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APPENDIX A

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

2025 CO 6

Supreme Court Case No. 23SC81
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA1304

Petitioner:

Adam Douglas Densmore,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
February 10, 2025

Attorneys for Petitioner:
Megan A. Ring, Public Defender
Chelsea E. Mowrer, Deputy Public Defender
Denver, *Colorado*

Attorneys for Respondent:
Philip J. Weiser, Attorney General
Grant R. Fevurly, Senior Assistant Attorney General
Denver, *Colorado*

Attorneys for *Amici Curiae* ACLU of Colorado and Office of Respondent Parents' Counsel:
Timothy R. Macdonald
Sara Neel
Emma Mclean-Riggs
Laura Moraff
Denver, *Colorado*

Zaven T. Saroyan
Denver, *Colorado*

Attorneys for *Amicus Curiae* Colorado Department of Human Services:
Philip J. Weiser, Attorney General
Nicole Chaney, Assistant Attorney General
Denver, *Colorado*

Attorneys for *Amici Curiae* Denver Department of Human Services and Arapahoe County Department of Human Services:
Amy J. Packer, Assistant City Attorney
Denver, *Colorado*

Jordan Lewis, Assistant County Attorney
Aurora, *Colorado*

Attorneys for *Amici Curiae* Office of Alternate Defense Counsel and Colorado Criminal Defense Bar:
Spencer Fane LLP
Dean Neuwirth
Denver, *Colorado*

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**,

JUSTICE BOATRIGHT, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶ 1 We granted *certiorari* to consider whether *Miranda v. Arizona*, 384 U.S. 436 (1966), applies when a Department of Human Services caseworker conducts a custodial interrogation. Adam Douglas Densmore urges us to adopt a bright-line rule that whenever a caseworker conducts a custodial interrogation that involves current or unsolved allegations that a reasonable caseworker should know are criminal, *Miranda* applies. Alternatively, he asks us to adopt an objective totality of the circumstances test that does not consider subjective intent.

¶ 2 We decline both invitations and instead conclude that, in determining whether a caseworker acted as an agent of law enforcement in interviewing a person who was in custody, such that *Miranda* warnings were required, courts must consider the totality of the circumstances, including both objective and subjective factors. Applying that standard to the facts presented here, we further conclude that the caseworker who interviewed Densmore did not act as an agent of law enforcement when she spoke with him and, therefore, she was not required to provide *Miranda* warnings before conducting the interviews.

¶ 3 Accordingly, we affirm the judgment of the court of appeals division below.

I. Facts and Procedural History

¶ 4 In February 2017, Densmore lived in Boulder with his thirteen-month-old child and the child's

mother, Ashley Mead. After Mead did not arrive for work one day, her employer called the police.

¶ 5 At this time, Densmore and the child were in Oklahoma, where Densmore was arrested by Oklahoma law enforcement officers. Because Densmore had the child with him when he was arrested and the child had no other adult caregivers, the police called the Oklahoma Department of Human Services (the "Department") and asked the Department to take custody of the child. At that point, Jessica Punches, then a child welfare specialist in the Department's Child Welfare Division, got involved in this matter.

¶ 6 Punches was not a law enforcement officer, and her job description did not include any specific law enforcement activities or criminal investigations. Rather, her job involved investigating the safety of children and reporting information that could endanger a child's welfare.

¶ 7 In performing these duties, Punches frequently interviewed people who were incarcerated. When she conducted such interviews, her purpose was to determine what brought a child to the Department's attention and the steps necessary to maintain the child's safety. Thus, when interviewing someone who was incarcerated, she asked questions concerning substance abuse, domestic violence, family support, discipline, parenting styles, child placement options, and services that the incarcerated parent might need. Ultimately, Punches sought to determine the least restrictive placement for the child, prioritizing

placing the child with a family member, if possible, rather than in foster care.

¶ 8 Consistent with the foregoing, Punches took custody of Densmore's child, brought the child to her office, and began seeking an appropriate placement. She also spoke with a detective from the Boulder Police Department. At that point, the detective informed Punches that Densmore was being held on a suspected custody violation, Mead's whereabouts were unknown, and it was unclear whether Mead was alive.

¶ 9 Punches then interviewed Densmore at the county jail where he was being held. Before this interview, police had twice provided Densmore with *Miranda* warnings, and each time, Densmore had invoked his right to an attorney. It appears undisputed that Punches did not provide Densmore with *Miranda* warnings before beginning her interview. It likewise appears undisputed that no law enforcement officer had asked Punches to interview Densmore and that Punches did not offer to interview Densmore on behalf of any law enforcement officers. Rather, consistent with her usual practice as a child welfare specialist, her intent was to ascertain information to ensure the safety and appropriate placement of the child.

¶ 10 Punches questioned Densmore regarding the child's allergies, her likes and dislikes, how to comfort her, how she was disciplined, parenting techniques, substance abuse, domestic violence, and support systems for the family. Punches also asked Densmore how he ended up in the county where he was arrested

and about his travel plans. She asked these questions to try to establish a timeline of what had happened for purposes of her investigation. She further asked Densmore if he knew where Mead was. She did so because if a parent is available, then she would want to place the child with that parent. She also inquired about other family members who could possibly take custody of the child.

¶ 11 In the course of this conversation, Punches asked Densmore when he last saw Mead. He responded that it was on the previous Sunday, and he noted that he and Mead had gotten into a fight. Punches asked him to tell her about the fight and whether it was physical. Densmore responded that he had slapped Mead. Punches also asked about his relationship with Mead generally.

¶ 12 Punches inquired about domestic violence in the household because she understood that exposure to domestic violence is a child safety concern. She sought information regarding Densmore's relationship with Mead because she generally wanted to know how individuals in a child's home got along and related to each other, to determine whether there was any danger to the child.

¶ 13 During Punches's interview of Densmore, a task force officer sat behind Punches, at her request, for her "safety." The officer did not ask Densmore any questions, instruct Punches to ask any questions, or participate in the interview in any way.

¶ 14 In addition, an audio/video recording system recorded Punches's interview of Densmore, as well as

Densmore's interactions with law enforcement officers following that interview. At the conclusion of the interview, it appears that both Punches and an FBI agent obtained discs containing the video recording. It further appears that the recording was subsequently shared with the Boulder Police Department.

¶ 15 After Punches completed her interview of Densmore, she spoke with an FBI agent who told her that a torso had been found in a dumpster and that he believed it to be Mead's torso. She also spoke with a Boulder detective who informed her that Densmore was being held on suspicion of first degree murder.

¶ 16 The next day, Punches spoke again with Densmore, this time by telephone. Two of Punches's colleagues also participated in this call, the purpose of which was to conduct a "child safety meeting." It appears undisputed that neither Punches nor either of her colleagues provided Densmore with *Miranda* warnings before this meeting, assuming that a telephonic meeting like this could even be characterized as a custodial interrogation. And, as with the prior interview, the purpose of this meeting was not to aid in any prosecution, to solve any crimes, or to gather incriminating information; Punches did not make the call on behalf of any law enforcement personnel; and no law enforcement personnel instructed Punches to make this call. Rather, the purpose of the meeting was to discuss with Densmore the facts that he was incarcerated and Punches had not yet found another caregiver, Densmore's admitted substance abuse, and "possible fighting" between him and Mead. Punches also discussed with Densmore his

strengths as a parent and the best placement plan for the child.

¶ 17 In the course of this conversation, Punches again inquired whether there had been any domestic violence between Mead and Densmore. When Densmore responded that there had not been, Punches confronted him with his statement during the initial interview that he had slapped Mead. Punches followed up because, as noted above, she understood that domestic violence in the home was a child safety concern and also because she wanted her two colleagues, who had not been present during her initial interview, to hear the information that she had gathered previously.

¶ 18 When Punches conducted an investigation like the one in this case, she created a report that she often (although not always) filed with the district attorney. She created such a report here and shared it with the district attorney, although she did not include in her report information regarding the child safety meeting. She excluded that information because all parties to that meeting had agreed to treat the meeting as confidential. Thus, the child safety meeting was documented only internally at the Department.

¶ 19 Several months later, a Boulder detective contacted Punches because the detective's copy of the recording of Punches's initial interview with Densmore was not working properly. The detective inquired whether Punches had a working copy and asked for information about her interview with Densmore. Because the Department's records are

sealed, Punches was unsure whether it was appropriate for her to share this information without a court order. She therefore asked her supervisor. Her district director responded that she could share the requested information with law enforcement, and Punches did so.

¶ 20 The People charged Densmore with first degree murder of Mead, tampering with a deceased human body, tampering with physical evidence, and abuse of a corpse. Densmore thereafter moved to suppress the statements that he had made to Punches during her interview of him at the jail and to suppress any testimony regarding the telephonic child safety meeting. Regarding the former, Densmore argued that (1) Punches was acting as an agent of the state when she interrogated Densmore and, thus, all of his statements should be suppressed because they were in violation of *Miranda* and (2) the statements were not voluntary. Regarding the latter, he argued, among other things, that the statements were not voluntary.

¶ 21 The trial court ultimately denied both of Densmore's motions, principally reasoning that Punches's purpose in interviewing Densmore was to develop a safety plan and placement options for the child. In support of this determination, the court found that it was the Department's regular practice to interview a child's biological parents when the Department took custody of the child and, thus, Punches had a purpose other than to aid law enforcement in investigating this case. Accordingly, the court concluded that Punches was not acting as an agent of law enforcement when she conducted the

interview and, therefore, the interview did not fall within the purview of the Constitution. In light of this ruling, the court did not need to decide whether Densmore's statements were voluntary.

¶ 22 As to the telephonic child safety meeting, the court similarly found that the meeting's purpose was to discuss with Densmore the Department's allegations, to obtain his thoughts regarding the child's placement, and to find the least restrictive environment for the child. The purpose of the meeting was not to aid law enforcement, which did not participate in the meeting, and, thus, Punches and her colleagues were not acting as agents of law enforcement during the meeting. As a result, the court concluded that, like Punches's initial interview, this meeting did not implicate constitutional protections, and the court again did not need to determine whether Densmore's statements were voluntary.

¶ 23 The case proceeded to a jury trial, and, at trial, the court admitted some of Densmore's statements to Punches. The jury convicted Densmore as charged, and he appealed, arguing, as pertinent here, that the trial court had erred in denying his motions to suppress his statements to Punches.

¶ 24 In a unanimous, unpublished opinion, a division of the court of appeals affirmed. *People v. Densmore*, No. 18CA1304, ¶ 106 (Nov. 23, 2022). In so ruling, the division observed that *Miranda* applies to a custodial interrogation conducted by a person other than a law enforcement officer when that person acts as an agent of law enforcement. *Id.* at ¶ 28. This is to

prevent law enforcement officers from circumventing Miranda by directing third parties to act on their behalf. *Id*. The division then applied a totality of the circumstances test to determine whether Punches had acted as an agent of law enforcement. *Id*. at ¶ 31. In applying this test, the division considered, among other things, that (1) Punches was a government employee; (2) her job duties all related to child welfare and family reunification; (3) she confirmed that she was not a law enforcement officer and did not investigate crimes; (4) the fundamental purpose of her investigations was not to obtain incriminating information; (5) there was no evidence that the police directed, controlled, or participated in her investigation; (6) she had not consulted or coordinated with law enforcement personnel regarding the questions to ask Densmore; (7) she had had only brief contact with law enforcement officers before beginning her investigation; (8) no evidence showed that she had reviewed any police reports or other materials related to the criminal investigation; (9) she had a duty to report information that may endanger a child's welfare; (10) she did not provide a report to prosecutors in every case; and (11) she did not have the authority to apprehend, detain, or handcuff individuals. *Id*. at ¶¶ 32-35. Considering these factors in their totality, the division concluded that Punches was not acting as an agent of law enforcement when she spoke with Densmore in this case. *Id*. at ¶ 36. The division thus determined that the trial court had correctly denied Densmore's motions to suppress his statements to Punches. *Id*. at ¶ 37.

¶ 25 Densmore then petitioned this court for a writ of *certiorari*, and we granted his petition.

II. Analysis

¶ 26 We begin by setting forth the applicable standard of review and *Miranda*'s requirements. We then address the law that applies when a person other than a law enforcement officer conducts a custodial interrogation. We end by applying these legal principles to the facts now before us.

A. Standard of Review and Governing *Miranda* Principles

¶ 27 Our review of a trial court's order regarding a motion to suppress evidence involves a mixed question of fact and law. *People v. Cline*, 2019 CO 33, ¶ 13, 439 P.3d 1232, 1236. We defer to a trial court's factual findings if they are supported by competent evidence in the record, but we review de novo the court's legal conclusions. *Id*. Our review of a trial court's ruling on a motion to suppress is limited to the record created at the suppression hearing. *People v. Thompson*, 2021 CO 15, ¶ 16, 500 P.3d 1075, 1078.

¶ 28 The Fifth Amendment to the United States Constitution protects individuals from compelled self-incrimination. U.S. Const. amend. V. To safeguard this right, *Miranda*, 384 U.S. at 478-79, requires that when an individual is subjected to a custodial interrogation, the interrogator must advise the individual that (1) they have the right to remain silent; (2) anything they say can be used against them in a court of law; (3) they have the right to an

attorney's presence; and (4) if they cannot afford an attorney, then one will be appointed for them prior to any questioning if they so desire. Absent an exception to this rule, unwarned statements made during a custodial interrogation are presumed to be compelled and are inadmissible in the prosecution's case in chief. *Verigan v. People*, 2018 CO 53, ¶ 19, 420 P.3d 247, 251.

B. Custodial Interrogations by Non-Law Enforcement Officers

¶ 29 Although *Miranda* typically applies to law enforcement officers conducting custodial interrogations, we have opined that it also applies to "civilians acting as agents of the state in order to prevent law enforcement officials from circumventing the *Miranda* requirements by directing a third party to act on their behalf." *People v. Robledo*, 832 P.2d 249, 250 (Colo. 1992). To determine whether a civilian is acting as an agent of law enforcement in conducting a custodial interrogation, a court must consider the totality of the circumstances. *Id.* Although our case law has not compiled an exhaustive list of factors that a court must consider, we have provided guidance.

¶ 30 In *Robledo*, for example, we considered whether a counselor at a juvenile detention center acted as an agent of law enforcement in speaking with a detained juvenile. *Id.* In that context, we deemed relevant the counselor's duty to investigate and interview juveniles to determine whether they qualified for home monitoring; the counselor's authority to apprehend, handcuff, and detain

juveniles under certain circumstances; his access to police reports and the fact that he had reviewed the incarcerated juvenile's police report before meeting with the juvenile; the counselor's duty to report information that he learned and that might cause or had caused bodily injury to another; and the fact that the counselor was under contract with and was paid by the state to perform these duties. *Id*. at 251.

¶ 31 Nothing in *Robledo*, however, suggested that these factors are the exclusive factors that courts are to consider in determining whether a civilian is acting as an agent of law enforcement when conducting a custodial interrogation. To the contrary, we emphasized that courts are to consider the totality of the circumstances. *Id*. at 250. Accordingly, in our view, the division below did not err in also considering factors such as the investigator's job duties and the purposes of those duties; whether the investigator was a law enforcement officer who investigates crimes; whether the investigator's purpose was to obtain incriminating information; whether the police directed, controlled, or participated in her investigation or gave input regarding the questions the investigator should ask the person to be interviewed; and the extent of the investigator's contact with law enforcement officers before she began her investigation. *Densmore*, ¶¶ 32-35. All of these factors contribute to an assessment of the totality of the circumstances.

¶ 32 We believe—and therefore reaffirm—that the foregoing totality of the circumstances approach is a workable one that appropriately considers the facts of each particular case. We thus decline to adopt

Densmore's proposed bright-line rule that whenever a caseworker conducts a custodial interrogation that involves current or unsolved allegations that a reasonable caseworker should know are criminal, *Miranda* applies. Such a rule would, as a practical matter, cover most child welfare interviews that caseworkers conduct of parents in custody, regardless of the circumstances of a particular case, and Densmore has offered no persuasive reason for extending *Miranda* to custodial interrogations conducted by people who are neither law enforcement officers nor agents of law enforcement.

¶ 33 We likewise decline Densmore's invitation to limit the factors that a court may consider to objective ones, excluding did not factors such as the intent of the interrogator. Neither *Robledo* nor any other case of which we are aware expressly limits the agency determination to an assessment of objective factors, and we believe that such an approach would, in some cases, preclude consideration of relevant facts, contrary to a totality of the circumstances analysis.

¶ 34 Accordingly, we reaffirm the totality of the circumstances approach that we adopted decades ago in *Robledo* and decline to limit the factors that a court may deem relevant in a particular case.

C. Application

¶ 35 Applying the foregoing principles to the facts before us, we conclude that Punches was not acting as an agent of law enforcement when she interviewed Densmore here. To be sure, Punches, like the counselor in *Robledo*, was paid by the state and had

duties to investigate and interview individuals and to report certain information that she had learned (albeit not necessarily for law enforcement purposes). Unlike in *Robledo*, however, no evidence was presented that Punches had the authority to apprehend, detain, or handcuff individuals. Nor did she have access to or review any police reports or other materials related to the criminal investigation involving Densmore before speaking with him.

¶ 36 In addition, although the police were aware that Punches was interviewing Densmore, they did not direct her to do so. Nor did they direct or control her investigation or coordinate with her regarding questions that she was to ask Densmore. And Punches did not intend through her questioning to assist law enforcement in investigating any crimes or to obtain incriminating information. Rather, her purpose was to gather information to ensure the child's welfare and to find a safe placement for the child. The fact that Punches sometimes shared her report with the district attorney and did so here did not change her role or purpose in interviewing Densmore. Nor did her role or purpose in performing her duties change when, several months after her initial interview and child safety meeting with Densmore, she shared requested information with a Boulder detective.

¶ 37 We also note that although a task force officer was present during the initial interview, it appears undisputed that he was present at Punches's request and solely for her safety and that he did not participate in any way in the interview. And although law enforcement officers obtained the recording of

Punches's initial interview of Densmore, the record does not establish that the interview was recorded to gather incriminating information.

¶ 38 Considering all of these facts in their totality, we conclude that Punches was not acting as an agent of law enforcement when she interviewed Densmore and, thus, she had no obligation to provide *Miranda* warnings prior to conducting that interview.

¶ 39 We are not persuaded otherwise by Densmore's reliance on *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mathis v. United States*, 391 U.S. 1 (1968).

¶ 40 *Estelle*, 451 U.S. at 467, concerned whether the government could introduce, at the penalty phase of a capital trial, unwarned statements that an in-custody defendant had made to a psychiatrist during a court-ordered competency evaluation. There, although the psychiatrist was initially designated by the court to conduct a neutral competency evaluation, he subsequently went beyond merely reporting to the court on the question of the defendant's competence and testified for the prosecution at the penalty phase of the trial on the issue of the defendant's future dangerousness. *Id*. In these circumstances, the Court concluded that the psychiatrist's role had changed and that he had essentially become an agent of law enforcement. *Id*.

¶ 41 As Densmore contends, *Estelle* involved statements made to a person other than a law enforcement officer without the benefit of *Miranda* warnings, and the same is true here. Unlike here, however, the psychiatrist in *Estelle* had spoken to the

defendant in the context of, in direct connection with, and for the purpose of a pending criminal proceeding. Accordingly, it is not clear to us that *Estelle* is on point, as Densmore argues. Regardless, in the time since *Estelle* was decided, the Supreme Court has observed that its "opinion in *Estelle* suggested that [its] holding was limited to the 'distinct circumstances' presented there." *Penry v. Johnson*, 532 U.S. 782, 795 (2001). Indeed, the Court has noted that it "[has] never extended *Estelle*'s Fifth Amendment holding beyond its particular facts." *Id.* We therefore decline to apply *Estelle* to the very different factual setting now before us.

¶ 42 In *Mathis*, 391 U.S. at 2-4, 3 n.2, an in-custody defendant had made unwarned statements to an Internal Revenue Service agent as part of what the Government deemed a "routine tax investigation." The defendant contended that the statements were inadmissible under *Miranda*. *Id.* at 3. The Government responded that *Miranda* was inapplicable because (1) the questions were asked as part of a "routine tax investigation" that might not have resulted in a criminal prosecution and (2) the defendant was not incarcerated by the agent questioning him but was imprisoned for a different purpose. *Id.* at 4.

¶ 43 The Court agreed with the defendant, concluding that the distinctions between the case before it and *Miranda* were "too minor and shadowy" to justify departing from *Miranda*. *Id.* In support of this conclusion, the Court began by acknowledging that tax investigations could be initiated for the purpose of civil proceedings rather than criminal

prosecutions and that, to this extent, tax investigations differ from investigations of some other crimes. *Id*. The Court went on to note, however, that tax investigations frequently lead to criminal prosecutions, as had occurred in the case before it. *Id*. Indeed, the full-fledged criminal investigation in the matter before the Court began just days after the agent's last visit to question the defendant. *Id*. In these circumstances, the Court declined to conclude that tax investigations are immune from *Miranda*'s requirements, as the Government there had argued. *Id*.

¶ 44 Although we acknowledge that there are some parallels between the interviews at issue in *Mathis* and the meetings at issue here, we conclude that the tax investigation in *Mathis* differs in material ways from the kind of child welfare investigation that occurred in this case. The purpose of the agent's investigation in *Mathis* was to enforce federal tax laws, whether through civil or criminal proceedings. *Id*. Accordingly, the investigation served a predominantly law enforcement purpose. Here, in contrast, Punches conducted her investigation to determine how to care for and where to place Densmore's child while Densmore was in custody, Mead's whereabouts were unknown, and the child had no other caregivers. As a result, Punches's investigation was not aimed at uncovering violations of law, developing evidence in a criminal case, or enforcing criminal law, even if her investigation ultimately uncovered facts that subsequently became relevant in the criminal investigation concerning Densmore.

