SUMMARY
November 16, 2017

2017COA140

No. 14CA1920, *People v. Deleon* — Criminal Law — Jury Instructions — Testimony of Defendant Not Compelled — Harmless Error

A division of the court of appeals, with one judge dissenting, concludes that a district court's remarks to voir dire members concerning a defendant's right not to testify satisfied constitutional requirements, even though the court failed to give the jurors another such instruction immediately before closing arguments. Though the court's inadvertent failure to give the jurors such an instruction immediately before closing arguments violated Crim. P. 30, the division concludes that the error was harmless under the circumstances. The division also rejects the defendant's evidentiary challenge to an answer given by a witness. Accordingly, the division affirms.

COLORADO COURT OF APPEALS **2017COA140**

Court of Appeals No. 14CA1920
Boulder County District Court No. 13CR124
Honorable Patrick D. Butler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Julian Anastacio Deleon,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE J. JONES
Graham J., concurs
Welling, J., dissents

Announced November 16, 2017

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¶ 1 Defendant, Juilan Anastacio Deleon, appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of sexual assault on a child. He challenges the district court's failure to give the jurors his tendered instruction saying that he has a constitutional right not to testify and that they couldn't consider his decision not to testify for any reason. But, as we read his briefs, his challenge actually raises two related issues:

(1) Did the district court abuse its discretion in denying the particular instruction tendered by his attorney?

(2) Did the court err in failing to instruct the jurors immediately before closing arguments that he had a right not to testify and that they couldn't hold his decision against him in any way?

¶ 2 We conclude that the court didn't abuse its discretion in rejecting his tendered instruction and that, under the particular circumstances of this case, it didn't plainly err in failing to give any instruction to the jurors on the point immediately before closing arguments. Because we also reject defendant's other claim of error, we affirm.

I. Background

¶ 3 The victim, S.R., told her friend that defendant, her mother's boyfriend, had touched her inappropriately on several occasions. S.R.'s friend told the victim's mother, who in turn contacted police. Following an investigation, the People charged defendant with two counts of sexual assault.

¶ 4 At trial, defendant asserted that S.R. had fabricated the assaults because she was angry at her mother, who was pregnant with twins and had decided to marry defendant. A jury, however, rejected that defense and found defendant guilty of both charges.

II. Discussion

¶ 5 Defendant contends that the district court erred by (1) failing to instruct the jurors immediately before closing arguments of his constitutional right not to testify; and (2) admitting into evidence S.R.'s out-of-court statement to a Sexual Assault Nurse Examiner (SANE nurse) that defendant had been "kicked out of the house." We address and reject both of these contentions in turn.

A. Jury Instruction on the Right Not to Testify

¶ 6 In its introductory remarks to prospective jurors, the district court told them as follows:

> You should understand that the District Attorney has the burden of proof in this case, and this is the only party with any burden of proof. The defendant has no obligation to present any evidence or testimony at all. *The defendant does not have to testify. And if he chooses not to testify, you cannot hold it against him in any way that he did not.*

(Emphasis added.) After the jury was selected and sworn, the court told the jurors,

> I do have some *further introductory instructions* that I have to give to you and then we'll proceed with our opening statements.
>
> All of you heard my earlier remarks to the jury panel. Now that you've been accepted by counsel and sworn as the jury to try this case, I have some *additional* introductory remarks concerning the procedure to be followed in this trial. . . .
>
> Once the prosecution has called all of their witnesses and presented all of their evidence, they will rest their case. And the defense may then offer evidence, but, remember, he is not obligated to do so. . . .
>
> The law never imposes on the Defendant in a criminal case the burden of calling any witnesses or introducing any evidence.

(Emphasis added.)

¶ 7 At the jury instruction conference, which occurred before closing arguments, defense counsel tendered the following instruction on defendant's right not to testify:

> Every defendant has an absolute constitutional right not to testify. I remind you that the prosecution must prove the defendant's guilt beyond a reasonable doubt. The defendant does not have to prove anything. Do not consider, for any reason at all, that the defendant did not testify. Do not discuss it during your deliberations or let it influence your decisions in any way.

¶ 8 The court rejected this instruction because it differed from the relevant pattern instruction. The court indicated that it would give the jury the pattern instruction. The court then apparently prepared a packet of nineteen instructions it intended to give to the jurors and gave it to counsel. But the packet didn't include an instruction on defendant's right not to testify, an obvious oversight.

¶ 9 Before closing arguments, the court had the attorneys make a record on the instructions it intended to give the jurors. The court asked the attorneys whether they had "any additions, corrections, or changes, or objections?" Defense counsel reiterated her request to give the jurors the instruction she had previously tendered on defendant's right not to testify. The court again denied that

request, saying, "the better way to go would be to follow the pattern jury instructions."

¶ 10 When the trial resumed, the court read the instructions to the jurors. It seems that no one noticed that the instructions didn't include the pattern instruction (or any other form of instruction) on a defendant's right not to testify, because neither defense counsel nor the prosecutor alerted the court to the omission and the court didn't say anything about it either.

