of the exceptions to the hearsay rule in CRE 803. When one of those firmly rooted exceptions applies, hearsay evidence is considered trustworthy and may be admissible. 2 Broun et al., *supra*, § 270.

¶27 Contrary to the district court's understanding, there is no preliminary "threshold" "to cross" before a defendant's self-serving hearsay statement may be admitted under one of the CRE 803 exceptions. In fairness to the district court, the common law precluded a party's self-serving hearsay statement. 2 Broun et al., *supra*, § 270. As mentioned, the genesis of this practice was the direct-interest doctrine, which prohibited parties and anyone else with a direct pecuniary or proprietary interest in a case from testifying. *Id.* Although the direct-interest doctrine was eventually abolished through statute, the practice regarding the exclusion of a party's self-serving hearsay somehow managed to survive in some jurisdictions. *Id.* And that, in turn, has muddled the legal landscape.

¶28 We now clarify that Colorado law has no per se rule excluding a defendant's self-serving hearsay statement. Instead, we hold that, like any other hearsay statement, a defendant's self-serving hearsay statement may be admissible if it satisfies a hearsay-rule exception in the Colorado Rules of Evidence.

¶29 At least two well-respected treatises align with our holding. *See id.* ("If a statement with a self-serving aspect falls within an exception to the hearsay rule, the judgment underlying the exception that the assurances of trustworthiness outweigh the dangers inherent in hearsay should be taken as controlling, and the declaration should be admitted despite its self-serving aspects."); 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* §§ 8:70–8:71 (4th ed.), Westlaw (database updated July 2022) (explaining that concerns related to candor, without more, do not justify excluding self-serving statements that meet the requirements of Fed. R. Evid. 803(3) because "the possibility that factfinders will be misled, or fail to appreciate the possibility that they are false or exaggerated, seems remote"). So do some out-of-state cases. *See, e.g.*, *State v. Vandenburg*, No. M2017-01882-CCA-R3-CD, 2019 WL 3720892, at *46 (Tenn. Crim. App. Aug. 8, 2019) (indicating that there is no general rule of evidence excluding an out-of-court statement merely because it is self-serving); *Oiye v. Fox*, 151 Cal. Rptr. 3d 65, 76 (Cal. Ct. App. 2012); *State v. L'Minggio*, 803 A.2d 408, 414 (Conn. App. Ct. 2002); *Williams v. State*, 915 P.2d 371, 378 (Okla. Crim. App. 1996); *Swain v. Citizens & S. Bank of Albany*, 372 S.E.2d 423, 425 (Ga. 1988); *People v. Berry*, 526 N.E.2d 502, 506 (Ill. App. Ct. 1988).

¶30 The prosecution's reliance on *People v. Cunningham*, 570 P.2d 1086 (Colo. 1977), is misplaced. To begin with, *Cunningham* preceded our promulgation of the

Colorado Rules of Evidence, and the rules, not vestiges of the common law, guide our analysis.[9]

¶31 More importantly, the prosecution misunderstands *Cunningham*. During his trial on murder and kidnapping charges, Cunningham chose not to testify but nevertheless sought to introduce a statement he had made to the police admitting involvement in the kidnapping while denying involvement in the murder. *Id.* at 1089. He argued that the statement in question was an admission against interest.[10] *Id.* Following a hearing outside the presence of the jury, the trial court denied Cunningham's request on the ground that his statement was largely exculpatory and thus not covered by the rule "which allows admissions against interest." *Id.* Our court agreed. *Id.* We reasoned that Cunningham's statement was "basically self-serving" because "its primary purpose, both when made and when offered . . . at trial, was to attempt to shift blame to others, and to deny any

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[9] The Colorado Rules of Evidence went into effect on January 1, 1980, *see* CRE Ch. 33 (Introductory Paragraph), more than two years after we announced *Cunningham*.

[10] CRE 801(d)(2) ("*Admission by Party-Opponent*") reflects the common law rule on which Cunningham relied. It provides that an out-of-court statement is not hearsay if it is "offered against a party and is . . . the party's own statement." CRE 801(d)(2).

involvement in the murder." *Id.* Accordingly, we concluded that the trial court had correctly ruled the statement inadmissible pursuant to the hearsay rule. *Id.*

¶32 It is true that we stated in *Cunningham* that "[h]earsay declarations made by a defendant in his own favor are generally not admissible for the defense." *Id.* We elaborated that self-serving hearsay is inadmissible "because there is nothing to guarantee its testimonial trustworthiness." *Id.* (quoting 2 Charles E. Torcia, *Wharton's Criminal Evidence* § 303, at 97–98 (13th ed. 1972)). If such evidence were admissible, we continued, "the door would be thrown open to obvious abuse: An accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence." *Id.* (quoting 2 Torcia, *supra*, § 303, at 98).

¶33 This discussion, however, must be understood in light of the question that was before us: whether Cunningham's statement fell *within the scope of the rule that permits out-of-court admissions against interest*. In answering no, we explained why the rule invoked by Cunningham was limited to out-of-court statements against interest and could not sweep in hearsay statements that were self-serving. *Id.* Contrasting the two types of statements, we impliedly recognized that the latter lack the trustworthiness that the former enjoy. *Id.* It's in that specific context that we said that a defendant's self-serving hearsay is generally untrustworthy and inadmissible. *Id.* Our point was that a defendant's self-serving hearsay, on the

one hand, and a defendant's out-of-court admission against interest, on the other, warrant different treatment, and therefore, the rule allowing out-of-court statements against interest cannot rescue from the land of inadmissibility a defendant's self-serving hearsay.

