

**USING POOR FORM AS A PROXY FOR  
POOR SUBSTANCE: A LOOK AT WEND V.  
PEOPLE AND ITS CATEGORICAL RULE  
PROHIBITING PROSECUTORS FROM  
USING THE WORD “LIE”**

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*In Wend v. People, the Colorado Supreme Court reversed a second-degree murder conviction because the prosecutor repeatedly used various forms of the word “lie” to describe some of the defendant’s statements made during two taped interviews with the police. In its opinion, the court first held that in Colorado it is categorically improper for a prosecutor to use the word “lie.” In doing so, it committed itself to a unique legal standard for one word that runs contrary to the traditional legal test used nationwide for all forms of prosecutorial misconduct. Then, the court reversed the conviction on plain error review—a standard that requires a contextual, “totality of the circumstances” analysis of the trial’s fundamental fairness—but only after it completely avoided critical facts bearing on that inquiry. This Note demonstrates that Colorado’s categorical rule against a prosecutor’s use of the word “lie” is unnecessary and imprudent. It also shows that Wend’s plain error review was incomplete because it failed to address the case’s most critical facts bearing on whether the defendant was denied a fair trial.*

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## INTRODUCTION

*Beware lest you lose the substance by grasping at the shadow.*

—Aesop<sup>1</sup>

Jennifer Lee-Renee Wend shot and killed her roommate, Michael Adamson, in the early hours of Christmas morning 2002.<sup>2</sup> She did not contact the police but rather let Adamson’s body lie dead in his room until December 31, when her friend,

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1. Aesop, *The Dog and the Shadow*, in FOLK-LORE AND FABLE 10 (Charles W. Eliot ed., P.F. Collier & Son 1909).

2. *Wend v. People*, 235 P.3d 1089, 1091 (Colo. 2010).

Randy Anderson, removed the body from Wend's house.<sup>3</sup> A few days later, the police received a tip that Adamson was missing, which resulted in a video-recorded police interview of Wend on January 3, 2003.<sup>4</sup> Wend told the police that she did not know where Adamson was but was confident that he was alive.<sup>5</sup> A few days later, however, Anderson confessed to his role in Adamson's disappearance and told the police that Wend killed Adamson.<sup>6</sup> Thus, on January 17, a second video-recorded interview between the police and Wend occurred.<sup>7</sup> Initially, she again denied any knowledge of a shooting.<sup>8</sup> Then, she told the police that Anderson shot Adamson.<sup>9</sup> Finally, by the end of the second interview, Wend confessed to her role in Adamson's death.<sup>10</sup> She told the police, "I have not been telling you the truth,"<sup>11</sup> and she admitted that she killed Adamson.<sup>12</sup>

Wend went to trial claiming self-defense.<sup>13</sup> Both police interviews were placed into evidence.<sup>14</sup> Accordingly, Wend's lies and her admission to lying were before the jury as evidence.<sup>15</sup> At trial, the prosecutor highlighted the fact that Wend had lied to the police and that she admitted to it.<sup>16</sup> Her own counsel also repeatedly acknowledged that she had lied to the police.<sup>17</sup>

The jury convicted Wend of second-degree murder.<sup>18</sup> But the conviction did not withstand appellate scrutiny. After the Colorado Court of Appeals affirmed the decision,<sup>19</sup> the Colorado Supreme Court found prosecutorial misconduct and reversed on plain error.<sup>20</sup> The court first held that in Colorado it is

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3. See Respondent's Answer Brief at 6–7, *Wend*, 235 P.3d 1089 (No. 09SC478).

4. *Wend*, 235 P.3d at 1092; Respondent's Answer Brief, *supra* note 3, at 9.

5. Respondent's Answer Brief, *supra* note 3, at 9.

6. *Wend*, 235 P.3d at 1092.

7. *Id.*; Respondent's Answer Brief, *supra* note 3, at 39.