¶ 11 On appeal, defendant contends that the district court erred by not giving the jury his tendered instruction on his right not to testify. As noted, we see really two issues here. First, did the district court abuse its discretion in rejecting defendant's tendered instruction? And second, did the court err in failing to instruct the jury immediately before closing arguments on defendant's right not to testify? Though these issues are related, we address them separately because our standard of review differs as to each, and our analysis differs as well.

1. Failure to Give Defendant's Tendered Instruction

a. Standard of Review

¶ 12 We review de novo whether a jury instruction correctly states the law. *People v. McClelland*, 2015 COA 1, ¶ 14. But we review for an abuse of discretion whether the district court erred in refusing to give a particular instruction. *Id.* This part of defendant's argument challenges the district court's discretionary decision to reject a particular instruction — defendant's tendered instruction on his right not to testify.

b. Analysis

¶ 13 In *Carter v. Kentucky*, 450 U.S. 288, 300 (1981), the Court held that a trial court must, if asked by a defendant to do so, instruct jurors that they can't draw adverse inferences from a defendant's failure to testify. In *James v. Kentucky*, 466 U.S. 341, 350 (1984), the Court followed up by holding that "the Constitution obliges the trial judge to tell the jury, in an effective manner, not to draw the inference if the defendant so requests; but it does not afford the defendant the right to dictate, inconsistent with state practice, how the jury is to be told."

¶ 14 Certainly defendant's tendered instruction accurately set forth the law concerning his right not to testify. But it doesn't follow that the district court abused its discretion in rejecting it.

¶ 15 The court rejected the tendered instruction because it contained language going beyond the then-applicable pattern instruction, which the court said it would give the jury. That pattern instruction said,

> The defendant does not have to testify. The decision not to testify is not evidence, does not prove anything, and should not be considered for any purpose.

COLJI-Crim. E:07 (2008). That pattern instruction conveyed, in an effective manner, the substance of a defendant's right and the prohibition against drawing any adverse inference based on a defendant's exercise of that right. We reject defendant's argument that the pattern instruction, as then worded, was deficient because it didn't expressly say that the right is constitutional.[1] He cites no authority for that proposition, and we aren't aware of any.

[1] The current version of the pattern instruction says that the right is "constitutional"; the version in effect at the time of trial didn't. In any event, pattern instructions aren't legal authority. *People v. Hoskin*, 2016 CO 63, ¶ 20.

¶ 16 It follows that in choosing between defendant's tendered instruction and the pattern instruction, the district court didn't abuse its discretion by electing to go with the latter.

¶ 17 The thornier issue is whether we must reverse defendant's conviction because, although the court intended to give the pattern instruction with its other written instructions at the close of the evidence, it forgot to do so. We turn now to that admittedly difficult issue.

2. Failure to Give Any Instruction Immediately Before Closing Arguments

a. Preservation and Standard of Review

¶ 18 By tendering an instruction on a defendant's right not to testify, defense counsel preserved the argument that the court erred in refusing that instruction. And defense counsel thereby preserved an argument that defendant was entitled to an instruction on that subject. *See James*, 466 U.S. at 350 (the court must give such an instruction if the defendant requests one). But the district court didn't refuse to give such an instruction — that is, the court didn't say it wouldn't give such an instruction. Rather, the court said it would give such an instruction. In this part of defendant's

argument, the claimed error is the court's failure to give such an instruction after saying that it would. And that failure didn't occur until the court read the instructions to the jurors and gave them a copy of the instructions to take back to the jury room. Defense counsel didn't object to that failure. Therefore, this issue isn't preserved. *See United States v. Padilla*, 639 F.3d 892, 895 (9th Cir. 2011) (tendering of a *Carter* right not to testify instruction didn't preserve issue of whether the trial court erred in failing to give any such instruction; defense counsel didn't object to the instructions as given); *United States v. Velez-Vasquez*, 116 F.3d 58, 60 (2d Cir. 1997) (holding similarly with respect to a presumption of innocence instruction); *United States v. Payne*, 944 F.2d 1458, 1464 (9th Cir. 1991) (holding similarly with respect to a presumption of innocence instruction).

¶ 19 Whether this issue implicates the court's duty to adequately instruct the jurors on all relevant matters of law (which we review de novo) or the court's discretion to give (or not to give) an instruction (which we review for an abuse of discretion) isn't entirely clear. But either way, the issue presents a question of law: Was the court obligated as a matter of constitutional or other source of law

to instruct the jurors on defendant's right not to testify at the close of the evidence? We review such questions of law de novo. *See People v. Higgins*, 2016 CO 68, ¶ 7; *People v. Sandoval-Candelaria*, 2014 CO 21, ¶ 11; *see also People v. Voth*, 2013 CO 61, ¶ 15 ("A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law.").

¶ 20 Because defendant failed to preserve this issue, if we determine that the court erred, we must apply the plain error test to determine whether the error requires us to reverse defendant's convictions. *Hagos v. People*, 2012 CO 63, ¶ 14 (we review all unpreserved errors, including constitutional errors, for plain error); *see also Padilla*, 639 F.3d at 895; *Velez-Vasquez*, 116 F.3d at 60; *Payne*, 944 F.2d at 1464.[2] Under that test, we reverse only if the error was obvious and so undermined the fundamental fairness of the trial that it casts serious doubt on the reliability of the judgment of conviction. *Hagos*, ¶ 14.