¶ 45 Moreover, in a case like this, child welfare specialists like Punches serve a critical role that is entirely separate and distinct from any criminal proceedings, namely, ensuring child safety and finding an appropriate placement for a child. In our view, such facts make Punches's involvement in this case materially different from that of the Internal Revenue Service agent in *Mathis*. *Mathis* is therefore distinguishable from the case now before us.

III. Conclusion

¶ 46 For these reasons, we conclude that when determining whether a Department of Human Services caseworker acted as an agent of law enforcement in interviewing a person who was in custody, such that *Miranda* warnings were required, courts must consider the totality of the circumstances, including both objective and subjective factors. Applying this approach to the facts now before us, we further conclude that Punches did not act as an agent of law enforcement when she interviewed Densmore and, therefore, she was not required to provide *Miranda* warnings before conducting the interviews. As a result, the division below correctly upheld the trial court's order denying Densmore's motions to suppress.

¶ 47 Accordingly, we affirm the division's judgment.

APPENDIX B

Supreme Court of Colorado.

Adam Douglas DENSMORE,
v.
The PEOPLE of the State of Colorado.

No. 23SC81
|
December 4, 2023

Court of Appeals Case No. 18CA1304

EN BANC.

Opinion

Petition for Writ of Certiorari GRANTED.

Whether *Miranda v. Arizona*, 384 U.S. 436 (1966), applies when a Department of Human Services caseworker conducts a custodial interrogation.

DENIED AS TO ALL OTHER ISSUES.

APPENDIX C

Colorado Court of Appeals, Division IV.

The PEOPLE of the State of Colorado, Plaintiff-Appellee,

v.

Adam Douglas DENSMORE, Defendant-Appellant.

Court of Appeals No. 18CA1304
|
Announced November 23, 2022

Boulder County District Court No. 17CR530, Honorable Judith L. LaBuda, Judge

Attorneys and Law Firms

Philip J. Weiser, Attorney General, Grant R. Fevurly, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Lynn Noesner, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Opinion

Opinion by JUDGE DUNN

¶ 1 Defendant, Adam Douglas Densmore, appeals the judgment of conviction entered after a jury found him guilty of first degree murder, tampering with a

deceased human body, tampering with physical evidence, and abuse of a corpse.

¶ 2 Densmore contends reversal is required for six reasons. He argues the trial court erred by (1) failing to suppress statements he made to a child welfare specialist; (2) preliminarily ruling on the conditional admissibility of other act evidence; (3) denying his requested self-defense instruction; and (4) failing to adequately respond to jury questions about the phrase "after deliberation." Densmore also claims that the prosecution violated his Sixth Amendment right to counsel by seizing privileged attorney-client documents from his jail cell. Finally, he contends that if the errors do not require reversal individually, then they do cumulatively. We affirm.

I. Background

¶ 3 In 2017, Densmore and the victim lived together with their thirteen-month-old child in Boulder but were no longer romantically involved.

¶ 4 On the morning of February 14, the victim didn't show up for work and wasn't responding to text messages. Concerned, her supervisor called police.

¶ 5 Almost immediately police began trying to locate Densmore, the victim, and the child. They discovered the last outgoing text from the victim's phone was sent on February 12 at 6:53 p.m.

¶ 6 Using Densmore's cell phone records, the police learned that Densmore left the Boulder apartment late on the evening of February 12 and traveled to his

parents' home in Louisiana where he stayed for a couple of days. From there, he drove to his grandmother's house in Arkansas. After a night there, he began driving toward Colorado.

¶ 7 On February 15, alerted by family members that police wanted to speak with him, Densmore called a Boulder detective. Densmore reported to the detective that he and the victim "had the worst argument they had ever had" on February 12 and he told the victim, "I hate you and I hope you die." But he said that when he and the child left the apartment that night, the victim was alive and well.

¶ 8 The detective then alerted law enforcement that Densmore and the child were in Oklahoma, and local officers arrested him.

¶ 9 Meanwhile, the day of Densmore's arrest, an Oklahoma gas station employee discovered a suitcase in a dumpster that contained what police later confirmed was the victim's torso. Video surveillance from the gas station showed Densmore putting something in the station's dumpster.

¶ 10 No other remains were found, though police discovered Densmore stopped at several other gas stations with dumpsters during his travels.

¶ 11 Police found a variety of saws, scalpels, knives, and scissors in Densmore's Boulder apartment and car. And they found a reciprocating saw at his parents' home. Testing showed the blood on the saw blade matched the victim's DNA profile. The victim's blood was also found on items in the Boulder

apartment, Densmore's car, and Densmore's parents' house.

¶ 12 The prosecution charged Densmore with first degree murder, tampering with a deceased human body, tampering with physical evidence, and abuse of a corpse.

¶ 13 At trial, the medical examiner explained to the jury that it was impossible to know how the victim died because her organs, head, and other body parts were never found.

¶ 14 The prosecution proceeded on the theory that Densmore killed the victim in Colorado, traveled to his parents' home where he dismembered the victim, and then scattered her body parts in different dumpsters. Densmore defended on the theory that the prosecution had not met its burden of proof.

¶ 15 After a two-week trial, the jury convicted Densmore as charged and the trial court imposed a controlling sentence of life without the possibility of parole.

II. The Motion to Suppress Statements Made to the Child Welfare Specialist

¶ 16 Densmore first contends that the trial court erred by failing to suppress statements he made to a child welfare specialist days after his arrest. Densmore argues that suppression was required because the child welfare specialist was acting as an agent of law enforcement and did not advise him of

his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree.

A. Additional Background

¶ 17 Because Densmore had his child with him when he was arrested, a child welfare specialist with the Oklahoma Department of Human Services, Jessica Punches, was called to the scene to take custody of the child.

¶ 18 After taking custody of the child, Punches began to look for a placement option. To start, she spoke with a Boulder detective who told Punches that "[Densmore] was being held on a [child] custody violation," "the mother's whereabouts were unknown at this point," it was unclear if the mother was alive, and the detective had "not found any relatives in Colorado" and was "trying to find someone that may know something about the child."

¶ 19 Punches next spoke with Densmore at the jail. As to that recorded interview, Punches testified that it took place at a desk in an interview room and lasted thirty minutes. Because the interview was at the jail, a law enforcement agent was present for "safety" but sat behind Punches and didn't participate in the interview.

¶ 20 Punches confirmed that no law enforcement officer asked or instructed her to interview Densmore and that her intent in interviewing Densmore was not to act on behalf of law enforcement. Rather, she explained that the purpose of speaking with Densmore was the safety of the child and "to get as

much information" as possible to provide care for the child. That information included inquiries about "substance abuse, domestic violence, family support, discipline, and parenting services." And to determine placement options, Punches asked if Densmore "knew where the mother was" because "if we have a parent, [she] want[s] to place that child with the other parent." Punches also inquired about other family members that could take the child.

¶ 21 During the interview, Densmore never confessed to murdering or dismembering the victim, but he admitted that he and the victim had a "massive fight" and that he "slapped her."

¶ 22 After she completed her investigation, Punches and two colleagues had a telephonic child safety meeting with Densmore. Punches explained the purpose of that call was to "find what would be the least restrictive decision to care for the child while maintaining" safety. The call was not at the direction of law enforcement and the purpose was not to gather incriminating information. Punches explained she wanted to review some safety concerns related to Densmore's disclosure about substance abuse and "possible fighting" between him and the mother as well as to get ideas as to "the best plan for the child." As part of that call, she asked Densmore more questions about the child's mom, the recent fight he had with the child's mom, and whether the child had ever been exposed to domestic violence. The telephone call was also recorded.

¶ 23 Months after these two interviews, a Boulder detective contacted Punches and asked for copies of

the recorded conversations. Punches consulted with her supervisor, who instructed Punches to provide them to the detective.

¶ 24 Densmore moved to suppress the jail interview, arguing Punches was acting as an agent of law enforcement and obtained the statements in violation of *Miranda*. The trial court denied the motion, finding the purpose of the interview was "to obtain information with regards to [the child] in order to develop a safety plan and placement options." And it found that it is the regular practice of the Department of Human Services to interview parents when a child is taken into the Department's custody. The court therefore found Punches was not an "agent of the state."[1]

¶ 25 At trial, Punches told the jury about both conversations she had with Densmore, and the prosecution played clips from the jail interview.

B. Legal Principles

¶ 26 The Fifth Amendment of the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

¶ 27 To safeguard that privilege, "the Supreme Court, for decades, has required that law enforcement officers use certain 'procedural safeguards' when they

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[1] Though Densmore moved to suppress the recorded telephone call for different reasons, the court denied that motion, again finding that Punches was not acting as an agent of law enforcement.

subject someone to custodial interrogation." *People v. Coke*, 2020 CO 28, ¶ 13 (quoting *Miranda*, 384 U.S. at 444-45). Included among those safeguards is the required notice of the right to remain silent, that any statement a person makes may be used against him, and the right to an attorney, either retained or appointed. *Miranda*, 384 U.S. at 444; *People v. Theander*, 2013 CO 15, ¶ 20. These protections apply only when a person is in custody and subject to police interrogation. *Coke*, ¶ 13.[2]

¶ 28 Although custodial interrogations are typically performed by police officers, *Miranda's* procedural protections extend to civilians acting as agents of law enforcement "to prevent law enforcement officials from circumventing the *Miranda* requirements by directing a third party to act on their behalf." *People v. Robledo*, 832 P.2d 249, 250 (Colo. 1992); *see also People v. Lopez*, 946 P.2d 478, 481 (Colo. App. 1997) ("[P]rivate persons become agents of the police by virtue of [the police's] suggestion, order, request, or participation for purposes of criminal investigation.").

¶ 29 The test as to whether a private citizen has acted as an agent of the police for purposes of criminal investigation is whether the person, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state. *Lopez*,

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[2] Because the parties didn't litigate whether Densmore was in custody for purposes of the child welfare worker's investigation, we won't consider that question. *See People v. Denison*, 918 P.2d 1114, 1116 (Colo. 1996) (establishing the test for whether a person incarcerated for one offense, but who is being questioned for a separate offense committed while incarcerated, is "in custody" during questioning for purposes of *Miranda*).

946 P.2d at 481 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)); see *also Robledo*, 832 P.2d at 250. Among the nonexclusive factors to consider are whether the police suggested or directed the questioning, whether the police participated in the questioning, whether the questioner was employed by the state, the purpose of the questioning, whether the questioner had access to police reports, the questioner's job duties, whether the questioner intended to assist police, and whether the questioner had a duty to report to authorities what they learned. *See Robledo*, 832 P.2d at 251; *Lopez*, 946 P.2d at 481; *see also People v. Pilkington*, 156 P.3d 477, 479 (Colo. 2007) (considering whether the government encouraged, initiated, or instigated action and whether a party intended to assist the government to determine whether a civilian was acting as an agent of the government under the Fourth Amendment).

¶ 30 Review of a trial court's suppression order presents a mixed question of fact and law. *Coke*, ¶ 10. We defer to the trial court's factual findings if sufficient evidence in the record supports them, but we review the court's legal conclusions *de novo*. *Id*.

C. Punches Wasn't Acting as An Agent of Law Enforcement

¶ 31 Densmore says that because there were "sufficient indicia to establish an agency relationship between Punches and the [s]tate," the trial court erred by failing to suppress Densmore's statements. Considering the totality of the circumstances, we disagree.

¶ 32 To be sure, Punches was a government employee and Densmore leans heavily on that fact. But that is not determinative. Her job responsibilities are more telling. *See Robledo*, 832 P.2d at 251. And Punches' job duties all relate to child welfare and family reunification. She also confirmed that she is not a law enforcement officer, she does not "investigate crimes," and the fundamental purpose of her child welfare investigations is not to obtain incriminating information. *See* Okla. Stat. Ann. tit. 10A, § 1-7-103 (West 2022) (providing that the Department of Human Services has the power and duty to provide for the care and treatment of children taken into protective or emergency custody under Oklahoma Children's Code); *see also In re T.H.*, 2015 OK 26, ¶ 9, 348 P.3d 1089, 1092 (recognizing that the Oklahoma Children's Code "is to be liberally construed to carry out its purpose, which includes unifying and strengthening family ties whenever possible in children's best interest and for the safety and health of children" (quoting *In re BTW*, 2010 OK 69, ¶ 13, 241 P.3d 199, 205-06)).

¶ 33 Densmore also says that Punches acted as an agent of law enforcement because her supervisor later instructed her to share her interviews with law enforcement. But what Punches did after her investigation says nothing about whether she conducted the interview at the suggestion or request of law enforcement. *See Lopez*, 946 P.2d at 482. What's clear here is that there's no evidence that law enforcement directed, controlled, or participated in Punches' child welfare investigation. More specifically, Punches never consulted—or coordinated—with law enforcement about questions

to ask Densmore. Punches had only brief contact with law enforcement officers before she began her child welfare investigation and learned that he was being held on a child custody violation. And there's no evidence she reviewed any police reports or other materials related to the criminal investigation.

¶ 34 Densmore also loosely points to a "duty to report" in support of his claim that Punches was acting as an agent of law enforcement. But as a child welfare worker, Punches testified she has a duty to report "information that may [en]danger the child's welfare." She didn't testify that she provides reports to prosecutors in every case she investigates. *See* Okla. Stat. Ann. tit. 10A, § 1-2-102(B) (West 2022) (outlining circumstances under which the Department must make a referral to local law enforcement for alleged child abuse or neglect when the allegations are against someone other than the person responsible for the child's care).

¶ 35 That makes the facts here very different from *Robledo*. There, a counselor at a youth detention center who had some authority to apprehend, detain, and handcuff juveniles obtained the defendant's "police report," "discussed it with the [defendant's] probation officer," and then directly asked the defendant how he got involved in "this type of mess." *Robledo*, 832 P.2d at 250. After the defendant made inculpatory statements, the counselor reported the statements to the prosecution (which he was required to do). *Id*. Given these facts, the supreme court affirmed the trial court's findings that the youth detention counselor acted as an agent of law

enforcement. *Id*. None of those facts apply to the child welfare investigation in this case.

¶ 36 This is not to say a child welfare worker may never act as an agent of law enforcement. Indeed, trial courts should carefully scrutinize law enforcement's involvement with a child welfare investigation. But nothing in the facts before us suggests that law enforcement used Punches to circumvent *Miranda*. *See Robledo*, 832 P.2d at 250. Rather, the facts show Punches was not acting as a law enforcement agent when she spoke with Densmore.

¶ 37 We conclude the trial court properly denied Densmore's motion to suppress his statements to Punches.

III. The Preliminary Other Act Evidence Ruling

¶ 38 Next, Densmore argues the trial court reversibly erred and burdened his defense when it made a preliminary ruling regarding the conditional admissibility of a prior bad act.

A. Additional Background

1. The Preliminary Ruling

¶ 39 Before trial, the prosecution gave notice of its intent to introduce a 2008 incident in which Densmore was charged with strangling his ex-wife *if* Densmore were to claim self-defense, accidental death, overdose, medical condition or heart attack, heat of passion, or intoxication. The prosecution did not seek to admit the 2008 incident in its case in chief.

¶ 40 At a motions hearing, Densmore objected to the notice, arguing, among other things, that the other act evidence wasn't admissible under *People v. Spoto*, 795 P.2d 1314 (Colo. 1990), that "there's going to be some questions that are unanswered" about the cause of death, and that it would prejudice him to allow the other act evidence. Though Densmore generally argued it would impair his right to a fair trial, he didn't specifically argue the evidence would burden his right to present any particular defense.

¶ 41 After the hearing, the trial court issued a written order, "preliminarily" holding that *if* Densmore "opens the door by claiming self-defense, accidental death, heat of passion, or intoxication," the other act evidence "meets the four-part test in *Spoto*, as to the prior conduct and is offered for the purpose of intent or absence of mistake or accident." At the end of its ruling, the court again emphasized the ruling was preliminary and stated that it "shall consider the context in which any said defense is raised at trial and this ruling remains subject to reconsideration based on said context."

2. The Expert's Cause of Death Testimony

¶ 42 During trial, Dr. David Arboe, a forensic pathologist, testified about the autopsy he performed on the victim's torso. When asked if he was able to determine the cause of the victim's death he said, "For this case, the cause of death would be unknown and the manner of death could not be determined." But Dr. Arboe confirmed that he found the presence of cocaine and methamphetamine in the victim's blood.

¶ 43 When the court asked if defense counsel had any questions for the medical examiner, defense counsel asked to approach. At the bench conference, defense counsel said,

> Your Honor, [the prosecutor] just asked a number of questions with regards to causes and manner of death that he, Dr. Arboe, could not answer because he did not have the remaining body parts. One of the things Dr. Arboe told me in my discussion with him is that another determination he can't make is whether or not [the victim] died of an overdose. And he specifically said that's because he didn't have the head.
>
> I'm asking the [c]ourt to allow me to go into that questioning without opening the door of this being an accidental death, which would then open the door to the 404(b). I think [the prosecutor] asked a number of questions with regards to different types of causes of death, and I think it's only fair to allow that one of the other causes he can't determine is overdose.

¶ 44 The prosecutor did not object to defense counsel eliciting testimony that Dr. Arboe "was not able to determine whether or not the death was caused...by an overdose because of the absence of the head." The court agreed defense counsel could ask that question.

¶ 45 Defense counsel did not ask the court to allow it to explore any other areas under the preliminary other act ruling. Nor did defense counsel make any

additional record about the ruling or any possible prejudice to Densmore's defense. And despite the ruling allowing defense counsel to confirm that Dr. Arboe could not determine if the victim died of an overdose, defense counsel declined to question Dr. Arboe.

¶ 46 The prosecution never introduced the other act evidence.

B. Standard of Review and Preservation

¶ 47 We review the trial court's evidentiary rulings for an abuse of discretion. *People v. Moore*, 2021 CO 26, ¶ 26. The trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or where it is based on an erroneous view of the law. *People v. Manzanares*, 2020 COA 140M, ¶ 28.

¶ 48 A pretrial motion may preserve an evidentiary objection for appellate review "if the moving party fairly presents the issue to the court and the court issues a definitive ruling." *People v. Dinapoli*, 2015 COA 9, ¶ 20; *see* CRE 103(a)(2); *see also United States v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999) (where a trial court makes a conditional ruling on a motion in limine then objection is necessary at trial).

C. The Preliminary Ruling Isn't Properly Before Us

¶ 49 As we understand it, Densmore claims the preliminary, conditional other act evidence ruling caused Densmore not to pursue certain defenses. So even though the other act evidence wasn't admitted and Densmore didn't object or seek any additional

rulings at trial about his ability to pursue certain questions or defenses, he claims his constitutional right to present a defense was improperly chilled.

¶ 50 Under the circumstances here, we agree with the People that we simply do not have an adequate record to review Densmore's claim. *See People v. Brewer*, 720 P.2d 596, 597 (Colo. App. 1985) (determining there was no appellate review of a trial court's ruling regarding the admissibility of the defendant's previous conviction for impeachment when defendant did not testify).

¶ 51 The trial court made clear that its ruling on the other act evidence was preliminary and conditional. And by its nature, a preliminary ruling is subject to modification. It was therefore Densmore's responsibility to press for a definitive ruling. *See Dinapoli*, ¶ 20; CRE 103. Densmore didn't do that. Nor did he make an offer of proof about how the preliminary ruling impacted any defenses or his ability to defend. By not doing so, Densmore deprived the trial court of the opportunity to alter or limit its preliminary ruling. And in fact, when Densmore sought to question the forensic pathologist without triggering the admission of the other act evidence, the court modified its ruling to allow the questioning.[3] The court also allowed Densmore to argue self-induced intoxication (and instructed the jury on that

[3] Though Densmore asserts that "the defense wanted to question [Dr. Arboe] about the likelihood of [the victim's] death being caused by an overdose but the defense feared such inquiry would open the door," the record shows the court allowed Densmore to pursue that inquiry.

defense) without triggering the admission of the other act evidence.

¶ 52 Even if we somehow could apply a plain error analysis to an inchoate ruling, any possible harm flowing from the preliminary ruling is speculative and thus neither obvious nor substantial. *See People v. Snelling*, 2022 COA 116, ¶ 33 (discussing plain error review).

¶ 53 For these reasons, we are unable to review the preliminary conditional ruling on the other act evidence.

IV. Self-Defense

¶ 54 Densmore contends the trial court erred by "refusing to issue a self-defense instruction." We disagree.

A. Additional Background

¶ 55 In addition to first degree murder, the court agreed to instruct the jury on the lesser included offenses of murder in the second degree, manslaughter, and criminally negligent homicide.

¶ 56 Though Densmore never endorsed self-defense before trial, during the jury instruction conference Densmore asked for a self-defense instruction "*not as an affirmative defense*, but as a general defense when the mental state is criminal negligence or recklessly." (Emphasis added.) But his tendered elemental traverse instruction on self-defense stated, "The evidence presented in this case has raised the question of self-defense with respect to murder in the

first degree, murder in the second degree, manslaughter and criminally negligent homicide."

¶ 57 To support the instruction, Densmore pointed to pictures taken of Densmore after his arrest showing "marks that could be looked at as defensive wounds."

¶ 58 The trial court denied the tendered traverse instruction. The trial court found there was no evidence that Densmore admitted to the conduct leading to the acts charged. The trial court also rejected Densmore's argument that the pictures after Densmore's arrest supported the self-defense instruction "because, again, there's no admission to the conduct."

¶ 59 Densmore never asked the court to instruct on the affirmative defense of self-defense.

B. Legal Principles

¶ 60 The trial court has a duty to instruct the jury correctly on the applicable law. *Roberts v. People*, 2017 CO 76, ¶ 18. We review a court's decision to give or not to give a particular instruction for an abuse of discretion. *People v. Maloy*, 2020 COA 71, ¶ 45.

¶ 61 "To present an affirmative defense for jury consideration, a defendant must present some credible evidence to support the claimed defense." *People v. DeGreat*, 2018 CO 83, ¶ 16. We review *de novo* whether there was sufficient evidence in the record to support a self-defense jury instruction. *People v. Coahran*, 2019 COA 6, ¶ 15.