¶34 We nowhere suggested that a party's self-serving hearsay is automatically inadmissible or that there is a per se rule barring such hearsay from ever being admitted pursuant to an exception to the hearsay rule. *See id.* That a party's self-serving hearsay can't be admitted through the rule governing out-of-court admissions against interest (i.e., out-of-court party-opponent admissions) doesn't mean that it can never be introduced through a different hearsay-related rule, including a hearsay exception in CRE 803. Because Cunningham didn't assert that his statement was admissible through an alternative hearsay-related rule, we simply didn't reach that question. *See id.*

¶35 Our reading of *Cunningham* is corroborated by our decision in *King v. People*, 785 P.2d 596 (Colo. 1990). King moved to introduce his out-of-court statements regarding his actions and thoughts during and shortly after the killings with which he was charged. *Id.* at 597. Without considering the legal authority cited by King, which included CRE 803(4) (the hearsay exception concerning statements made for medical diagnosis or treatment purposes), the trial court found that the statements were "self-serving" and inadmissible. *Id.* at 599. A division of the court

of appeals affirmed, noting that King's statements "lacked adequate guarantees of trustworthiness" and that their admission would have allowed him to improperly use the defense-retained psychiatrist to whom they were made "as a 'surrogate witness . . . while refusing to submit himself to cross-examination.'" *Id.* at 600 (quoting *People v. King*, 765 P.2d 608, 609 (Colo. App. 1988)). We, however, concluded that the statements were within the purview of CRE 803(4) and should have been admitted. *Id.* at 603. In so doing, we observed that "CRE 803(4) is itself predicated on considerations of trustworthiness and does not contemplate that a party's statements made to a nontreating physician for the purpose of diagnosis in connection with pending litigation must be supported by some independent demonstration of trustworthiness as a prerequisite to admissibility." *Id.*

¶36 If *Cunningham* stood for the proposition that self-serving hearsay by a defendant is per se inadmissible, we would have arrived at a different decision in *King*. But we didn't even mention *Cunningham* in *King*.[11]

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[11] To the extent that cases from the court of appeals have suggested that *Cunningham* erected a per se barrier to self-serving hearsay statements, they are overruled. *See, e.g.*, *People v. Abeyta*, 728 P.2d 327, 331 (Colo. App. 1986); *People v. Avery*, 736 P.2d 1233, 1237 (Colo. App. 1986). Similarly, to the extent that cases from the same court have concluded, without relying on *Cunningham*, that a defendant's self-serving hearsay statement is generally inadmissible because there is nothing to guarantee its trustworthiness, they, too, are overruled. *See, e.g.*, *People v. Murray*, 2018 COA 102, ¶ 39, 452 P.3d 101, 110–11; *People v. Zubiate*,

¶37 Our decisions in *People v. Newton*, 966 P.2d 563 (Colo. 1998), and *Nicholls v. People*, 2017 CO 71, 396 P.3d 675, offer the prosecution no refuge either. *Newton* and *Nicholls* each dealt with a prior version of CRE 804(b)(3) and a third-party witness's statement against that witness's interest when the witness is not available to testify. *Newton*, 966 P.2d at 565–66; *Nicholls*, ¶¶ 1, 14, 40 n.6, 396 P.3d at 677, 679, 683 n.6. We acknowledge that in its current form, CRE 804(b)(3) requires "corroborating circumstances that clearly indicate [the statement's] trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability." CRE 804(b)(3)(B). But there is no basis to extrapolate that requirement and engraft it onto the admissibility of a defendant's self-serving hearsay statement. Whatever concerns CRE 804(b)(3) aims to address are not present in this case. As such, *Newton* and *Nicholls* (and CRE 804(b)(3)) are inapposite.

¶38 In sum, like the division, we conclude that there is no per se impediment to the admission of a defendant's self-serving hearsay. Because the district court determined otherwise, it misapplied the law and abused its discretion. *See Baker*, ¶ 29, 485 P.3d at 1106.

2013 COA 69, ¶ 27, 411 P.3d 757, 763–64, *aff'd*, 2017 CO 17, 390 P.3d 394; *People v. Davis*, 218 P.3d 718, 731 (Colo. App. 2008).

¶39 Our work, however, isn't done. Determining that Vanderpauye's hearsay statement was not rendered automatically inadmissible by its self-serving nature doesn't fully resolve the matter. We still have to decide whether the excluded statement was admissible. Relying on the excited utterance exception to the hearsay rule, CRE 803(2), Vanderpauye says it was. We turn to that claim now.

B. Vanderpauye's Statement Was Admissible Under CRE 803(2)

¶40 CRE 803(2) provides that an excited utterance is "not excluded by the hearsay rule." An excited utterance is any "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

¶41 The excited utterance exception rests on the notion that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *People in Int. of O.E.P.*, 654 P.2d 312, 317 (Colo. 1982) (quoting Fed. R. Evid. 803(2) advisory committee's note to 1972 proposed rules).[12] Because the circumstances surrounding an excited utterance "eliminate the possibility of fabrication,

[12] CRE 803(2) is substantively identical to Fed. R. Evid. 803(2).

coaching, or confabulation," they lend sufficient trustworthiness to overcome the hearsay rule's proscription. *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

¶42 For a hearsay statement to be admissible as an excited utterance, the proponent of the statement must establish the following three conditions:

> (1) the event was sufficiently startling to render normal reflective thought processes of the observer inoperative; (2) the statement was a spontaneous reaction to the event; and (3) direct or circumstantial evidence exists to allow the jury to infer that the declarant had the opportunity to observe the startling event.

People v. Pernell, 2014 COA 157, ¶ 31, 414 P.3d 1, 7; *accord People v. Dement*, 661 P.2d 675, 678–79 (Colo. 1983) (characterizing the third condition as an "implicit requirement, one applicable to all testimonial evidence"), *abrogated on other grounds by People v. Fry*, 92 P.3d 970, 976 (Colo. 2004). We explore each condition in turn, cognizant that our review must consider the totality of the circumstances present. *See Garcia*, 826 P.2d at 1264.

¶43 First, was there an event that was sufficiently startling to render Vanderpauye's normal reflective thought processes inoperative? We answer yes.

¶44 A startling event clearly occurred when L.S. suddenly woke up and accused Vanderpauye of raping her. Recall that, immediately upon waking up, L.S. yelled, "What are you doing? You're raping me! I was passed out! What are you doing?" During trial, L.S. testified that Vanderpauye seemed "very startled" when she woke up and made these exclamations. Further, the district court itself found that

what startled Vanderpauye was L.S. waking up and stopping him. Indeed, per the district court, L.S. "waking up and stopping" Vanderpauye was "startling."

