COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue | Denver, CO 80203	DATE FILED November 7, 2024 2:48 PM FILING ID: ADF6CAD66032D CASE NUMBER: 2024CA1002
Appeal from the Adams County District Court Honorable Judge Mark Douglas Warner Case No. 2021CR2800	
Plaintiff-Appellee: PEOPLE OF THE STATE OF COLORADO v. **Defendant-Appellant:** JEREMY COOPER	▲**COURT USE ONLY**▲ Case No. 2024 CA 1002

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OPENING BRIEF OF APPELLANT JEREMY COOPER

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of C.A.R. 32, including all formatting requirements in that rule.

Specifically, I certify that:

The brief complies with the applicable word limit in C.A.R. 28(g).

It contains 9,483 words.

The brief complies with the standard of review requirements in C.A.R. 28(a)(7)(A).

For each issue raised by the appellant, the brief contains under a separate heading before discussion of the issue a concise statement (1) of the applicable standard of appellate review with citation to authority and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled.

I acknowledge that this motion may be stricken if it fails to comply with any of the requirements of C.A.R. 32.

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This appeal arises from the prosecution of two Aurora Fire Rescue paramedics, Defendant-Appellant Jeremy Cooper and Co-Defendant Peter Cichuniec,[1] for the tragic death of Elijah McClain. Although indicted on 11 counts, Mr. Cooper was convicted of only one, criminally negligent homicide. This charge—a highly unusual and controversial[2] attempt to criminalize alleged medical errors—was based on the theory that, in administering the sedative ketamine, Mr. Cooper failed to comply with his training and medical protocols.

Mr. Cooper raises the following issues on appeal:

I. Whether the district court reversibly erred in instructing the jury to use an ordinary standard of care in a case alleging medical negligence.

II. Whether the district court erroneously relieved the prosecution of its burden to disprove the elements of Colorado's "special relationship" statute, C.R.S. § 18-1-703(3)(II), which demarcates the line between civil and criminal liability for emergency medical intervention.

III. Whether the Attorney General lacked authority to prosecute Mr. Cooper after the District Attorney affirmatively declined to pursue charges and the

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[1] Mr. Cichuniec filed a separate appeal, No. 2024CA675.

[2] *E.g.*, Am. Coll. Med. Toxicology, Am. Academy Clinical Toxicology, Am. Academy Emergency Med., *Joint Statement Against Criminalization of Medical Errors* (May 2, 2022), https://www.acmt.net/wp-content/uploads/2022/06/PS_220502_Joint-Statement-Against-Criminalization-of-Medical-Errors.pdf.

Attorney General failed to pursue a special counsel appointment under C.R.S. § 16-5-209.

IV. Whether the jury's consideration of the trial court's holiday vacation schedule was extraneous prejudicial information under C.R.E. 606(b) that placed improper time pressure on the jury's deliberations.

STATEMENT OF THE CASE AND FACTS

A. The paramedics are dispatched to provide medical intervention after police officers repeatedly employ a "carotid control hold" against Elijah McClain.

Late one evening in August 2019, police officers were dispatched to East Colfax Avenue in Aurora in response to a 911 call about an individual wearing a ski mask and acting suspiciously. TR 11/29/23 p.m., 54:9-56:7.

Three officers initially approached Mr. McClain, the subject of the 911 call. TR 11/29/23 p.m., 120:3-123:20. Within seconds, a physical altercation broke out. The officers used an aggressive physical tactic called a "carotid control hold," applying pressure to Mr. McClain's carotid arteries, stopping blood flow to his brain, and rendering him unconscious. TR 12/1/23 a.m., 57:22-58:21. The maneuver, which the officers used more than once, caused Mr. McClain to vomit. TR 12/4/23 a.m., 90:4-6; TR 12/1/23 p.m., 58:8-16; TR 9/4/23 p.m., 90:25-91:22. Due to the altercation and the officers' perceived need to employ carotid control

holds, they requested medical assistance from Aurora Fire and Rescue. TR 9/4/23 p.m., 95:11-12; TR 12/5/23 p.m., 34:3-14.

Several minutes later, a four-member team from Aurora Fire and Rescue—including Fire Medic Jeremy Cooper and his supervisor, Lieutenant Peter Cichuniec—arrived on scene. TR 12/18/23 a.m., 21:4-8. A two-member ambulance team from Falck Rocky Mountain, an ambulance and emergency medical services provider, was also dispatched. TR 12/18/23 a.m., 12:25-13:7, 20:3-21:3.

As Mr. Cooper and Mr. Cichuniec first approached the scene, they confronted an unusually heavy police presence—three officers were physically subduing Mr. McClain, who was conscious and struggling, and other officers were in the immediate vicinity. TR 12/18/23 p.m., 14:21-15:4; TR 12/18/23 a.m., 17:20-24. Given the chaotic situation, the paramedics relied in part on information conveyed by the officers to determine how to proceed. TR 12/4/23 a.m., 8:20-9:12, 34:20-35:11, 37:19-38:9; TR 12/18/23 a.m., 19:6-15, 32:17-23; TR 12/18/23 p.m., 14:21-15:4. The officers told the paramedics that Mr. McClain exhibited "crazy," "unusual," or "superhuman" strength. TR 12/5/23 a.m., 14:16-22, 18:6-19. The paramedics also were informed that it had taken three officers to subdue Mr. McClain and that he was able to perform a pushup against the weight of those

three officers. TR 12/18/23 p.m., 24:3-11; TR 12/4/23 p.m., 107:17-22; TR 12/5/23 a.m., 15:2-7. The paramedics were not told, however, that the officers used "carotid control holds," that Mr. McClain vomited, or that he lost consciousness. TR 12/18/23 a.m., 83:18-84:20; TR 12/18/23 p.m., 15:18-22.

Based on the information they received, as well as a visual assessment indicating that Mr. McClain was suffering disorientation, diaphoresis (excessive sweating), tachypnea (rapid breathing), and tachycardia (rapid heart rate), Mr. Cooper and Mr. Cichuniec concluded that Mr. McClain was symptomatic of a condition called excited delirium—a medical syndrome the paramedics understood to be dangerous and even fatal. TR 12/18/23 p.m., 21:15-22:17; TR 12/18/23 a.m., 30:12-31:14, 111:19-112:9. At the time, protocols established by the Aurora Fire and Rescue Medical Director specified a single treatment for the condition, which had been approved by the Colorado Department of Public Health and Environment: administration of the anesthetic ketamine in a dose of 5 milligrams per kilogram of body weight. TR 12/18/23 a.m., 31:11-32:4; TR 12/18/23 p.m., 22:20-23:25; TR 12/19/23 p.m., 28:7-10.

Emergency medical providers in the field cannot use a scale to determine a patient's bodyweight; they instead determine dosage based on estimates. TR 12/19/23 p.m., 55:1-18. Mr. Cooper and Mr. Cichuniec both overestimated

Mr. McClain's weight, with Mr. Cooper estimating 100 kg for a dose of 500 mg. TR 12/18/23 a.m., 91:22-24, 111:15-22; TR 12/18/23 p.m., 112:7-20.