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[2] To the extent defendant argues that any error in failing to give a right not to testify instruction immediately before closing arguments is structural, we reject that argument. *United States v. Brand*, 80 F.3d 560, 568 (1st Cir. 1996).

b. Analysis

i. The Constitution

¶ 21 Because defendant asked for an instruction on his right not to testify, the United States Constitution entitled him to one. *James*, 466 U.S. at 350; *Carter*, 450 U.S. at 300 ("[T]he Fifth Amendment requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so."). But what satisfies this requirement? Certainly a properly worded written instruction given to the jurors after the evidence has been presented would. That isn't to say, however, that such a written instruction is the only way to satisfy the requirement. The Supreme Court has declined to hold that a written instruction is required, leaving the decision whether to impose such a requirement to the states. *James*, 466 U.S. at 350.

¶ 22 In this case, of course, there not only was no written instruction, there was no oral instruction after the presentation of the evidence. Must the court, as a matter of constitutional law, at least give an oral instruction immediately before closing arguments (or immediately before deliberations)? Though that would obviously be the better practice, we don't think the constitution always

requires the court to do so.[3] In our view, if the court otherwise makes clear to the jurors the meaning of the right in a way that jurors would understand binds them in deliberations, there is no constitutional violation. *Id.* (the right must be communicated to the jurors "in an effective manner").

¶ 23 As we see it, the court's statements to the prospective jurors during voir dire and its statements to the jurors after they were sworn met that test. The court's statements during voir dire were clear and unequivocal. And they were directory: the court told the prospective jurors something they could not do ("[Y]ou cannot hold it against him in any way that he did not [testify]."). The context matters also. The statements concerned one of several legal points about which the court informed the prospective jurors. At the same time, the court also told them that the charges against defendant were not evidence, explained the presumption of innocence and the prosecution's burden of proof, explained the meaning of reasonable doubt, told the prospective jurors that they must disregard any

[3] As discussed below, Crim. P. 30 requires the court to read the instructions to the jurors "[b]efore argument." And the court must give written instructions to the jurors to take with them for deliberations.

evidence as to which the court sustained an objection, and told them that they couldn't consider the punishment that the court could impose if they found defendant guilty. The court conveyed these legal principles to the prospective jurors in the same way that it later did so before closing arguments. We don't think any reasonable juror would have understood these statements as anything less than binding legal precepts applicable throughout the trial.

¶ 24 We also note that the attorneys emphasized to the prospective jurors that they must follow what the court had told them during voir dire. In discussing the concept of reasonable doubt with the prospective jurors, the prosecutor noted that "[t]he judge has read to you what the burden is," and told them the standard was "as the court read it to you." Similarly, defense counsel, in talking about the presumption of innocence, said, "One of the laws — the judge read a lot of them to you this morning — was the concept of presumption of innocence."

¶ 25 And defense counsel specifically hammered home defendant's right not to testify during voir dire. After a juror said she wanted to hear from both sides, defense counsel said,

> Unfortunately, the law – or fortunately, the law doesn't work that way. Okay? The law says the only person you have to hear from is this side, is these people right here. They have the burden to prove beyond a reasonable doubt that any crime was committed. The defense does not have to do anything. [Co-defense counsel] and I could sit back, put our heels on the table for the next four days, and do nothing, and you could in no way hold that against the defense. So it's not about hearing both sides. It's about proving beyond a reasonable doubt whether or not something happened. . . . The bigger issue is this whole idea of both sides, and that you don't necessarily get to hear from both sides. And that if we wouldn't put on any witnesses, if we wouldn't put any evidence in, but rather you only hear from the [p]rosecution, you cannot hold that against Mr. Deleon. You can't say, well, I didn't hear from them, so that means he's guilty. You can't do that. That's impermissible, and the law says no way.

¶ 26 A bit later, defense counsel said, "I started briefly to speak with a juror about the concept of a client's right not to testify, and the Judge *read you an instruction* way back at the beginning of the day about Mr. Deleon has the right not to testify; and that if he chooses not to testify, you in no way can hold that against him. Why do you think an innocent person would not want to take the stand?" (Emphasis added.) One prospective juror said that "in a world in which facts cannot be established with a hundred percent

certainty, with the constitutional guaranty that [defendant] need not actually testify, it wouldn't surprise me if he doesn't." After other prospective jurors expressed their thoughts on the issue, defense counsel said,

> I think the bigger idea is that everyone understands the concept that [defendant] has a right not to testify, and that if he chooses not to testify, you cannot in any way hold that against him. Do any of you have an issue with that?

No juror said that they did.

¶ 27 That wasn't the last the jurors heard of the matter. The next morning, after the jurors were selected and sworn, the court reminded them of its earlier remarks. And by saying that it would then give them "additional instructions," the court conveyed that those earlier remarks retained their force. *Cf. Padilla*, 639 F.3d at 897-98 (court's oral instruction on the defendant's right not to testify, given after the jurors were sworn, was constitutionally sufficient).

¶ 28 One last thing. The time from the court's instructions during voir dire and the beginning of deliberations was about a day and a half. And the time from the court's reminder to the sworn jurors

and their deliberations was about one day. We believe it extremely unlikely that the jurors would've forgotten the court's admonitions over the course of such a short trial.