¶ 62 Self-defense can be either an affirmative defense or a traverse. *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011). An affirmative defense admits the defendant's commission of the charged crime but seeks to justify or excuse the conduct. *Id.* A traverse refutes the possibility that the defendant committed the charged crime by negating one or more elements of the crime. *Id.*

¶ 63 Self-defense operates as an affirmative defense to crimes requiring culpable mental states of intent, knowledge, or willfulness. *Riley v. People*, 266 P.3d 1089, 1093 (Colo. 2011). But for crimes requiring recklessness or criminal negligence, self-defense is not an affirmative defense, rather it's a traverse designed to negate the *mens rea* element. *See Pickering*, 276 P.3d at 556.

C. The Trial Court Properly Denied the Requested Instruction

¶ 64 Densmore doesn't appear to argue he was entitled to an elemental traverse for first or second degree murder or that the court erred by not instructing the jury on a traverse to those charges. And to the extent he contends the trial court erred by failing to give the traverse instruction as to manslaughter and criminally negligent homicide, because the jury found Densmore guilty of first degree murder, it didn't consider the lesser included offenses.

¶ 65 Instead, Densmore appears to contend for the first time on appeal that the court plainly erred by failing to instruct the jury on self-defense as an affirmative defense. That's so, he says, because there

was a scintilla of evidence supporting the instruction and he maintains that he could assert the affirmative defense without admitting he committed the crime.

¶ 66 But "the essence of an affirmative defense is the admission of the conduct giving rise to the charged offense. Having acknowledged presence at and participation in the event, the participant in effect justifies the conduct on grounds deemed by law to be sufficient to render the participant exempt from criminal responsibility." *People v. Huckleberry*, 768 P.2d 1235, 1239 (Colo. 1989). Because Densmore never admitted killing the victim or acknowledged his "presence at and participation in" the killing, the court didn't plainly err by not *sua sponte* instructing the jury on self-defense as an affirmative defense.

¶ 67 And even assuming Densmore could assert an affirmative defense without admitting the conduct, we don't agree that he presented a scintilla of evidence to support a deadly force self-defense instruction.

¶ 68 Densmore now says the following evidence supported instructing the jury on the affirmative defense of self-defense: (1) the photographs of Densmore after his arrest that showed bruises, cuts, and bite marks; (2) evidence that the victim had cocaine and methamphetamine in her system; (3) Densmore's statements to the child welfare worker that the victim was verbally and emotionally abusive to him; and (4) evidence that Densmore and the victim were close to the same size in terms of weight and height.

¶ 69 As relevant here, Colorado's self-defense statute provides that deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and "[t]he actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury." § 18-1-704(2)(a), C.R.S. 2022.

¶ 70 Here, no evidence was presented that Densmore believed he was in danger of death or great bodily injury. No evidence was presented that the victim threatened Densmore. No evidence was presented that the victim had a weapon or attacked Densmore. And no evidence was presented that the victim caused any of the marks on Densmore and, if she did, that the injuries justified deadly physical force, as opposed to a lesser degree of force.

¶ 71 We therefore conclude that the trial court did not err by refusing to *sua sponte* instruct the jury on the affirmative defense of self-defense.

V. Jury Questions about "After Deliberation"

¶ 72 Densmore contends that the trial court's failure to adequately respond to the deliberating jury's confusion regarding the meaning of "after deliberation" requires reversal. We disagree.

A. Additional Background

¶ 73 As relevant here, Instruction 15 told the jury that to establish first degree murder, the prosecution had to prove beyond a reasonable doubt that the defendant, after deliberation and with the intent to

cause the death of a person other than himself, caused the victim's death. Instruction 13 defined several relevant terms and, specifically, stated that

> [t]he term "after deliberation" means not only intentionally, but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

Both instructions tracked the relevant statutes as well as the model jury instructions. *See* § 18-3-101(3), C.R.S. 2022; § 18-3-102(1)(a), C.R.S. 2022; COLJI-Crim. F:10, G1:01 (2021).

¶ 74 During deliberations, the jury asked a total of five questions. The first two were asked simultaneously, and the next three were sent out all at once as well.

¶ 75 The first two questions were the following:

- "Does the term 'after deliberation' require that the act was committed both after the exercise of reflection and judgment, and in the absence of haste or impulsivity?" OR "Does the term 'after deliberation' only require that the act was committed after the exercise of reflection and judgment?"

- In Jury instruction 13, It says "the term 'after deliberation' means not only intentionally but

> also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner." Our question is does the prosecution need to prove beyond a reasonable doubt that the defendant did not commit the crime in a hasty or impulsive manner even if the jury has determined that the defendant exercised reflection and judgment concerning the act?

¶ 76 After consulting with the parties, the trial court responded to both questions by referring the jury to Instructions 13 and 15.

¶ 77 The next day, the jury sent out three more questions simultaneously.

¶ 78 First, "On Jury Instruction Number 13, why is 'after deliberation' in quotes the first time it is mentioned and not the second time it is mentioned?" After consulting with the parties, the court responded that the quotation marks "carry no significance in [I]nstruction 13."

¶ 79 Second, "Is there a legal limit or threshold to the amount or duration of reflection required to constitute deliberation? Can deliberation occur moment by moment?"

¶ 80 After hearing from the parties and considering relevant legal authority, the trial court responded, "The length of time required for deliberation need not

be long. An appreciable length of time must have elapsed."[4]

¶ 81 And third,

> Does the term "after deliberation" mean:
>
> A. "not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act."
>
> Or
>
> B. "not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act <u>and</u> is never one which has been committed in a hasty or impulsive manner"?

Please answer A or B.

¶ 82 The trial court consulted with the parties and then responded, "Neither 'A' or 'B' are correct. The term 'after deliberation' is set forth in [I]nstruction 13."

B. Legal Principles

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[4] Densmore doesn't specifically develop any argument that this supplemental response was incorrect. In any event, it is based directly on case law. *See Martinez v. People*, 2015 CO 16, ¶ 18 ("[A]fter deliberation" requires "an appreciable length of time" between forming the intent to kill and "commit[ting] the fatal act.").

¶ 83 When a jury asks a question during its deliberations, the jury should be referred back to the original instructions "when it is apparent that the jury has overlooked some portion of the instructions or when the instructions clearly answer the jury's inquiry." *Leonardo v. People*, 728 P.2d 1252, 1255 (Colo. 1986). When, on the other hand, the jury's question demonstrates that the jury has considered the relevant instruction and has a fundamental misunderstanding, or when the instructions provide no clear answer to the jury's question, the trial court has an obligation to clarify the matter for the jury in a concrete and unambiguous manner. *Id.* at 1255-56. "But no additional instruction is required when the original instructions adequately inform the jury." *People v. Phillips*, 91 P.3d 476, 484 (Colo. App. 2004).

¶ 84 Whether to provide the jury with additional written instructions in response to a question is a determination within the trial court's sound discretion. *People v. Bass*, 155 P.3d 547, 552 (Colo. App. 2006).

C. The Trial Court Properly Exercised its Discretion by Referring the Jury Back to the Original Instructions

¶ 85 Relying on *Leonardo*, Densmore argues that the trial court had an obligation to clarify the meaning of the term "after deliberation" for the jury and erred by referring the jury back to the original instructions. *See Leonardo*, 728 P.2d 1252.

¶ 86 But the facts here are not like *Leonardo*. In that case, the court instructed the jury that the defendant

could be convicted of theft by receiving if he acted only while "*knowing or believing*" that the thing of value in question had been stolen. *Id.* at 1254. The court defined the term "knowing" but did not define the term "believing." *Id*. In the course of deliberations, the jury asked, "Is Knowing or Believing in instruction [n]umber 6 [t]he [s]ame as *Having a Suspicion of?*" *Id*. The court responded, "You must reach your verdict applying the words as you find them in the instructions." *Id*. Under these circumstances, the Colorado Supreme Court held that the trial court erred by referring the jury back to the original instructions because the question "demonstrate[d] that the jury had considered the relevant instruction on mental state" and the instruction "provided no clear answer to the jury's question." *Id.* at 1255.

¶ 87 That's not the case here. While the jury certainly wanted the court to parse the definition of "after deliberation," no one disputes that the court instructed the jury on the proper definition of "after deliberation." The definition tracks the statute verbatim as well as the pattern model jury instruction. *See People v. Hayward*, 55 P.3d 803, 805 (Colo. App. 2002) ("Jury instructions framed in the language of statutes are adequate and proper."). Thus, unlike *Leonardo*, the definitional instruction here answered the jury's question and adequately informed the jury of the law. *See Boothe v. People*, 814 P.2d 372, 375-76 (Colo. 1991) (judge's response to a question from the jury directing it to reread the original instructions was appropriate because the original instructions adequately informed the jury of the law); *see also Phillips*, 91 P.3d at 484 (no additional instruction was required on the definition

of "knowingly" where the court properly instructed the jury on the definition and responded to the jury question asking for clarification about "knowingly" by referring the jury back to the original instruction).

¶ 88 Indeed, had the court supplemented or explained the statutory definition in different terms, it risked misstating the law. *E.g.*, *Tibbels v. People*, 2022 CO 1, ¶ 43 (setting out the governing standard for appellate courts when considering "whether a court's statements to a jury regarding the meaning of 'reasonable doubt' (whether in formal instructions or not) unconstitutionally lowered the prosecution's burden of proof"); *People v. Knobee*, 2020 COA 7, ¶ 17 (concluding the court's explanation of the reasonable doubt instruction during *voir dire* necessitated reversal) (*cert. granted* June 29, 2020). And any response attempting to clarify a statutory definition also risked improperly emphasizing specific evidence. *See People v. Nerud*, 2015 COA 27, ¶ 43 (jury instructions that emphasize specific evidence are disfavored).

¶ 89 Because the trial court properly instructed the jury on the definition of "after deliberation," it didn't abuse its discretion by referring the jury back to the original instructions.

VI. Densmore's Jail Writings

¶ 90 Densmore contends that the prosecution violated his Sixth Amendment right to counsel by seizing privileged attorney-client documents from his jail cell. Because Densmore doesn't challenge the court's

ruling that the documents were not privileged, we disagree.

A. The Seized Documents

¶ 91 In March 2018, an investigator intercepted a letter Densmore wrote to the victim's sister. In this letter, Densmore said, "I have been writing, but my lawyers would string me up by my balls if I sent it, and nobody wants that" and "the end of my book is looming in the horizon." The day after the discovery of this letter, a detective obtained a warrant to search Densmore's jail cell.[5]

¶ 92 During the search, police seized

- white envelopes marked "legal" containing writings about daily activities;
- a torn white envelope labeled "anxiety book";
- an unmarked white envelope containing writings;
- a letter to the victim's sister;
- a red composition notebook;
- a blue composition notebook; and
- a black composition notebook covered with photos.

[5] As the warrant made clear, Densmore was known to journal. Indeed, police found notebooks, letters, papers, and journals in Densmore's apartment and car.

¶ 93 The police also photographed—but did not seize—a notebook that listed things related to the case such as legal definitions, elements of various offenses, possible defenses, lesser included offenses, and dates of legal proceedings.

¶ 94 Densmore moved to suppress the documents on the basis that all the seized material was "protected by the attorney-client privilege," and he requested an "*ex parte* hearing to establish why the materials" are privileged.

¶ 95 Over the prosecution's objection, the trial court granted the request for an *ex parte* hearing before a different judge. At the *ex parte* hearing, defense counsel made an offer of proof claiming all the documents were privileged. Seeing no authority for the defense to litigate "an evidentiary matter ex parte," the *ex parte* court ruled that the trial court "needs to proceed to determine the evidentiary issue" and the prosecution has "the right to be present and contest, argue, [and] litigate the issue." The *ex parte* court did not rule that any of the seized materials were privileged.

¶ 96 Back before the trial court, Densmore again asked the court to consider "everything that was obtained" privileged. And he pointed to the fact that two envelopes were marked "legal." Densmore also generally referenced the notebook that was photographed (but not seized).

¶ 97 The trial court found that Densmore had not met his burden to establish the privilege and that although two envelopes had the word "legal" on them,

it wasn't clear what "portions were found in which envelopes" but in any event, "whether or not the word 'legal' is on them is not persuasive" in the court's determination.

¶ 98 And as to the approximately thirty-five pages of journal writings the prosecution specifically sought to admit at trial (some but not all of which were seized from Densmore's jail cell), the court found that Densmore had not proved these writings were protected by the attorney-client privilege.[6]

B. Legal Principles

¶ 99 The attorney-client privilege is a rule of evidence; there is no federal constitutional provision or guarantee establishing an attorney-client communication privilege. *E.g.*, *Howell v. Trammell*, 728 F.3d 202, 1222 (10th Cir. 2013); *see also People v. Johnson*, 999 P.2d 825, 832 (Colo. 2000). Thus, the scope of the attorney-client privilege is a function of state law.

¶ 100 In Colorado, the attorney-client privilege is codified by statute "and operates to protect communications between attorney and client relating to legal advice." *Wesp v. Everson*, 33 P.3d 191, 196 (Colo. 2001); *see* § 13-90-107(1)(b), C.R.S. 2022. And it applies only to "statements made in circumstances giving rise to a reasonable expectation that the

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[6] Out of Densmore's hundreds of pages of writings, the prosecution gave notice that it planned to admit approximately thirty-five pages, not all of which were seized from the jail cell. It's not clear from the record what writings admitted at trial were taken from his jail cell.

statements will be treated as confidential." *People v. Tucker*, 232 P.3d 194, 198 (Colo. App. 2009) (quoting *Wesp*, 33 P.3d at 197).

¶ 101 No blanket privilege for all attorney-client communications exists. *Wesp*, 33 P.3d at 197. Rather, the privilege must be claimed with respect to each specific communication and, in deciding whether the privilege attaches, a trial court must examine each communication independently. *Id*. The party claiming the attorney-client privilege has the burden of establishing it. *Id.*; *see also Fox v. Alfini*, 2018 CO 94, ¶ 19; *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 467 (Colo. App. 2003); *cf. People v. Trujillo*, 144 P.3d 539, 542 (Colo. 2006) (noting the burden of establishing a waiver of attorney-client privilege rests with the party seeking it).

¶ 102 Where an attorney-client privilege is established, if a defendant is prejudiced, the violation of the privilege may implicate a defendant's Sixth Amendment right to counsel. *See Weatherford v. Bursey*, 429 U.S. 545, 558 (1977) (noting government interference with the privilege must substantially prejudice a criminal defendant before it amounts to a Sixth Amendment violation); *see also People v. Curren*, 2014 COA 59M, ¶ 49 (explaining a showing of prejudice is required even when a defendant is asserting a Sixth Amendment claim challenging an "actual intrusion" upon the attorney-client relationship).

C. The Trial Court Properly Exercised its Discretion by Finding Densmore Didn't Satisfy his Burden of Proof

¶ 103 Densmore doesn't specifically claim the court erred by finding he did not satisfy his burden to show the seized materials were privileged. Nor does he explain how he satisfied his burden with respect to any particular seized document. *See Wesp*, 33 P.3d at 197. To the extent Densmore implies the court erred by finding he did not satisfy his burden to show the seized documents were privileged, we don't address undeveloped arguments. *People v. Liggett*, 2021 COA 51, ¶ 53. And the explanation as to how Densmore satisfied his burden of proof as to any particular seized document is not self-evident.

¶ 104 Though Densmore skips over the privilege ruling, it is a necessary predicate to his Sixth Amendment claim. *See Weatherford*, 429 U.S. at 558. Because Densmore has not directly challenged the trial court's finding that he did not meet his burden of proving the seized jail writings were privileged, we need not address the remainder of Densmore's arguments.

VII. Cumulative Error

¶ 105 Finally, because we conclude no error occurred, we necessarily reject Densmore's contention that the aggregate effect of the alleged errors deprived him of a fair trial. *See People v. Allgier*, 2018 COA 122, ¶¶ 71-72.

VIII. Conclusion

¶ 106 The judgment of conviction is affirmed.

JUDGE GROVE and JUDGE BERNARD* concur.

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

APPENDIX D

District Court, Boulder County, State of Colorado
1777 6th Street, Boulder, Colorado 80302
(303) 441-3748

DATE FILED: March 01, 2018 4:20 PM

PEOPLE OF THE STATE OF COLORADO,

vs.

ADAM DENSMORE,
DEFENDANT.

Attorney(s) for the People:
Ken Kupfner, Catrina Weigel, and Lys Runnerstrom

Attorney(s) for the Defendant:
Jennifer Chenu and Katherine Herold

Case Number:
17CR530

Division 4
Courtroom S

ORDER RE: DEFENDANT'S MOTIONS TO SUPPRESS (D-030), (D-040), (D-041), (D-044); MOTIONS TO EXCLUDE TELEPHONE CONVERSATION AND VOICEMAIL (D-042), (D-043), (D-045)

On February 5 and 6, 2018, the following actions were taken in the above captioned case. The clerk is

directed to enter these proceedings in the register of actions:

COURT REPORTER:
K. Ritter (2/5/18)
A. Lee (2/6/18)

APPEARANCES:
Ken Kupfner, Catrina Weigel, and Lys Runnerstrom appeared on behalf of the People.
Katherine Herold and Jennifer Chenu appeared on behalf of Defendant who was present.

WITNESSES:
Andrew Kirshbaum (2/6/18)
Christopher Mecca (2/6/18)
Michael Yelton (2/6/18)
Matthew Hewett (2/6/18)
Jake Westerfield (2/6/18)
Kristin Weisbach (2/6/18)
Jessica Punches (2/6/18)
Kara Wills (2/6/18)

EXHIBITS: 1

THIS MATTER comes before the Court in connection with the following Motions:

Defendant's Motion to Suppress Evidence Illegally Obtained from Defendant's Body—February 15, 2017 (D-030); Defendant's Motion to suppress statements—Deputy Mecca and Deputy Phipps (D-040); Defendant's Motion to suppress statements—Lieutenant Michael Yelton Jr. and Agent Matthew Hewett (D-041); Defendant's Motion to exclude

testimony regarding telephone conversation—Detective Kirshbaum (D-042); Defendant's Motion to exclude testimony regarding phone messages—Detective Kirshbaum (D-043); Defendant's Motion to suppress statements—Jessica Punches (D-044); and Defendant's Motion to exclude testimony regarding telephone conversation—Aaron Curry, Jennifer Pope, and Jessica Punches (D-045).

The parties' other motions shall be addressed in a separate order.

The Court, having considered the pleadings, exhibit, testimony, and the additional argument of counsel, hereby enters the following findings of fact, conclusions of law and ORDER:

I. BACKGROUND

Defendant is charged with murder in the first degree—domestic violence, a class 1 felony; tampering with a deceased human body, a class 3 felony; tampering with physical evidence, a class 6 felony; and abuse of a corpse, a class 2 misdemeanor.

These charges arise out of Defendant's alleged conduct on February 12 to February 15, 2017. Defendant allegedly killed the named victim and dismembered her body.

This case is set for a 15-day jury trial the week of April 9, 2018.

II. LEGAL STANDARD

Defendant's Statements

a. *Miranda*

Prior to any custodial interrogation of a suspect by a police officer, the suspect is constitutionally entitled to be advised of certain rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). If a suspect's statements are made while the suspect is not in custody, or if the statements are not made in response to interrogation (i.e., if the statements are "spontaneous"), no *Miranda* warnings are required. *Id*.

The test for determining whether questioning is "custodial" is an objective one: the trial court is to determine whether, in view of all the circumstances surrounding the encounter at the time of the questioning, a reasonable person in the suspect's position would consider himself deprived of his freedom of action in a significant way. *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984). This test is not whether a reasonable person would believe he was free to leave, but rather "whether such a person would believe he was in police custody of the degree associated with a formal arrest." *People v. Polander*, 41 P.3d 698, 705 (Colo. 2001).

Colorado courts have identified nine factors as relevant to determining whether a reasonable person would have believed he was in custody: the time, place, and purpose of the encounter; the persons present during the interrogation; the words spoken by

the officer; the officer's tone of voice and general demeanor; the length and mode of the interrogation; whether any limitation of movement or other form of restraint was placed on the suspect during the interrogation; the officer's response to any questions asked by the suspect; whether any directions were given to the suspect during the interrogation; and the suspect's verbal and nonverbal responses to such directions. *People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997).

The standard for determining whether questioning constitutes interrogation is an objective one. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *People v. Trujillo*, 784 P.2d 788, 790 (Colo. 1990). Under *Miranda*, interrogation consists not only of express questioning, but also of its functional equivalent, *i.e.*, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Lewis v. Florida*, 486 U.S. 1036 (1988) (quoting *Innis*, 446 U.S. at 301). This inquiry "focuses primarily upon the perceptions of the suspect…rather than the intent of the police." *Innis*, 446 U.S. at 301.

Police conduct generally constitutes the functional equivalent of interrogation if the defendant is "subjected to compelling influences, psychological ploys, or direct questioning." *See Arizona v. Mauro*, 481 U.S. 520 (1987); *see also People v. Rivas*, 13 P.3d 315, 319 (Colo. 2000) ("Practices identified as the functional equivalents of interrogation generally employ compelling influences or psychological ploys

in tandem with police custody to obtain confessions."). Further, "[t]he words or actions of the officer must also be such that he should know they will be perceived by the suspect as provocative rather than merely informative or permissive." *Rivas*, 13 P.3d at 320. "In determining whether a person has been subjected to custodial interrogation, courts must consider the totality of the circumstances surrounding the encounter." *Id.* at 319 (citing *People v. Gonzales*, 987 P.2d 239, 241 (Colo. 1999)).

Miranda, however, establishes that "confessions remain a proper element in law enforcement and that volunteered statements of any kind are not barred by the Fifth Amendment." *Id.* at 319 (citing *Miranda*, 384 U.S. at 478). Accordingly, the pivotal issue is "whether the defendant was compelled by the police to make a statement, not whether he was allowed to talk to the police without the benefit of warnings and counsel." *Id.* "Even in the face of a clear request by a suspect in custody for permission to make what is likely to be an incriminating statement, police reaction by either granting permission or remaining silent does not necessarily constitute interrogation." *Id.* at 319-20.