Mr. Cichuniec ultimately agreed with Mr. Cooper's dosage of 500 mg, in part to avoid under-medicating a potentially life-threatening condition. TR 12/18/23 a.m., 104:5-11, 111:15-113:13. Additionally, the paramedics, when trained to use ketamine to treat excited delirium, were advised to use dosages of 300 mg for adolescents, 400 mg for small adults, and 500 mg for average adult men. TR 12/18/23 a.m., 104:1-4, 111:19-22; TR 12/18/23 p.m., 30:15-20, 112:23-113:2.

Mr. Cichuniec relayed the request for 500 mg of ketamine to the Falck ambulance paramedic. TR 12/18/23 a.m., 103:9-5. Aurora Fire and Rescue did not keep ketamine in their medical kits; Mr. Cichuniec and Mr. Cooper therefore relied on the Falck paramedic to prepare the dose. TR 12/18/23 a.m., 26:19-27:1. The Falck paramedic drew up the dose and delivered the medication to Mr. Cooper, who administered it to Mr. McClain. TR 12/18/23 a.m., 37:21-38:12, 91:22-24.

After the ketamine took effect, Mr. McClain was transferred to the waiting Falck ambulance. Shortly after Mr. McClain was loaded into the ambulance, however, the paramedic team observed depressed breathing and determined that Mr. McClain lacked a pulse. TR 12/18/23 p.m., 40:10-16; TR 12/5/23 p.m., 89:5-90:4. Although the paramedics immediately began resuscitation and were able to

restore Mr. McClain's heartbeat and breathing, he was taken to the hospital where, tragically, he died three days later. TR 12/18/23 p.m., 45:16-24.

B. Although the District Attorney, after investigation, affirmatively declines to pursue charges, the Governor orders the Attorney General to "utilize a State Grand Jury" to "investigate and, if deemed necessary, prosecute."

The District Attorney for the 17th Judicial District immediately conducted an investigation into Mr. McClain's tragic death and determined that no "state criminal charges" were warranted. *E.g.*, CF 1128-29; Letter from Dist. Att'y Dave Young, 17th Jud. Dist., to City of Aurora Police Chief Nicholas Metz (Nov. 22, 2019), https://adamsbroomfieldda.org/userfiles/2358/files/ICD-8-24-19.pdf. In June 2020, however, after Mr. McClain's death received attention from advocacy groups and the media, the Governor, citing C.R.S. § 24-31-101(1)(b), designated the Attorney General to "be the State's prosecutor" and "to investigate and, if deemed necessary, prosecute, on behalf of the State of Colorado, any potential criminal activity." Exec. Order D 2020-115 (June 25, 2020).

While noting "the solemn duty of the State's district attorneys to investigate and, at their judgment and discretion, bring charges for the commission of crimes," the Governor's order nonetheless stated that this case "merit[ed] a supplemental evaluation" by an "independent prosecutor." *Id.* at 2. Yet at no point did the Governor, Attorney General, or any other party seek appointment of a special

counsel under C.R.S. § 16-5-209, which requires judicial oversight before overriding a district attorney's decision to decline charges.

The Attorney General sought charges against the three police officers. The Attorney General also, in an unprecedented step, sought charges against the firefighter paramedics. This case, it appears, is the first in the country in which firefighter paramedics faced criminal charges for intervention during a police interaction.[3]

On August 27, 2021, the Statewide Grand Jury returned a 32-count indictment. CF 1-33. Mr. Cooper and Mr. Cichuniec were each charged with various crimes and sentence enhancers, including reckless manslaughter, C.R.S. § 18-3-104(1)(a), and the lesser-included offense of criminally negligent homicide, C.R.S. § 18-3-105. CF 1-33. The police officers were charged with 11 counts, including manslaughter, criminally negligent homicide, and second-degree assault. *Id*. Based on the indictment, the Attorney General filed five cases in Adams County, one against each of the three police officers and two paramedics.[4]

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[3] The district court noted only "one other prosecution of a paramedic in this country," TR 6/18/24, 16:21-24, in which the incident and charges occurred after the incident and charges here.

[4] The police officers were tried separately from Mr. Cooper and Mr. Cichuniec. Officer Roedema was convicted on two charges and appealed in Case No. 2024CA303.

C. The jury acquits Mr. Cooper of all charges except criminally negligent homicide.

Mr. Cooper was tried jointly with Mr. Cichuniec. Four of the eleven charges against Mr. Cooper, one of which included a sentence enhancer, were ultimately submitted to the jury.[5]

Trial lasted over three weeks. The prosecution's theory for criminally negligent homicide was that the paramedics committed medical error. The prosecution argued that Mr. Cooper and Mr. Cichuniec were guilty of crimes because they "fail[ed] every step of their training and protocols" and acted "in direct contradiction of their training." TR 11/29/23 a.m., 37:14-37:15.[6] Given the prosecution's focus on medical error, the jurors heard testimony from numerous competing expert witness who disagreed on the standard of care and whether the

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[5] Before trial, the court dismissed four of the sentence enhancers. TR 7/17/23, 5:19-25, 7:5-14. Because the prosecution failed to submit sufficient evidence at trial that administering ketamine qualified as the use of a "deadly weapon," the court dismissed one assault count and one of the remaining sentence enhancers. TR 12/14/23 a.m., 37:21-38:12.

[6] At sentencing, the district court observed that this is a case of "negligence," not "indifference" or actions performed "after deliberation, intentionally, knowingly, or even recklessly." TR 4/26/24, 83:20-22, 85:20-23. The court noted that paramedics "have to rely upon the information that they get once they arrive on scene"; Mr. Cooper "was obliged to rely upon the information relayed to him by really the only witnesses that were there and that was the law enforcement"; and that this "information was clearly deficient." *Id*. 85:3-18.

defendants satisfied it. TR 12/12/23 a.m., 32:2-8 (prosecution expert opining there was no "medical reason to give ketamine to Elijah McClain"); TR 12/19/23 a.m., 38:4-7 (defense expert opining that defendants' actions were "within the standard of care for Aurora paramedics in 2019").

Despite this focus on alleged medical error, the district court refused to define "standard of care" and "reasonable person"—terms with particularized meanings in medical negligence cases. *Infra*, I.B. It did so despite extensive competing expert testimony, despite recognizing that "standard of care" was *"really [one of] the lynchpin issues in this case*," and despite acknowledging that the "criminal negligence" charge "specifically" raised "a standard of care issue." TR 12/19/23 p.m., 126:7-127:11 (emphasis added). Additionally, the court refused to place the burden on the prosecution to disprove the elements of Colorado's "special relationship" statute, C.R.S. § 18-1-703(3)(II), which demarcates the line between civil and criminal liability for emergency medical intervention. *Infra*, II.B.

The jury struggled to reach a verdict. It asked several questions of the court, including the meaning of "standard of care." CF 2387 ("May we have a definition of the standard of care? Or a description of it?"). Again, the district court refused to define the term. Instead, over repeated defense objections, the court instructed the

jury to give the term its "common and ordinary meaning[ ]." CF 2381; TR 12/21/23 p.m., 3:10-16, 5:15-23.