8. *Wend*, 235 P.3d at 1092.

9. *Id.*

10. *Id.*

11. Respondent's Answer Brief, *supra* note 3, at 42.

12. See *Wend*, 235 P.3d at 1092.

13. *Id.*

14. See *id.* at 1092 n.1.

15. See *id.*

16. See *id.* at 1092.

17. *Id.*

18. *Id.* at 1093.

19. *People v. Wend*, No. 07CA1283, 2008 WL 5009627, at \*1 (Colo. App. Nov. 26, 2008), *rev'd*, 235 P.3d 1089 (Colo. 2010).

20. *Wend*, 235 P.3d at 1091.

categorically improper for a prosecutor to use the word “lie.”<sup>21</sup> In doing so, it committed itself to a unique legal standard for one word that runs contrary to the traditional legal test used nationwide for all forms of prosecutorial misconduct.<sup>22</sup> Then, the court reversed the conviction on plain error review—a standard that requires a contextual, “totality of the circumstances” analysis of the trial’s fundamental fairness—but only after the court completely avoided mentioning critical facts bearing on that inquiry.<sup>23</sup> Specifically, the court never addressed that the only reasonable conclusion from Wend’s statements is that Wend did lie multiple times to police, that Wend admitted to having lied to the police, that defense counsel conceded that Wend lied, and that Wend’s lies and her admission to lying were captured on video and placed into evidence for the jury to consider.<sup>24</sup>

This Note first demonstrates that Colorado’s categorical rule against a prosecutor’s use of the word “lie” is unnecessary and imprudent. Appellate courts review for prosecutorial misconduct because defendants have a constitutional right to a fair trial.<sup>25</sup> At its root, trial fairness is a matter of substance, not form.<sup>26</sup> Not surprisingly, the traditional two-step test for prosecutorial misconduct is anchored to substance, primarily through its use of a contextual, totality of the circumstances standard of review.<sup>27</sup> The test recognizes that a statement’s context frequently influences its substantive effect at least as much as its content does.<sup>28</sup> Therefore, Colorado’s prohibition against the use of one word—“lie”<sup>29</sup>—regardless of the context

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21. *Id.*

22. *See, e.g.*, *United States v. Kravchuk*, 335 F.3d 1147 (10th Cir. 2003); *People v. Martinez*, 224 P.3d 877 (Cal. 2010); *State v. Reynolds*, 836 A.2d 224 (Conn. 2003); *Mills v. State*, No. 56,2007, 2007 WL 4245464 (Del. Dec. 3, 2007); *McKenney v. State*, 967 So. 2d 951 (Fla. Dist. Ct. App. 2007); *State v. Marsh*, 728 P.2d 1301 (Haw. 1986); *State v. Sheahan*, 77 P.3d 956 (Idaho 2003); *People v. Nowicki*, 894 N.E.2d 896 (Ill. App. Ct. 2008); *Ellison v. State*, 717 N.E.2d 211 (Ind. Ct. App. 1999); *State v. Musser*, 721 N.W.2d 734 (Iowa 2006).

23. *Wend*, 235 P.3d at 1096–99.

24. *See* discussion *infra* Part VI.B.2.

25. *United States v. Young*, 470 U.S. 1, 11–12 (1985).

26. *Id.*

27. *See, e.g.*, *Kravchuk*, 335 F.3d at 1153.

28. *See, e.g.*, *United States v. Gartmon*, 146 F.3d 1015, 1025–27 (D.C. Cir. 1998) (finding that the prosecutor’s use of a number of terms, including the word “lie,” was not improper because of various contextual factors).

29. Other forms of the word are also prohibited. Saying “lies,” “liar,” “lying,” “lied,” or any other variation of “lie” is prohibited. Curiously, however, Colorado actually encourages prosecutors to use euphemisms of the word “lie,” such as

under which it is uttered, is a misguided rule that elevates form over substance.