The U.S. Supreme Court has held that an accused has the right under the Fifth Amendment to have an attorney present during *custodial* interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 469-73, 694 (1966). Recently, the Colorado Supreme Court clarified that in determining whether a suspect in *custody* has made an unambiguous request for counsel, the proper standard under *Davis v. United States*, 512 U.S. 452 (1994) is "whether a

reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *People v. Kutlak*, 364 P.3d 199 (Colo. 2016).

b. <u>*Voluntariness*</u>

To be admissible under any circumstances, a defendant's statements must be voluntary. *Jackson v. Denno*, 378 U.S. 368 (1964). Voluntary statements are statements that are not "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *People v. Freeman*, 668 P.2d 1371, 1378 (Colo. 1983). In making a finding regarding voluntariness, the trial court must consider the totality of the circumstances and determine whether the defendant's will was overborne by coercive police conduct. *People v. Stephenson*, 56 P.3d 1112, 1120 (Colo. App. 2001). The prosecution bears the burden of proving, by a preponderance of the evidence, that a Defendant's statement is voluntary. *People v. May*, 859 P.2d 879 (Colo. 1993).

"Critical to any finding of involuntariness is the existence of coercive governmental conduct, either physical or mental, that plays a significant role in inducing a confession or an inculpatory statement." *People v. Valdez*, 969 P.2d 208, 211 (Colo. 1998). A statement may be involuntary even if a defendant was not in custody when the statement was made, even if the statement was not inculpatory, and even if the statement was preceded by a valid *Miranda* warning. *People v. Humphrey*, 132 P.3d 352, 360 (Colo. 2006). The mere fact that police conduct is "angry and confrontational," *Valdez*, 969 P.2d at 212,

or that a defendant was under the influence of drugs and alcohol at the time of questioning, *People v. Cardenas*, 25 P.3d 1258, 1264 (Colo. App. 2000), does not necessarily render a statement involuntary. "However, the deliberate exploitation of a person's weaknesses by psychological intimidation can, under certain circumstances, constitute coercion rendering a statement involuntary." *Valdez*, 969 P.2d at 211.

Colorado courts have considered various factors in assessing voluntariness, including the following:

> whether the defendant was in custody or was free to leave and was aware of his or her situation; whether *Miranda* warnings were given prior to any interrogation and whether the defendant understood and waived his or her *Miranda* rights; whether the challenged statement was made during the course of an interrogation or instead was volunteered; whether any overt or implied threat or promise was directed to the defendant; the method and style employed by the interrogator in questioning defendant and the length and place of the interrogation; and the defendant's mental and physical condition immediately prior to and during the interrogation, as well as the defendant's educational background, employment status, and prior experience with law enforcement and the criminal justice system.

People v. Roybal, 55 P.3d 144, 147 (Colo. App. 2001), *People v. Gennings*, 808 P.2d 839 (Colo. 1991).

c. *Waiver*

A suspect can waive his *Miranda* rights. A *Miranda* waiver must be made knowingly, voluntarily, and intelligently. *Miranda*, 384 U.S. 436. The prosecution must prove by a preponderance of the evidence that the *Miranda* waiver was made knowingly, voluntarily, and intelligently based on the totality of the circumstances. *People v. Platt*, 81 P.3d 1060 (Colo. 2004). A suspect waives his *Miranda* rights when he makes an unequivocal request for counsel, but then initiates further communication, exchanges, or conversations with the police. *People v. Bradshaw*, 156 P.3d 452, 458 (Colo. 2007). The interrogation must be re-initiated by the suspect, and not by the police. *Id.*

d. *Booking exception*

"Certain routine administrative procedures, such as fingerprinting, photographing, and getting a proper name and address from the defendant, are incidental events accompanying an arrest that are necessary for orderly law enforcement and protection of individual rights." *United States v. Olivares-Rangel*, 458 F.3d 1104, 1114 (10th Cir. 2006). Fingerprinting is a part of the routine booking process to confirm the identity of the person being arrested. *Id.*

III. PENDING MOTIONS

a. Defendant's Motion to Suppress Evidence Illegally Obtained from Defendant's Body—February 15, 2017 (D-030)

1. Argument

On December 29, 2017, Defendant filed the present motion moving to exclude the photographs taken of Defendant's body on February 15, 2017. Defendant asserts the photos were taken without a warrant and without Defendant's voluntary consent.

On January 19, 2018, the People filed a response. The People assert Defendant voluntarily consented to the photographs being taken as demonstrated by Defendant removing and adjusting clothing to assist in taking the pictures.

2. Legal Standard

The Fourth Amendment of the United States Constitution protects individuals against unreasonable searches and seizures by government officials. U.S. Const. amend. IV. Further, Article II, Section 7 of the Colorado Constitution provides: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause,

supported by oath or affirmation reduced to writing." Colo. Const. Art. II, § 7.

It is well established that "[a] warrantless search is presumptively unreasonable—i.e., it violates the Fourth Amendment—unless the search falls within an exception to the warrant requirement." *People v. Vaughn*, 334 P.3d 226, 230 (Colo. 2014).

A valid search may occur without a warrant if it is based on consent. *People v. Berdahl*, 310 P.3d 230, 237 (Colo. App. 2012). The determine whether consent to search was voluntarily, the Court considers whether objective evidence exists of police coercion, duress, deception, promises, threats, intrusive conduct, or other undue influence by the police in obtaining that consent. *Id.* The court must also consider a defendant's subjective characteristics, such as age, education, and knowledge, in addition the location and duration of the search. *Id.* Finally, the court must apply an objective test to determine whether the police conduct could reasonably have appeared to the defendant to be coercive. *Id.*

A "consensual search is involuntary if it is 'the result of duress or coercion, express or implied, or any other form of undue influence exercised [by the police] against the defendant.'" *People v. Munoz–Gutierrez*, 342 P.3d 439 (Colo. 2015). "Undue influence includes promises, threats, and intrusive or threatening police conduct." *Id.*

3. Order

As an initial matter, Defendant does not assert said evidence was taken in violation of Defendant's Fifth Amendment right against self-incrimination, but rather cites the Fourth Amendment. Therefore, the Court does not determine whether taking the photographs or buccal swabs invoked Defendant's Fifth Amendment rights.

Here, Defendant has a right against searches of his person. The photographs and buccal swabs were taken without a warrant. However, the Court finds Defendant voluntarily consented to have photographs and buccal swabs taken while at the Pawnee jail. The Court finds Agent Hewett did not engage in coercion, duress, deception, making promises or threats, intrusive conduct, or other undue influence in obtaining Defendant's consent.

Defendant was given his *Miranda* advisement while at the jail; at said time Defendant responded "no" when asked if he would talk. Defendant was then asked if pictures and a buccal swab could be taken to which Defendant responded "ya." At said time pictures were taken.

The Court finds Defendant was not coerced or unduly influenced into giving consent as he was comfortable asserting his *Miranda* rights just prior to consenting to the photographs and buccal swab. The Court further finds Defendant's consent was voluntary as he assisted in facilitating the photographs by removing his clothing and shoes, holding out his hands and requesting specific pictures

be taken of handcuff marks. Defendant did not state he did not wish the photographs to be taken.

Therefore, the Court DENIES Defendant's motion.

b. <u>Defendant's Motion to suppress statements—Deputy Mecca and Deputy Phipps (D-040)</u>

1. Argument

On December 29, 2017, Defendant filed the present motion and moves to suppress statements Defendant made to Deputy Mecca and Deputy Phipps. Defendant asserts he was taken into custody on February 15, 2017 in Oklahoma; at said time Defendant was advised of his *Miranda* rights. Defendant asserts after being advised, Defendant invoked his right to counsel. On February 17, 2017, Defendant was transported to Colorado and booked into the jail by Deputies Mecca and Phipps. Defendant asserts during the booking process, Deputy Phipps asked Defendant if he had a scar on his finger to which Defendant responded it was a cut; Defendant asserts said question was interrogation in violation of Defendant's *Miranda* rights. Defendant asserts the question does not fall under the booking exception as the question was not related to basic identifying data and Defendant had requested an attorney. Finally, Defendant asserts his statements were not voluntary.

On January 19, 2018, the People filed a response asserting the deputies inquired into the scar after

noticing an anomaly in Defendant's prints. The People assert the deputies were not interrogating Defendant. The People argue the question falls within the booking exception as fingerprinting is basic identifying data and is not considered interrogation. The People assert Defendant's statement was voluntary as the deputies were engaging in routine fingerprinting and was not coercive. In the alternative, the People assert the deputies were not interrogating Defendant as the question was not meant to elicit an incriminating response.

2. Order

The Court DENIES Defendant's motion and finds Defendant's statement was not in response to interrogation.

At the time when Defendant made the statement that the mark on his finger was a cut, Deputy Mecca was fingerprinting Defendant. Deputy Mecca was being trained by Deputy Phipps on the fingerprinting process.

Deputy Mecca testified that in the process of taking Defendant's fingerprints, he asked Deputy Phipps what would cause a white line to appear on the finger print on the screen to which Deputy Phipps stated it could be a scar. At that time, Defendant stated "it is a cut."

During cross examination, Deputy Mecca was asked if his report stated Deputy Phipps asked if the white line was a scar. The report referenced in Deputy Mecca's testimony was not attached as an exhibit to

the pleadings nor offered at the motions hearing. On recross, Deputy Mecca reiterated the conversation regarding the scar was between himself and Deputy Phipps. The Court finds Deputy Mecca's testimony credible and finds the deputies were not engaging in a conversation that they should have known was reasonably likely to elicit an incriminating response from the suspect. The deputies were engaged in a conversation between themselves with the purpose of training Deputy Mecca. The deputies could not have known Defendant would respond to their interchange.

The Court DENIES Defendant's motion.

c. <u>Defendant's Motion to suppress statements—Lieutenant Michael Yelton Jr. and Agent Matthew Hewett (D-041)</u>

1. Argument

On December 29, 2017, Defendant filed the present motion asserting Defendant's statement to Lieutenant Yelton regarding the whereabouts of the named victim and statements to Lieutenant Yelton and Agent Hewett regarding Defendant's daughter after Defendant invoked his right to counsel should be suppressed. Defendant asserts said statements were the result of custodial interrogation in violation of Defendant's rights. Finally, Defendant argues his statements were not voluntary.

At the hearing, Defendant asserted his statements made to Agent Hewett after *Miranda* regarding who owned the vehicle and if the vehicle could be searched should be suppressed.

On January 19, 2018, the People filed a response asserting Defendant's statements to his daughter were not the product of interrogation and Defendant volunteered his statements to his daughter. The People argue Defendant's statements to his daughter were not involuntary as Defendant had requested to speak to his daughter.

At the hearing, the People represented they do not intend to introduce Defendant's statements made to Lieutenant Yelton; however the People maintain the statement was voluntary and may be used for impeachment purposes.

2. Order

Once law enforcement located Defendant's vehicle, they initiated a felony traffic stop with lights and sirens. Felony traffic stops include law enforcement taking the suspect out of the vehicle at gunpoint; here, one or two law enforcement officers pointed his or her long gun at the vehicle. Defendant was "firmly" ordered out of the vehicle. Law enforcement was yelling.

Defendant was ordered to face away from the police and walk backwards; Defendant was ordered to go to his knees. Defendant was then handcuffed and law enforcement re-holstered their weapons. Defendant was placed in the police car.

At this time, Lieutenant Yelton asked Defendant, in a conversational tone, the whereabouts of the named victim. Defendant responded "that seems to be

the question of the day" and said he had not seen her since Sunday.

The Court finds Defendant had not been advised of his *Miranda* rights and was being interrogated while in custody. Defendant had guns pointed at him and his vehicle; he was ordered to his knees to be secured. Law enforcement was yelling commands at Defendant. The Court finds a reasonable person would believe he was in custody to the degree associated with a formal arrest; such is custodial interrogation.

The Court further finds Lieutenant Yelton asked Defendant a question he knew was reasonably likely to elicit an incriminating response regarding where the named victim was located.

Therefore the Court finds Defendant was subject to custodial interrogation without being advised of *Miranda*; thus the statement is suppressed. However, to determine whether Defendant's statement may be used for impeachment purposes, the Court next turns to whether Defendant's statement was voluntary. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) ("Despite the fact that patently voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination.").

The Court finds Lieutenant Yelton asked Defendant the question regarding the named victim's whereabouts after he had holstered his weapon and placed Defendant in the vehicle. Lieutenant Yelton's

tone was conversational and he did not make threats or promises to Defendant or exert any improper influence over Defendant. Therefore, the Court finds Defendant's statement was voluntary and may be used for impeachment purposes.

With regards to Defendant's statements he made to his daughter, the Court DENIES Defendant's motion. The Court finds said statements were volunteered by Defendant and were not the result of interrogation. Law enforcement did not ask Defendant a question nor was law enforcement engaging in a conversation they should have known would elicit a response from Defendant. Law enforcement was giving Defendant a courtesy by allowing Defendant an opportunity to talk to his daughter prior to him being separated from her. As such, the Court finds Defendant's statements to his daughter were not the result of custodial interrogation.

Defendant further seeks to suppress Defendant's statements to Agent Hewett regarding consent to search the vehicle and who owned the vehicle.

After Defendant had invoked his *Miranda* rights and after Defendant had consented to having his photographs and buccal swabs taken, Agent Hewett asked Defendant for consent to search the vehicle. Defendant replied he did not give consent and would have to speak with his lawyer. Agent Hewett then asked who owned the vehicle to determine whose consent he needed in order to search the vehicle.

The Court finds Agent Hewett's question of who owned the vehicle was custodial interrogation. Defendant was in custody and had unequivocally invoked his right to counsel after Agent Hewett read Defendant his *Miranda* rights. Further, said question was interrogation as law enforcement knew the named victim drove a white Volvo; the white Volvo and the named victim had been missing. Agent Hewett then asked Defendant who owned the vehicle. Agent Hewett should have known said question was likely to elicit an incriminating response from Defendant regarding how Defendant came into possession of the vehicle or where the named victim was located. As such, the Court finds Defendant response is inadmissible as Defendant was being interrogated while in custody after invoking his right to counsel.

However, the Court finds Defendant's statement was not the result of threats, promises, undue influence, or coercion. Therefore, Defendant's statement was voluntary and may be used for impeachment purposes only. *Elstad*, 470 U.S. at 307.

d. <u>Defendant's Motion to exclude testimony regarding telephone conversation—Detective Kirshbaum (D-042) and Defendant's Motion to exclude testimony regarding phone messages—Detective Kirshbaum (D-043)</u>

1. Argument

On December 29, 2017, Defendant filed the present motions. Defendant moves to exclude

testimony regarding the voicemails and the telephone conversations Detective Kirshbaum engaged in with a man named Adam Densmore. Defendant asserts said telephone conversation would be inadmissible hearsay unless Detective Kirshbaum could establish the other caller was Defendant. Defendant argues such proper identification would require that the witness is familiar with and recognized the voice. Finally, Defendant asserts said statements are involuntary.

On January 19, 2018, the People filed a response asserting Defendant's statements made in the phone call are admissible as Defendant identified himself to Detective Kirshbaum and the content of the conversation related to the victim and their child; the People assert such topics are topics in which solely Defendant would be familiar. The People assert the conversation was voluntary as the tone of the phone call was conversational and the Detective did not make threats or promises to Defendant.

With regards to the voicemails, the People assert the issue is not yet ripe as the People have not had an opportunity to lay proper foundation for the admissibility of the voicemails. The People argue Defendant identified himself as "Adam Densmore" and stated facts further identifying himself as Defendant.

2. Legal Standard

Pursuant to C.R.E. 901(b)(6), "by way of illustration only, and not by way of limitation," an example to authenticate a telephone conversation is

to present evidence that a call was made to the number assigned at the time by the telephone company to a particular person if circumstances, including self-identification, show the person answering to be the individual called.

3. Order

The Court DENIES Defendant's motion with regard to the phone calls (D-042) and reserves ruling with regards to the voicemails Defendant's motion (D-043).

The Court finds Detective Kirshbaum contacted Defendant's father ("Mr. Densmore") on February 14, 2017. At said time, Detective Kirshbaum asked Mr. Densmore to give Defendant the message to call Detective Kirshbaum. Mr. Densmore also gave Detective Kirshbaum Defendant's phone number. Detective Kirshbaum called the phone number provided and was unsuccessful in reaching Defendant.

On February 15, 2017, Detective Kirshbaum received two voicemails at 7:50 a.m. and 7:51 a.m. from a man who identified himself as "Adam Densmore" in both messages. From the caller ID, Detective Kirshbaum could determine the individual who left the voicemails had the same phone number as the number Mr. Densmore provided as Defendant's phone number.

The Court reserves ruling with regards to the voicemails, Defendant's motion (D-043). The Court finds foundation is required as to the identification of

the caller who left Detective Kirshbaum the voicemails.

With regards to the phone calls, Defendant called Detective Kirshbaum from the same number as above at 12:33 p.m. and 1:13 p.m.; Defendant and Detective Kirshbaum spoke during both phone calls. The Court finds Defendant initiated the conversation and identified himself. Defendant further discussed topics with Detective Kirshbaum that Defendant has knowledge of including W.M., his family, and Defendant himself. Detective Kirshbaum testified to this effect and the Court has listened to the transcript of the calls. Though Detective Kirshbaum did not initiate the conversation as the example in C.R.E. 901(b)(6) contemplates, the Court finds such is sufficient to comply with C.R.E. 901(b)(6) and to lay sufficient foundation. Defendant's statements are admissible.

The Court further finds Defendant's statements were voluntary. Defendant made initial contact with Detective Kirshbaum each time. Detective Kirshbaum did not make promises, threats, or coerce Defendant in making statements or to initiate subsequent conversations with Detective Kirshbaum.

The Court DENIES Defendant's motion (D-042).

e. <u>Defendant's Motion to suppress statements—Jessica Punches (D-044)</u>

1. Argument

On December 29, 2017, Defendant filed the present motion to suppress statements Defendant made to Jessica Punches, a child welfare specialist 3 with Pawnee County Department of Health and Human Services ("DHHS"). Defendant asserts Defendant's statement should be suppressed as Ms. Punches spoke with Defendant after Defendant had invoked his right to counsel and Ms. Punches had been requested by law enforcement to interrogate Defendant; as such Ms. Punches was acting as an agent of the state during the interrogation. Finally, Defendant asserts his statements were not voluntary.

On January 19, 2018, the People filed a response. The People assert the purpose of Ms. Punches' interview with Defendant was for child welfare and child safety; such required Ms. Punches to "discuss everything from the incident that brought [Ms. Punches] to the scene to meet the child that day." The People argue Ms. Punches was not acting as an agent of the state as there is no direct evidence that law enforcement "recruited or directed Ms. Punches to assist in the investigation." Further, Ms. Punches "refused to share any information with law enforcement before getting her supervisor's permission." The People assert Ms. Punches' refusal to share information demonstrates she was not acting as an agent for law enforcement. Finally, the People assert Defendant's statements to Ms. Punches were voluntary.

2. Legal Standard

Constitutional violations resulting in the exclusion of evidence generally do not apply to evidence obtained by private parties, or evidence resulting from the conduct of private parties. *People v. Lopez*, 946 P.2d 478, 481 (Colo. App. 1997). However, "an exception to this rule exists when private persons become agents of the police by virtue of the police's suggestion, order, request, or participation for purposes of criminal investigation. *Id.* (citing *People v. Henderson*, 559 P.2d 1108, Colo. App. 1976).

The test to determine whether a private citizen has acted as an agent of the police for purposes of criminal investigation is whether the person "in light of the circumstances of the case, must be regarded as an 'instrument' or agent of the state." *Lopez*, 946 P.2d at 481 (*citing Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)). Critical factors include "whether the prosecution knew of and acquiesced the intrusive conduct, and whether the party performing such intrusive conduct intended to assist law enforcement efforts." *Lopez*, 946 P.2d at 482 (*citing United States v. Black*, 767 F.2d 1334 (9th Cir. 1985). The "private or non-law enforcement government actors come within the purview of the Fourth Amendment only when their searches of individuals have no other purpose but to aid law enforcement investigatory or administrative functions." *People v. Holmberg*, 992 P.2d 775, 708 (Colo. App. 1999).

3. Order

Ms. Punches received a report that Defendant had been arrested and a child, W.M., was present; W.M. did not have an adult caretaker at that time as her father was in jail and her mother was missing/deceased. Thus, it was necessary for DHHS to take custody of W.M.

Prior to the interview taking place, Ms. Punches asked law enforcement if they had information regarding the child. Ms. Punches also viewed W.M. to determine if she had injuries.

Ms. Punches conducted an interview with Defendant face to face at the jail. Ms. Punches did not offer to interview Defendant for law enforcement nor did law enforcement request she conduct the interview. When Ms. Punches conducts a face to face interview at the jail her routine practice is to have law enforcement present for her safety. The officer does not participate or ask questions during her interview.

The Court finds here, the FBI agent was present at the interview at the request of Ms. Punches. Ms. Punches testified she requested a law enforcement officer be present in the interview room for her safety. The officer stood behind Ms. Punches and did not participate in the interview by asking questions or directing Ms. Punches to ask questions. No other law enforcement officers directed Ms. Punches to ask any questions of Defendant.

Ms. Punches spoke with Defendant for approximately 30 minutes to determine what DHHS

needed to be aware of W.M.'s situation, inclusive of if the other parent was available to provide care. Ms. Punches testified part of her DHHS mandate is to try to locate all biological parents or a child in their custody. Ms. Punches further interviewed Defendant in order to determine the next steps for W.M. and her safety. Finally, the interview consisted of information regarding family support, W.M.'s likes and dislikes, how W.M. is comforted, parenting techniques, historical and routine discipline, who would take care of the child while the parent was incarcerated inclusive of whether other family members were available, substance abuse, and domestic violence.