At 3:10 p.m. the Friday before Christmas, the jury informed the court that it was "split on one of the charges" and could not reach a verdict. CF 2389. When polled, all but one of the jurors said they were hopelessly deadlocked. TR 12/22/23, 16:13-21:2. The court instructed them to continue deliberations. CF 2382. Just two hours later, at 5:30 p.m., the jury reached a verdict, acquitting Mr. Cooper of all charges except criminally negligent homicide. CF 2391-93; TR 12/22/23, 23:22-24:7.

After trial, two jurors disclosed evidence of defects in the jury's deliberations. As explained below, *infra* III, the jury believed it was under a deadline to reach a unanimous verdict before Christmas, and the jurors considered the district court's vacation schedule during deliberations, giving the approaching holiday "paramount" importance.

The district court sentenced Mr. Cooper to probation, community service, and a 14-month jail term, to be served through work release. CF 2809. The court partially stayed that sentence after this Court ordered it to assess the likelihood of success of this appeal. *See* CF 2997-3001.

SUMMARY OF ARGUMENT

I. In instructing the jury on the charge of criminal negligence, the district court failed to define "standard of care" and "reasonable person." Worse, in response to a jury question, the court instructed the jurors to give "standard of care" its "common and ordinary meaning."

Longstanding case law, which predates and therefore informs Colorado's statutory definition of "criminal negligence," holds that allegations of negligence against medical professionals cannot be measured against ordinary standards of care or a generic "reasonable person." Medical professionals are subject to standards of care defined by experts "practicing the same profession in the same locality." *United Blood Servs. v. Quintana*, 827 P.2d 509, 520 (Colo. 1992). Failing to instruct the jury on this technical, particular meaning of "standard of care" and "reasonable person," as case law and C.R.S. § 2-4-101 require, was error.

The error requires reversal. The district court acknowledged that "standard of care" was one of the "lynchpin issues in this case," and both parties offered competing experts on the standard of care and whether Mr. Cooper complied with it. By instructing the jury to give "standard of care" its "common and ordinary" meaning, the court permitted the jury to discount this testimony—including from a

defense expert who was the sole witness to opine on the "standard of care for Aurora paramedics in 2019"—and convict Mr. Cooper of a crime without measuring his conduct against the training and protocols under which he was acting.

II. Colorado's "special relationship" statute, C.R.S. § 18-1-703(1)(e)(II), insulates emergency medical providers from criminal liability if certain factors are met. Although the prosecution conceded the statute applies, the district court concluded it was a traverse, rather than an affirmative defense, to criminally negligent homicide. The court consequently instructed the jury that the prosecution did not bear the burden of disproving the elements of the statute.

This was reversible error. The elements of criminally negligent homicide and the elements of the statute are not "mutually exclusive" such that, in every case, proving the former negates the latter. *Pearson v. People*, 2022 CO 4, ¶ 24. The statute turns on whether a defendant reasonably believes a particular "form of treatment" promotes physical health, not whether the standard of care was breached. Here, the evidence showed that Mr. Cooper believed the administration of ketamine, a treatment approved by the State, was safe and adapted to promoting the health of a patient suffering a dangerous, potentially fatal condition. Relieving the prosecution of its burden on that critical issue was not harmless.

III. The decision to decline charges against Mr. Cooper was within the District Attorney's constitutional authority and sole discretion. *E.g.*, *Kailey v. Chambers*, 261 P.3d 792, 796 (Colo. App. 2011). The General Assembly has specified procedures to override that decision, C.R.S. § 16-5-209, but the Attorney General did not invoke them. Because the Attorney General's statutory authority to appear in criminal cases when ordered to do so by the Governor, C.R.S. § 24-31-101(1)(b), does not explicitly supplant the District Attorney's discretion to decline prosecution, the Attorney General lacked authority to bring this case.

IV. During deliberations, multiple jurors, including the foreperson, discussed and considered the court's posted holiday schedule, information neither received into evidence nor included in the court's instructions. This information either imposed time pressure on the jurors—who were deadlocked before rendering a verdict at 5:30 p.m. the Friday before Christmas—or exacerbated existing time pressure, making it both extraneous and prejudicial under C.R.E 606(b). Because time pressure creates "a risk of coercion on the jury's deliberative process," *Key v. People*, 865 P.2d 822, 825 (Colo. 1994), reversal is required.

ARGUMENT

I. The district court erred in instructing the jury to use an ordinary standard of care in a case alleging medical negligence.

A. Standard of Review and Preservation.

This Court "review[s] jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law." *People v. Neckel*, 2019 COA 69, ¶ 26 (citation omitted). If the instructions fail to accurately define all elements of an offense, the error is "of constitutional magnitude," requiring reversal unless "the reviewing court is confident beyond a reasonable doubt that the error did not contribute to the verdict." *Griego v. People*, 19 P.3d 1, 7-10 (Colo. 2001).

The defense preserved its objection to the trial court's refusal to define "standard of care" and "reasonable person" and its instruction to give "standard of care" its "common and ordinary" meaning. TR 12/20/23, 11:7-13:11, 14:17-15:6; TR 12/22/23, 4:25-8:7; CF 2286 (Defense Proposed Instr. No. G1:01).

B. In defining the elements of criminally negligent homicide, the district court was required to use the long-settled meanings of "standard of care" and "reasonable person" in medical negligence cases—not instruct the jury to use an ordinary standard of care.

The district court's elements instruction for criminally negligent homicide required the jury to find that Mr. Cooper's "conduct amount[ed] to criminal

negligence." CF 2356 (Instruction No. 11). The court defined this key element, "criminal negligence," in Instruction No. 8:

> A person acts "**with criminal negligence**" when, through a gross deviation from *the standard of care that a reasonable person would exercise*, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

CF 2353 (Instruction No. 8) (italics added).

Because the prosecution's theory was based on alleged medical error, the defense requested that the court define "standard of care" and "reasonable person" in light of the particular, technical definitions these terms have acquired in cases of alleged medical negligence. Specifically, the defense requested that these terms be defined with reference to a reasonable medical professional in the relevant community—here, a "reasonable paramedic in Aurora Colorado." TR 12/20/23 a.m., 9:2-12:23; CF 2286 (Defense Proposed Instr. No. G1:01).

The court rejected that request, holding that although the General Assembly "would be within their province to adopt different standards of negligence … specific to certain occupations if they wish to … they haven't." TR 12/20/23 a.m., 14:17-15:6. Based on this flawed reasoning, the court refused to provide a definition of "reasonable person" or "standard of care." Worse, in response to a jury question during deliberations specifically seeking a "definition" or "description" of "standard of care," CF 2387, the court instructed the jury to give

the term its "common and ordinary meaning[ ]." CF 2381 (Instruction No. 32). The court thus instructed the jury to apply an *ordinary* standard of care in a medical negligence case, where both sides presented extensive evidence from *experts* on the subject.