¶45 Still, not every startling event suffices. To satisfy the first condition of admissibility, the event must have been sufficiently startling to render Vanderpauye's normal reflective thought processes inoperative. So, were Vanderpauye's normal reflective thought processes rendered inoperative? We consider this question in concert with the second—and "most significant"—condition of admissibility: the out-of-court statement must have been "a spontaneous reaction to the exciting event," not "the result of reflective thought." 2 Kenneth S. Broun et al., *McCormick on Evidence* § 272 (Robert P. Mosteller ed., 8th ed.), Westlaw (database updated July 2022). Factors that should be considered in determining whether an out-of-court statement was spontaneous include

> the lapse of time between the startling event or condition and the . . . statement; whether the statement was a response to an inquiry; whether the statement is accompanied by outward signs of excitement or emotional distress; and the declarant's choice of words to describe the startling event or condition.

Compan v. People, 121 P.3d 876, 882 (Colo. 2005), *overruled on other grounds by Nicholls*, ¶ 30, 396 P.3d at 681.

¶46 We agree with the prosecution that in some cases the self-serving nature of a defendant's hearsay statement may be relevant in determining whether the

statement fits within the scope of a hearsay exception in CRE 803. Of particular relevance here, under the excited utterance exception in CRE 803(2), the self-serving nature of a defendant's hearsay statement may be probative of whether the statement was a spontaneous reaction, rendering it potentially admissible, or the result of reflective thought, rendering it inadmissible. As Professor McCormick explains, "[a]lthough not grounds for automatic exclusion, evidence that the statement . . . was self-serving is an indication that the statement was the result of reflective thought." 2 Broun et al., *supra*, § 272.

¶47 In this case, however, the absence of any time interval between the startling event and the self-serving statement didn't permit reflective thought. *See id.* "The most important of the many factors" related to whether the observer reacted spontaneously or engaged in reflective thought "is the temporal element." *Id.* As more time passes between the event and the statement, "courts become more reluctant to find the statement an excited utterance." *Id.* "A useful rule of thumb is that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." *Id.* The temporal element takes on added significance when a defendant's out-of-court statement is self-serving. *See Williams*, 915 P.2d at 378 (stating that the lack

of trustworthiness in self-serving statements makes the requirement that there be "no time for reflection or fabrication" especially important).

¶48 Vanderpauye's response to L.S. was self-serving to be sure. But there was no time between the startling event and Vanderpauye's response to engage in reflective thought. The record reflects that, upon being accused of rape by L.S. when she woke up, Vanderpauye *immediately* responded, "I thought you said I could do anything to you." L.S. specifically told the police that Vanderpauye's reaction occurred immediately after she woke up and accused him of rape.

¶49 Had there been time for Vanderpauye to engage in reflective thought, the self-serving nature of his statement may well have been the factor that swung the balance in favor of exclusion. The absence of an opportunity for fabrication or any other reflective thought, however, minimizes the significance of the self-serving nature of Vanderpauye's statement. Because no time elapsed between L.S. waking up and accusing Vanderpauye of rape, on the one hand, and Vanderpauye responding to her, on the other, we infer that his response was not the result of reflective thought and was, instead, a spontaneous reaction while he remained under the stress of excitement caused by the startling event.

¶50 This determination is buoyed by the other relevant factors we identified earlier. Vanderpauye's reaction was not made in response to an inquiry, was accompanied by outward signs of excitement, and did not contain words that were

indicative of preplanning.[13] Thus, in impliedly, but necessarily, finding that Vanderpauye's reaction to the startling event (L.S. waking up and accusing him of rape) was not spontaneous and was instead the result of reflective thought, the district court misapplied the law and abused its discretion. *See Baker*, ¶ 29, 485 P.3d at 1106.

¶51 The prosecution pushes back, however, arguing that L.S. waking up and accusing Vanderpauye of rape cannot be deemed a startling event that rendered his normal reflective thought processes inoperative because *he prompted the event* (i.e., he raped her). More specifically, according to the prosecution, as Vanderpauye was raping L.S., it was foreseeable that she could wake up, catch him in the act, and confront him about it, so he could not have been startled when she woke up and accused him of rape, much less to the degree of being stripped of "the reflective capacity to offer a planned and fabricated response." As the prosecution sees it, when people offer a planned and fabricated response after

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[13] The prosecution maintains that Vanderpauye's use of the word "thought"—"I thought you said I could do anything to you"—demonstrates that he engaged in reflective thought. We are unpersuaded. Under the circumstances present, including the absence of an opportunity for reflective thought, the prosecution reads too much into Vanderpauye's use of the word "thought." If Vanderpauye had said instead, "you said I could do anything to you," would the prosecution concede that he didn't engage in reflective thought? We suspect not.

being caught committing a crime, they necessarily exercise reflective thought. Perhaps realizing that this position is incongruous with L.S.'s testimony that Vanderpauye seemed "very startled" when she woke up and accused him of rape, the prosecution contends that criminals sometimes get nervous when denying wrongdoing. In the prosecution's book, such perpetrators are simply nervous liars.

¶52 The chief problem with the prosecution's position is that it assumes Vanderpauye's guilt (i.e., it assumes that Vanderpauye did what the prosecution accuses him of doing). *If*, as the prosecution alleges, Vanderpauye had sexual intercourse with L.S. while she was physically helpless and while he knew she was physically helpless and didn't consent, then he would have foreseen that she might wake up, catch him in the act, and confront him about it, and her accusation would not have startled him. But that's a big *if*. More importantly, it's an improper *if* because it contravenes the presumption of innocence. *If*, consistent with the presumption of innocence, we assume that Vanderpauye did nothing illegal and that he engaged in sexual intercourse with L.S. after she consented to it, then he

would not have foreseen that she'd accuse him of rape and her accusation would have been quite startling to him.[14]

¶53 The Kentucky Supreme Court's decision in *Bray v. Commonwealth*, 68 S.W.3d 375 (Ky. 2002), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010), is instructive. Bray claimed that the trial court had erred in refusing to allow his sister to testify that, upon hearing about the victims' deaths, he "let out a bloodcurdling scream," exclaiming, "oh my God, not Audrey" (his wife). *Id.* at 382. Kentucky's high court agreed and held that the proffered testimony should have been admitted pursuant to CRE 803(2)'s counterpart, KRE 803(2). *Id.* More specifically, the court rejected the prosecution's argument that the pertinent event