The Court finds Ms. Punches' purpose of the interview with Defendant was to obtain information with regards to W.M. in order to develop a safety plan and placement options for W.M. The Court finds it is the regular practice of DHHS to interview the biological parents in cases where DHHS is taking custody of a child. As such, the Court finds Ms. Punches had a different purpose to interview Defendant than to aid law enforcement in investigating the present case. As such, the Court finds Ms. Punches was not an agent of the state and the interview she conducted with Defendant does not fall within the purview of the Fourth Amendment. As Defendant's statements to Ms. Punches are not subject to the Fourth Amendment, the Court need not determine whether Defendant's statements were voluntary.

The Court DENIES Defendant's motion.

f. <u>Defendant's Motion to exclude testimony regarding telephone conversation—Aaron Curry, Jennifer Pope, and Jessica Punches (D-045)</u>

1. Argument

On December 29, 2017, Defendant filed the present motion moving to exclude testimony regarding a telephone conversation Mr. Curry, Ms. Pope, and Ms. Punches initiated with a man by the name of Adams Densmore. Defendant asserts if the People establish Defendant made the statements, said statements were involuntary.

On January 19, 2018, the People filed a response. The People assert the present motion is not ripe and should be addressed at trial. The People argue Defendant's statements were voluntary and not the result of the government's coercive conduct as Mr. Curry, Ms. Pope, and Ms. Punches are not government actors. In the alternative, the People assert if Mr. Curry, Ms. Pope, and Ms. Punches are considered government actors, the three individuals did not engage in coercive conduct.

2. Order

The Court incorporates the above analysis in determining Ms. Punches was not acting as an agent of the state and her purpose in speaking with Defendant was not to aid law enforcement in their investigation.

Ms. Punches, her supervisor Jennifer Pope, and the DHHS facilitator Aaron Curry conducted a child safety meeting with Defendant over the phone on February 16, 2017; said phone conversation lasted approximately 30-45 minutes.

The purpose of the phone call was to discuss the DHHS allegations with the parent and the concerns of the department. During a child safety meeting, DHHS attempts to obtain the parent's thoughts regarding the child's placement and to find the least restrictive environment for the child. Therefore, the purpose of the phone call was to develop a child safety plan regarding W.M., to get Defendant's perspective, and to find a positive living environment for W.M. The Court finds the purpose of the phone call was not to aid law enforcement in their investigation and law enforcement did not participate in the phone call.

As such, the Court finds Ms. Punches, Ms. Pope, and Mr. Curry were not agents of the state and the phone conversation with Defendant does not fall within the purview of the Fourth Amendment. As Defendant's statements to Ms. Punches, Ms. Pope, and Mr. Curry are not subject to the Fourth Amendment, the Court need not determine whether Defendant's statements were voluntary.

The Court DENIES Defendant's motion.

DATED: 3/1/18

BY THE COURT

/s/ [h/w signature]
Judith L. LaBuda
District Court Judge

APPENDIX E

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

2025 CO 7

Supreme Court Case No. 23SC85
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA35

Petitioner:

Patrick Frazee,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
February 10, 2025

Attorneys for Petitioner:
Megan A. Ring, Public Defender
Sean James Lacefield, Deputy Public Defender
Denver, Colorado

Attorneys for Respondent:
Philip J. Weiser, Attorney General
Brittany Limes Zehner, Assistant Solicitor General
Denver, Colorado

Attorneys for Amici Curiae ACLU of Colorado and Office of Respondent Parents' Counsel:
Timothy R. Macdonald
Sara Neel
Emma Mclean-Riggs
Laura Moraff
Denver, Colorado

Zaven T. Saroyan
Denver, Colorado

Attorneys for *Amicus Curiae* Colorado Department of Human Services:
Philip J. Weiser, Attorney General
Nicole Chaney, Assistant Attorney General
Denver, Colorado

Attorneys for *Amici Curiae* Denver Department of Human Services and Arapahoe County Department of Human Services:
Amy J. Packer, Assistant City Attorney
Denver, Colorado

Jordan Lewis, Assistant County Attorney
Aurora, Colorado

Attorneys for *Amici Curiae* Office of Alternate Defense Counsel and Colorado Criminal Defense Bar:
Spencer Fane LLP
Dean Neuwirth
Denver, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ,**

JUSTICE BOATRIGHT, JUSTICE HOOD, JUSTICE HART, JUSTICE SAMOUR, and JUSTICE BERKENKOTTER joined.
JUSTICE GABRIEL delivered the Opinion of the Court

¶ 1 We granted *certiorari* to determine whether a Department of Human Services caseworker is a law enforcement officer under *Miranda v. Arizona*, 384 U.S. 436 (1966), and, if so, whether *Miranda*'s test for custody applies when someone in pretrial detention is questioned about the facts underlying their custody. Patrick Frazee urges us to adopt a bright-line rule that Department of Human Services caseworkers must give *Miranda* warnings any time they interrogate someone in custody about current or unsolved allegations that a reasonable caseworker should know are criminal. In the alternative, Frazee argues that, under the totality of the circumstances, the caseworker here was acting as a law enforcement officer or as an agent of law enforcement and, thus, was required to give *Miranda* warnings.

¶ 2 In *Densmore v. People*, 2025 CO 6, ¶¶ 2, 38, 46, __ P.3d __, which we are also announcing today, we addressed a nearly identical issue and concluded that, under a totality of the circumstances test, the caseworker there was not acting as an agent of law enforcement for purposes of *Miranda* and, thus, *Miranda* did not apply. Guided by the principles announced in *Densmore*, we conclude that Department of Human Services caseworker Mary Longmire likewise was neither a law enforcement officer nor an agent of law enforcement for *Miranda* purposes. Accordingly, *Miranda* does not apply in this

case, and we need not reach the question of whether *Miranda*'s test for custody should apply when a Department of Human Services caseworker questions someone in pretrial detention about the facts underlying their custody.

¶ 3 We therefore affirm the judgment of the division below, albeit on different grounds.

I. Facts and Procedural History

¶ 4 Frazee was arrested in connection with the November 22, 2018 murder of his romantic partner, Kelsey Berreth.

¶ 5 Frazee and Berreth had a daughter who was just over one year old at the time of Berreth's death. On the day of Frazee's arrest, December 21, 2018, the Teller County Department of Human Services (the "Department") received a referral from the Woodland Park Police Department concerning the child. This referral was assigned to Longmire, the child and family services administrator with the Department, and, in this instance, Longmire agreed to serve as a caseworker. The child was brought to the Department's office, and a court granted the Department emergency custody of her.

¶ 6 That same day, Longmire went to the Teller County jail to meet with Frazee. The purpose of this meeting was to serve Frazee notice of the upcoming shelter care hearing concerning the child, to provide him with information about the dependency and neglect process, and to inform him that the child was in the Department's custody.

¶ 7 Several days later, on December 26, Longmire again met with Frazee at the Teller County jail. It is this meeting that is at issue in this case. No law enforcement authorities asked Longmire to conduct this meeting, and she did not notify the local police that she was doing so. The meeting took place the day before a preliminary protective proceeding concerning the child was scheduled to occur. As of this time, Frazee had not yet been formally charged with Berreth's murder. Law enforcement officers had, however, told Longmire what they believed had happened, although they did not provide details and Longmire did not have access to any search or arrest warrants that had been issued in the case.

¶ 8 Longmire met with Frazee in the jail's video advisement room, which is used for, among other things, video advisements, video court sessions, attorney visits, and other official visits, such as the one at issue here. A deputy brought Frazee into the room, but the deputy did not stay, and Longmire was alone with Frazee during the meeting. Frazee was neither handcuffed nor restrained, nor did Longmire limit his freedom of movement during the meeting. And Frazee was free to leave at any time. Longmire, who was not a law enforcement officer and who had never been trained in law enforcement interrogation techniques, did not provide *Miranda* warnings to Frazee.

¶ 9 At the outset of the meeting, Longmire explained to Frazee that due to his incarceration, the child did not have an appropriate caregiver and that Longmire had questions for Frazee regarding that issue. Longmire expressly told Frazee that she would

understand if there were questions that he did not want to answer due to the allegations against him and the ongoing criminal investigation.

¶ 10 Longmire further told Frazee that she was there to complete her assessment of the family and to gather information about the child that she needed in order to complete the paperwork for the Interstate Compact on the Placement of Children. In particular, she explained that she "needed to learn about [Frazee's] background growing up, about [the child's] development, if she had any medical issues, you know, what was her daily schedule, how was her development, different things like that." Longmire also asked about Berreth, Frazee's relationship with her, and the custody arrangement that they had regarding the child, so that Longmire could understand what the child's daily life was like, whom she was with and when, and her relationship with both of her parents. And Longmire went through a list of fourteen standardized questions that she and her colleagues use to compile a child's family history and to complete an assessment.

¶ 11 In response to Longmire's questions, Frazee described how he and Berreth met, and he provided context and background on their relationship. He also provided background information on himself, his upbringing, his family, and his childhood, as well as some information on Berreth's relationship with his family.

¶ 12 In addition, although Berreth was, in fact, deceased by the time of this meeting, Frazee told Longmire where Berreth was living, and he noted

that he was not living with her at that time. He then described the custody arrangement that he and Berreth had concerning the child, noting that it was a "split custody" arrangement, which was a then-recent change from their initial arrangement, in which Frazee had had the child during the day while Berreth worked.

¶ 13 The conversation next turned to the Thanksgiving 2018 time frame, when Berreth went missing. Longmire explained that she wanted to discuss that period in order to determine where the child was, particularly during the time of Berreth's disappearance. This was relevant to the allegation that the child had been exposed to an injurious environment or to violence. Accordingly, Longmire wanted to know the timeline of events involving the child during those several days.

¶ 14 Frazee explained that he had the child with him the day before Thanksgiving and that he was to return the child to Berreth that day. For several reasons, however, the exchange was delayed, and Frazee ultimately returned the child to Berreth late that evening. The child was to spend Thanksgiving morning with Berreth and Thanksgiving afternoon with Frazee, and in accordance with this plan, Frazee picked up the child on Thanksgiving and took her with him to do some work, which was not atypical. Thereafter, they went to Frazee's mother's house for Thanksgiving dinner, and they stayed there through the evening.

¶ 15 Frazee then told Longmire that on the Friday after Thanksgiving, he had several communications

with Berreth regarding the exchange of the child. According to Frazee, Berreth told him that she needed to sort some things out, and she asked him to keep the child that day, which he did.

¶ 16 Frazee claimed that he had telephone calls or exchanged text messages with Berreth the next day (Saturday) and that Berreth again asked him to keep the child. Frazee told Longmire that during a conversation that day, Berreth "lost it," and, thus, Frazee wanted to keep the child "until the storm blew over."

¶ 17 Frazee further told Longmire that he spoke with Berreth the following day (Sunday), and he and Berreth discussed where their relationship was going. Frazee indicated that they agreed that Frazee would continue to keep the child with him, and he again took her to work. Frazee then noted that he and Berreth exchanged several texts that day, after which he was unable to get a hold of her. Frazee's description of the timeline ended with Frazee indicating that he spoke with Berreth's mother on December 2 and that she said that she had not been able to reach Berreth. Frazee responded that Berreth needed her space.

¶ 18 The meeting between Longmire and Frazee lasted between sixty and ninety minutes. Longmire described the meeting as professional, and she noted that Frazee was cooperative and provided a lot of information about the child. At no time during the meeting did Longmire confront Frazee about anything. In her view, she had no information with which to do so.

¶ 19 After the meeting ended, Longmire documented what she had learned in a Referral/Assessment Summary. Pursuant to a release that Frazee had signed during one of Longmire's two meetings with him, Longmire shared her assessment documentation with both the district attorney's and public defender's offices.

¶ 20 The criminal case against Frazee proceeded, and prior to trial, the People endorsed Longmire as a witness. Thereafter, Frazee moved to suppress all of the statements that he had made to Longmire at his December 26 meeting with her, arguing that the meeting was a custodial interrogation conducted without the requisite *Miranda* warnings. Frazee thus asserted that the admission of his statements to Longmire would violate his constitutional rights.

¶ 21 The trial court subsequently conducted an evidentiary hearing on Frazee's motion. At this hearing, Longmire testified to the conversations described above.

¶ 22 A few days later, the court issued a written order denying Frazee's motion. In support of its ruling, the court began by explaining that *Miranda* is inapplicable unless the suspect is in custody and the statement at issue was the product of a police interrogation. The court next observed that the facts that Frazee was incarcerated and that the meeting with Longmire took place at the county jail did not necessarily mean that Frazee was in custody. Rather, the court noted that in *People v. Denison*, 918 P.2d 1114, 1116 (Colo. 1996), *People v. J.D.*, 989 P.2d 762, 768 (Colo. 1999), and *People v. Parsons*, 15 P.3d 799,

801-02 (Colo. App. 2000), this court and a division of the court of appeals described the factors that courts should consider in determining whether an inmate, who is already in custody, has been further restricted so as to establish custody for *Miranda* purposes. The court then opined that, by its terms, *Miranda* applies only to actions of law enforcement officials, and the court noted the statutory duties imposed on state human services departments to investigate and act in circumstances like those present here to ensure that the needs of the child are satisfied and to keep the court and the parents apprised as to the status of the matter.

¶ 23 Applying these principles to the case before it, the court found that Longmire was not a police officer, a peace officer, or a law enforcement officer. To the contrary, her actions in this case were consistent with her duties under the Children's Code, and because a court had placed legal custody of the child with the Department, she was required by law to investigate the matter and to make a recommendation to the court regarding child placement. As a result, in the court's view, Longmire was not acting as an agent of law enforcement but, in fact, was acting independently of law enforcement. In addition, the court found that although Frazee was in jail, no custodial interrogation had taken place. Based on these findings, the court concluded that Longmire had no legal duty to provide Frazee with a *Miranda* advisement or warning.

¶ 24 The case proceeded to a jury trial at which Longmire testified regarding her meetings with Frazee. The jury ultimately found Frazee guilty of

first degree murder after deliberation, felony murder, three counts of solicitation to commit first degree murder, and tampering with a deceased human body.

¶ 25 Frazee then appealed, contending, among other things, that the trial court had erred in admitting Longmire's testimony. *People v. Frazee*, No. 20CA35, ¶¶ 1, 38 (Dec. 29, 2022). Specifically, he argued that suppression of his statements to Longmire was required because he had made those statements during a custodial interrogation that Longmire conducted without first providing him with *Miranda* warnings. *Id.* at ¶ 38.

¶ 26 In a unanimous, unpublished decision, the division disagreed and affirmed the judgment of conviction. *Id.* at ¶¶ 1, 38-52, 115. In so ruling, the division agreed with the trial court that Frazee was not in custody for *Miranda* purposes during Longmire's meeting with him. *Id.* at ¶ 45. Accordingly, the division did not need to consider whether Longmire was acting as an agent of law enforcement during the meeting. *Id.*

¶ 27 Frazee then petitioned this court for a writ of *certiorari*, and we granted his petition.

II. Analysis

¶ 28 We begin by setting forth the applicable standard of review and *Miranda*'s requirements, particularly with regard to when a person other than a law enforcement officer conducts a custodial interrogation. We then apply those principles to the facts now before us.

A. Standard of Review and Applicable Legal Principles

¶ 29 Our review of a trial court's order regarding a suppression motion involves a mixed question of fact and law. *Densmore*, ¶ 27. We defer to the court's factual findings if they are supported by competent evidence in the record, but we review its legal conclusions *de novo*. *Id.* Our review of a trial court's ruling on a suppression motion is limited to the record created at the hearing on that motion. *Id.*

¶ 30 The Fifth Amendment to the United States Constitution protects individuals from compelled self-incrimination. U.S. Const. amend. V. To safeguard this right, *Miranda*, 384 U.S. at 478-79, requires that when an individual is subjected to a custodial interrogation, the interrogator must advise the individual that (1) they have the right to remain silent; (2) anything they say can be used against them in a court of law; (3) they have the right to an attorney's presence; and (4) if they cannot afford an attorney, then one will be appointed for them prior to any questioning if they so desire. Absent an exception to this rule, unwarned statements made during a custodial interrogation are presumed to be compelled and are inadmissible in the prosecution's case in chief. *Verigan v. People*, 2018 CO 53, ¶ 19, 420 P.3d 247, 251.

¶ 31 In *Densmore*, ¶ 29, which involved a nearly identical issue to that now before us, we explained that although *Miranda* typically applies to law enforcement officers conducting custodial interrogations, it also applies to non-law enforcement

officers acting as agents of law enforcement. We further explained that to determine whether a non-law enforcement officer is acting as an agent of law enforcement in conducting a custodial interrogation, courts consider the totality of the circumstances, including both objective and subjective factors. *Id.* At ¶¶ 29, 33. And we provided a nonexclusive list of factors that courts may consider in determining whether a person, such as a Department of Human Services caseworker, was acting as an agent of law enforcement. *Id.* at ¶¶ 30-32. Such factors include the caseworker's duty to investigate and interview people who may be incarcerated; her authority to apprehend, handcuff, and detain others; her access to police reports and whether she reviewed any police reports before the interrogation at issue; her duty to report information that she learned; her job duties and the purposes of those duties; whether she was under contract with and paid by the state to perform these duties; whether she investigates crimes; whether her purpose was to obtain incriminating information; whether the police directed, controlled, or participated in her investigation or provided input regarding the questions she should ask the person to be interviewed; and the extent of the investigator's contact with law enforcement officers before she began her investigation. *Id.*

¶ 32 Those same principles apply here, and with these principles in mind, we turn to the facts of this case.

B. Application

¶ 33 Applying the above-described factors, we conclude that Longmire was not acting either as a law enforcement officer or as an agent of law enforcement when she spoke with Frazee. Accordingly, she was not required to provide him with *Miranda* warnings before asking him questions.

¶ 34 Specifically, evidence in the record of the suppression hearing established that Longmire was not a law enforcement officer, and she had no law enforcement training. Moreover, the police did not ask Longmire to meet with Frazee, and she did not advise them that she was doing so. And Longmire did not have access to any police reports or files, although before she met with Frazee, the police had shared with her their belief as to what had happened, albeit without providing details.

¶ 35 When Longmire then met with Frazee, she did not have the authority to apprehend, detain, or handcuff him, and he was not restrained during his meeting with her. In addition, Frazee could have left at any time, and Longmire advised him at the outset of the meeting that he was free to decline to answer any of her questions, given the circumstances. And no law enforcement officers directed the meeting or scripted the questions that Longmire asked. Indeed, no law enforcement officers participated in or were even present for the meeting.

¶ 36 Finally, as in *Densmore*, ¶ 36, Longmire's purpose for the interview was not to uncover violations of law, to develop evidence in a criminal

case, or to enforce criminal law. Rather, her purpose was to learn about the child's needs, development, and relationships so that she could place the child in an appropriate home and ensure her safety. The fact that Longmire ultimately shared her assessment with the district attorney's and public defender's offices did not change this fundamental purpose of her meeting with Frazee. *See id.* Nor is it dispositive that Longmire was paid by the state. She had a statutory duty to investigate matters related to the child and to report certain information. In doing so, she was not performing a law enforcement function.

¶ 37 Considering all of these factors in their totality, we conclude, as did the trial court with ample record support, that Longmire was not acting either as a law enforcement officer or as an agent of law enforcement when she met with Frazee. Accordingly, she had no obligation to provide Frazee with *Miranda* warnings prior to speaking with him.

¶ 38 In so concluding, and for the reasons set forth in *Densmore*, ¶ 32, we decline to adopt Frazee's proposed bright-line rule that *Miranda* should apply whenever a caseworker conducts a custodial interrogation that involves current or unsolved allegations that a reasonable caseworker should know are criminal. As we said in *Densmore*, such a rule would, as a practical matter, cover most child welfare interviews that caseworkers conduct of parents in custody, regardless of the circumstances of a particular case, and Frazee has offered no persuasive reason for extending *Miranda* to custodial interrogations conducted by people who are neither

law enforcement officers nor agents of law enforcement. *See id.*

¶ 39 We likewise are unpersuaded by Frazee's focus on the facts that the police made the initial referral; before Longmire met with Frazee, law enforcement officers had told her what they believed had occurred; and Longmire knew that Frazee was the subject of an active criminal investigation at the time she met with him.

¶ 40 As to the referral, this is simply one way that a dependency and neglect proceeding begins. *See* § 19-3-501(1), C.R.S. (2024) (authorizing law enforcement officers to refer dependency and neglect matters to the court, which may then designate a county department of human services to conduct an investigation).

¶ 41 As to the facts that Longmire obtained some information before speaking with Frazee and was aware that an active criminal investigation was ongoing, we decline to conclude that a caseworker's attempt to educate herself about a case before she conducts her investigation, in and of itself, renders her an agent of law enforcement. Rather, as noted above, courts must consider the totality of the circumstances, and the fact that Longmire obtained information before meeting with Frazee, including that he was the subject of a criminal investigation, does not override the myriad factors described above establishing that Longmire was not acting either as a law enforcement officer or as an agent of law enforcement when she spoke with Frazee.

¶ 42 Finally, we are unpersuaded by Frazee's contention that law enforcement officers provided Longmire with a list of questions to ask Frazee. Although the division below appears to have accepted Frazee's assertion that Longmire took notes on a form provided by the district attorney's office, *see Frazee*, ¶ 44, in our view, and with respect, the record demonstrates otherwise. Specifically, as noted above, Longmire used a standardized list of fourteen questions that the Department employs during such interviews, and the People introduced into evidence at the suppression hearing a blank form containing these standardized questions. The portion of the transcript on which Frazee relies establishes nothing more than that when Longmire could not remember a detail during her testimony, the People refreshed her recollection with the assessment summary *that she had provided to law enforcement*. At no point did Longmire or the prosecutor state that the district attorney's office had created the assessment form that Longmire was to use. Nor do we perceive anything in the record to support an allegation that law enforcement officials provided such a form to Longmire prior to her meeting with Frazee.