This was error. While C.R.S. § 18-1-501(3) provides only a generic definition of "criminal negligence" and does not specifically define "standard of care" and "reasonable person" for cases of alleged medical negligence, both terms have acquired particular, technical meanings in that context. Medical professionals undergo specialized training and act under particular licenses, protocols, and procedures; their standard of care is therefore not "within the common knowledge or experience of an ordinary person." *Tracz ex rel. Tracz v. Charter Centennial Peaks Behav. Health Sys., Inc.*, 9 P.3d 1168, 1173 (Colo. App. 2000). Here, for example, multiple competing expert witnesses testified to the medical principles, training, and protocols that, in their view, established the standard of care. TR 12/19/23 p.m., 16:10-17:5 (defense expert explaining paramedic standard of care); TR 12/19/23 a.m., 10:20-25 (same); TR 12/12/23 a.m., 21:13-22:16 (prosecution expert allowed to "opine in the areas of anesthesiology, excited delirium, hypoxia, acidosis, aspiration, and ketamine" but not pre-hospital settings or the standard for paramedics). This record demonstrates that—consistent with longstanding law—

medical decisions by professionals like Mr. Cooper cannot be evaluated based on an ordinary standard of care or judged against the benchmark of a generic "reasonable person." Their conduct must be subject to the standard of care for similar professionals in their community. *E.g.*, *United Blood Servs.*, 827 P.2d at 520.

Yet, in the district court's view, because the criminal code does not specifically define "standard of care" and "reasonable person," the court was absolved of responsibility to provide the jurors definitions of those terms. TR 12/20/23 p.m., 14:17-15:6. That holding was mistaken: "The trial court *must instruct the jury on the technical or particular definition of an element of an offense* if the element constitutes a term that has acquired a technical or particular meaning, whether by legislative definition *or otherwise*." *People v. Serra*, 2015 COA 130, ¶ 50 (emphasis added). Indeed, the General Assembly itself has directed courts to interpret statutory "words and phrases" according to any "technical or particular meaning" they have acquired, "whether by legislative definition *or otherwise*." C.R.S. § 2-4-101 (emphasis added); *Griego*, 19 P.3d at 7 (quoting this statute). Thus, the particular meaning acquired by terms used to define an element of a criminal offense need not exclusively be assigned by statute, as the district court incorrectly assumed.

Here, decades-old common law makes clear that in cases of alleged medical negligence, the terms "standard of care" and "reasonable person" have long "acquired" particular, technical definitions. C.R.S. § 2-4-101. Unlike the "ordinary" standard of care "measured by what a reasonable person of ordinary prudence would or would not do," the standard for "those practicing a profession involving specialized knowledge or skill," is "to possess 'a standard minimum of special knowledge and ability,' and to exercise reasonable care in a manner consistent with the knowledge and ability possessed by members of the profession in good standing." *United Blood Servs.*, 827 P.2d at 519 (citation omitted); *Tracz*, 9 P.3d at 1173. Expert testimony is necessary to define this standard, *e.g.*, *Tracz*, 9 P.3d at 1173, and it is subject to the "locality rule," under which "a health care professional [is] bound by the knowledge and skill applicable to those practicing the same profession in the same locality," *United Blood Servs.*, 827 P.2d at 520.[7] Colorado's courts—like courts nationwide—have applied these principles for

[7] These principles apply whenever the "standard of care applicable to the allegedly negligent act is a professional one," including to a professional practicing a "healing art." Colo. Jury Instr. (Civil) 15:2, *Notes on Use*, Notes 2, 4 (applying rule to dentists and chiropractors). Here, the allegedly "negligent act" was a "professional one"—i.e., medical intervention by two paramedics acting under State-approved medical protocols. As the prosecution told the jury, Mr. Cooper is a "trained professional[ ] with judgment to exercise." TR 12/20/23 p.m., 50:2-10.

decades. *E.g.*, *Day v. Johnson*, 255 P.3d 1064, 1069 (Colo. 2011); *Melville v. Southward*, 791 P.2d 383, 387 (Colo. 1990); *Klimkiewicz v. Karnick*, 372 P.2d 736, 739 (Colo. 1962); *see also* Restatement (Second) of Torts § 299A (1965) (members of "a profession or trade" must "exercise the skill and knowledge normally possessed by members of that profession or trade").

Criminal statutes must be interpreted in light of longstanding precedent and established legal principles. *E.g.*, *People v. Leske*, 957 P.2d 1030, 1037 (Colo. 1998) (applying presumption that General Assembly is aware of "judicial precedent" when enacting legislation); *Cooper v. People*, 973 P.2d 1239 (Colo. 1999) (same); *see also Robbins v. People*, 107 P. 3d 384 (Colo. 2005) ("[A] statute may not be construed to abrogate the common law unless such abrogation was clearly the intent of the general assembly.").[8] Colorado's statutory definition of "criminal negligence" was enacted in 1975. 1975 Colo. Sess. Laws, Ch. 167, 616; *compare* C.R.S. § 40-1-604(9) (1963, 1971 cum. supp.) (setting forth first statutory definition, enacted in 1971). At that time, the Colorado Supreme Court had established the requirement that medical professionals be judged by professional,

[8] Additionally, it is not unusual for criminal law to borrow from civil common law. *E.g.*, *People v. Lopez*, 97 P.3d 277, 280 (Colo. App. 2004) (equating "proximate cause" in the civil and criminal contexts).

rather than ordinary, standards of care—and had established that it was reversible error to apply an "ordinary" standard of care in a medical negligence case. *Klimkiewicz*, 372 P.2d at 740. This reflected nationwide consensus. Restatement (Second) of Torts § 299A (1965). The General Assembly, when it enacted the current definition of "criminal negligence," is presumed to have been aware of this precedent.

Yet here, in defining "criminal negligence"—the key element of criminally negligent homicide—the district court not only refused to instruct the jury on the particular, technical definitions of "standard of care" and "reasonable person" imposed by Colorado precedent and the common law; it impermissibly required the jury to apply a definition of "negligence" that stands in direct conflict with that long-established law. The district court was not permitted to do so. C.R.S. § 2-4-101; *Serra*, 2015 COA 130, ¶ 50.

C. The district court's failure to accurately define a disputed element of criminally negligent homicide, and to instruct the jury to apply an ordinary standard of care, was not harmless.

Because the court's instructions failed to accurately define the elements of criminally negligent homicide—the sole offense for which Mr. Cooper was convicted—the error is "of constitutional magnitude." *Griego*, 19 P.3d at 7-10.

Reversal is required unless this Court "is confident beyond a reasonable doubt that the error did not contribute to the verdict." *Id*.[9]

The harm from the district court's erroneous "standard of care" and "reasonable person" instructions is apparent. A critical dispute at trial was whether Mr. Cooper's conduct fell below the standard of care based on his training and protocols. Both the prosecution and defense understood that this critical dispute required *expert* testimony. *E.g.*, TR 12/19/23 p.m., 113:6-19 (prosecution requesting additional "expert rebuttal evidence on the standard of care issue" in response to defense's "three standard of care experts"); TR 12/20/23 p.m., 134:24-135:6 (prosecution admitting standard of care is based on defendants' training and protocols). As the district court acknowledged, "standard of care" was "*really [one of] the lynchpin issues in this case*"; the jury "heard plenty of testimony, either implicit or explicit, whether the standards of care were followed or not followed"; and the "criminal negligence" charge "specifically" raised "a standard of care issue." TR 12/19/23 p.m., 126:7-127:11.

[9] Even assuming the error was not "of constitutional magnitude," the Court must reverse unless there is "no reasonable possibility that the failure to instruct … contributed to the defendant's conviction." *People v. Roman*, 2017 CO 70, ¶ 2. Both standards are met here.