¶ 29 Given all this, we see no constitutional problem with the fact that the court instructed the jurors about defendant's right not to testify during voir dire but not immediately before closing arguments.[4]

¶ 30 In arguing that a court's statements in voir dire can't satisfy the constitutional requirement, defendant notes that Colorado appellate courts have on occasion distinguished between comments during voir dire and written jury instructions. Perhaps that is so. But no Colorado court has held that such comments never carry

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[4] *Barnes v. State*, 782 S.E.2d 811 (Ga. Ct. App. 2016), on which defendant relies, is distinguishable. In that case, the appellate court held that the trial court erred by failing to give the jurors a complete instruction on the defendant's right not to testify at the close of the evidence. Though the court had told jurors before the presentation of evidence that the defendant had "the absolute right *to remain silent* and the jury was not permitted to draw any inference of guilt from his exercise of *that right*," the court had not told the jurors that the defendant had a right not to testify. *Id.* at 814 (emphasis added). Thus, the jurors could've thought merely that the defendant couldn't be called as a witness. *Id.* In this case, however, the court told the jurors that defendant had a right not to testify *and* that they couldn't "hold it against" defendant "in any way" if he didn't testify. Simply put, the instruction in *Barnes* was incomplete; the instruction in this case wasn't.

the weight of written jury instructions.[5] Depending on what the court says and the context in which the court says it, reasonable jurors may well understand that the court's statements of law during voir dire express principles that they must apply throughout the case.

¶ 31 But the question remains, did the substance of the court's oral instruction satisfy constitutional requirements? Defendant argues that it didn't because the court didn't say that the right was "constitutional" and didn't say specifically that the jurors couldn't draw any "adverse inference" from his failure to testify. This argument fails on both grounds.

¶ 32 As previously discussed, the instruction needn't expressly tell jurors that a defendant's right not to testify derives from the Constitution. The important thing is that the instruction accurately conveys the fact and substance of the right.

¶ 33 Nor does it matter if the instruction doesn't say precisely that jurors may not "draw any adverse inference" from the defendant's failure to testify. Rather, what matters is that the court tells the

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[5] Indeed, we sometimes regard such comments as the equivalent of instructions. *See, e.g.*, *People v. Baca*, 2015 COA 153, ¶ 13.

jurors "in an effective manner" that they may not draw any such inference. *James*, 466 U.S. at 350. Telling jurors that they "cannot hold it against [the defendant] in any way" if he doesn't testify effectively makes the point. Contrary to defendant's suggestion, we see nothing ambiguous about that phrase. It may be broader than the language defendant says the court should've used, but it's certainly no less clear. (We also observe that defendant's tendered instruction didn't include the "adverse inference" language he now says the court should've used.)[6]

¶ 34 We therefore conclude that, under the particular circumstances of this case, the district court met its constitutional obligation to instruct the jurors about defendant's right not to testify.

ii. Other Source of Law

¶ 35 Crim. P. 30 says that "[b]efore argument the court shall read its instructions to the jury . . . ." Thus, the district court had an obligation under the rule to instruct the jurors about defendant's right not to testify before the attorneys made their closing arguments. The court didn't do that, and thereby erred. But even

[6] Nor does the pattern jury instruction.

if we assume the error was obvious, we conclude that reversal isn't warranted because the error doesn't cast serious doubt on the reliability of the judgment of conviction. The court properly instructed the jurors on defendant's right not to testify during voir dire, and reminded the sworn jurors of its earlier remarks. As we said earlier, we see no reasonable possibility that any juror would've thought himself or herself free to disregard the court's instruction; reasonable jurors would've understood that the court was explaining a legal principle that they must apply throughout the case. And given the short length of trial, the jurors were unlikely to have forgotten the court's admonition.[7]

B. Out-of-Court Statement

¶ 36 The prosecutor called a SANE nurse who had examined the victim. When the prosecutor asked the SANE nurse what the victim had said when she had asked her why she was being examined, defense counsel objected, apparently on the basis of hearsay. (The record is far from clear that defense counsel made a hearsay objection, but the People concede on appeal that the hearsay issue

[7] Indeed, it is good practice to tell the jurors about this right before the presentation of evidence. Doing so may (and should) cause them not to draw any adverse inference in the first place.

is preserved.) The court overruled the objection. The victim replied, "[B]ecause I had to take some medicine, and [defendant] got kicked out of the house." Defendant contends on appeal that the victim's answer to the SANE nurse's question as to why she was being examined was inadmissible hearsay and that its admission violated his constitutional right to confront the victim. We aren't persuaded.

1. Preservation and Standard of Review

¶ 37 The parties agree that the hearsay objection was preserved, but that the Confrontation Clause issue wasn't. We review the district court's decision to allow the testimony over defendant's timely hearsay objection for an abuse of discretion, *see People v. Geisick*, 2016 COA 113, ¶ 9, and if we conclude that the court abused its discretion, we must decide whether the error was harmless, *id.* In contrast, we review de novo whether the testimony violated a defendant's constitutional right to confront a witness. *See People v. Warrick*, 284 P3d 139, 144 (Colo. App. 2011). But because defense counsel didn't make a Confrontation Clause objection, we would reverse only if any error was plain. Plain error is error that is both obvious and substantial, and which so undermined the fundamental fairness of the trial itself as to cast

serious doubt on the reliability of the judgment of conviction. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

2. Analysis

¶ 38 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. CRE 801(c). Hearsay is inadmissible unless it falls within an exception to the rule recognized by rule or statute. CRE 802; *see People v. Blecha*, 940 P.2d 1070, 1074 (Colo. App. 1996), *aff'd*, 962 P.2d 931 (Colo. 1998); *People v. Rosenthal*, 670 P.2d 1254, 1256-57 (Colo. App. 1983).