III. Conclusion

¶ 43 For these reasons, we conclude that Longmire did not act either as a law enforcement officer or as an agent of law enforcement when she met with Frazee. Accordingly, she had no obligation to provide Frazee with *Miranda* warnings before speaking with him. In light of the foregoing, we need not reach the question of whether Frazee was in custody for *Miranda* purposes.

¶ 44 Accordingly, we affirm the judgment of the division below, albeit on different grounds.

APPENDIX F

Supreme Court of Colorado.

Patrick FRAZEE,

v.

The PEOPLE of the State of Colorado.

No. 23SC85
|
December 4, 2023

Court of Appeals Case No. 20CA35

EN BANC.

Opinion
Petition for Writ of Certiorari GRANTED.

Whether a Department of Human Services caseworker is law enforcement under *Miranda v. Arizona*, 384 U.S. 436 (1966), and if so whether Miranda's test for custody applies when someone in pretrial detention is questioned about the facts underlying their custody.

DENIED AS TO ALL OTHER ISSUES.

APPENDIX G

Colorado Court of Appeals, Division IV.

The PEOPLE of the State of Colorado,
Plaintiff-Appellee,

v.

Patrick FRAZEE, Defendant-Appellant.

Court of Appeals No. 20CA0035
|
Announced December 29, 2022

Teller County District Court No. 18CR330, Honorable Scott A. Sells, Judge

Attorneys and Law Firms

Philip J. Weiser, Attorney General, Brittany Limes Zehner, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Sean James Lacefield, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Opinion

Opinion by JUDGE GROVE

¶ 1 Defendant, Patrick Frazee, appeals his convictions for first degree murder, felony murder, three counts of solicitation to commit first degree murder, and tampering with a deceased human body. We affirm.

I. Background

¶ 2 At trial, the prosecution presented evidence from which the jury could find the following facts.

¶ 3 Frazee and the victim, K.B., met in 2015 and became romantically involved. K.B. moved to Colorado to be closer to Frazee, and in October 2017, they had a daughter, K.F., together. During that time, Frazee maintained an on-again-off-again relationship with Krystal Lee, who he first began dating in 2006, and who lived in Idaho with her husband and children. Starting in 2015, Lee frequently visited Frazee in Colorado.

¶ 4 Frazee falsely told Lee that K.B. was abusive toward K.F., who was just over a year old when K.B. was killed, and that Lee needed to do something to protect K.F. from imminent danger. On three separate occasions between September and October 2018, Frazee solicited Lee to murder K.B. First, he told her to put a lethal dose of medication in K.B.'s coffee drink. When Lee did not, Frazee instructed her to beat K.B. to death with a pipe that he provided. Again, Lee did not do as Frazee asked, so Frazee told her to bring a baseball bat to K.B.'s residence and kill K.B. with it. Each time, Lee went to K.B.'s condo, but she never followed through with the plans.

¶ 5 On Thanksgiving Day 2018, Frazee went to K.B.'s condo while she was cooking for a holiday dinner. Footage from a nearby security camera showed K.B., Frazee, and K.F. entering K.B.'s residence. It also

showed a large black plastic tote in the back of Frazee's truck.

¶ 6 Once inside, Frazee blindfolded K.B. with a sweater under the guise of having her smell various scented candles. But then, after covering K.B.'s eyes, Frazee bludgeoned her to death with a baseball bat. Frazee took K.B.'s cell phone, put her body in the large black plastic tote, washed his clothes, and drove back to his house to have Thanksgiving dinner with his family and K.F. During dinner, K.B.'s corpse remained in the tote in the back of Frazee's truck.

¶ 7 Frazee called Lee, who was in Idaho, multiple times on Thanksgiving evening. He told her that she had a "mess" to clean up, and that she needed to come immediately. After rearranging her work schedule, Lee packed cleaning supplies and drove to K.B.'s condo. When she arrived, Lee found blood everywhere: on the walls, floor, stove, dishwasher, children's toys, and bathroom. She spent hours cleaning the entire residence with bleach, and she filled six trash bags with items that could not be cleaned.

¶ 8 Later, Lee and Frazee drove to where Frazee had hidden the tote with K.B.'s body and brought it to Frazee's farm. They put it and the trash bags from K.B.'s condo into a large water trough that was filled with wooden pallets, doused it with gasoline, and set everything on fire.

¶ 9 Lee returned to Idaho and took K.B.'s phone with her. Impersonating K.B., she sent a text to K.B.'s boss

telling him that she would not be able to work the next week. Lee then shut the phone off and burned it.

¶ 10 When law enforcement later confronted Lee about the murder, she initially denied knowing who K.B. was. Eventually, however, she confessed. In exchange for testifying against Frazee, Lee pleaded guilty to tampering with a deceased human body. After a three-week trial, the jury found Frazee guilty of first degree murder, felony murder, three counts of solicitation to commit first degree murder, and tampering with a deceased human body.

II. Juror Pre-Deliberations

¶ 11 Frazee contends that the trial court erred by failing to take adequate curative steps after three jurors discussed the case before deliberations began. We disagree.

A. Additional Facts

¶ 12 Once the jurors and alternates were empaneled, the court gave the following instructions:

> You cannot form or express an opinion. You may not discuss the case among each other or with anybody else. Easier said than done. You're gonna have some dead time, obviously, while you're back there waiting for court to start. The only time that the sixteen of you can discuss the case is when the twelve of you are deliberating, but that's it. You just can't discuss the case. Again, you can talk about the weather, the Broncos, anything that you want

> to, but you cannot talk about the case. And I know that's easier said than done.

¶ 13 The court regularly repeated admonitions of this type before breaks in the trial, saying things like, "Please, don't form or express an opinion; please, don't discuss the case among yourselves or with anyone else or do any investigation." Yet not all of the jurors followed the court's instructions.

¶ 14 During a lunch break toward the end of the trial, Juror No. 5 said to a member of the court staff, "I am not going to sit in there with the three of them at the end [referring to three other jurors] talking about the trial." The staff member told the judge, who brought Juror No. 5 into the courtroom by himself for further inquiry. Juror No. 5 explained that he made the comment because three other jurors "were discussing previous witnesses again. What else is yet to come? What do they expect to happen next." Specifically, Juror No. 5 said that the jurors in question were discussing the most recent witness, saying that "she was a very professional witness" and that they could "sit here and listen to her all day." In addition, he said that the jurors were speculating whether the next witness might "prove DNA." Juror No. 5 confirmed that nothing he had heard would affect his ability to be fair and impartial. But based on the interactions that Juror No. 5 described, the court decided to individually question the three jurors he identified: Juror No. 4, Juror No. 6, and Juror No. 9.

¶ 15 Juror No. 4 disclosed that "[t]here's been anticipation about the balance of the presentation of the case," including speculation about a future

witness. However, Juror No. 4 insisted that there had been no discussion about the credibility of any particular witnesses and that any discussion he had would "definitely not" affect his ability to be fair and impartial. He further insisted that he would be able to work with all the other jurors in this case. Before dismissing Juror No. 4, the court asked both the prosecutor and defense counsel if they wanted the court to inquire further about anything. When both declined, Juror No. 4 was excused from the courtroom.

¶ 16 Next, the court reminded Juror No. 6 that "jurors are always under the admonition not to discuss the case, not…form or express any opinion." Juror No. 6 disclosed that she and the other two jurors had discussed the fact that they found the previous witness "attractive." She also expressed "the hope that some things would come together," such as follow-up regarding a tooth that was found in K.B.'s apartment. Still, Juror No. 6 maintained that she could be fair and impartial and that she would be able to work with the other jurors throughout the remainder of the trial and during the deliberation process. Once again, when asked by the court whether they had additional input, neither the prosecutor nor defense counsel had any objections or further comment.

¶ 17 Finally, after the court told Juror No. 9 that the court "constantly attempt[s] to give the admonition that jurors should not be discussing the case," the juror disclosed that "the main conversation was about…that the trial might end on Friday." Accordingly, the three jurors were speculating that

the "prosecution must be almost finished, and the defense is about to start." Also, Juror No. 9 said that the three jurors had commented that they hadn't "heard anything about DNA yet." Like the others, Juror No. 9 confirmed that he could be fair and impartial and that he could still work with the other jurors throughout the trial and during deliberations. When prompted, neither party objected nor chose to make "any record."

¶ 18 The trial court then ruled:

> I've had the opportunity to speak with all four jurors and observe their demeanor, and I have no concerns about any of the four jurors' ability to be fair and impartial jurors. I did talk to the jury, try to give them a heads up that we were getting close to the end, and I don't think it's inappropriate for them to wonder how close we are because I brought it up. I will…beef up my admonition at the conclusion of each and every break from here on out.

¶ 19 At the next break, the court repeated its standard admonition about not discussing the case, and also added, "please don't discuss any aspect of the case that you've heard or any potential upcoming aspect of the case."

B. Preservation and Standard of Review

¶ 20 The parties dispute whether this issue was preserved. Frazee contends that it was because the trial court made extensive findings and issued a

definitive ruling on whether the jurors could continue to participate in the trial. But the People note that as the trial court was questioning the jurors individually, defense counsel never objected or asked the court to be more thorough in its questioning.

¶ 21 On appeal, Frazee's specific contention is that the trial court "failed to take adequate steps to preserve Frazee's constitutional right to a presumption of innocence and a fair trial by an impartial jury." Our review of the record confirms that defense counsel, even when prompted, failed to object or articulate any concerns with the trial court's questioning of the jurors or request any additional curative action. We therefore conclude this issue is not preserved.

¶ 22 The question remains, however, whether defense counsel's silence amounts to a waiver or a forfeiture. The distinction between waiver and forfeiture is significant because "a waiver extinguishes error, and therefore appellate review, but a forfeiture does not." *People v. Rediger*, 2018 CO 32, ¶ 40. Waiver is "the intentional relinquishment of a known right or privilege." *Id.* at ¶ 39 (citation omitted). Forfeiture, by contrast, is "the failure to make the timely assertion of a right" and is accomplished "through neglect" rather than through intent. *Id.* at ¶ 40 (citations omitted). We do not presume acquiescence in the loss of rights and, therefore, "we 'indulge every reasonable presumption against waiver.'" *Phillips v. People*, 2019 CO 72, ¶ 16 (quoting *Rediger*, ¶ 39).

¶ 23 Accordingly, we assume without deciding that defense counsel did not waive the issue, and we now

choose to review this issue as a forfeiture. Appellate courts may review a forfeited issue for plain error. *Rediger*, ¶ 40.

¶ 24 Under the plain error standard of review, a defendant bears the burden of establishing that an error occurred and that, at that time, it was so clear cut and obvious that a trial judge should have been able to avoid it without benefit of objection. *People v. Conyac*, 2014 COA 8, ¶ 54. A defendant must also establish that the error was so grave that it undermined the trial's fundamental fairness as to cast serious doubt on the conviction's reliability. *Id.*

C. Applicable Law

¶ 25 The United States and Colorado Constitutions guarantee criminal defendants the right to a fair trial by an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25. That right is violated if the court fails to remove a juror who is biased against the defendant. *People v. Harmon*, 284 P.3d 124, 127 (Colo. App. 2011). One way that a juror can demonstrate bias is by expressing an opinion on the defendant's guilt before the jury has begun deliberating. *Id.* at 128. This infringes on a defendant's Sixth Amendment right because if even one juror prematurely decides a defendant's guilt, that criminal defendant is deprived of his right to a fair and impartial jury. *Id.*

¶ 26 When a juror expresses a premature opinion on the defendant's guilt, the court must take corrective action. *Id.* While the court need not necessarily remove that juror, *People v. Drake*, 748 P.2d 1237,

1243 (Colo. 1988), it must make some effort to avoid allowing a biased juror to decide the case. *Harmon*, 284 P.3d at 128. In making that effort, the court has considerable discretion over how best to address the issue. *Id.* at 128-29.

D. Analysis

¶ 27 Frazee contends that the trial court's conversations with Juror Nos. 4, 6, and 9 revealed that they had formed premature, tentative opinions of his guilt, and were anticipating additional evidence from the prosecution to support these opinions. In support of this interpretation, he relies primarily on Juror No. 6's "hope" that the prosecution's case would "come together" with additional evidence, arguing that this statement demonstrates the three jurors' predeliberation. But these phrases could be interpreted multiple ways. For example, the juror's "hope" that the case would "come together" could have been born of confusion over the prosecution's evidentiary presentation up to that point, or it could have actually been an expression of skepticism over the sufficiency of the prosecution's evidence thus far. Whatever it may have meant, none of the jurors' comments explicitly indicated that they had formed opinions regarding Frazee's guilt.

¶ 28 Because "only the trial court can assess accurately the juror's intent from the juror's tone of voice, facial expressions, and general demeanor," *People v. Young*, 16 P.3d 821, 825-26 (Colo. 2001), we defer to its assessment of credibility. Here, the trial court explained that it "had the opportunity to speak with all four jurors and observe their demeanor," and

accordingly had "no concerns about any of the four jurors' ability to be fair and impartial." Therefore, we do not disturb this determination on appeal.

¶ 29 But wait, Frazee argues, the trial court also failed to adequately secure his right to a fair trial because it did not reprimand the jurors for discussing the case prematurely, remind them of the presumption of innocence, or elicit assurances that they would follow the court's instructions in the future. We find no plain error in the omission of these admonitions. Frazee cites no authority that would require the court to provide them under circumstances similar to those here, and in any event, the trial court *did* remind two of the three jurors of its instructions not to discuss the case; Frazee's presumption of innocence was made explicit in the jury instructions; and at recesses going forward, the court more thoroughly instructed the jurors not to discuss the case.

¶ 30 Finally, Frazee contends that because the trial court did not explore the possibility that other jurors were exposed to and/ or participated in premature discussions, it lacked the necessary information to determine whether his right to a fair trial was at risk. We find no plain error. The court interviewed each of the three jurors that Juror No. 5 identified, and nothing else in the record suggests that anyone else participated in or was even aware of those jurors' discussions. Therefore, we cannot conclude that the court's failure to inquire about other jurors was so grave that it undermined the trial's fundamental fairness and cast serious doubt on the conviction's reliability. *See Conyac*, ¶ 54.

III. Expert Testimony

¶ 31 Frazee contends that the trial court plainly erred by allowing an expert witness to improperly vouch for Lee's credibility. We are not persuaded.

A. Additional Facts

¶ 32 Jonathyn Priest testified for the prosecution as an expert in blood stain pattern analysis and crime scene reconstruction. He based his report on a wide array of information, including police reports, DNA and serology reports, photographs of bloodstains taken at the scene, and a video of Lee walking through K.B.'s residence.

¶ 33 During Priest's testimony, the prosecution played the video of Lee's walkthrough, during which she pointed out where the blood stains had been located and described both those that she had been able to clean and those that she had not. The prosecution repeatedly paused the video so that Priest could provide analysis on the patterns of blood that remained. He generally confirmed what Lee described and gave scientific context for how the blood patterns she described would have been created. The prosecution then projected images of blood stains while Priest described where they were located within the apartment and what the patterns revealed about their source. Priest further discussed exhibits, such as floorboards removed from K.B.'s residence, and described how the blood patterns and markings found on them were consistent with Lee's testimony.

¶ 34 On cross-examination, the defense attempted to undermine Priest's conclusions by suggesting that they were based in large part on what Lee described rather than on his own expert analysis. During redirect, the prosecutor attempted to rehabilitate Priest and emphasize that he did his own independent assessment of the evidence. To that end, the prosecutor and Priest had the following colloquy:

> PROSECUTOR: Counsel asked you about things that were based on Krystal Lee versus not. Let me ask. Is there anything that you saw that was inconsistent with the description that Krystal Lee gave of this crime scene?
>
> PRIEST: No.
>
> Q: Or inconsistent with the description Krystal Lee gave of what Patrick Frazee told her occurred at this crime scene?
>
> A: No.
>
> Q: Were the floorboards consistent with what she told you?
>
> A: Very much.
>
> Q: Was every single drop of blood that you could see either tested or untested consistent with what she told you?
>
> A: Yes. Well, what she described. She told me nothing.

Q: You're correct. I'm sorry. Was the cleaning that she described consistent with what you found?

A: Yes.

Q: Was the couch—blood on the couch consistent with what was described?

A: Yes.

Q: Was the blood on the baby gate consistent with what was described?

A: Yes.

….

PROSECUTOR: Is there anything that you saw in that scene that would make you question the description that Krystal Lee gave of either what she was told happened during the event or what she told you she did in terms of seeing it and cleaning it?

PRIEST: No. Her description of her observations were [sic] very consistent with what was left behind in my observations based on my experience and background.

B. Standard of Review and Applicable Law

¶ 35 Because Frazee did not lodge a contemporaneous objection to the statements at issue, we review for plain error. *Conyac*, ¶ 54.

¶ 36 Neither an expert nor a lay witness may opine that another witness told the truth on a particular occasion. *People v. Cook*, 197 P.3d 269, 274-77 (Colo. App. 2008). But testimony is not inadmissible simply because it supports the prosecution's position. *People v. Koon*, 724 P.2d 1367, 1370 (Colo. App. 1986) (expert testimony is not inadmissible simply because it incidentally tends to bolster or attack another's credibility).

C. Analysis

¶ 37 In the context of Priest's entire testimony, the complained-of statements do not plainly and obviously appear to be impermissible vouching. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (plain error doctrine applies to error that is both obvious and substantial). Although Priest's testimony was consistent with the testimony provided by Lee, Priest did not express an opinion on Lee's truthfulness. *People v. Tillery*, 231 P.3d 36, 42 (Colo. App. 2009) (holding that statements were not vouching because the witness did not express an opinion on the victim's truthfulness or sincerity); *People v. West*, 2019 COA 131, ¶ 43 (concluding that there was no plain error when a witness indicated that certain statements did not conflict with other statements or evidence).[1] Instead, Priest used his background and

[1] We recognize that *People v. Daley*, 2021 COA 85, disagreed with the analysis in *People v. West*, 2019 COA 131. But the division in *Daley* did not (and could not) overrule *West*. Moreover, because *Daley* was decided well after Frazee's trial, any error based on its holding would not have been plain. *See Scott v. People*, 2017 CO 16, ¶ 18 (holding that an error was not

experience to analyze the blood patterns present at the crime scene. On redirect—and apparently in response to the angle that defense counsel took on cross-examination—the prosecutor's line of questioning was intended to emphasize how Priest's conclusions aligned with Lee's description of the crime and its aftermath. But such consistency in the prosecution's case does not mean that Priest improperly vouched for Lee. *Koon*, 724 P.2d at 1370. Therefore, any error was not plain. *Miller*, 113 P.3d at 750.

IV. Motion to Suppress

¶ 38 Frazee contends that the trial court erroneously admitted statements he made to a human services caseworker after his arrest and while he was being detained in the county jail. He argues that suppression was required because the statements were made during a custodial interrogation and the caseworker did not advise him of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree.

A. Standard of Review and Applicable Law

¶ 39 Police must warn a person of his Fifth Amendment right against self-incrimination "when [he] is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." *Miranda*, 384 U.S. at 478; *see also People v. Theander*, 2013 CO 15, ¶ 20.

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obvious when a published case at the time of trial "had rejected the precise argument [the defendant] makes" for the first time on appeal).

Specifically, police must advise the person of his right to remain silent and the right to a court appointed attorney if he cannot afford one, and that anything he says may be used against him. *Mumford v. People*, 2012 CO 2, ¶ 12. But these rights only apply when the suspect is in custody and subject to interrogation by law enforcement personnel or an agent acting on behalf of law enforcement. *Id.*

¶ 40 Although custodial interrogations are typically performed by police officers, private citizens can also act as agents of law enforcement, thereby triggering advisement requirements under *Miranda*. "The test as to whether a private citizen has acted as an agent of the police for purposes of criminal investigation is whether the person 'in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state.'" *People v. Lopez*, 946 P.2d 478, 481 (Colo. App. 1997) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)).

B. Additional Facts

¶ 41 Frazee moved to suppress statements that he made to Mary Longmire, an employee of Teller County Human Services (DHS) who visited Frazee at the Teller County Jail several days after his arrest.[2]

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[2] We recognize that *People v. Daley*, 2021 COA 85, disagreed with the analysis in *People v. West*, 2019 COA 131. But the division in *Daley* did not (and could not) overrule *West*. Moreover, because *Daley* was decided well after Frazee's trial, any error based on its holding would not have been plain. *See Scott v. People*, 2017 CO 16, ¶ 18 (holding that an error was not obvious when a published case at the time of trial "had rejected

The trial court denied the motion in a written order after holding a hearing. As relevant here, the court found that Longmire visited Frazee at the jail because DHS had taken custody of K.F., the daughter of Frazee and K.B., after Frazee's arrest and K.B.'s disappearance, and a shelter hearing was scheduled to be held a day later. Longmire, the court found, "had a legal obligation as per the Colorado Children's Code to investigate and make a placement recommendation [at the shelter hearing] the next day." Longmire's goals were to "investigate allegations of abuse and neglect" and to gather information on Frazee's "upbringing, social history, and whether his family was an appropriate placement." Relevant to those questions were issues such as whether the child had been exposed to violence, what the custody arrangement between the parents had been, what the child's schedule was when both parents were involved in her care, and whether there were any medical issues that needed to be addressed.

¶ 42 The trial court found that while Longmire knew that Frazee had been charged with murdering K.B. and that K.B. had been missing for about a month, her knowledge of the case was limited because Frazee's arrest warrant was still sealed at the time of her visit.

¶ 43 Longmire visited the jail on her own initiative, without telling law enforcement officials she was coming. (We note, however, that, according to the prosecution's response to the motion to suppress,

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the precise argument [the defendant] makes" for the first time on appeal).

Longmire contacted the chief of police to inquire about the investigation before visiting Frazee. The prosecution asserted that the chief of police provided "very little information" and "the arrest affidavit remained sealed.") Although she originally scheduled the visit for 3 p.m. on December 26, Frazee was meeting with his attorneys at that time, so she rescheduled the meeting for 7 p.m. that same day. The interview took place in the jail's video advisement room, which, according to Longmire, DHS workers commonly "use[d] to interview inmates." The room has a table, chairs, one door, and one window. Frazee was brought to the room by a sheriff's deputy, who left him there. He sat at the table with Longmire, but he was not in handcuffs, the room was not locked, and the window blinds were open.