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[14] The prosecution emphasizes that L.S. was unconscious while Vanderpauye had sexual intercourse with her. The facts, however, are not as straightforward as the prosecution implies. After consuming a lot of alcohol, Vanderpauye and L.S. were kissing affectionately on his bed right before L.S. fell asleep. L.S. testified that she did not know when she fell asleep or how long she had been asleep when she woke up. But Vanderpauye maintained that L.S. was awake and willingly participated in the sexual encounter, though he was precluded from introducing direct evidence in support of his position. In any case, to the extent that L.S. was passed out at any point while Vanderpauye had sexual intercourse with her, the presumption of innocence compels us to assume that she had consented to such sexual contact and that she had done so while she was capable of appraising the nature of her conduct. And, contrary to the prosecution's suggestion, no matter how debatable an issue may be, the presumption of innocence can never be trumped by a trial court's broad latitude to determine the admissibility of evidence.

for purposes of KRE 803(2) was Audrey's murder and that, therefore, Bray's exclamation two days later couldn't have been deemed an excited utterance. *Id.* Instead, the court viewed the sister's statement about Audrey's death as the startling event. *Id.* It explained that the startling event "could not be the murders because [Bray was] presumed to be innocent and therefore [was] presumed not to have known of the murders until he heard from [his sister]." *Id.*

¶54 *Williams* provides further guidance. In support of his defense of self-defense, Williams sought to have a witness testify that, immediately after the victims were shot, he told her he had no choice because it was either "them or me." *Williams*, 915 P.2d at 378. As relevant here, Williams argued that his out-of-court statement was admissible as an excited utterance. *Id.* The State acknowledged that, if the killings had occurred as Williams described, then his statement "might be the result of a startling event." *Id.* at 379. But because the State didn't think the evidence supported Williams's self-defense claim, it opposed his request. *Id.* The trial court sided with the State and excluded the statement. *Id.*

¶55 On appeal, however, the Oklahoma Court of Criminal Appeals reversed Williams's conviction, concluding that the statement was admissible under Oklahoma's excited utterance exception. *Id.* at 379–80. In the process, it disavowed the State's analytical framework, which the prosecution's approach in this case shadows:

> *The State's argument seems to be based on the theory that since the State does not believe Williams's statement or claim of self-defense, the statement is not admissible.* When the trial court made its ruling, no evidence had as yet been submitted, and even if it had the trial court is not the finder of fact. The issue in determining the admissibility of this statement under the hearsay exceptions is not whether evidence supported the truth of the statement. The issue is whether the statement meets the requirements for admissibility under any given exception. If the statement meets these foundational requirements then it should be given to the jury. If the trial court were to impose other requirements after determining a statement falls within a hearsay exception, then the trial court would be improperly usurping the jury's fact-finding function. The trial court is the judge of the law, while the jury determines the facts of the case based on admissible evidence. *If this statement was admissible under a hearsay exception then the jury should have heard it. It was up to the jury to determine whether the statement was credible based on subsequently presented evidence.*

Id. (emphases added).

¶56 Just as the appellate courts did in *Bray* and *Williams*, we adhere to the presumption of innocence. It follows that in analyzing whether Vanderpauye's statement qualifies as an excited utterance under CRE 803(2), we cannot assume that he did what the prosecution accuses him of doing. Ultimately, it will be up to the jury to determine what weight, if any, to accord Vanderpauye's statement. To adopt the prosecution's position would be to usurp the jury's factfinding role.

¶57 Considering the totality of the circumstances, we conclude that Vanderpauye's offer of proof satisfied the two contested conditions of admissibility under CRE 803(2). And because it is undisputed that Vanderpauye had an opportunity to observe the startling event, we determine that the third

condition was met as well. Therefore, Vanderpauye's statement immediately after L.S. woke up and accused him of rape, though self-serving, fell within the scope of the excited utterance exception in CRE 803(2). Because the district court misapplied the law in ruling otherwise, it abused its discretion. *See Baker*, ¶ 29, 485 P.3d at 1106.

¶58 One step remains in our admissibility analysis. As we recognized in *King*, "[t]he fact that hearsay evidence may qualify" under a hearsay exception "does not mean that a trial court is required to admit such evidence under any and all circumstances." 785 P.2d at 603. Hearsay evidence that is admissible under the excited utterance exception may nevertheless be excluded pursuant to CRE 403. *Id.* Therefore, regardless of whether the self-serving nature of a defendant's hearsay statement affects the statement's admissibility under the particular hearsay exception in play, the trial court should consider that aspect of the statement in exercising its discretion under CRE 403. We tackle admissibility pursuant to CRE 403 next.

C. Vanderpauye's Statement Was Admissible Pursuant to CRE 403

¶59 Even if relevant, evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403. We are mindful,

however, that CRE 403 "strongly favors admissibility of relevant evidence." *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995). For that reason, when considering the balancing required by CRE 403, we give the evidence the maximum probative value attributable to it by a reasonable factfinder and the minimum unfair prejudice that may be reasonably expected from it. *Id.* Staying within these guardrails, we have little difficulty concluding that Vanderpauye's statement was admissible under CRE 403.

¶60 First, Vanderpauye's statement was highly probative. As the division wisely pointed out, without the statement, the jury was left with the misleading impression that Vanderpauye remained silent in the face of L.S.'s serious accusation and was thus guilty.[15] *Vanderpauye*, ¶ 43, 500 P.3d at 1155. It is human nature to expect that a person falsely accused of a crime like rape will deny the accusation rather than stay silent. Silence in that context is deafening. As the Supreme Court observed in *United States v. Hale*, 422 U.S. 171, 176 (1975), "[s]ilence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." Notably, our court of appeals recently recognized

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[15] The rule of completeness, CRE 106, is not before us, as it wasn't raised by Vanderpauye.

that the omission of a defendant's denial of wrongdoing may permit the prosecution to paint a misleading picture for the jury. *See People v. Short*, 2018 COA 47, ¶¶ 58–59, 425 P.3d 1208, 1223.