This Note also demonstrates that the Colorado Supreme Court conducted an incomplete plain error review in *Wend*. Plain error review reverses convictions where, under the totality of the circumstances, errors affecting substantial rights call into question the fundamental fairness or integrity of a trial.<sup>30</sup> In *Wend* the Colorado Supreme Court did not review the totality of the circumstances. Unfortunately, the court's plain error review failed to address many of the case's most critical facts bearing on whether *Wend* was denied a fair trial.<sup>31</sup>

Part I of this Note begins with a review of the traditional two-step test used to adjudicate prosecutorial misconduct allegations. Part II then examines the various forms of prosecutorial conduct that have and have not been deemed improper under the traditional framework's first step. Next, Part III describes the practical and theoretical reasons that a prosecutor's use of the word "lie" can be improper. After that, Part IV explores how the traditional framework's second step is applied under plain error review. Part V reviews *Wend*'s facts, trial, and opinion. Finally, Part VI first argues that *Wend*'s new categorical rule is both imprudent and unnecessary and then criticizes the court's unwillingness under plain error review to look at the case's unique facts bearing on whether the defendant's trial was fundamentally unfair.

## I. ADJUDICATING PROSECUTORIAL MISCONDUCT: THE LEGAL FRAMEWORK

Appellate courts, regardless of jurisdiction, review prosecutorial misconduct allegations similarly.<sup>32</sup> This Part reviews the traditional test used to examine allegations of prosecutorial misconduct. It begins with a review of the test at the federal level. Then it reviews Colorado's version of the test.

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"untruthful." *Wend*, 235 P.3d at 1091, 1096, 1098. This distinction is discussed *infra* Part VI.B.1.

30. See, e.g., *United States v. Cotton*, 535 U.S. 625, 631 (2002); *Young*, 470 U.S. at 11–12; *Wend*, 235 P.3d at 1097–98.

31. See discussion *infra* Part VI.B.2.

32. See cases cited *supra* note 22. These cases all look at both the content and context of the proceeding to determine whether the prosecutor's conduct was improper, followed, if necessary, by a determination of whether any impropriety warrants reversal under the relevant standard of review.

In both jurisdictions, the test's linchpin feature is that it accounts for both content and context.

Prosecutorial misconduct refers to conduct or methods used by prosecutors calculated or tending to produce wrongful convictions.<sup>33</sup> Federal courts apply a two-step test to review claims of prosecutorial misconduct.<sup>34</sup> In the first step, courts determine whether the prosecutor's conduct was improper.<sup>35</sup> Whether conduct was improper rests in part on the context surrounding the conduct.<sup>36</sup> Appellate courts review conduct de novo, meaning the appellate court gives no deference to the trial court's decision about whether something was improper.<sup>37</sup> If an appellate court determines that a prosecutor's conduct was improper—which is a finding of prosecutorial misconduct—then it proceeds to the second step.<sup>38</sup>

The second step is to determine whether the prosecutorial misconduct warrants that the conviction be reversed.<sup>39</sup> The mere occurrence of prosecutorial misconduct is not determinative of reversal.<sup>40</sup> Whether reversal is warranted is not reviewed de novo.<sup>41</sup> Rather, deference to the trial court is given at the degree appropriate to the case's reviewing posture.<sup>42</sup> The reviewing posture will usually be either plain or harmless error review.<sup>43</sup> In general, appellate courts will not review error if it was not first objected to at trial.<sup>44</sup> However,

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33. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

34. See, e.g., *United States v. Kravchuk*, 335 F.3d 1147, 1153 (10th Cir. 2003).

35. See, e.g., *United States v. Gordon*, 173 F.3d 761, 769 (10th Cir. 1999).

36. See, e.g., *United States v. Jaswal*, 47 F.3d 539, 544 (2d Cir. 1995) (finding that the prosecutor's use of “I think” was not improper because context did not show reference to personal beliefs).