¶ 44 Longmire did not inform Frazee of his *Miranda* rights, nor has she ever done so when conducting similar interviews with others. Longmire took notes on a form that was provided by the district attorney, and that she later gave to the prosecution, but the interview was cooperative and nonconfrontational, and Frazee could have ended it at any time. Longmire also told him at the outset that he was not required to answer her questions and that, given the allegations against him and the ongoing criminal investigation, she would understand if there were questions he did not want to answer.

C. Analysis

¶ 45 The trial court denied the motion to suppress for two reasons: (1) Frazee was not in custody during the interview, and (2) while conducting her investigation

on behalf of DHS, Longmire was not acting as an agent of law enforcement. Because we agree that Frazee was not in custody for *Miranda* purposes during the interview, we need not consider his argument that Longmire was acting on behalf of the police.

¶ 46 In determining whether a person is in custody for *Miranda* purposes, the question is ordinarily whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action to the degree associated with a formal arrest. *Mumford*, ¶ 13. This freedom of action test, however, does not apply in a jail setting. *See People v. Denison*, 918 P.2d 1114, 1116 (Colo. 1996).

¶ 47 Instead, to decide whether an inmate is in custody, courts apply a "restriction" standard. *Id.* Under this analysis, an interrogation is custodial for *Miranda* purposes if the inmate "was deprived of [his] freedom of movement within the detention facility through additional restrictions." *People v. J.D.*, 989 P.2d 762, 771 (Colo. 1999); *see also Denison*, 918 P.2d at 1116. This requires the trial court to consider the totality of the circumstances surrounding the interrogation, including the following four factors: (1) the language used to summon the individual; (2) the physical surroundings of the interrogation; (3) the extent to which the individual is confronted with evidence of his guilt; and (4) the additional pressures exerted to detain him. *Denison*, 918 P.2d at 1116; *J.D.*, 989 P.2d at 768. As part of its analysis, a court may also consider: (1) the time, place, and purpose of the encounter; (2) the persons present; (3) the words spoken by the officer to the defendant;

(4) the officer's tone of voice and general demeanor; (5) the length and mood of the interrogation; (6) the placement of any limitation of movement or other form of restraint on the defendant during the interrogation; (7) the officer's response to any questions asked by the defendant; (8) any directions given to the defendant during the interrogation; and (9) the defendant's verbal or nonverbal response to such directions. *J.D.*, 989 P.2d at 768; *see also People v. Parsons*, 15 P.3d 799, 802 (Colo. App. 2000).

¶ 48 We first reject Frazee's argument that the *Denison* test does not apply here because it pertains only to questioning "for a separate offense committed while incarcerated." *Denison*, 918 P.2d at 1116. To be sure, *Denison* involved a jailhouse interrogation involving an assault that occurred in the jail. *Id.* at 1118. But it is beyond debate that the restriction standard is not limited to the facts of that case. *See, e.g.*, *J.D.*, 989 P.2d at 771-72 (applying restriction standard to questioning of juvenile detainee suspected of crime committed before the juvenile's detention and unrelated to the juvenile's detention). Moreover, even if some of the questioning elicited information that was relevant to Frazee's charges, that was a mere side effect of the discussion. Simply put, Longmire's interview was not focused on eliciting information about Frazee's offenses. Instead, she was fulfilling her responsibility of ensuring that K.F.—who suddenly no longer had parents to care for her—could be placed somewhere safe on a short-term basis.

¶ 49 Applying *Denison* to the facts that the court found after the suppression hearing, we conclude that virtually all of them undercut Frazee's argument that

he was in custody for *Miranda* purposes during the Longmire interview.

¶ 50 We begin with the *Denison* factors:

- There is no information in the record about the specific language used to summon Frazee to the interview, but a prison sergeant testified that inmates are generally allowed to refuse visits.

- The interview occurred in the jail's video advisement room, not a cell. The room had a table and chairs, along with a door and a window.

- Frazee was not confronted with evidence of his guilt, and Longmire's interview questions were not focused on that issue. Rather, her intent was to gather information about K.F.'s circumstances in order to provide a recommendation to the court at the upcoming shelter hearing (which was unrelated to Frazee's criminal proceeding).

- Neither jail officials nor Longmire imposed any additional restrictive detention measures. For instance, Frazee was not handcuffed, the door to the interview room was not locked, there were no guards or other law enforcement officials in the room, and he could have voluntarily ended the interview at any time.

¶ 51 Virtually all of the nine additional factors listed in *J.D.* also weigh against a finding of custody.

- The interview occurred at 7 p.m. in the county jail. It was an information-gathering session for K.F.'s shelter hearing, which was scheduled for the next day.

- The only people present were Frazee and Longmire.

- Longmire asked questions intended to elicit information about K.F.'s circumstances for the shelter hearing. She did not confront him with evidence of his crimes or accuse him of anything.

- Longmire's tone was personable and professional.

- The interview lasted between sixty and ninety minutes and was conversational throughout. It occurred a short time after Frazee had met with the attorneys representing him on his criminal case, and Longmire made clear to Frazee that he was not required to answer her questions, particularly in light of his pending charges.

- Frazee was not restrained and could have terminated the interview at any time.

- Longmire's conversation with Frazee was two-sided. She asked him questions but also answered questions that he asked her.

Longmire did subsequently provide notes that she took during the conversation to the district attorney's office.

- Longmire did not give Frazee any instructions during the interview.

¶ 52 Because we perceive no error in the trial court's ruling that Frazee was not in custody during his exchange with Longmire, the trial court did not error by denying the suppression motion.

V. CRE 404(b) Rulings

¶ 53 Frazee contends that the trial court reversibly erred by allowing several of the prosecution's witnesses to offer evidence of bad character in violation of CRE 404(b). We are not persuaded.

A. Standard of Review

¶ 54 We review a trial court's evidentiary decisions for an abuse of discretion. *Kaufman v. People*, 202 P.3d 542, 553 (Colo. 2009). Trial courts have considerable discretion in determining the relevance, probative value, prejudicial impact, and ultimate admissibility of evidence. *Id.* A court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or misapplies the law. *People v. Glover*, 2015 COA 16, ¶ 10. We review unpreserved arguments for plain error and will reverse only if any error is substantial, obvious, and so undermines "the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *Hagos v. People*, 2012 CO 63, ¶ 14

(quoting *Miller*, 113 P.3d at 750). We review preserved arguments for harmless error. *Id.* at ¶ 12.

B. Applicable Law

¶ 55 CRE 404(b)(1) precludes "[e]vidence of any other crime, wrong, or act…to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." CRE 404(b)(2) allows a court to admit other acts evidence "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

¶ 56 Generally, when a party presents evidence of other acts under CRE 404(b), the trial court should apply the four-part test developed in *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). The *Spoto* test provides that such evidence is admissible only if (1) the evidence relates to a material fact; (2) the evidence has logical relevance; (3) the logical relevance of the evidence does not depend on an intermediate inference that the party has a bad character; and (4) the probative value of the evidence is not substantially outweighed by the evidence's prejudicial impact. *Id.*

C. Analysis

¶ 57 The prosecution elicited certain testimony from K.B.'s mother, Krystal Lee, Joseph Moore, Kayla Daugherty, and Katherine Donahue that Frazee now contends was inadmissible for various reasons. He also contends that evidence regarding his failure to

express public concern for K.B. after her disappearance should have been ruled inadmissible under CRE 404(b). We address both the substance and the preservation of each of his arguments in turn. At the threshold, however, we note that several of Frazee's arguments are undeveloped and simply assert without explanation that certain evidence was improperly admitted. We identify these arguments below, but we reach them on the merits only to the extent that we are able to discern the issues that they raise. *See People v. Liggett*, 2021 COA 51, ¶ 53 (acknowledging that appellate courts do not address undeveloped arguments).

1. K.B.'s Mother's Testimony

¶ 58 Over defense counsel's objection, the court allowed K.B.'s mother to testify that Frazee's mother had called K.B. a "hooker." In addition, the prosecution elicited testimony that Frazee chose not to tell his mother about K.B.'s pregnancy. When Frazee's mother found out that K.B. was pregnant, she confronted K.B., accused her of lying, and "threw her out of the house."

¶ 59 Defense counsel objected to this testimony as irrelevant. The court implicitly rejected that argument while ruling that it was admissible under CRE 807. On appeal, Frazee appears to raise a different—albeit undeveloped—argument. As best we understand it, he seems to argue that testimony describing Frazee's mother's antipathy toward K.B. was character evidence that should have been excluded under CRE 404(b). While we acknowledge that the People fail to address this argument, we note

that Frazee does not explain why his *mother's* statements would be inadmissible under CRE 404, particularly where her character had no apparent connection to the charges against Frazee. Accordingly, under the plain error standard, which applies because Frazee's appellate argument differs from the objection he raised in the trial court, *see People v. Acosta*, 2014 COA 82, ¶ 7, we discern no reversible error arising from the admission of these statements.

2. Lee's Testimony

¶ 60 Lee described how Frazee gifted her a dog in 2008. Frazee later changed his mind and asked Lee to either give the dog back or pay him for it. When Lee never sent him a check, Frazee told her that if she "didn't send the money he would come to Idaho and kill the dog." Defense counsel objected to this testimony on CRE 404(b) grounds. The court overruled the objection, but it barred the prosecutor from disclosing that Frazee had shot and killed dogs in the past.

¶ 61 Later, Lee testified that she became pregnant with Frazee's child in March of 2016 while she was still married to her husband. When she told Frazee, he responded that the baby was "a bastard" and implied that she should get an abortion, saying, "[E]ither you're a baby killer or you're not." Lee subsequently had an abortion. At that point, Lee was still hoping to pursue a relationship with Frazee, but she was concerned about losing custody of her children if she moved from Idaho to Colorado to be with him. During one of those discussions, Frazee

asked Lee what she "was going to do with [her] shit loads," referring to Lee's children. Defense counsel did not object to this testimony.

¶ 62 In his opening brief, Frazee summarily argues that "[t]his character evidence…had little probative value independent of the prohibited character inference, but carried a high degree of unfair prejudice by painting Frazee as a cruel and abusive individual." Some of this evidence—particularly Frazee's derogatory language about Lee's children—appears to have had little probative value to the prosecution's case. But the fact that Frazee may not have cared much for Lee's children was not overly prejudicial, and certainly does not rise to the level of plain error.

¶ 63 The remaining statements related by Lee had more relevance. An important part of the prosecution's case was explaining why Lee agreed to help Frazee sanitize the crime scene and dispose of K.B.'s body. Frazee's manipulation of Lee throughout their relationship helped explain her decision making and was offered as a rebuttal to the defense's focused attacks on her credibility. Given the importance of Lee's credibility to the prosecution's case, this evidence had sufficient probative value independent of the prohibited inference to pass muster under CRE 404(b).

3. Moore's Testimony

¶ 64 Moore, who knew Frazee for at least twenty years through ranching activities, testified that he observed Frazee berating K.B. "horribly" when K.B.

was trying to help Frazee move cattle. Frazee objected on the basis of CRE 404(b), but the trial court overruled the objection. Moore continued to explain that Frazee "yelled at [K.B.], cussed at her terribly."

¶ 65 With the court's permission, the prosecutor next elicited testimony from Moore that Frazee was once having trouble with someone and told them that "kids go missing all the time from playgrounds and school yards." Frazee also commented to Moore that he had met someone who was "a hit man for the mob," and that he had people spying on K.B. and taking pictures of her because he wanted to obtain full custody of K.F. He claimed to have a picture of K.F. left alone in K.B.'s car, with the car running, while K.B. was purchasing alcohol at a liquor store. Defense counsel objected to all of these statements, but only on hearsay grounds. CRE 404(b) was not mentioned.

¶ 66 Finally, Moore also testified that Frazee said that he found out K.B. was pregnant only when she called him to take her to the emergency room to give birth. Frazee did not object to this statement.

¶ 67 Frazee's argument that Moore's testimony was improperly admitted is once again cursory. He argues only that it "had little probative value except to paint Frazee as a person of bad character." But statements describing Frazee's contempt for K.B. bolstered the prosecution's theory that the killing was intentional and done after deliberation. And Frazee's statements about having K.B. watched, about knowing "a hit man for the mob," and about children going missing gave context to other testimony from Moore—in particular, his claim that Frazee had told him that he had

"figured out a way to kill" K.B., and followed up by saying, "No body, no crime; right?"

4. Daugherty's Testimony

¶ 68 Kayla Daugherty had both a professional and a personal relationship with Frazee, and in the spring of 2016, had a sexual relationship with him as well. Subject to the trial court's ruling, the prosecutor was permitted to elicit that at one point, Frazee told Daugherty that Teller County was "a vast area to get rid of someone," and that "it would be easy to just put a body on a horse and take it where nobody ever goes." The trial court found that the testimony "relate[d] to a material fact and that would be Mr. Frazee's familiarity with Teller County," which the court determined was probative to the prosecution's case in light of the fact that K.B.'s body was never found. The court instructed the jury that this testimony was admitted for "the limited purpose to establish Mr. Frazee's knowledge of the Teller County area."

¶ 69 In his reply brief, Frazee asserts that the People have offered a new evidential hypothesis—*res gestae*—for this testimony, and that, as a result, their argument should either not be considered or that we should apply a heightened standard of review. The doctrine of *res gestae* was recently abolished in Colorado, *see Rojas v. People*, 2022 CO 8, but even if we were to assume that the court erroneously admitted this testimony, any error would be harmless given the narrowness of the trial court's limiting instruction. We presume that the jury follows limiting instructions, *People v. Caime*, 2021 COA 134, ¶ 14, and the fact that Frazee had "knowledge of the Teller

County area" was neither disputed nor in and of itself suggestive of bad character. Accordingly, any error associated with the admission of this evidence was harmless.

5. Donahue's Testimony

¶ 70 Donahue knew Frazee when he worked as her farrier beginning in the fall of 2016. Frazee went to her property every eight weeks to tend to her donkeys, and she spoke with him at every visit. During their first meeting, she inquired about his relationship status and family life and he responded, "No, not me. I'm free." He regularly went to the property alone, but "then one day [in December 2017] he showed up with a two-month old baby." After seeing the baby, she said, "Oh, you're babysitting" and Frazee responded, "No. This is my daughter."

¶ 71 Frazee explained "he had been dating this gal, and that she had left….And then in October she had called him…and told him she was on her way to have a baby." He "never had anything good to say about the mother," but "would always have the baby with him." She then described statements she made to an agent from the Colorado Bureau of Investigations in January 2019, who contacted her after she called in a tip. She told the agent that Frazee described K.B. as "absolutely crazy" and that she "took off two days after the baby was born."

¶ 72 Defense counsel did not object to any of these statements. We conclude that the court did not err, plainly or otherwise, by admitting them because, as was the case with many of the statements described

above, they were probative of Frazee's state of mind and feelings toward K.B.

6. Frazee's Lack of Concern After K.B.'s Disappearance

¶ 73 Finally, Frazee contends that it was prejudicial for the prosecution to introduce evidence that Frazee did not search for K.B., attend a candlelight vigil for her, or post messages of concern on her Facebook page. This issue was not preserved, and we cannot conclude that the court plainly erred. Frazee's lack of public concern for K.B. after her disappearance is relevant and admissible for the purpose of showing both intent and his knowledge of K.B.'s fate. Under CRE 404(b)(2), other acts evidence is admissible to prove knowledge. The admission of this testimony was therefore appropriate.

VI. Testimony by Jailhouse Informant

¶ 74 Frazee contends that the trial court erroneously admitted testimony from a jailhouse informant. We disagree.

A. Standard of Review

¶ 75 "Trial courts are accorded substantial discretion when deciding whether to admit evidence of other acts." *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009). Appellate courts "review a trial court's decision in this area for abuse of discretion." *Id.* A trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or is based on a

misapplication of the law. *People v. Kendrick*, 2017 CO 82, ¶ 36.

B. Additional Facts

¶ 76 Frazee met Jacob Bentley in the Teller County jail when the two men were placed in the same jail pod. Because Bentley was restricted from purchasing commissary items, he approached Frazee about purchasing some items for him. Soon Frazee inquired about a prison gang tattoo that Bentley had on the side of his face, and after discussing the tattoo, Frazee expressed interest in the prison gang helping him out with his trial. Bentley indicated that this was a possibility, so Frazee began passing notes to Bentley, instructing him to kill witnesses, including Lee. Frazee passed several other notes to Bentley about witnesses who he wanted to make disappear. Bentley then contacted the authorities to inform them of these communications.

¶ 77 The trial court allowed Bentley to testify about Frazee's actions, but issued a limiting instruction directing the jury to only consider the testimony for the limited purpose of assessing Frazee's consciousness of guilt.

C. Analysis

¶ 78 The trial court did not abuse its discretion by admitting Bentley's testimony under CRE 404(b) because the evidence satisfied every prong of the *Spoto* test. On appeal, Frazee only challenges prongs three and four of the *Spoto* test, so we limit our analysis accordingly.

¶ 79 The third prong of *Spoto* requires that the evidence be logically relevant independent of propensity. Frazee argues that this testimony had little probative value independent of bad character because Frazee had an equally powerful motive to prevent Lee and others from giving false testimony; therefore, his motive was consistent with consciousness of innocence.

¶ 80 But it is difficult for us to imagine an innocent person, on trial for first degree murder, soliciting the murder of multiple witnesses. This would require us to believe that many different witnesses had conspired to lie under oath to falsely accuse Frazee of murder, and that Frazee—purportedly someone who has never killed anyone—would be so motivated to prove his own innocence that he would try to get multiple people murdered. We decline to make that leap.

¶ 81 To the contrary, we observe that this testimony was highly probative of Frazee's consciousness of his own guilt and was thus admissible under CRE 404(b). *See People v. Medina*, 51 P.3d 1006, 1013 (Colo. App. 2001) ("We agree the evidence was admissible under CRE 404(b) to show defendant's consciousness of guilt because it showed his knowledge of the crime as well as his attempt to conceal his role in the victim's death by persuading his wife not to testify."), *aff'd sub nom. Mata-Medina v. People*, 71 P.3d 973 (Colo. 2003). The prosecution used Bentley's testimony to show that Frazee knew witnesses testifying truthfully at his trial would result in his conviction.

¶ 82 The fourth prong of *Spoto* requires that the evidence have probative value not substantially outweighed by the danger of unfair prejudice. *Spoto*, 795 P.2d at 1318. While we acknowledge the possibility that Bentley's testimony might make the jury view Frazee unfavorably, we discern no *unfair* prejudice in the sense contemplated by *Spoto*. And at any rate, the court issued a limiting instruction that allowed the jury to *only* consider this evidence for the purpose of assessing Frazee's consciousness of guilt. *See People v. Cisneros*, 2014 COA 49, ¶ 110 (holding that unfair prejudice can be mitigated by limiting instructions). Because we presume that the jury followed the court's instructions, *Caime*, ¶ 14, we conclude that Bentley's testimony was properly admitted.

VII. Denial of Continuance Request

¶ 83 Frazee contends that the trial court erred by denying his request for a two-week trial continuance so that his attorneys could investigate Bentley's claims. We are not persuaded.

A. Standard of Review and Applicable Law

¶ 84 We review the denial of a continuance for an abuse of discretion. *People v. Villano*, 181 P.3d 1225, 1228 (Colo. App. 2008). A trial court abuses its discretion when its denial of a continuance is "arbitrary or unreasonable and materially prejudiced the defendant." *People v. Brown*, 2014 CO 25, ¶ 19 (quoting *United States v. Simpson*, 152 F.3d 1241, 1251 (10th Cir. 1998)). A defendant must demonstrate actual prejudice to establish that the trial court

abused its discretion by denying a motion for a continuance. *People v. Pratarelli*, 2020 COA 33, ¶ 39. "Absent an abuse of discretion that results in injustice, the decision to grant a continuance is left to the sound discretion of the trial court." *People v. Scales*, 763 P.2d 1045, 1048 (Colo. 1988). In determining whether a trial court abused its discretion by denying a continuance, we must consider the totality of the circumstances, paying particular attention to "the reasons presented to the trial judge at the time the request is denied." *People v. Hampton*, 758 P.2d 1344, 1353-54 (Colo. 1988) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

B. Analysis

¶ 85 Prosecutors learned that Bentley was attempting to contact them only after trial had already begun. A meeting was arranged and on Monday evening in the second week of trial, Bentley met with a district attorney investigator who collected Frazee's letters and generated a report regarding the meeting. Prosecutors provided those materials to the defense the next morning. The trial court informed the defense on Thursday evening that they would most likely need to be prepared to go forward with this testimony the following day.

¶ 86 The defense asked for a two-week continuance to investigate this new evidence. But the court declined to grant the continuance and on Friday gave Frazee the option of deferring cross until the following Monday to investigate Bentley's newly revealed claims, thus giving the defense the full weekend to prepare. Defense counsel declined the offer.

¶ 87 Defense counsel had the information regarding Bentley for three days before Bentley testified. And the prosecution provided its report to the defense as soon as it was available. Had Frazee taken the court's remedy of deferring cross until the following Monday, the defense would have had almost a full week to investigate and prepare.

¶ 88 Moreover, despite the short timeline, the cross-examination of Bentley was effective. Frazee argues that more time was needed to investigate and find ways to undermine Bentley's credibility. But on cross-examination, defense counsel questioned Bentley about the favorable treatment he was receiving from the prosecution in exchange for his testimony. Further, the defense was able to attack the authenticity of the notes when Bentley conceded that he had learned more about the case from a recent television show and knew of some of the witnesses, thus making it more possible that the notes were forgeries.