¶61 The prosecution's attempt to discount the probative value of Vanderpauye's statement is fatally flawed. According to the prosecution, the statement had little probative value because L.S. (1) had told Vanderpauye on the way to his residence that she was not going to have sex with him, (2) fell asleep on his bed, and (3) woke up to find him having sexual intercourse with her. Much like its position on the excited utterance exception, the prosecution's stance here violates Vanderpauye's presumption of innocence and invades the province of the jury. In any event, the evidence the prosecution marshals before us makes Vanderpauye's statement all the more probative. In the excluded statement, Vanderpauye communicated to L.S. that, contrary to her accusation of rape, she had told him that he could do anything he wanted to her. As such, his statement directly undermined the evidence referenced by the prosecution. It is hard to think of a statement having more probative value.

¶62 Second, as it relates to the flip side of the CRE 403 coin, the probative value of Vanderpauye's statement was not outweighed, much less substantially so, by any of the concerns listed in the rule. The prosecution doesn't even advance any specific contention based on one of those concerns. Instead, it summarily leans on

its reading of *Cunningham*—that a defendant's self-serving hearsay statement is per se unreliable—to urge that admission of Vanderpauye's statement would have created a high danger of unfair prejudice. But we've now rejected that reading of *Cunningham*.

¶63 In short, Vanderpauye's statement was admissible under CRE 403. The concerns identified in the rule, either singly or in combination, did not substantially outweigh the statement's probative value.

¶64 One final question remains for us: whether the district court's error requires reversal. In a word, yes, as we explain in the following section.

D. The District Court's Error Was Not Harmless

¶65 The prosecution asks us to follow the division's lead and apply the *nonconstitutional* harmless error standard of reversal. Vanderpauye counters that the *constitutional* harmless error standard, a less demanding standard of reversal, controls. We don't have to settle this dispute because, even siding with the prosecution, we conclude that the district court's error requires reversal of Vanderpauye's conviction and a new trial.

¶66 In *Hagos v. People*, 2012 CO 63, ¶¶ 8–9, 288 P.3d 116, 118–19, we set forth the standards "that dictate reversal of a conviction" in criminal cases. We stated that preserved nonconstitutional trial errors are subject to the harmless error standard of reversal. *Id.* at ¶12, 288 P.3d at 119. This standard requires us to "reverse the

judgment of conviction if there is a reasonable probability that any error by the trial court contributed to [the defendant's] conviction." *People v. Monroe*, 2020 CO 67, ¶ 17, 468 P.3d 1273, 1276; *see also People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001) (explaining that harmless error requires reversal if the error affected the "substantial rights of the defendant").

¶67 We need not pause long to dispose of the prosecution's claim that the district court's error was harmless. The prosecution argues that the error was inconsequential because Vanderpauye apologized to L.S. as she was getting into the Uber after leaving his residence. Thus, maintains the prosecution, whatever persuasive weight Vanderpauye's statement may have had, it "would have been voided by his later apology." Maybe. Maybe not.

¶68 As Vanderpauye indicates, "people routinely apologize for accidents, misunderstandings, and unintended harms." Some people say they're "sorry" simply because someone they're with is upset. It's possible that Vanderpauye said he was sorry because he felt bad that L.S. was upset or because her reaction conveyed to him that a misunderstanding had occurred.

¶69 Viewed in this light, the apology makes the excluded statement that much more relevant and the trial court's error that much more significant. What the jury heard is that L.S. accused Vanderpauye of rape and that he said nothing in response, except that moments later, he ran out of his residence and apologized to

her. The trial court's error prevented the jury from considering Vanderpauye's apology in the context of his earlier statement. Any opportunity Vanderpauye may have had to persuasively contend that he apologized either because he felt bad that L.S. was upset or because he realized there had been a misunderstanding all but evaporated when he was prohibited from introducing his earlier statement.

¶70 The prosecution, insists, however, that there is no way anyone would have deemed what happened here a misunderstanding. But it is for the jury, not us, to resolve that type of factual dispute. Had the trial court admitted Vanderpauye's statement, the jury would have determined how to reconcile the excluded statement and the apology.

¶71 Having concluded that the excluded statement fit within the scope of the excited utterance exception and satisfied the CRE 403 balancing test, and having further considered the excluded statement in the context of the evidence that was admitted, we are convinced that there is a reasonable probability that the district court's error contributed to Vanderpauye's conviction. Accordingly, we agree with the division that Vanderpauye's conviction must be reversed.

IV. Conclusion

¶72 We respect the substantial discretion vested in trial courts over evidentiary matters. But for the foregoing reasons, we conclude that the district court here abused its discretion in excluding Vanderpauye's statement to L.S. And because

we further conclude that the error was not harmless, we affirm the judgment of the court of appeals. The matter is thus remanded to the court of appeals with instructions to return the case to the district court for a new trial.

CHIEF JUSTICE BOATRIGHT, joined by **JUSTICE HART**, dissented.

CHIEF JUSTICE BOATRIGHT, joined by JUSTICE HART, dissenting.

¶73 L.S. testified that she fell asleep with her clothes on, slept for "a while," and woke up to Jacob Vanderpauye having intercourse with her unconscious body. Under those circumstances, it's inconceivable that Vanderpauye gave *no thought* to what he would say in the event that L.S. woke up, whether he believed he had consent or not. Common sense dictates that he had to be thinking, "What am I going to do if she wakes up while I am having sex with her?" So the statement Vanderpauye made when L.S. did wake up—"I thought you said I could do anything to you"—is the antithesis of an excited utterance. There's nothing startling about a foreseeable and, in fact, anticipated event. And there's nothing spontaneous about a planned reaction. Finally, even if Vanderpauye did not plan his reaction, a denial of responsibility under these circumstances is not indicative of a surprised reaction. The bottom line is that nothing about what Vanderpauye said has the required trustworthiness that warrants an exception to the rule prohibiting hearsay. Hence, I do not believe that the statement in question is an excited utterance, much less that the trial court abused its discretion by excluding the statement. Therefore, I respectfully dissent.

I. Facts

¶74 The People charged Vanderpauye with sexual assault after L.S. accused him of having intercourse with her while she was unconscious. In support of a consent

defense, Vanderpauye sought to admit the hearsay at issue here as evidence that L.S. consented (or that he believed she did). The trial court ruled on the statement twice—once pretrial, and once after L.S. testified.