37. See *Buford v. United States*, 532 U.S. 59, 64 (2001) (noting that when an appellate court reviews de novo, it gives no deference to the lower court's findings); see also *United States v. Rigas*, 583 F.3d 108, 116 (2d Cir. 2009) (explaining that de novo means “anew”).

38. *Kravchuk*, 335 F.3d at 1153.

39. *Id.*

40. *United States v. Cotton*, 535 U.S. 625, 632 (2002).

41. See *United States v. Thompson*, 449 F.3d 267, 271 (1st Cir. 2006) (finding that the trial court was in a better position to determine whether the harm caused by improper comments warranted reversal).

42. Compare *United States v. Hasting*, 461 U.S. 499, 508–09 (1983) (applying harmless error review), with *United States v. Van Anh*, 523 F.3d 43, 55–57 (1st Cir. 2008) (applying plain error review).

43. See, e.g., *Hasting*, 461 U.S. at 508–09; *Van Anh*, 523 F.3d at 55–57.

44. See, e.g., *United States v. Mebane*, 839 F.2d 230, 232 (4th Cir. 1988).

plain error review provides an exception to this rule and allows a court to review error if it is alleged that the error affected a substantial right of the defendant.<sup>45</sup> A conviction will be reversed on plain error review if the error did in fact affect a substantial right of the defendant such that it undermined the fundamental fairness of the trial and called into question the correctness of the trial's outcome.<sup>46</sup> Alternatively, courts will apply harmless error review for errors that were objected to at trial.<sup>47</sup> Under harmless error review, courts will affirm a judgment if either there was no error or if the error was "harmless" to the conviction.<sup>48</sup> But if it "can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself," a reviewing court will reverse a conviction under harmless error review.<sup>49</sup>

Accordingly, due to their different degrees of deference, the standard of review applied on appeal can influence whether or not improper conduct warrants reversal.<sup>50</sup> Additionally, when reviewing for prosecutorial misconduct, federal courts will reverse a conviction where the prosecutor's conduct violated the defendant's due process right to a fair trial.<sup>51</sup> The defendant must prove that her rights were violated when viewing the misconduct in the context of the whole trial.<sup>52</sup>

Colorado courts review prosecutorial misconduct much like federal courts.<sup>53</sup> First, they decide whether the conduct in question was improper based on the totality of the

45. *Cotton*, 535 U.S. at 632.

46. *See Van Anh*, 523 F.3d at 55.

47. *See Martinez v. People*, 244 P.3d 135, 142–43 (Colo. 2010).

48. *See Hasting*, 461 U.S. at 509–12. A court may find constitutional errors harmless if it is beyond a reasonable doubt that they had no effect on the judgment. *Mitchell v. Esparza*, 540 U.S. 12, 17–18 (2003).

49. *People v. Rivera*, 56 P.3d 1155, 1169 (Colo. App. 2002).

50. *United States v. Weatherspoon*, 410 F.3d 1142, 1150–51 (9th Cir. 2005) (quoting *United States v. Hinton*, 31 F.3d 817, 824 (9th Cir. 1994)) ("Where defense counsel objects . . . we review for harmless error on defendant's appeal; absent such an objection, we review under the more deferential plain error standard.")

51. *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005); *see also United States v. Young*, 470 U.S. 1, 11–12 (1985).

52. *Young*, 470 U.S. at 11 ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."); *United States v. Kravchuk*, 335 F.3d 1147, 1153 (10th Cir. 2003).