¶ 89 Frazee argues that the trial court did not give a justification for why it was denying a continuance. But the trial court expressly stated that it wanted to keep the trial moving, particularly in light of the fact that no one was even sure of what, exactly, Bentley would testify to. Because of this, the court's offer was to get the testimony out and then let Frazee investigate over the weekend so as to not waste an entire day on testimony that could turn out to be inconsequential. This reasoning was a more than adequate justification to support the court's discretionary ruling.

VIII. Prosecutorial Misconduct

¶ 90 Next, Frazee contends that the prosecutor committed such flagrant and egregiously improper misconduct that it amounted to plain error and deprived him of his right to a fair trial by an impartial jury. We disagree.

A. Standard of Review and Applicable Law

¶ 91 In reviewing a prosecutorial misconduct claim, we first determine whether the conduct was improper based on the totality of the circumstances. We then consider whether the conduct warrants reversal under the proper standard of review. *People v. McMinn*, 2013 COA 94, ¶ 59.

¶ 92 Where—as here—a defendant does not object, we apply plain error review. *Conyac*, ¶ 54. "To constitute plain error, prosecutorial misconduct must be flagrant or glaringly or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *McMinn*, ¶ 58.

B. Analysis

¶ 93 Frazee claims that the prosecutor committed misconduct by indoctrinating the jury during voir dire, bolstering Lee's credibility, and using prohibited language during closing argument. He also alleges that the cumulative effect of this alleged misconduct warrants reversal of his convictions. We address each contention in turn.

1. Indoctrinating the Jury

¶ 94 During voir dire, the prosecutor asked prospective jurors about their knowledge of and views on plea bargains. "Do you understand one of the necessary things in law enforcement is to sometimes have a confederate plead guilty, get a stipulated sentence, in order to get information from them to solve the case?" Multiple jurors confirmed that they were familiar with the concept of plea bargains. The prosecutor continued: "Have you ever heard that concept before, of giving a…necessary tool of law enforcement and prosecution is to give a confederate—have them plead guilty to a particular charge, stipulate to a sentence, and demand information from them?"

¶ 95 When one of the prospective jurors indicated that he was unfamiliar with plea bargains, the prosecutor explained:

> It may be in this case that you would be angry at the plea bargain or the…sentence that the person was given. You might be angry with the prosecution over that. Would that make it—blind you so much that you would not listen to the information they have to provide?

When the prospective juror insisted that an accepted plea bargain would not bias him against any witness, the prosecutor continued to ask another prospective juror about bias deriving from a witness's plea bargain.

¶ 96 Frazee contends that this colloquy "indoctrinated" the jury with the view that offering a witness a plea bargain is a necessary law enforcement tactic that "solves" the criminal case. He is right that a prosecutor "should not intentionally use…voir dire to…argue the prosecution's case to the jury." *People v. Adams*, 708 P.2d 813, 815 (Colo. App. 1985) (emphasis omitted) (quoting ABA, *Standards for Criminal Justice*, Standard 3-5.3(c) (2d ed. 1980)). But that is not what happened here.

¶ 97 Viewing the questioning in context, it is apparent that the prosecutor was asking prospective jurors about their thoughts on plea deals because he wanted to determine if any of them would refuse to believe Lee's testimony because—through her plea agreement—she received favorable treatment. This type of questioning is permissible during voir dire. *See People v. Wilson*, 2013 COA 75, ¶ 12 (The purpose of voir dire is "to allow counsel 'to determine whether any potential jurors possessed any beliefs that would bias them such as to prevent [the defendant] from receiving a fair trial'" (quoting *People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996))). We perceive no error, much less plain error.

2. Bolstering Lee's Credibility

¶ 98 Next, Frazee contends that the prosecutor improperly vouched for Lee's story. The relevant colloquy is as follows:

PROSECUTOR: So when you c[a]me to Colorado on December 20th, did you provide a full statement?

LEE: Yes, I did.

PROSECUTOR: And on December 21st, did you continue to provide a full statement?

LEE: Yes, I did.

PROSECUTOR: And did you tell the truth?

LEE: Yes, I did.

PROSECUTOR: Was it easy?

LEE: (Shakes head.)

THE COURT: I'm sorry, was that a no?

LEE: No, it wasn't easy.

PROSECUTOR: Is it easy to—tell the truth in this courtroom?

LEE: No.

PROSECUTOR: Why is it hard?

LEE: (Pause.) It's hard.

PROSECUTOR: It's just hard?

LEE: (Nods head.)

¶ 99 According to Frazee, this exchange sought to impress upon the jury the belief that Lee's testimony was truthful because it was hard for her to give it, and it implied that the prosecution had verified the truth of her statements.

¶ 100 Based on the reasoning in *People v. Coughlin*, the case that Frazee cites in support of his conclusion, we disagree. 304 P.3d 575 (Colo. App. 2011). In *Coughlin*, a witness testified that part of his plea agreement was to tell the truth when testifying against his friend, the defendant. *Id.* at 582-83. As part of that dialogue, the witness repeatedly said that exaggerating or minimizing his or the defendant's role in the occurrence would be "untruthful." The *Coughlin* court concluded that because the prosecutor "neither expressed a personal opinion about the [witness's] credibility nor appeared to possess information unavailable to the jury," the prosecutor did not improperly vouch for the witness's credibility. *Id.* at 583.

¶ 101 Like the witness in *Coughlin*, Lee merely described telling the truth as a condition of her plea agreement. The fact that she described that as hard to do is not improper, and Frazee does not cite any case law that stands for this proposition. Nor did the prosecutor indicate that he possessed information unavailable to the jury; he was simply asking questions of Lee. Therefore, we observe no error.

3. Misconduct During Closing Argument

¶ 102 Frazee also contends that the prosecutor committed misconduct during closing argument with three statements.

¶ 103 First, the prosecutor referred to Frazee's explanation of events as "a lie." The prosecutor said, "What does 'after deliberation' mean in this case? Lie. A lie. He'd been planning for months." It is

undisputed that the prosecutorial use of the word "lie" is categorically improper because it implicates the defendant's right to a fair trial, as guaranteed by both the Sixth Amendment of the United States Constitution and article II, sections 16 and 23 of the Colorado Constitution. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). Thus, the prosecutor acted improperly when he used the word "lie." But we cannot conclude that the court's failure to intervene amounted to plain error.

¶ 104 The *Wend* court found that because the prosecutor's use of the word "lie" *permeated* both opening statements and closing arguments, this constituted plain error. *Id.* at 1099. In contrast, here, the word "lie" was mentioned twice in rapid succession, during closing argument only. This is more akin to the facts of *Domingo-Gomez*, in which our supreme court found that the fleeting use of the word "lie" in closing argument did not amount to plain error. *Domingo-Gomez v. People*, 125 P.3d 1043, 1053-55 (Colo. 2005). As was the case in *Domingo-Gomez*, defense counsel's failure to make a contemporaneous objection here demonstrates that he perceived no obvious prejudice to Frazee. *See id.* at 1054. And in the context of a three-week long trial, we are confident that a short improper comment by the prosecutor during closing argument did not so prejudice Frazee as to undermine the fundamental fairness of the trial or cast serious doubt on the reliability of the verdict.

¶ 105 Second, when discussing the deliberation prong of the first degree murder charge, the prosecutor stated,

> And if you don't think [Frazee] had a plan in advance to do this, then look at Kyle Ritchie and Sam Dygert, who were helping [Frazee], unknowingly. He manipulated them like he manipulates everyone else, to build a fire on his property, to drag a trough from the lower end of the property to a higher area that had never been in that spot before, to have Kyle Ritchie and Sam Dygert pile up pallets so he could burn things.

¶ 106 Frazee contends that this was an improper statement of the law because it tied the concept of prior deliberation to Frazee's actions after K.B.'s death. But this misapprehends the evidence to which the prosecutor was referring.

¶ 107 At trial, the prosecution called Ritchie as a witness. Ritchie testified that when he and Sam Dygert worked as ranch hands for Frazee, Frazee asked them to move a horse trough and pallets the week of Thanksgiving but *before* Thanksgiving day. This is significant because the prosecution introduced evidence that Frazee killed K.B. on Thanksgiving. After Lee cleaned K.B.'s apartment, she and Frazee burned K.B.'s body in the horse trough along with the pallets. Therefore, the prosecutor's implication that Frazee planned to kill K.B., in part because he asked his ranch hands to move material before her murder that he would later use to destroy her body, was not an improper argument.

¶ 108 Third, when referring to Priest's testimony, the prosecutor stated: "Do you believe Jonathyn Priest? He seemed to really know what he was talking about,

explaining this case to you. He told you exactly what you should find on that floor, and that's what we found." Frazee contends that this was improper bolstering because the prosecutor implied possession of outside information and experience with the witness, which supported Priest's testimony.

¶ 109 But viewing this statement in context, the prosecutor's statement was permissible because it was anchored in substantial evidence. *See Domingo-Gomez*, 125 P.3d at 1050 ("Factors to consider when determining the propriety of [prosecutorial] statements include the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction."). When the prosecutor made the statement about Priest, he was discussing Lee's credibility and how many witnesses corroborated her story using techniques such as cadaver dogs, phone records, and blood pattern analysis. The prosecutor related Lee's testimony to Priest's testimony, which is permissible. Further, we do not discern how, as Frazee claims, the prosecutor's comment could have implied that he possessed outside information that supported Priest's testimony. Therefore, we conclude that this comment was not error.

4. Cumulative Effect of Misconduct

¶ 110 Finally, Frazee contends that the cumulative effect of all the alleged misconduct warrants reversal under the plain error standard of review. But because we see only a single improper comment, there was no cumulative error. *See People v. Walton*, 167 P.3d 163,

169 (Colo. App. 2007) (holding that cumulative error must be based on multiple errors).

IX. Cumulative Error

¶ 111 Similarly, Frazee contends that numerous trial errors in the aggregate show the absence of a fair trial. But again, we have found a single instance of prosecutorial misconduct and assumed only one evidentiary error. "For reversal to occur based on cumulative error, a reviewing court must identify multiple errors that collectively prejudice the substantial rights of the defendant, even if any single error does not." *Howard-Walker v. People*, 2019 CO 69, ¶ 25. The minor errors that we have discussed did not substantially prejudice Frazee's rights; we therefore reject his claim of cumulative error.

X. Sufficiency of the Evidence

¶ 112 Finally, Frazee contends that the prosecution presented insufficient evidence to convict him of felony murder because it did not establish that Frazee formed the culpable mental state for robbery either before or concomitant with the homicidal act. We disagree.

A. Standard of Review and Applicable Law

¶ 113 We review the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain a conviction. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). In determining this, we use the substantial evidence test. That test requires us to determine whether the

evidence, viewed as a whole, and in the light most favorable to the prosecution, is sufficient for a reasonable person to conclude that the defendant is guilty of the crimes charged beyond a reasonable doubt. *Id.*; *see also People v. Sprouse*, 983 P.2d 771, 777 (Colo. 1999). We must give the prosecution the benefit of every reasonable inference that may be fairly drawn from the evidence. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).

A defendant commits felony murder if

> [a]cting either alone or with one or more persons, he or she commits or attempts to commit…robbery…and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by any participant.

§ 18-3-103(1)(b), C.R.S. 2022. To be found guilty of robbery, a defendant must "knowingly take[ ] anything of value from the person or presence of another by the use of force, threats, or intimidation." § 18-4-301(1), C.R.S. 2022. On appeal, Frazee only challenges the sufficiency of the evidence with respect to whether he formed the culpable mental state for robbery either before or at the same time as the murder. We therefore limit our analysis accordingly.

B. Analysis

¶ 114 The evidence, when viewed in the light most favorable to the prosecution, was sufficient for a

reasonable person to conclude that Frazee chose to take K.B.'s cell phone—something of value—prior to or during the murder. Quite simply, the prosecution presented evidence that both K.B.'s and Frazee's cell phones were traveling together from the general vicinity of her home to the general vicinity of Frazee's home soon after K.B.'s approximate time of death. Because people typically carry their cell phones with them, the jury could reasonably infer that Frazee took K.B.'s phone after he killed her. Lee testified that Frazee subsequently gave her K.B.'s cell phone and asked her to take it back to K.B.'s home and to text K.B.'s mother. This evidence, both circumstantial and direct, is sufficient to support the robbery conviction that triggered the felony murder charge.

XI. Conclusion

¶ 115 The judgment is affirmed.

JUDGE DUNN and JUDGE SCHUTZ concur.

APPENDIX H

DISTRICT COURT, TELLER COUNTY, COLORADO
Court address: **P.O. Box 997 Cripple Creek, CO 80813**
Phone Number: **(719) 689 2574**

DATE FILED: August 28, 2019

PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs

PATRICK FRAZEE, Defendant

Case Number: **2018CR330**

Division **11**

ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

INTRODUCTION

THIS MATTER came before the Court on August 23, 2019 for a hearing on Defendant's Motion to Suppress Statements (D-14). The People appeared by Mr. May, Ms. Reed and Ms. Viehman. Defendant appeared with Mr. Steigerwald and Ms. Porter. I have reviewed the People's Response (P-16), considered the testimony of Sergeant Sandefur and social worker, Mary Longmire and People's Exhibit #1. I find and Order as follows:

ISSUE

Whether statements made by Mr. Frazee to DHS caseworker, Mary Longmire on 12/26/2019 while incarcerated at the Teller County Jail should be suppressed?

DEFENDANT CONTENDS

Defendant contends Ms. Longmire is a government agent performing law enforcement duties who conducted a custodial interrogation without a Miranda advisement of rights.

DISTRICT ATTORNEY CONTENDS

District Attorney contends the Defendant was not in custody, Ms. Longmire is not a police officer, statements by Defendant were voluntary and a Miranda advisement was not required.

BACKGROUND

Defendant was arrested on 12/21/18 for murder in the first degree of Kelsey Berreth and solicitation to commit murder in the first degree. Defendant and Ms. Berreth have one child who was about 14 months old at that time and was in Defendant's custody at the time of his arrest. Ms. Berreth has not been seen since the Thanksgiving timeframe of 2018. On 12/21/19 the child was placed in the legal and physical custody of the Teller County Department of Social Services as per Court Order.

Ms. Longmire is the Administrator of Teller County Social Service and acted as the DHS intake

worker in this case initially. Ms. Longmire visited Defendant at the Teller County Jail on 12/21/18 and 12/26/18. Defendant seeks to suppress only the statements made by him on 12/26/18. Teller County DHS filed a Dependency and Neglect Petition on 12/27/19 in a separate juvenile proceeding.

FINDINGS OF FACT

PLACE OF INTERVIEW AND PROTOCOL

The Teller County Jail has an interview room in the TV advisement room where video advisements are held. It is not a cell and the room is used for inmate attorney visits and for other inmate visitors. The room is adjacent to the inmate booking area, has a large window, large television, shelves, chairs, table and telephone. There is one door to the interview room which does not have a lock or was unlocked on 12/26/18. The window allows those in the room to see booking personnel and booking to see into the room. The window has blinds that can be closed upon the request of the attorney.

When an inmate has a visitor a deputy will inform the inmate and the inmate may refuse the visit and is not brought to the interview room. The inmate or visitor may terminate the visit at any time by signaling the booking deputy.

PURPOSE OF VISIT BY MS. LONGMIRE ON 12/26/18

Teller County DHS had custody of the minor child and a hearing was scheduled for 12/27/18 as per

C.R.S. 19-3-403(3.5). Father was in jail and mother had been missing for a month. Neither parent was available to parent and three family members were requesting custody of the child. Ms. Longmire had a legal obligation as per the Colorado Children's Code to investigate and make a placement recommendation to the Judge the following day. Ms. Longmire is required by law to investigate allegations of abuse and neglect. She testified there were very tight timelines if the child was to be placed out of state. Defendant's mother and sister were also requesting custody and she had spoken with them. She wanted information on Defendant's upbringing, social history and whether his family was an appropriate placement.

Because of the nature of the criminal charge and the allegation the child had been exposed to violence she needed to determine where the child was during the time of mother's disappearance. She wanted information on the custody arrangement between the parents, relationship with mother and child's schedule, any medical issues or other needs of the child for placement purposes with potential caregivers.

WHAT MS. LONGMIRE KNEW ABOUT THE CASE AT TIME OF 12/26/18 VISIT

She knew Defendant was charged with first degree murder of the child's mother and of an allegation of child abuse. She was aware of news reports regarding the case and knew mother had been missing since the Thanksgiving timeframe. The arrest warrant was sealed at that time. She did not

notify law enforcement of the visit and law enforcement did not ask her to visit.

THE ACTUAL VISIT

Ms. Longmire called the jail to schedule a 3pm visit. When she arrived, she was told Defendant was meeting with his attorneys and was told to return at 7pm which she did. Caseworkers routinely interview incarcerated parents at the Teller County Jail. She did not notify Defendant's criminal defense attorneys of the visit and the record is silent if she knew their identity.

A deputy brought Defendant into the room and left. Defendant was not in handcuffs, the door to the room was not locked and the window blind was not closed. Both parties sat at the table. The length of the meeting was sixty to ninety minutes.

Ms. Longmire told Defendant he did not have to answer questions. She described Defendant's attitude as cooperative, personable and he provided information about the child, custody arrangements and Thanksgiving timeframe. Defendant signed a release of information at her request. Ms. Longmire and Defendant were the only people present. Ms. Longmire described her own demeanor as non-confrontational because she had no information to confront him with. She sought information in fourteen areas as per the Family Social History and Assessment (People's Exhibit 14).

Defendant asked questions about the process, he never refused to answer questions, and Ms. Longmire

never made any threats or limited Defendant's movement.

Ms. Longmire testified she is not law enforcement, did not give a Miranda warning and had never given anyone a Miranda warning.

Defendant was free to leave anytime, and it would have been ok if he did not want to talk with her and no restrictions were placed upon him regarding sharing the paperwork she gave him with others.

APPLICABLE LAW

Social workers are not included in the definition of peace officers in C.R.S. 16-2.5-101 to 16-2.5-152. A law enforcement officer means a peace officer C.R.S. 16-2.5-101(3).

In order for there to be a *Miranda* violation, the Court must determine that the statement was obtained while the Defendant was subject to custodial interrogation. "For *Miranda* to be applicable, the suspect must be in custody and the statement must be the product of a police interrogation." *People v. Baird*, 66 P.3d 183, 188 (Colo. App. 2002). "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are likely to elicit an incriminating response." *Id*.

The fact that the Defendant was incarcerated, and the interview took place at the Teller County Jail

does not automatically mean that the Defendant was in custody. Colorado law has recognized that the traditional test of custody is inapplicable in a prison or jail setting because it would lead to the conclusion that all prison questioning is custodial [“]because a reasonable person would always believe he could not leave the prison freely.” *People v. Parsons*, 15P.3d 799, 801 (Colo. App. 2000). The Colorado Supreme Court adopted a four-part test first formulated in *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978). “In determining whether an inmate has been restricted s as to require the advisement of *Miranda* rights, four factors are to be considered: (1) the language used to summon the individual; (2) the physical surroundings of the interrogation; (3) the extent to which he is confronted with evidence of his guilt; and (4) the additional pressure exerted to detain him.” *People v. Denison*, 918 P.2d 1114, 1116 (Colo. 1996). This test has been followed in *In Re J.D.*, 989 P.2d 762 (Colo. 1999) and expanded further in *Parsons*:

> The factors set forth in *Denison*, however, are not necessarily dispositive of the inquiry whether an individual has been further restricted to such an extent as to be deemed in custody for *Miranda* purposes. Other circumstances a court may consider include: (1) the time, place, and purpose of the encounter; (2) the persons present during the interrogation; (3) the words spoken by the officer to the defendant; (4) the officer’s tone of voice and general demeanor; (5) the length and mood of the interrogation; (6) the placement of any limitation of movement or other form of restraint on the defendant

> during the interrogation; (7) the officer's response to any questions asked by the defendant; (8) any directions given to the defendant during the interrogation; and (9) the defendant's verbal or nonverbal response to such directions. *Parsons* at 801-02.

Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody," *People v. Robledo*, 832 P.2d 249, 250 (Colo. 1992). "[T]hus *Miranda* by its own terms applies only to actions of law enforcement officials," *People v. Chastain*, 733 P.2d 1206, 1213 (Colo. 1987). "State action has been extended to include civilians acting as agents of the state in order to prevent law enforcement officials from circumventing the *Miranda* requirements by directing a third party to act on their behalf," *Robledo* at 250. "Determination of whether an individual is acting as an agent of the police requires examination of the totality of the circumstances," *Id. Citing People in Interest of PEA.*, 754 P.2d 382, 385 (Colo. 1988).

The Colorado Children's Code requires social services to investigate and act in a situation like this. A hearing shall be held within 72 hours of placement, parents and family members must be interviewed, advised and reports completed as per C.R.S. 19-3-403. The Children's Code has expedited time lines for children under six years of age C.R.S. 19-3-505 and 19-1-123. Social services is required to prepare a social study and report to the Court and provide a list of services available to families that are specific to the needs of the child. C.R.S. 19-1-107. Social services is

required to notify parents of court proceedings as per 19-3-312 and 19-3-502(7).

CONCLUSION

I had the opportunity to listen to and observe the testimony and demeanor of both witnesses. I find them both credible witnesses.

I find by a preponderance of the evidence Defendant made the statements attributed to him. Ms. Longmire is not a police officer, peace officer or law enforcement officer. Her actions were consistent with her duties under the Colorado Children's Code. A Judge placed legal custody of a child with her and she was required by law to investigate and make a recommendation to the Court on 12/27/18. She was not working as an agent of law enforcement and was in fact working independently of law enforcement.

Ms. Longmire had no legal duty to give Defendant a Miranda advisement or warning because she is not a police officer. Defendant was in jail, but no custodial interrogation took place.

The meeting was voluntary. When I consider the totality of the circumstances, I find no threats, limits of movement, harsh words, confrontation of evidence of guilt, or any other factor mentioned in the *Cervantes* and *Dennison* cases that would indicate any type of Miranda warning was required or to find any constitutional violation.

Defendant's Motion to Suppress is DENIED.

BY THE COURT

[h/w signature]
Scott A. Selis
District Court Judge
8/28/2019