¶75 Pretrial, Vanderpauye made an offer of proof that relied entirely on statements L.S. made to the police. L.S. told the police that when she woke up and stopped the sexual act, Vanderpauye responded, "I thought you said I could do anything to you." Vanderpauye argued that this statement was admissible as either a present sense impression under CRE 803(1) or an excited utterance under CRE 803(2) because he made it "immediately after the victim terminated the sexual encounter, surprising Mr. Vanderpauye." At a motions hearing, Vanderpauye's counsel argued that Vanderpauye was sufficiently startled when L.S. either "stopped a consensual sexual encounter suddenly" or "woke up from an unconscious sexual encounter." The court excluded Vanderpauye's statement as self-serving hearsay, finding that it couldn't "see any way to not be concerned about whether or not this statement would be trustworthy" due to its exculpatory

nature. The trial court also ruled, in the alternative, that the statement was not a present sense impression or an excited utterance.[1]

¶76 At trial, L.S. testified that she had been drinking with Vanderpauye the night of the assault when she told him that she was "really tired and very drunk." Vanderpauye then walked L.S. to his apartment, but L.S. "made it clear that [she] did not want to have sex with him or anything of that nature." Once they arrived at the apartment, L.S. told Vanderpauye that she had the spins and told him repeatedly that she was "very tired." Vanderpauye and L.S. kissed, but she stopped him, told him again that she was "really tired," and said that she "need[ed] to go to sleep." Vanderpauye encouraged L.S. to go to sleep in his bed and she did, wearing her clothes.

¶77 L.S. testified that when she woke up, Vanderpauye was having intercourse with her. Her shirt and bra were off, her skirt was pulled up, and her underwear was pulled down. She testified that she "immediately said" to Vanderpauye, "[W]hat are you doing? You're raping me. I was passed out." L.S. testified that

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[1] Specifically, the trial court stated:

> I don't find that it's either an excited utterance or a statement of present sense impression. If anything was startling to Mr. Vanderpauye, it was [L.S.] either waking up and stopping him or for some other reason stopping him, but what was startling to him, it was not that statement. It was some other event that happened.

Vanderpauye "seemed very startled that [she] woke up" and that "[b]ased off his body language, he seemed surprised." L.S. was not sure how long she had slept but thought that she "was probably asleep for a while."

¶78 Following L.S.'s testimony, Vanderpauye renewed his request to admit the statement he made when L.S. stopped the encounter: "I thought you said I could do anything to you." In support, his counsel argued that L.S. "specifically said [that] when she stopped him, called him a rapist, he was surprised." Because Vanderpauye was surprised and his statement "was in direct response" to L.S.'s accusation, Vanderpauye's counsel argued that the requirements for an excited utterance were met. The trial court adhered to its prior ruling that the statement was inadmissible as self-serving hearsay but noted that it was "not finding it is an excited utterance" regardless.

II. Analysis

¶79 First, I outline our standard of review, which affords substantial deference to the trial court. Next, I outline the three requirements for a statement to be admitted as an excited utterance. I then discuss how the circumstances Vanderpauye relied on to admit his statement—namely, L.S.'s account of the assault—failed to establish that the statement met two of those requirements.

A. Standard of Review

¶80 "A trial court has substantial discretion in deciding questions concerning the admissibility of evidence." *People v. Eppens*, 979 P.2d 14, 22 (Colo. 1999). Absent an abuse of discretion, we will affirm a trial court's evidentiary rulings. *Id.* A trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law. *People v. Baker*, 2021 CO 29, ¶ 29, 485 P.3d 1100, 1106. "[O]n appeal, a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court." *Eppens*, 979 P.2d at 22.

¶81 The People argue that the trial court did not abuse its discretion by excluding Vanderpauye's statement because under the totality of the circumstances presented, the statement simply did not meet the requirements of an excited utterance. So, I turn to those requirements now.

B. Excited Utterances

¶82 Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." CRE 801(c). Hearsay is not admissible unless an exception applies. CRE 802. The burden of showing that a hearsay exception applies "is on the proponent of the evidence." *People v. Garcia*, 826 P.2d 1259, 1264 (Colo. 1992). When we review whether a statement falls under a hearsay exception, "we must

consider the totality of circumstances presented to determine whether the trial court abused its discretion." *Id.*

¶83 Under CRE 803(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," otherwise called an excited utterance, is not excluded by the hearsay rule. The rationale behind this exception is that some events "may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *People in Int. of O.E.P.*, 654 P.2d 312, 317 (Colo. 1982) (quoting Fed. R. Evid. 803(2) advisory committee's note to 1972 proposed rules); *People v. Dement*, 661 P.2d 675, 679 (Colo. 1983) ("The rationale for the exception is that the declarant's powers of reflection and ability to fabricate or misrepresent the events observed are momentarily suspended while the declarant is under the stress of excitement from a startling event."), *overruled on other grounds by People v. Fry*, 92 P.3d 970, 976 (Colo. 2004).

¶84 For a statement to qualify as an excited utterance, it must meet three requirements. *Dement*, 661 P.2d at 678–79. First, the court must determine whether there was "some occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative." *People v. Franklin*, 683 P.2d 775, 781 (Colo. 1984) (quoting *Dement*, 661 P.2d at 678). Second, the court must determine whether the declarant's statement was "a spontaneous reaction to

the occurrence or event and not the result of reflective thought." *Id.* (quoting *Dement*, 661 P.2d at 678–79). Third, the declarant must have "had the opportunity to observe the startling occurrence." *Dement*, 661 P.2d at 679.

C. Vanderpauye's Statement

¶85 In my view, the record reflects that Vanderpauye failed to establish the first two requirements for an excited utterance: that a "sufficiently startling" event occurred and that his statement was "a spontaneous reaction" rather than "the result of reflective thought." *Franklin*, 683 P.2d at 781 (quoting *Dement*, 661 P.2d at 678–79). I address both requirements in turn.