53. *See, e.g., Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005).

circumstances,<sup>54</sup> thus ensuring that context is taken into account.<sup>55</sup> Second, upon finding improper conduct, the reviewing court determines if the misconduct warrants reversal.<sup>56</sup> As with the federal courts, Colorado's appellate courts give deference to trial courts in this analysis, because trial courts are "best positioned to evaluate whether any statements made by counsel affected the jury's verdict."<sup>57</sup> So too, the standard of review varies depending on whether the defendant objected at trial.<sup>58</sup> Deference to trial courts differs depending on whether misconduct is reviewed for harmless or plain error, with plain error being the tougher standard to overcome for a defendant appealing her conviction.<sup>59</sup> Where there is plain error review, courts again inquire into the case's content and context, "because only through an examination of the totality of the circumstances can the appellate court deduce whether error affected the fundamental fairness of the trial."<sup>60</sup> Hence, Colorado courts review prosecutorial misconduct under plain error review, in part, by looking at context in both the first and second step of their analysis.<sup>61</sup>

## II. FINDING THE DIVIDING LINE: WHAT IS (AND IS NOT) IMPROPER CONDUCT

This Part reviews the results of the first-step analysis of prosecutorial misconduct cases. Section A looks at conduct deemed to be improper, while Section B looks at conduct judged as proper. As Section B will demonstrate, context frequently differentiates those cases that do and do not lead to findings of prosecutorial misconduct. Indeed, often the same conduct is

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54. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

55. *Id.* Although Colorado sometimes fails to expressly state it, the first step is reviewed de novo review. See *Domingo-Gomez*, 125 P.3d at 1048.

56. *Domingo-Gomez*, 125 P.3d at 1048.

57. *Wend*, 235 P.3d at 1097 (quoting *Domingo-Gomez*, 125 P.3d at 1049).

58. See *Domingo-Gomez*, 125 P.3d at 1053 (reviewing different statements made in the same trial under different standards of review based on whether the statements were objected to at trial).

59. Compare *People v. Avila*, 944 P.2d 673, 676 (Colo. App. 1997) (noting that reversal for plain error occurs only where misconduct was "flagrantly, glaringly, or tremendously improper"), with *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000) (noting that reversal under harmless error review occurs where there is a reasonable probability that the misconduct contributed to the conviction).

60. *Wend*, 235 P.3d at 1098.

61. *Id.* at 1096, 1098.

deemed improper in one case but found to be proper in another as a result of differing contexts.

### A. *Examples of Prosecutorial Misconduct*

Prosecutorial misconduct arises in many ways. Sometimes misconduct emerges from unethical motives.<sup>62</sup> For example, a prosecutor cannot prosecute for vindictive reasons<sup>63</sup> or bring new charges to retaliate against a defendant who invokes her legal rights.<sup>64</sup> Other times, misconduct emerges from pre-trial negligence.<sup>65</sup> Accordingly, a prosecutor should not elicit information from a defendant without defense counsel being present,<sup>66</sup> nor should a prosecutor keep potentially exculpatory evidence from the defendant.<sup>67</sup>

Prosecutorial misconduct also frequently results from a prosecutor's conduct during trial.<sup>68</sup> For example, convictions can be overturned because a prosecutor expresses a personal opinion to the jury.<sup>69</sup> Thus, statements about the defendant's guilt or credibility are frequently improper,<sup>70</sup> as are opinions that require personal experience or expertise.<sup>71</sup> A prosecutor

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62. See *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974) (finding it improper for the prosecutor to bring a more serious charge in response to the defendant invoking his statutory right to appeal because of the charge's potential vindictive nature in a habeas corpus review).

63. See *id.*

64. *Id.*

65. See *Strickler v. Greene*, 527 U.S. 263, 281–84, 289 (1999) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)) (finding that the prosecutor failed to comply with the *Brady* rule's mandate that the prosecution must disclose all exculpatory or impeaching evidence).

66. See, e.g., *Massiah v. United States*, 377 U.S. 201, 202–04 (1964) (finding it improper for the government to obtain inculpatory post-indictment information through secretly recorded conversations between co-defendants where defense counsel was not present).

67. *Banks v. Dretke*, 540 U.S. 668, 691–93 (2004) (finding it improper for the government to have withheld potentially exculpatory evidence from the defendant in violation of the *Brady* rule in a habeas corpus review).