The jury's request for a "definition of the standard of care," CF 2387, therefore struck at the heart of the case. The district court's response was to decline any "further definition," to instruct the jury to give "words and phrases … their common and ordinary meanings," and to "refer the jury back to the prior instructions." CF 2381. This could "only serve to confuse the jury." *Klimkiewicz*, 372 P.3d at 739 (instructing on "ordinary care" in medical negligence case against chiropractor requires reversal). Both the defense and the prosecution called competing experts to both define the standard of care and show whether or not it was violated. *E.g.*, TR 12/12/23 a.m., 21:13-22:16; TR 12/19/23 a.m., 10:20-25; TR 12/19/23 p.m., 16:10-17:5. Only the defense, however, offered expert testimony on the "standard of care for Aurora paramedics in 2019," which was based on the actual protocols and training that Mr. Cooper followed. TR 12/19/23 a.m., 38:4-9, 46:20-24. In that expert's opinion, Mr. Cooper acted within the relevant standard of care. *Id*.

Yet despite the massive amount of evidence from competing *expert witnesses* the standard of care, the jurors were told to use a "common and ordinary" definition. In other words, they were instructed to apply an "ordinary" standard of care rather than evaluate Mr. Cooper's conduct based on the specialized knowledge and skill that was the main focus of trial. CF 2381. In doing

so, the court allowed the jury to discount the training and protocols Mr. Cooper was bound by and critical expert testimony on the "standard of care for Aurora paramedics in 2019."

As a result of the court's instructions, Mr. Cooper received fewer legal protections in this criminal proceeding as to a critical element of liability—the standard of care—than he would have received in a civil action for medical negligence. *E.g.*, *United Blood Servs*, 827 P.2d at 520; *Klimkiewicz*, 372 P.3d at 739. This Court cannot be assured beyond a reasonable doubt that this error did not contribute to Mr. Cooper's verdict. *Cf. Garcia v. People*, 2022 CO 6, ¶ 35 (reversal required where trial court incorrectly instructed jury on definition of element of kidnapping); *People v. Mendenhall*, 2015 COA 107M, ¶ 48 (reversal required because court's "elemental instruction appear[ed] to *require* rejection of … expert testimony"). Reversal is required.

II. The district court improperly relieved the prosecution of its burden to disprove the elements of Colorado's "special relationship" statute, which demarcates the line between civil and criminal liability for medical providers who administer emergency treatment.

A. Standard of Review and Preservation.

This Court reviews de novo whether the "special relationship" statute is a traverse rather than an affirmative defense to criminally negligent homicide. *Roberts v. People*, 2017 CO 76, ¶ 18. If a district court mischaracterizes an

affirmative defense as a traverse, it "impermissibly lower[s] the prosecution's burden," requiring reversal unless the Court "find[s] that the error was harmless beyond a reasonable doubt." *Martinez v. People*, 2024 CO 48, ¶ 10; *see also Bogdanov v. People*, 941 P.2d 247, 253 (Colo. 1997) ("automatic reversal" if instructions "permit[ted] the jury to arrive at a guilty verdict without determining each essential element beyond a reasonable doubt").

The defense preserved the issue. CF 2296 (Defense Proposed Instr. No. H:10); TR 12/20/23 a.m., 107:20-109:11; *see also id*., 27:20-31:11, 72:6-73:23, 82:17-25, 99:7-100:20.

B. Colorado's "special relationship" statute is an affirmative defense, not a traverse, to criminally negligent homicide.

Colorado insulates medical providers from criminal liability for "[t]he use of physical force upon another person that would otherwise constitute an offense" under specified circumstances, including when "treatment is administered in an emergency." C.R.S. § 18-1-703(1)(e)(II). The statute ensures that, under specified conditions, medical errors cannot be punished as crimes.

The prosecution agreed this statute applied to Mr. Cooper. TR 12/20/23 a.m., 73:8-10 ("For the record, we wanted to note that we don't have an objection to giving this instruction generally."). But it asserted that, as to criminally negligent homicide, the statute is "not an affirmative defense" on which the

prosecution bore the burden of proof. Instead, the prosecution argued the statute is an element-negating "traverse" to that charge. *Id*., 72:15-19. The court agreed. It instructed the jury that, "with respect to … criminally negligent homicide, the prosecution does not have an additional burden to disprove use of physical force (special relationship)." CF 2357 (Instruction No. 12). It did so even while instructing the jury that, as to the charge of assault, the "special relationship" statute *was* an affirmative defense as to which the prosecution bore the burden of proof. CF 2375 (Instruction No. 26).

To distinguish an affirmative defense from a traverse, the question is whether it is logically "irreconcilable" for a jury to simultaneously find all elements of the offense *and* all elements of the defense. *Martinez*, 2024 CO 48, ¶¶ 15-19. If so, it is a traverse, not an affirmative defense. In other words, for the "special relationship" statute to be a traverse to criminally negligent homicide, the elements of that charge and the elements of the statute must "always, in every circumstance, [be] *mutually exclusive*," such that to prove the elements of the former is, in every case, to negate the elements of the latter. *Pearson*, 2022 CO 4, ¶ 24 (emphasis added). That is not true here.

The key element of criminally negligent homicide is "conduct amounting to criminal negligence." CF 2356 (Instruction No. 11).[10] The district court defined this element as follows: "A person acts 'with criminal negligence' when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists." CF 2353 (Instruction No. 8). The elements of the "special relationship" statute, meanwhile, required the jury to find as follows:

> (1) Mr. Cooper was a duly licensed paramedic acting under direction of a duly licensed physician;
>
> (2) he used reasonable and appropriate physical force for the purpose of administering a recognized form of treatment;
>
> (3) he reasonably believed the form treatment was adapted to promoting the physical or mental health of the patient;
>
> (4) the treatment was administered in an emergency; and
>
> (5) he reasonably believed no one competent to consent could be consulted and a reasonable person, wishing to safeguard the welfare of the patient, would consent.

CF 2357 (Instruction No. 12); C.R.S. § 18-1-703(1)(e)(II). Comparing these elements to the key element of criminal negligence shows that it is logically

[10] The remaining elements are not mutually exclusive with the special relationship statute, for example, the location of the crime. CF 2356.

possible for a jury to find criminal negligence *and* to find all elements of the special relationship statute are met.

As to element 1 of the statute, it is logically possible for a defendant to commit criminal negligence while serving as a paramedic under a licensed physician's direction—that was precisely what the prosecution alleged. Regarding element 2, it is possible for a paramedic to use reasonable and appropriate physical force to administer a recognized form of treatment, even if the administration of that form of treatment was criminally negligent under the circumstances. Indeed, the prosecution's theory here was not that Mr. Cooper used too much force in administering ketamine; the prosecution instead asserted that it was the decision to administer ketamine at all, or to do so in too large a dose, that was criminally negligent. And, regarding element 4 of the statute, criminal negligence can of course occur during an emergency.

The remaining elements of the statute, 3 and 5, are logically connected. If a person reasonably believes a "form of treatment" is adapted to promoting mental or physical health, the person would also reasonably believe he had consent to administer the treatment. Under those two elements, it is possible for a jury to simultaneously find that a defendant "reasonably believed" a "form of treatment"

was "adapted" to the patient's health, but that the defendant engaged in criminal negligence in administering that "form of treatment."