1. Startling Event

¶86 To begin, the record supports the conclusion that no sufficiently startling event occurred here. True, L.S. testified that Vanderpauye "seemed very startled that [she] woke up" and that "[b]ased off his body language, he seemed surprised." But under our excited utterance jurisprudence, being startled or surprised, on its own, is not enough: The event must be "sufficiently startling *to render normal reflective thought processes of an observer inoperative*." *Id.* (emphasis added) (quoting *Dement*, 661 P.2d at 678); *see also W.C.L. v. People*, 685 P.2d 176, 177, 180 (Colo. 1984) (expressing doubts that an adult's verbal response to a child's inappropriate sexual behavior, even when made "in a tone that apparently startled the child," qualified as a startling event and collecting cases that "considered the

effect of similar events insufficient to allow the admission of hearsay statements as excited utterances"), *superseded by statute on other grounds*, Ch. 149, sec. 1, § 13-90-106(1)(b)(II), 1989 Colo. Sess. Laws 862, 862, *as recognized in People v. Dist. Ct.*, 791 P.2d 682, 685 n.3 (Colo. 1990).

¶87 Our case law provides numerous examples of the type of events that may qualify as sufficiently startling, all of which are objectively more startling than the event at issue here. For example, experiencing a violent crime likely rises to this standard. *See, e.g.*, *O.E.P.*, 654 P.2d at 318 (sexual assault of a child-declarant qualified as startling event); *Compan v. People*, 121 P.3d 876, 878, 883 (Colo. 2005) (abusive behavior by declarant's husband, including yelling at declarant and striking her, qualified as a startling event), *overruled on other grounds by Nicholls v. People*, 2017 CO 71, ¶ 30, 396 P.3d 675, 681; *People v. King*, 121 P.3d 234, 238 (Colo. App. 2005) ("[T]he sexual assault and stabbing of [the declarant] constituted a startling event."). Likewise, witnessing a violent crime may qualify as a startling event. *See, e.g.*, *People v. Roark*, 643 P.2d 756, 760–61 (Colo. 1982) (child-declarant witnessing murder of another child and observing parents' reaction to the death qualified as startling events). So too may undergoing a physically traumatic failed surgery. *Franklin*, 683 P.2d at 781. In each context, the event qualifies not just because it's startling, but because it's *so* startling that the declarant is rendered temporarily incapable of normal thought.

¶88 The "startling event" here—L.S. waking up and accusing Vanderpauye of raping her—is materially different, for at least two reasons. First, foreseeable and anticipated events are not startling. *See* 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8.68 (4th ed.), Westlaw (database updated July 2022) ("Something unexpected is more likely to cause excited reaction than something long anticipated."). Based on the circumstances Vanderpauye relied upon (L.S.'s testimony and statements to the police), L.S. repeatedly told him that she was drunk and tired. She told him that she was uninterested in having sex with him. She stopped kissing him and told him she needed to sleep. And after she fell asleep for "a while," she awoke to him having intercourse with her anyway. Those are the circumstances we must look to when deciding whether the trial court abused its discretion by ruling that Vanderpauye's statement was not an excited utterance. And under those circumstances, L.S. waking up and accusing Vanderpauye of having intercourse with her while she was unconscious would have been entirely foreseeable to him—according to the evidence he cited, *he was having intercourse with her while she was unconscious*. In a footnote, the majority indicates that the facts "are not as straightforward" as they seem because "Vanderpauye maintained that L.S. was awake and willingly participated in the sexual encounter." Maj. op. ¶ 52 n.14. But that was merely Vanderpauye's

argument; the only *evidence* presented was L.S.'s testimony about the encounter. And according to that evidence, she was unconscious.

¶89 In those circumstances, common sense dictates that Vanderpauye had to be planning on what he would say and do in the event L.S. woke up. The majority infers the opposite, citing the presumption of innocence. *Id.* at ¶ 52. But even against that backdrop, the analysis here doesn't change. Assume that L.S. did consent, or that Vanderpauye believed she did. Still, while he undressed and had intercourse with an unconscious person, Vanderpauye had to have been concerned with what she would say if she woke up. He had to have been concerned with whether she would even *remember* giving consent—recall, L.S. was extremely intoxicated at the time. In other words, L.S. waking up and confronting Vanderpauye would have been on his mind the entire time. So while the majority concludes that "[a] startling event clearly occurred when L.S. suddenly woke up and accused Vanderpauye of raping her," Maj. op. ¶ 44, it's equally clear to me that Vanderpauye would have, in fact, anticipated this event. That view of Vanderpauye's proffer is entirely consistent with the presumption of innocence. So to the extent that this issue is debatable, the tiebreaker isn't the presumption of innocence. In my view, it's the abuse of discretion standard, which recognizes that "[a] trial court enjoys broad latitude to determine the admissibility of evidence." *Davis v. People*, 2013 CO 57, ¶ 13, 310 P.3d 58, 61. Because "we grant considerable

deference to the trial court's determinations" under that standard, we should uphold the trial court's decision here. *Id.*, 310 P.3d at 62.

¶90 Second, when a person is confronted with a crime, "it requires only the briefest reflection to conclude that a denial and plea of ignorance is the best strategy." *United States v. Sewell*, 90 F.3d 326, 327 (8th Cir. 1996); *cf. United States v. Penney*, 576 F.3d 297, 313 (6th Cir. 2009) (holding that the declarant's statement after shooting a police officer—"you guys don't understand, I thought I was being robbed"—was not an excited utterance because the declarant "knew what was at stake at the time he made the statement"). In such circumstances, the declarant's capacity for normal thought is not overcome by the event at issue; it does not take much reflection to decide that denial is the best response, so the declarant retains the ability to do exactly that. *See Sewell*, 90 F.3d at 327. Thus, the rationales underlying the excited utterance exception do not apply. *Id.* (concluding that admitting such statements "hardly comports with the spirit of disinterested witness which pervades the rule"). Tellingly, the "startling event" here shares few similarities with the obviously shocking events that we've deemed sufficiently startling in other cases—for instance, being assaulted, being stabbed, or witnessing a murder. *See Compan*, 121 P.3d at 883; *King*, 121 P.3d at 238; *Roark*, 643 P.2d at 760.

¶91 Accordingly, the record supports the conclusion that Vanderpauye failed to establish that a sufficiently startling event occurred here—the first of three

necessary requirements for the excited utterance exception to apply. In my opinion, the trial court therefore did not abuse its discretion by excluding the statement.