¶ 39 Initially, we note that defense counsel's objection at trial focused not on the prosecutor's question or, for that matter, the SANE nurse's question to the victim: in asking the victim why she thought she was being examined, the SANE nurse clearly sought information relevant to medical diagnosis or treatment, a well-recognized exception to the rule against hearsay. CRE 803(4). Instead, defense counsel was objecting to the anticipated answer (counsel knew what the SANE nurse was going to say in response). According to defendant, in saying that defendant "got kicked out of the house," the victim implied that her mother had kicked

defendant out of the house because of the victim's allegations, implying in turn that the victim's mother believed those allegations.

¶ 40 Defendant argues that the victim's response included "implied hearsay," apparently mother's belief in defendant's guilt. That's conjecture. The victim didn't say anything about why defendant had been kicked out of the house; indeed, her answer to the SANE nurse's question seems nonresponsive, leaving one to speculate as to what the victim was talking about. Defendant's argument then rests on one speculative inference — the victim's mother kicked defendant out of the house because of the victim's allegations — which he says supports a second speculative inference — that the victim's mother believed the victim's allegations.

¶ 41 In any event, even if we assume that the statement was inadmissible hearsay, we conclude that any error in allowing it was harmless. As noted, the inferences defendant draws from the statement are speculative. The statement was a fleeting comment that no one ever mentioned again. And the victim's mother's testimony left no doubt that she didn't believe the victim. She said that she and defendant were still together as a couple, she had asked the police whether she was required to make defendant leave

the home (strongly implying that she did not want him to leave the home), she had never seen defendant act toward the victim in any way that gave her cause for concern, and the victim has "a very hard time being truthful about . . . just about anything." When defense counsel asked her whether her current financial dependence on defendant would affect how she responded to the victim's allegations, she said, "absolutely not. If I thought for a second that someone harmed my child, I would be the first person to put them in their place."

¶ 42 In light of the mother's testimony, and the other factors noted above, we see no possibility that the speculative inferences defendant attempts to draw from the victim's statement to the SANE nurse influenced the verdict.

¶ 43 Defendant's Confrontation Clause argument fares no better. Given the vagueness of defense counsel's objection, and the speculative nature of defendant's argument, any error was far from obvious. Moreover, because defense counsel failed to request that the victim be recalled to testify, defendant's right to confront was not compromised. *See People v. Miranda*, 2014 COA 102, ¶ 36 (*cert. granted in part* Aug. 31, 2015). And lastly, for the reasons

discussed above, any error does not cast doubt on the reliability of the judgment of conviction.

III. Conclusion

¶ 44 The judgment is affirmed.

JUDGE GRAHAM concurs.

JUDGE WELLING dissents.

JUDGE WELLING, dissenting.

¶ 45 Few rights that our constitution affords to criminal defendants are more difficult for a prospective juror to grasp and give full effect to than the right of a criminal defendant not to testify at his own criminal trial. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers." *Ullmann v. United States*, 350 U.S. 422, 426 (1956). "They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Id.* While "[n]o judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, . . . a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum." *Carter v. Kentucky*, 450 U.S. 288, 303 (1981). Accordingly, "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Id.* at 305. Indeed, "[t]he Constitution obliges the trial judge to tell the jury, *in an effective manner*, not to draw the inference if the defendant so requests . . . ." *James v. Kentucky*, 466 U.S. 341, 350 (1984) (emphasis added) (citing *Taylor v. Kentucky*, 436 U.S. 478,

485-86 (1978)). While I agree with the majority that the *content* of the trial court's instruction at the outset of jury selection was adequate, I disagree that the *manner* in which it was conveyed to the jury was constitutionally effective. And because I conclude that the district court's omission of the instruction from the final charge was plain error, I dissent.

I. Additional Factual Background

A. Jury Selection

¶ 46 Sixty prospective jurors reported for jury duty on Monday, May 19, 2014. When those jurors arrived at the courthouse that morning, they completed a questionnaire and waited to be called to the courtroom. After lunch, they were brought to the courtroom to begin jury selection. Upon arriving in the courtroom, the judge welcomed them and thanked them for their patience.

¶ 47 Once he introduced himself, the judge told the prospective jurors that "there are certain procedural things and rules of law that I must explain to you while you're all here." The judge then introduced the attorneys and the defendant, advised the venire of the anticipated length of the trial, described the charges, explained

that the charges are not evidence, and discussed the presumption of innocence and burden of proof. He then stated:

> The defendant has no obligation to present any evidence or testimony at all. The defendant does not have to testify. And if he chooses not to testify, you cannot hold it against him in any way that he did not.

¶ 48 The court never again referenced the defendant's right not to testify.