That term—"*form* of treatment"—is crucial. The special relationship statute does not refer to "standard of care." It focuses on a *form* of treatment, *i.e.*, a type of treatment, and whether that form of treatment is adapted to promoting physical or mental health. It is logically possible to prove two facts: (a) a paramedic reasonably believed a "form of treatment" (here, administering ketamine for excited delirium) was adapted to promoting physical or mental health, but (b) the actual administration of that form of treatment was criminally negligent under the circumstances.

These simultaneous findings are not "implausible" or "nonsensical." *Pearson*, 2022 CO 4, ¶ 24 (holding that harassment can be self-defense, even though "at first blush" this seems "implausible, if not downright nonsensical"). To the contrary, the conclusion that the special relationship statute is an affirmative defense to criminally negligent homicide is consistent with the statute's purpose: to ensure medical intervention that "would otherwise constitute an offense" is "not criminal." C.R.S. § 18-1-703(1). As the Aurora Fire and Rescue Medical Director testified, paramedic use of ketamine for excited delirium was cleared by the State

of Colorado. TR 12/19/23 p.m., 25:17-27:15. The prosecution's case, however, relied in part on criminalizing the administration of that very treatment.

Prominent medical organizations "condemn" criminalization of medical errors, including errors in mistakenly administering sedatives that can cause death, because doing so neither "improve[s] patient safety" nor "address[es] the underlying system factors" that lead to adverse outcomes.[11] The special relationship statute, consistent with that consensus, ensures medical errors in emergency situations cannot be criminalized absent proof of specific elements. The prosecution should have been required to bear the burden of proof on those elements.

C. Relieving the prosecution of its burden of proof on the "special relationship" statute was reversible error.

Lowering the prosecution's burden of proof by mischaracterizing an affirmative defense as a traverse is an error of constitutional magnitude, requiring reversal unless "the error was harmless beyond a reasonable doubt." *Martinez*, 2024 CO 48, ¶ 10. "[J]ury instructions … that would permit the jury to arrive at a

[11] E.g., Am. Coll. Med. Toxicology, Am. Academy Clinical Toxicology, Am. Academy Emergency Med., *Joint Statement Against Criminalization of Medical Errors* (May 2, 2022), https://www.acmt.net/wp-content/uploads/2022/06/PS_220502_Joint-Statement-Against-Criminalization-of-Medical-Errors.pdf.

guilty verdict without determining each essential element beyond a reasonable doubt" require "automatic reversal." *Bogdanov*, 941 P.2d at 253.

Here, the prosecution was relieved of the burden to disprove the special-relationship defense. While the prosecution's experts claimed that administering ketamine had "no medical or therapeutic purpose," *e.g.*, TR 12/1/23 a.m., 79:1-3; 12/12/23 a.m., 31:19-32:8, the court's instructions expressly permitted the jury to find Mr. Cooper criminally liable *without* proof beyond a reasonable doubt that administration of ketamine was not a "recognized form of treatment" and *without* proof beyond a reasonable doubt that Mr. Cooper did not reasonably believe this form of treatment was adapted to promote physical and mental health. CF 2357.

Mr. Cooper was trained on *precisely that point*—he was required to follow protocols establishing ketamine as the sole form of treatment for excited delirium. TR 12/19/23 p.m., 107:3-15; TR 12/19/23 a.m., 10:20-25. As the paramedics testified, "the only treatment we [could] do is ketamine." TR 12/18/23 a.m. 31:11-32:1 (Mr. Cichuniec); TR 12/18/23 p.m. 46:6-15 (Mr. Cooper explaining that ketamine was the required treatment under the protocol). Both paramedics were trained that ketamine was safe, and that its safety was the reason it was the required treatment for excited delirium and had been cleared by the State for use by paramedics. TR 12/18/23 p.m., 46:16-24; TR 12/18/23 a.m., 112:15-113:13.

Yet the form of treatment Mr. Cooper was required to administer was criminalized without the jury being required to find that the elements of the special relationship statute had been negated. That error—which undermined the protections of a statute that all parties agree applies here—cannot be harmless beyond a reasonable doubt.

III. Because the District Attorney affirmatively declined to prosecute Mr. Cooper, the Attorney General lacked authority to do so without a special prosecutor appointment under C.R.S. § 16-5-209.

A. Standard of Review and Preservation

Whether the Attorney General possessed authority to pursue charges against Mr. Cooper is reviewed de novo. *See People v. Salgado*, 2019 COA 5 ¶ 10.

The issue was preserved. CF 1123, 1128-32; TR 7/17/23, 49:6-65:9. Below, Mr. Cooper and Mr. Cichuniec moved to dismiss this case for lack of jurisdiction because the Attorney General did not comply with C.R.S. § 16-5-209, the statute dictating the process to appoint a special prosecutor if a "prosecuting attorney" "refus[es] … to prosecute" a person for an alleged offense. CF 1128-32. After the district court rejected this argument, TR 7/17/23, 65:7-9, the defendants petitioned for an original proceeding under C.A.R. 21 in the Colorado Supreme Court, which declined review. CF 1617 (order in case number 2023SA232).

B. The special prosecutor statute imposes specific requirements and court oversight before a District Attorney's decision not to prosecute may be overridden.

Colorado appellate courts have acknowledged that the Attorney General, under C.R.S. § 24-31-101(1)(b), may bring criminal charges when directed to do so by the Governor. *People ex rel. Witcher v. Dist. Ct.*, 549 P.2d 778, 779-80 (Colo. 1976); *Harrah v. People*, 243 P.2d 1035, 1038 (Colo. 1952); *People v. Gibson*, 125 P. 531, 535 (Colo. 1912); *Salgado*, 2019 COA 5, ¶ 1.[12] None of those cases, however, address the precise issue here: whether, once an elected district attorney makes an affirmative decision not to prosecute a case within the relevant jurisdiction for charges that the Attorney General does not have independent statutory authority to pursue, the Attorney General may nonetheless pursue charges without satisfying the requirements of C.R.S. § 16-5-209. Indeed, these cases do not address that statute at all.

District attorneys are elected constitutional officers, Colo. Const. art. VI, § 13, who are required to "appear on behalf of the state" in all "indictments, actions, and proceedings which may be pending in the district court in any county within his district wherein the state or the people thereof … may be a party."

[12] Mr. Cooper preserves arguments challenging the scope or validity of these decisions.

C.R.S. § 20-1-102(1)(a). They have "broad discretion in the performance of [their] duties," including "the power … to determine who shall be prosecuted and what crimes shall be charged" in the district courts within their jurisdiction. *People v. Dist. Ct.*, 632 P.2d 1022, 1024 (Colo. 1981); *People v. Renander*, 151 P.3d 657, 659 (Colo. App. 2006) ("[T]he power to initiate, alter, or dismiss charges rests solely within the prosecuting attorney's discretion."). A key aspect of that constitutional authority is the decision, "in some circumstances and for good cause consistent with the public interest" to "decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction." *Kailey v. Chambers*, 261 P.3d 792, 796 (Colo. App. 2011); *J.S. v. Chambers*, 226 P.3d 1193, 1200 (Colo. App. 2009) (noting that, aside from the special prosecutor statute, the "ultimate[ ]" remedy for a district attorney's failure to prosecute is the political process).