68. See, e.g., *Crider v. People*, 186 P.3d 39, 40 (Colo. 2008) (finding it improper for the prosecutor to tell the jury that the defendant lied on the witness stand).

69. See *id.*

70. *Cargle v. Mullin*, 317 F.3d 1196, 1218 (10th Cir. 2003) (finding it improper for the prosecutor to contend that the state does not prosecute innocent people because this statement suggested that the defendant was guilty merely because he was being prosecuted).

71. See, e.g., *Gall v. Parker*, 231 F.3d 265, 312 (6th Cir. 2000) (finding it improper for the prosecutor to suggest to the jury that it should heed his government expertise and dismiss the defendant's insanity defense), *superseded on other grounds by statute*, KY. REV. STAT. ANN. § 507.030(b) (LexisNexis 2011).

also should avoid making unscrupulous or unfair statements about people involved in the trial.<sup>72</sup> Such statements can lead to reversals, whether they are directed at the defendant,<sup>73</sup> defense counsel,<sup>74</sup> or witnesses.<sup>75</sup> Additionally, where a prosecutor comments on the defendant's legal strategy, a successful appeal from the defendant may follow.<sup>76</sup> This should caution a prosecutor from noting—even implicitly—that the defendant did not take the stand.<sup>77</sup> A prosecutor should also avoid suggesting that a defendant's post-arrest, post-*Miranda* silence indicates guilt.<sup>78</sup> Further, a wise prosecutor will not highlight to the jury that the defendant retained counsel.<sup>79</sup>

Unsurprisingly, a prosecutor's material misstatements of law<sup>80</sup> and fact<sup>81</sup> can be improper. A prosecutor, therefore, should limit opening statements to evidence she believes will be offered<sup>82</sup> and, in her closing, speak only of evidence actually admitted into the record.<sup>83</sup> Prosecutorial misconduct also occurs when a statement is meant to imply that the government's version of the case is the most credible.<sup>84</sup> Thus, a

72. See, e.g., *Malicoat v. Mullin*, 426 F.3d 1241, 1256 (10th Cir. 2005) (finding it improper for the prosecutor to call the defendant “evil” and “a monster”).

73. See *id.* In *Malicoat*, the court did not actually reverse the conviction because the prosecutor's comments did not rise to the level of plain error. *Id.*

74. See, e.g., *United States v. Friedman*, 909 F.2d 705, 708–09 (2d Cir. 1990) (finding it improper for the prosecutor to state that defense counsel would “make any argument he can to get that guy off” and that “while some people . . . prosecute drug dealers . . . there are others who . . . try to get them off, perhaps even for high fees”).

75. *Gall*, 231 F.3d at 312 (finding it improper for the prosecutor to describe defense witnesses as “blind men . . . asked to identify an elephant”).

76. See, e.g., *Beardslee v. Woodford*, 358 F.3d 560, 586–87 (9th Cir. 2004) (finding it improper for the prosecutor to call attention to the defendant's failure to express remorse because it implicitly criticized the defendant's decision to not testify at the penalty phase of his capital case).

77. *Id.*

78. *Gravley v. Mills*, 87 F.3d 779, 785–88 (6th Cir. 1996).

79. *Marshall v. Hendricks*, 307 F.3d 36, 72–74 (3d Cir. 2002).

80. See, e.g., *United States v. Perlaza*, 439 F.3d 1149, 1172 (9th Cir. 2006) (finding it improper for the prosecutor to say that the presumption of innocence disappears once the jury begins the deliberation process).

81. *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989) (finding it improper for the prosecutor to refer in both opening and closing to “testimony” by a witness that never testified and was not within the record).

82. See, e.g., *id.*

83. See, e.g., *Le v. Mullin*, 311 F.3d 1002, 1020–21 (10th Cir. 2002) (finding it improper for the prosecutor to implicitly suggest in closing that the defendant had murdered previously because evidence of the prior murder was not in the record).