¶ 49 The venire then took the first of two oaths.

¶ 50 Before turning the floor over to counsel to question the prospective jurors, the court told the venire:

> During the course of the trial I will be giving some instructions. *At the conclusion of the trial, I will be giving jury instructions to you that you will be required to follow to apply to the facts that you find.* Is there anyone who feels that they could not be bound to follow the instructions of the Court? No hands are raised.

(Emphasis added.)

¶ 51 Counsel then questioned the prospective jurors. The prosecutor did not reference the defendant's right not to testify during her questioning. Defense counsel, however, explored the subject on three occasions with prospective jurors. These

colloquies are set forth at length in the majority opinion, so I will not repeat them here.

¶ 52 Each side exercised its peremptory challenges, the jurors were selected and sworn, and they were released for the day.

¶ 53 On Tuesday morning, before opening statements, the district court gave the jury some opening instructions, including:

> All the evidence and law that you will have to decide the case *will be* presented to you as a group in court. As jurors, you have the power to accept everything as being true, to accept only part of it as true, or to reject all of it. That evidence and the Court's instructions should be the only basis for your verdict.

(Emphasis added.)

B. Trial

¶ 54 Trial lasted until late Wednesday. During the course of trial, the prosecution called seven witnesses, and the defendant called five witnesses. The defendant did not testify.

C. Jury Instructions and Verdict

¶ 55 During a jury instruction conference, the defendant requested an instruction regarding his right not to testify. The district court clearly intended to give the stock instruction regarding this right, but inadvertently did not do so.

¶ 56 The court read the jury nineteen instructions and two verdict forms before closing arguments. The first jury instruction began:

> Members of the jury, the evidence in this case has been completed. *I will now instruct you on the law which you must apply in order to reach your verdict.*
>
> It is my responsibility to decide what rules of law apply to the case. While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them. *You must follow all of the rules as I explain them to you.* Even if you disagree or do not understand the reasons for some of the rules, you must follow them. No single rule describes all the law which must be applied. Therefore, the rules must be considered together as a whole.

(Emphasis added.)

¶ 57 Following the reading of the instructions, counsel gave their closing arguments, and the jurors retired to the jury room to deliberate, each one with a copy of the instructions in hand.

D. Jury Deliberations and Verdict

¶ 58 The jury deliberated for a brief period Wednesday afternoon, all day Thursday, and returned its verdicts sometime on Friday. The jury returned guilty verdicts on both counts.

II. Analysis

¶ 59 I agree with the majority's framing of defendant's two distinct claims of instructional error, namely (1) whether the district court abused its discretion in rejecting defendant's tendered instruction and (2) whether the court erred in failing to instruct the jury immediately before closing arguments on defendant's right not to testify. I also agree with the majority's disposition of the first issue and its conclusion that the second issue is reviewed for plain error.

¶ 60 With respect to the second instructional issue, neither party disputes and the majority concludes that the trial court's omission of an instruction on the defendant's right not to testify as part of its final instructions was error. I, of course, agree with that conclusion. Where I part ways with the majority is on the question whether the error was constitutional in dimension and whether it warrants reversal under the plain error standard.

¶ 61 "Reversal for plain error is required only if (1) there was an error; (2) that error was obvious; and (3) that error so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *People v. Helms*, 2016 COA 90, ¶ 14 (citing *Hagos v. People*, 2012 CO 63, ¶ 14). In the

analysis below, I first focus on whether the error was constitutional (which I conclude it was), and then turn to the last two elements of plain error (which I conclude are satisfied).

A. The Jury Was Not Instructed in a Constitutionally Effective Manner on the Defendant's Right Not to Testify

¶ 62 I agree with the majority that the question of whether the instructional error is constitutional in dimension turns on whether the district court informed the jury of the defendant's right not to testify in "an effective manner." *James*, 466 U.S. at 350. The majority concludes that it did. But, in my view, the majority's analysis in this regard focuses too much on the content of the trial court's statement and too little on the statement's timing. Instead, I conclude that the instruction in this case was not given in an effective manner. I reach this conclusion for five reasons.

¶ 63 First, I am not as convinced as the majority that the jurors accurately recalled hearing the trial court's description of the defendant's right not to testify, at least not sufficiently to properly apply it during deliberations. Indeed, "the practice of instructing the jurors immediately prior to closing arguments has many benefits, including ensuring that the jury hears and considers all

the applicable law before deliberations and aiding the overall comprehension of the jury." *People v. Baenziger*, 97 P.3d 271, 274 (Colo. App. 2004); *see also State v. Johnson*, 842 P.2d 1287, 1289 (Ariz. 1992) ("Instructions given just before the jury deliberates will likely make more of an impression than those given prior to the presentation of evidence."); *State v. Nelson*, 587 N.W.2d 439 (S.D. 1998) (reviewing social science literature supporting practice of instructing jurors immediately prior to closing arguments). Simply put, "[t]hat jurors will remember instructions given at the beginning of a case may presume too much." *Nelson*, 587 N.W.2d at 444.