To override a district attorney's decision not to prosecute, the special prosecutor statute requires a series of procedures. First, a judge with "jurisdiction of the alleged offense" must receive an "affidavit" alleging both "the commission of a crime" and "the unjustified refusal of the prosecuting attorney to prosecute any person for the crime." C.R.S. § 16-5-209. Second, the judge "may require the prosecuting attorney to appear" to "explain the refusal." *Id*. Third, the judge may

order the prosecution to proceed only after a finding that "the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse." *Id*. As the statute's text indicates, this is a "very high standard." *J.S.*, 226 P.3d at 1201. Finally, the district court must determine whether to "order the prosecuting attorney to file an information and prosecute the case" or to "appoint a special prosecutor to do so." C.R.S. § 16-5-209.

Here, before investigating this case with the aid of the State Grand Jury and, ultimately, initiating proceedings in the 17th Judicial District, the Attorney General neither invoked nor attempted to satisfy the special prosecutor statute. The question, then, is whether the Attorney General's own powers override the power of a District Attorney to decline to prosecute, such that the Attorney General is excused from compliance with C.R.S. § 16-5-209.

C. The Attorney General's statutory powers do not override the District Attorney's constitutional role or permit him to ignore the special prosecutor statute.

The trial court concluded that the statute defining the powers of the Attorney General—specifically, C.R.S § 24-31-101(1)(b)—authorized the Attorney General to prosecute this case after the Governor issued an executive order appointing him "to be the State's prosecutor" in this proceeding. TR 7/17/23, 63:76-65:9; *see also* Exec. Order D 2020-115 (June 25, 2020). While acknowledging that C.R.S. § 24-

31-101(b) does not specifically address "what to do or what not to do should a district attorney either agree to prosecute or disagree with respect to a prosecution," TR 7/17/23, 63:20-23, the district court concluded that the special prosecutor statute and C.R.S. § 24-31-101(b) are "simply two different ways … for the prosecution of a criminal case." TR 7/17/23, 65:5-7. This holding ignores the constitutionally mandated role of Colorado's district attorneys and misconstrues the language of the relevant statutes.

As explained above, district attorneys are the constitutionally designated executive officers in Colorado who have the "sole" power to both pursue, and decline to pursue, criminal charges within their jurisdictions. *Renander*, 151 P.3d at 659 (collecting Colorado Supreme Court authority for the proposition that "[i]t is solely the authority of the prosecutor to decide matters involving the charging of offenses"); *see also People v. Dist. Ct.*, 632 P.2d at 1024; *Kailey*, 261 P.3d at 796; *J.S.*, 226 P.3d at 1200; *Renander*, 151 P.3d at 659. Given the constitutional status of the office, any restrictions on "the duties of the district attorney" must be imposed by legislation, and "such restrictions [must] be construed as narrowly as possible." *People ex rel. Losavio v. Gentry*, 606 P.2d 57, 61-62 (Colo. 1980) (emphasis added). Thus, "[e]xcept as otherwise provided for by statute, the district attorney is the sole authority charged with [determining whether or not to

prosecute] and he may not be supplanted in his duties by any other authority." *Id*. at 62.

The special prosecutor statute expressly imposes one particular "limit[ ]" on the power of district attorneys to decline a prosecution, and courts have appropriately construed that limitation as narrowly as possible. *E.g.*, *J.S.*, 226 P.3d at 1200-02 (describing the "very high" standard that must be overcome under the special prosecutor statute given the constitutional role of elected district attorneys and the broad discretion they are empowered to exercise). "Unless the requisite finding is made under [the special prosecutor statute], the district attorney's decision [not to prosecute] must stand." *Gentry*, 606 P.2d at 64.

In contrast, C.R.S. § 24-31-101(1)(b) imposes no limitation on the power of Colorado's district attorneys to decline prosecution. Indeed, it does not address that power at all. The trial court conceded as much, stating that C.R.S. § 24-31-101(1)(b) does not prescribe "what to do" in a case like this one. TR 7/17/23, 63:20-23. In reading into C.R.S. § 24-31-101(1)(b) a restriction on the power of Colorado's district attorneys that the text itself does not impose, the district court violated both the statute's plain language and the principle that "[e]xcept as otherwise provided for by statute, the district attorney … may not be supplanted in his duties by any other authority." *Gentry*, 606 P.2d at 62.

The Attorney General may, with the Governor's authorization, assume control over a prosecution that he and a district attorney cooperated in bringing, and in that situation he may exercise the powers of the district attorney. *Witcher*, 549 P.2d at 779-80. But this does not mean the Attorney General has authority to "supplant[ ]" one of the core decisions of elected district attorneys—namely, to decline to prosecute. *See Gentry*, 606 P.2d at 62. "The Colorado Constitution and the statutory commands of the general assembly grant the bulk of prosecutorial powers and duties to the district attorneys of the several judicial districts." *People ex rel. Tooley v. Dist. Ct.*, 549 P.2d 774, 777 (Colo. 1976). No statute grants the Attorney General concurrent jurisdiction over negligent homicide or assault—offenses at the core of a district attorney's prosecutorial authority.[13] And, more relevant here, no statute grants the Attorney General authority to override a district attorney's decision not to prosecute those crimes. Yet the district court read into C.R.S. § 24-31-101(1)(b) a severe limitation on one of the core powers of the

[13] When the General Assembly wishes to supplant the district attorneys' authority in particular areas, it does so expressly. C.R.S. § 24-31-101(i) (enumerating statutes under which Attorney General "[m]ay independently initiate and bring … criminal actions"); C.R.S. § 24-31-101(e) (specifying statutes over which Attorney General has "concurrent jurisdiction with the relevant district attorney"); C.R.S. § 24-31-805 (authorizing Attorney General to prosecute Medicaid fraud).

State's district attorneys, while conceding the statute was silent on the subject. Because that limitation on the power of district attorneys is not "provided for by statute," it cannot, as the district court assumed, "supplant[ ]" the "sole authority" of the District Attorney here to decline to prosecute a charge of negligent homicide against Mr. Cooper. *Gentry*, 606 P.2d at 62.

Because the Attorney General lacked authority to bring this proceeding, reversal and dismissal of the indictment are required. *See Gentry*, 606 P.2d at 64 (a prosecutor "is not to proceed" with a case outside the prosecutor's authority).

IV. The district court's posted holiday schedule was extraneous prejudicial information that exerted "time pressure" on the jury to render a verdict.

A. Standard of Review and Preservation

Whether information considered by jurors during deliberations is "extraneous and prejudicial" under C.R.E. 606(b) is reviewed de novo. *Clark v. People*, 2024 CO 55, ¶ 65. The issue was preserved. CF 2467-72, 2856.

B. The district court's posted holiday schedule, which the jurors considered during deliberations, was extraneous and prejudicial under C.R.E. 606(b).