84. See, e.g., *Floyd v. Meachum*, 907 F.2d 347, 354–55 (2d Cir. 1990) (finding it improper for the prosecutor to implore the jury to consider the prosecutor's own integrity and ethics).

prosecutor ought to avoid vouching for the credibility of herself,<sup>85</sup> her office,<sup>86</sup> or her witnesses.<sup>87</sup> A prosecutor also must avoid statements that improperly inflame the passions of the jurors.<sup>88</sup> For example, mentioning the defendant's irrelevant prior convictions or bad acts could result in the defendant successfully appealing her conviction.<sup>89</sup> And, as this Note suggests, a prudent prosecutor will not call a defendant a liar.<sup>90</sup>

### *B. When Context Mitigates Poor Form*

Although courts consistently find certain types of prosecutorial conduct improper, black-letter rules simply do not exist in the realm of misconduct proceedings. The very same conduct held as improper in one case may be permissible in another.<sup>91</sup> Hence, notwithstanding all the cases cited within Section A of this Part, prosecutors have acceptably expressed personal opinions about the defendant's credibility (including whether the defendant lied),<sup>92</sup> commented on the defendant's trial strategy<sup>93</sup> and past legal trouble,<sup>94</sup> vouched for the

85. *Id.* at 354.

86. *See, e.g.*, *United States v. Gallardo-Trapero*, 185 F.3d 307, 319 (5th Cir. 1999) (finding it improper for the prosecutor to ask the jury during closing whether federal agents and the prosecutor would “risk their career” to commit perjury).

87. *See, e.g.*, *People v. Shipman*, 747 P.2d 1, 2–3 (Colo. App. 1987) (finding it improper for the prosecutor to suggest that police officers are more credible than lay witnesses during voir dire).

88. *See, e.g.*, *People v. Lee*, 630 P.2d 583, 591–92 (Colo. 1981) (finding it improper for the prosecutor to allude to a miscarriage that resulted from events at issue in the case).

89. *See, e.g.*, *People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973) (finding it improper for the prosecutor to purposely elicit statements from a witness about the defendant's past crimes).

90. *E.g.*, *Wend v. People*, 235 P.3d 1089, 1089 (Colo. 2010).

91. *Compare* *United States v. Moreland*, 622 F.3d 1147, 1162 (9th Cir. 2010) (finding that the prosecutor who called the defendant a liar was not acting improperly because it was a reasonable inference from evidence and the prosecutor indicated as much), *with* *Wend* 235 P.3d at 1096 (finding it improper for the prosecutor to classify the defendant's statements as “lies”).

92. *See, e.g.*, *United States v. White*, 241 F.3d 1015, 1023 (8th Cir. 2001) (finding it to be questionable but not clearly improper that the prosecutor inferred from evidence that the defendant did not tell the truth).

93. *See, e.g.*, *Nguyen v. Reynolds*, 131 F.3d 1340, 1358–59 (10th Cir. 1997) (finding that the prosecutor's mention of the lack of an explanation for some of the defendant's conduct was not improper because it was not a clear, direct, or unequivocal reference to the defendant's failure to testify).

94. *See, e.g.*, *United States v. Bowman*, 353 F.3d 546, 551 (7th Cir. 2003) (finding that the prosecutor's statements that the defendant was a convicted felon,

integrity of the government<sup>95</sup> and its witnesses,<sup>96</sup> inflamed the jurors' consciences and passions,<sup>97</sup> and misstated the facts<sup>98</sup> and the law.<sup>99</sup>

Clearly, then, improper advocacy cannot be determined solely by the content at issue. This is because the ultimate message that a prosecutor's statement or conduct delivers can be significantly altered depending on the context in which it is made.<sup>100</sup> Admittedly, sometimes context will only minimally impact the ultimate message conveyed. The content at issue can bear on the statement's impropriety more than the context can. For example, context plays a small role in the impropriety of a prosecutor's statement that the defendant's brother was previously convicted for participating in the same conspiracy.<sup>101</sup> The prejudicial suggestion of guilt by association will ring in the jurors' ears in almost any context.