2. Spontaneous Reaction

¶92 In addition to establishing that a sufficiently startling event occurred, Vanderpauye was also required to establish that his statement was "a spontaneous reaction to the occurrence or event and not the result of reflective thought." *Franklin*, 683 P.2d at 781 (quoting *Dement*, 661 P.2d at 679). Again, in my view, he failed to do so.

¶93 We've recognized several factors with which to assess a statement's spontaneity: "the lapse of time between the startling event or condition and the out-of-court statement; whether the statement was a response to an inquiry; whether the statement is accompanied by outward signs of excitement or emotional distress; and the declarant's choice of words to describe the startling event or condition." *Compan*, 121 P.3d at 882. Under the totality of the circumstances presented, the weight of these factors suggests that Vanderpauye's statement was the result of reflective thought.

¶94 First, the lapse of time between L.S.'s accusation and Vanderpauye's statement might weigh in favor of spontaneity if one considers *only* the period of time after L.S. woke up. *See* Maj. op. ¶¶ 47–48. Specifically, Vanderpauye's offer

of proof stated that "the statement was made immediately after" or "contemporaneously with [L.S.] stopping the sexual act." That said, L.S. testified that she was "probably asleep for a while" *before* she woke up to Vanderpauye having intercourse with her. A statement is hardly spontaneous if a person has "a while" to formulate what he will say. Indeed, "even a brief period of time can provide a declarant an opportunity to couch a statement in such a way as to best serve his interests." *Jenkins v. State*, 812 S.E.2d 238, 242 (Ga. 2018). Because we must look to the totality of the circumstances presented, I don't believe that we should overlook L.S.'s testimony that she was "asleep for a while" before she woke up and confronted Vanderpauye.

¶95 Second, Vanderpauye's statement was, at least in part, made in response to an inquiry, which weighs against spontaneity. L.S. testified that when she woke up, she said to him, "[W]hat are you doing? You're raping me." Vanderpauye's statement was made in response to L.S.'s question and to rebut her allegation of rape. *See Franklin*, 683 P.2d at 781–82 (noting that while "the fact that the [declarant's] statements were responses to direct questions" is not "dispositive of the issue of admissibility" as excited utterances, it "is of some significance"); Mueller & Kirkpatrick, *supra*, § 8.68 ("It matters . . . whether the statement was made in response to questions or came from within as a direct reaction to events or conditions.").

¶96 Third, while Vanderpauye's statement was accompanied by some signs of excitement, this factor does not weigh heavily in favor of spontaneity because there were few signs that Vanderpauye was emotionally distressed. The only information about Vanderpauye's demeanor was L.S.'s testimony that "[b]ased off his body language, he seemed surprised." This pales in comparison to the significant signs of emotional distress we've discussed in other cases, like "biting [one's] nails, shaking, and crying." *Compan*, 121 P.3d at 883; *see also Franklin*, 683 P.2d at 782 (holding testimony that declarant was "pale, tired, weak, and bleeding" was sufficient to find she "was still under great stress"). Notably, we've distinguished cases where "the only evidence of the [declarant's] stress" is testimony that the declarant "was very upset"—as is the case here—from cases where the declarant demonstrated physical signs of that stress. *Compan*, 121 P.3d at 884 (citing *People v. Koon*, 724 P.2d 1367, 1373–74 (Colo. App. 1986)). While "outward signs of emotional distress" may weigh in favor of spontaneity, the *absence* of those signs is notable. *Id.* So even though L.S. testified that Vanderpauye "seemed surprised," I don't agree that this testimony alone establishes that his statement was an excited utterance.

¶97 Fourth, and most importantly, Vanderpauye's choice of words indicated that he was engaged in reflective thought. In this regard, I agree with the majority that it's relevant that Vanderpauye's statement was exculpatory, which may

indicate that the statement was "the result of reflective thought, rendering it inadmissible." Maj. op. ¶ 46; *see also* 2 Kenneth S. Broun et al., *McCormick on Evidence* § 272 (Robert P. Mosteller ed., 8th ed.), Westlaw (database updated July 2022) ("Although not grounds for automatic exclusion, evidence that the statement . . . was self-serving is an indication that the statement was the result of reflective thought."). Indeed, the majority *concedes* that "[h]ad there been time for Vanderpauye to engage in reflective thought, the self-serving nature of his statement may well have been the factor that swung the balance in favor of exclusion." Maj. op. ¶ 49.

¶98 Where I depart from the majority, however, is that I would recognize Vanderpauye *had time and motivation* to engage in reflective thought—the period of time when he was undressing L.S. and ultimately having intercourse with her while she was unconscious. L.S. testified that she went to sleep with her clothes on, slept for "a while," and woke up unclothed to Vanderpauye engaged in intercourse with her. Recall, L.S.'s shirt and bra had been removed, her skirt had been pulled up, and her underwear had been pulled down. She didn't do any of that; Vanderpauye took her clothes off. That took time. And during that time, Vanderpauye would have planned on what he would do and say should L.S. regain consciousness, whether he believed he had consent or not. To me, it simply does not make sense to say that somebody who had enough time to undress and

engage in an act of intercourse with an unconscious person paid no thought to what he would say if and when that person woke up. Vanderpauye knew that at some point L.S. was going to regain consciousness, either during or after the intercourse. And Vanderpauye had to know that he would have to justify his actions to the victim at some point. At the very least, under the most favorable facts possible for Vanderpauye, he would have to remind the victim that she consented.[2] In any event, what he would say had to have been on his mind.

¶99 All told, the factors set forth in *Compan*, 121 P.2d at 882, weigh against a finding that Vanderpauye's statement was a spontaneous reaction. Therefore, the trial court did not abuse its discretion by ruling that his statement was not admissible as an excited utterance.

III. Conclusion

¶100 Accordingly, I do not agree that Vanderpauye's statement was an excited utterance, let alone that the trial court abused its discretion by ruling as much. As this court has repeatedly admonished, we must respect the substantial discretion afforded to trial courts when deciding evidentiary matters. *See, e.g.*, *Eppens*, 979 P.2d at 22. So it's all the more important, in my view, that we should not

[2] Clearly, her accusation indicates that even if she did consent, she didn't remember doing so.

reverse the trial court's ruling here when it is supported by the record. Hence, I respectfully dissent.

I am authorized to state that JUSTICE HART joins in this dissent.