¶ 64 Second, the binding force of the trial court's single reference to the defendant's right not to testify in its opening remarks is substantially undercut by the trial court's repeated statements that the jury *would be* instructed on the law at the end of the case. Admittedly, there was an instance after the jury was empaneled where the district court characterized its remarks as "additional instructions," arguably incorporating its recitation of legal principles given during jury selection by that reference. But on two occasions prior to opening statements, the trial court explicitly told the jurors that they would be instructed on the law at the close of

evidence. *See United States v. Dilg*, 700 F.2d 620, 625 (11th Cir. 1983) ("[I]n the course of these preliminary instructions the judge specifically led the venire to believe that he would not actually instruct them on the law by which they were bound until a later time, after all the evidence had been heard."). And the written instructions that the jurors received reinforced the notion that those written instructions were the complete statement of the law that they were bound to follow in reaching their verdict. *Cf. Baenziger*, 97 P.3d at 274 ("Because the prior instructions and the notebooks, *combined with the trial court's reminder of the importance of these principles*, indicate that the jurors were aware of the proper standards for evaluating the evidence, we conclude that no structural error, nor even plain error, occurred, and therefore reversal is not required.") (emphasis added).

¶ 65 Third, I am not as persuaded as the majority by the influential effect of defense counsel's characterization of the court's opening remarks as "instructions." Statements of counsel are no substitute for an instruction from the court. *See Carter*, 450 U.S. at 304 ("The other trial instructions and arguments of counsel that the petitioner's jurors heard at the trial of this case were no substitute

for the explicit instruction that the petitioner's lawyer requested."). "Common sense and experience tell us that jurors give special credence to the pronouncements of judges." *Johnson*, 842 P.2d at 1289.

¶ 66 Fourth, the trial court's lone reference to the defendant's right not to testify was made before the jury was sworn, further diminishing its effectiveness. While this may seem to be a mere technical defect, other jurisdictions have recognized the significance of the jury's oath in this context. *See Dilg*, 700 F.2d at 625; *see also United States v. Padilla*, 639 F.3d 892, 897 (9th Cir. 2011) ("The significance of the sworn jury is well established. When a jury is sworn, it is entrusted with the obligation to apply the law, and we in turn presume that juries follow instructions given to them throughout the course of the trial." (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987))). In *Dilg*, the trial court instructed the venire on the presumption of innocence during jury selection, but did not do so again after the jury was selected and sworn. 700 F.2d at 621-22. In holding that doing so was reversible error, the Eleventh Circuit relied on the fact that at the time the preliminary instruction was given "[t]he potential jurors as members of the entire venire had

no sworn legal duty to heed the preliminary instructions of the court given prior to their being sworn as jurors." *Id.* at 625. Here too, the trial court's sole reference to the defendant's right not to testify was made before the jurors were sworn, "[t]hus there is no legal basis to assume that they did follow th[at] instruction[]." *Id.*

¶ 67 Fifth, the court's only reference to the defendant's right not to testify came before the right was invoked. As far as the jury was concerned, the right not to testify was not invoked until the defense rested its case without calling the defendant to the witness stand. I find it significant that the jury was never told about the right again after it was invoked.

¶ 68 In summary, the combination of circumstances described above leads me to conclude that the trial court's single reference to the defendant's right not to testify did not communicate that right to the jury *in an effective manner*. Accordingly, I conclude that the omission of further instruction was an error of constitutional dimension.

B. The Error Was Obvious

¶ 69 "Generally, an error is obvious when the action challenged on appeal contravenes (1) a clear statutory command; (2) a well-settled

legal principle; or (3) Colorado case law." People v. Hoggard, 2017 COA 88, ¶ 47 (quoting People v. Dinapoli, 2015 COA 9, ¶ 30). The omission of the instruction when requested by the defendant, as occurred here, was contrary to well-settled legal principles and Colorado case law. See People v. Trujillo, 712 P.2d 1079, 1081 (Colo. App. 1985) ("In the event the defendant actually does not testify, the court further must instruct the jury that such a failure cannot be considered evidence of guilt . . . ."); People v. Crawford, 632 P.2d 626, 628 (Colo. App. 1981) (holding that it was error for the trial court to refuse to instruct the jury that "[t]he defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way" (quoting Carter, 450 U.S. at 294)); see also Crim. P. 30 ("Before argument the court shall read its instructions to the jury . . . ."). I, therefore, conclude that the error was obvious.

C. The Error Undermined the Fundamental Fairness of the Trial and Cast Serious Doubt on the Reliability of the Judgment of Conviction

¶ 70 Even an error of constitutional dimension, as I conclude this one was, warrants reversal on plain error review only if the error "so undermined the fundamental fairness of the trial itself so as to cast

serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶ 14 (quoting *People v. Miller*, 113 P.3d 743, 748-50 (Colo. 2005)). I conclude that it did.

¶ 71 To begin, the five reasons that I discuss above for concluding that the instruction given was constitutionally deficient is also the starting point for my conclusion that the omission of the instruction from the final charge undermined the fundamental fairness of the trial. After all, a defendant's right not to testify is fundamental to a fair trial, and that right can only be fully vindicated if the jury is effectively instructed. *See Carter*, 450 U.S. at 305 ("[T]he failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege.").