"Jurors are required to consider only the evidence admitted at trial and the law as given in the trial court's instructions." *Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011) (citation omitted). Here, according to a juror affidavit, the

verdict was not based solely on "evidence admitted at trial and the law as given in the trial court's instructions." *Id.* The jurors—who began deliberations the Wednesday before Christmas (which fell on a Monday) and who, mid-afternoon Friday, informed the court they could not reach a unanimous verdict—also considered the court's holiday schedule:

> We knew the judge had PTO scheduled for the following week because it was on his calendar posted in the courtroom. This was observed and pointed out by one of the jurors and discussed by the jurors both before and during our deliberations. The foreman expressed that she felt bad interfering with the judge's PTO.

CF 2918. This information contributed to "pressure" to "reach a unanimous verdict as opposed to remaining deadlocked to finish the process (i.e., reach a verdict) ahead of Christmas." CF 2917. "The holiday," the juror averred, "was paramount to how we operated." *Id*.

Although C.R.E. 606(b) generally prohibits courts from considering juror testimony to impeach a verdict, it creates an exception for "extraneous prejudicial information [that] was improperly brought to the jurors' attention."[14] "[*A*]*ny*

[14] The trial court correctly declined to consider some statements in the juror's affidavit under C.R.E. 606(b). CF 2855-57. Nonetheless, the affidavit—which the juror prepared after independently e-mailing the district court to express concern about the verdict—describes serious defects in the jury's deliberations, including the court's decision not to provide "further clarification" of the definition

information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration." *Id*. (emphasis added) (quoting *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005)). This includes brief statements to a juror by a bailiff regarding the length of deliberations and the need for a unanimous verdict. *Ravin v. Gambrell*, 788 P.2d 817, 819, 821 (Colo. 1990).[15]

In *Ravin*, a juror—the only one prepared to find for the plaintiffs—asked the bailiff "whether a unanimous verdict was required and how long deliberations would continue in the absence of unanimity." *Id*. at 819. The bailiff, in a conversation "heard by other jurors," answered that "the verdict had to be unanimous" and "the judge could require deliberations to continue for some two weeks." *Id.* After hearing these statements, the jurors issued a verdict for defendant. *Id*. (jury returned verdict "after two days of deliberation," and conversation with bailiff occurred "on the second day"). Although the trial court refused to order retrial on the assumption that the bailiff's comments "did not

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of "standard of care," *see supra* I.C; confusion about the charges; and screaming in the jury room. CF 2915-20.

[15] "[T]he policies of C.R.E. 606 apply to all judicial proceedings," and the rule does not create "separate standards for civil and criminal cases." 788 P.2d at 821.

directly concern the case itself," both the court of appeals and the Colorado Supreme Court disagreed. *Id*. at 819, 821.

Here, the juror's testimony established that the jury not only was aware of the court's posted holiday vacation schedule but also explicitly considered it during deliberations. CF 2918. The jurors were split, with all but one of them telling the court that, as of mid-afternoon on the Friday before Christmas, they were hopelessly deadlocked. TR 12/22/23, 16:13-21:6. Two hours later—at 5:30 p.m. the Friday before Christmas Day, when the court's scheduled time off was to begin—the holdout jurors relented and the jury rendered a verdict. TR 12/22/23, 23:22, 24:5-24:7; CF 2918-19.

Whether or not the jurors correctly "extrapolat[ed]" the implications of the district court's posted holiday schedule, as the district court speculated, CF 2856,[16] is not the relevant question. Instead, under C.R.E. 606(b), the question is whether the posted schedule was extraneous—i.e., whether it was "information" that was either "properly received into evidence" or "included in the court's instructions."

[16] Information is "extraneous" "whether or not the court specifically warned against its use" during deliberations. *Harlan*, 109 P.3d at 625.

Kendrick, 252 P.3d at 1064. Here, neither are true. The posted schedule was extraneous and thus "improper for juror consideration." *Id*.

It was also prejudicial. A verdict must not be driven by "scheduling pressures"; it must be driven by deliberation on the evidence and the law. *E.g.*, *Key*, 865 P.2d at 825 (holding that "scheduling pressures create[ ] a risk of coercion on the jury's deliberative process"); *see also Martin v. People*, 2014 CO 68, ¶ 25 ("A court may not impose a deadline on deliberations that prevents the jury from reaching a well-considered verdict."). Here, the jury's consideration of the court's holiday schedule either created the risk of inappropriate time pressure on deliberations or, in the very least, exacerbated existing time pressure.

C. There is a reasonable possibility the extraneous information detrimentally influenced the verdict.

If information is extraneous and prejudicial under C.R.E. 606(b), the court must decide "whether there is a reasonable possibility that the extraneous prejudicial information influenced the verdict to the detriment of the defendant." *Clark*, 2024 CO 55 ¶ 71. This determination "often follow[s] a hearing," *id*., but it is an "objective test" applied to a "typical juror," not a factfinding determination based on "evidence of actual impact on specific jurors in the case." *Harlan*, 109 P.3d at 625.

"The relevant question for determining prejudice is whether there is a reasonable possibility that the extraneous information influenced the verdict to the detriment of the defendant; if so, the verdict must be reversed." *Id*.; *Clark*, 2024 CO 55, ¶ 71. A range of factors are relevant:

> (1) how the extraneous information related to critical issues in the case; (2) the degree of authority represented by the extraneous information; (3) how the information was acquired; (4) whether the information was shared with other jurors in the jury room; (5) whether the information was considered before the jury reached its verdict; and (6) swhether there is a reasonable possibility that the information would influence a typical juror to the defendant's detriment.

Id. ¶ 72 (citing *Harlan*, 109 P.3d at 630-31).

Here, these factors strongly indicate a reasonable possibility that the verdict was influenced to Mr. Cooper's detriment. First, the court's holiday schedule "related to [a] critical issue[ ]" in this case (and every other case), namely, the time the jury had to deliberate. *See Harlan,* 109 P.3d at 630; *Ravin*, 788 P.2d at 819, 821; *see also Key*, 865 P.2d at 825; *Martin*, 2014 CO 68, ¶ 25. Second, the "degree of authority" of the extraneous information was of the highest order: it came from the district court itself. Third, "the information was acquired" by every juror because it was displayed in the courtroom. Fourth, the information was not only "shared with other jurors in the jury room," but discussed in deliberations. CF 2918. Fifth, the information was "considered before the jury reached its

verdict"—it was "discussed by the jurors both before and during … deliberations." *Id*. And, sixth, there is a "reasonable possibility that the information would influence a typical juror" because time pressure is always an improper consideration by a jury. *E.g.*, *Key*, 865 P.2d at 825.

Here, the district court neither analyzed whether there was a reasonable possibility that the jury's consideration of extraneous prejudicial information influenced the verdict nor held a hearing to evaluate that issue. Because the record establishes this reasonable possibility, reversal and retrial are required. *Ravin*, 788 P.2d at 821. At minimum, remand is required for the district court to hold a hearing to decide this question.

CONCLUSION

Mr. Cooper requests that the Court reverse and remand for dismissal of, or retrial on, the single count for which he was convicted.

Dated: November 7, 2024

Respectfully submitted,

s/ Frederick R. Yarger

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CERTIFICATE OF SERVICE

I certify that on November 7, 2024, a true and correct copy of this **OPENING BRIEF OF APPELLANT JEREMY COOPER** was filed with the Court via Colorado Courts E-Filing System, with e-service to the following:

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