¶ 72 Furthermore, the nature of the evidence and disputed issues at trial make the absence of a no-adverse-inference instruction in the final instructions given to the jury particularly corrosive to the fundamental fairness of this trial. Defendant's primary theory of defense at trial was that the allegations against him were fabricated. Indeed, three of defendant's witnesses were called

simply to offer testimony regarding the victim's reputation for truthfulness. In other words, this case was a battle over credibility. Because the jurors were not effectively instructed that they could not give any weight to defendant's decision not to testify when deciding whom to believe, this case is particularly susceptible to the risk that the jurors' assessment of the allegations against him were influenced by his exercise of his right not to testify. *See United States v. Burgess*, 175 F.3d 1261, 1268 (11th Cir. 1999) ("It is thus not unreasonable to imagine that the jurors, not having been instructed to draw no adverse inference from [defendant's] decision not to testify, resolved their doubts against him because of his failure to take the stand in his own defense.").

¶ 73 Put more bluntly, this is the very type of case where a juror, unless effectively instructed otherwise, would likely be inclined to view a defendant's decision to stand mute in the face of the allegations with considerable skepticism. After all, if the defendant has nothing to hide and his primary defense is going to be an attack on the victim's credibility, why doesn't he take the stand, tell his side of the story, and subject himself to the same scrutiny? We know the answer: he has an absolute constitutional right not to do

so. And he is constitutionally entitled to exercise that right without suffering an adverse inference. But "[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter*, 450 U.S. at 302. "Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination . . . ." *Id.*

¶ 74 In concluding that the district court's error doesn't cast serious doubt on the reliability of the judgment of conviction, the majority focuses on the accuracy and directory nature of the district court's opening instruction on the defendant's right not to testify and the brevity of the trial (which diminishes the risk the jury would have forgotten the original instruction). While all of that is true, it does not restore my confidence in the fundamental fairness of the trial or the reliability of the judgment of conviction for three reasons.

¶ 75 First, I am not persuaded that the brevity of the trial diminished the risk that the jury failed to properly apply the court's opening instruction during its deliberations. Although trial only lasted a couple of days, the deliberations were of nearly equal (if not

greater) duration.[1] So I am not persuaded that by the time the jury concluded its deliberations and reached a verdict on Friday it still had a solid grasp on the instruction given on Monday. *See Madison v. State*, 816 So. 2d 503, 504, 508 (Ala. Crim. App. 2000) (holding that the trial court's failure to give an oral instruction on presumption of innocence at close of evidence constituted reversible error, even though trial lasted only one day and an instruction regarding presumption of innocence was given during voir dire).

¶ 76 Second, during those deliberations each juror had his or her own copy of the court's instructions, which conspicuously omitted any reference to the defendant's right not to testify. The assumption that the jury would understand the court's pretrial instruction regarding the defendant's right not to testify as consequential and binding during deliberations is, in my view, undermined by the fact that all of the other legal concepts the court covered in its opening remarks and pretrial orientation were included in the final instruction packet the jurors were given. Even

[1] The reason for the uncertainty in this comparison is that although it is clear from the record that the jury began its deliberations sometime Wednesday afternoon, it is unclear from the record when on Friday it returned its verdict.

a version of the court's pretrial admonition regarding the use of electronic devices made its way into the final instructions, but nothing about the defendant's right not to testify. In my view, the conspicuous omission of any reference to the defendant's right not to testify from the final instructions casts serious doubt on whether the jury would have understood it was bound by the court's pretrial admonition in this regard.

¶ 77 Third, the right at issue is nuanced, and it's too great a leap for me to assume that the jury fully appreciated the nature of the right to give it full effect during deliberation having had it conveyed to them just once during jury selection.[2] The majority's discussion of *Barnes v. State*, 782 S.E.2d 811 (Ga. Ct. App. 2016), highlights

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[2] I appreciate that generally we presume that juries understand and heed the instructions they are given. *See, e.g., Leonardo v. People*, 728 P.2d 1252, 1255 (Colo. 1986) ("*Absent a contrary showing*, it is presumed that the jury understood and heeded the trial court's instructions.") (emphasis in original). But this general principle necessarily rests on the premise that the instruction at issue was effectively communicated to the jury. Because I conclude that the timing and circumstances of the district court's description of that right did not communicate it to the jury in an effective manner, the premise for the presumption that the jury followed the pretrial admonition during its deliberations is missing. And without a sound basis for presuming that the jury followed the district court's opening admonition, there is no predicate for assuming that the jury gave effect to it during its deliberations.

the complex nature of the right at issue. *Supra* ¶ 29, n.4. After all, the right at issue is not simply the defendant's right not to testify. Instead, it's that right plus the right to be protected from any adverse inference. And it was the omission of the latter part of the right from the final instruction that, at least in part, formed the basis for reversal in *Barnes*. *Barnes*, 782 S.E.2d at 813. Here, I lack any confidence, based upon the circumstances of the single explanation of the right, that the jury adequately understood it to effectively apply it during deliberations in the absence of its inclusion in the final charge.

¶ 78 For these reasons, I conclude that the omission of an instruction on the defendant's right not to testify so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.

III. Conclusion

¶ 79 Because I conclude that the jury was not instructed on the defendant's right not to testify in an effective manner and that such a defect constituted plain error, I would reverse the convictions and remand this case for a new trial. Therefore, I respectfully dissent.