Sometimes, however, context plays a bigger role in understanding a message's true meaning than content does.<sup>102</sup> For example, it can be improper for a prosecutor to tell the jurors to ignore or disbelieve testimony from the defendant or

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carried an unregistered gun, and carried drugs were not improper because the statements were based on stipulated or uncontested facts).

95. *See, e.g.*, *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998) (finding that the prosecutor placing his own credibility at issue was not improper where the defendant's counsel was the first to raise the issue of the prosecutor's credibility).

96. *See, e.g.*, *United States v. Carr*, 424 F.3d 213, 228 (2d Cir. 2005) (finding that the prosecutor's remark that witnesses were required to tell the truth was acceptable because it was made in response to attacks on the witnesses' credibility by the defendant).

97. *See, e.g.*, *United States v. Salameh* 152 F.3d 88, 134–35 (2d Cir. 1998) (finding that the prosecutor telling a jury it must decide "guilt for the single most destructive act of terrorism ever committed here in the United States" was acceptable because the statement was rooted in evidence).

98. *See, e.g.*, *United States v. Smith*, 203 F.3d 884, 889–90 (5th Cir. 2000) (finding the prosecutor's inability to offer testimony promised during opening to come from a specific person a mere "alleged error" that did not warrant reversal because the promised evidence was presented at trial by alternative sources).

99. *See, e.g.*, *United States v. Bryant*, 349 F.3d 1093, 1096 (8th Cir. 2003) (finding that the prosecutor's suggestion that the defendant's presence at the scene of the crime was sufficient to support a guilty verdict was not improper because the defendant based his defense on not being at the scene).

100. *See, e.g., Tocco*, 135 F.3d at 130.

101. *See United States v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993).

102. *See, e.g., Beardslee v. Woodford*, 358 F.3d 560, 587 (9th Cir. 2004) (finding it improper for the prosecutor to comment that the defendant expressed no remorse because the defendant exercised his constitutional right to remain silent); *Tocco*, 135 F.3d at 130.

her witness.<sup>103</sup> But when a prosecutor says to ignore a defendant's testimony after the defendant refused to speak during cross-examination—resulting in the defendant's direct examination being struck from the record—context dictates that the prosecutor's conduct was proper.<sup>104</sup>

Context also may either mitigate or exacerbate a prosecutor's statements. For example, revealing that a defendant has a prior murder conviction, which usually is improper,<sup>105</sup> can be mitigated by context. Such a statement is acceptable if it is made during a capital punishment sentencing hearing because a past murder conviction is an aggravating factor to be considered in capital sentencing proceedings.<sup>106</sup> In contrast, the impropriety of claiming that a defendant is "like all of the other co-defendants in this case" is exacerbated where the jury knows that the other co-defendants already took guilty pleas.<sup>107</sup> Accordingly, courts are best able to adjudicate on the substantive reality of whether or not the defendant received a fair trial by looking at both a statement's content and its context because both content and context can significantly contribute to a statement's ultimate substantive meaning.

### III. WHY USING THE WORD "LIE" CAN BE IMPROPER

As the previous Part demonstrated, the use of the word "lie" is among the many ways a prosecutor can engage in misconduct. Courts have found that a prosecutor's use of the word "lie" to describe a defendant can be improper because it interferes with the defendant's right to a fair trial.<sup>108</sup> Two specific explanations have emerged to explain why a prosecutor's use of the word "lie" raises concerns of fairness.<sup>109</sup>

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103. *See, e.g.*, *United States v. Zehrbach*, 47 F.3d 1252, 1264 (3d Cir. 1995) (finding it improper for the prosecutor to state that the jury should disbelieve defense witnesses because they were guilty of "the same bankruptcy fraud that these two defendants are guilty of").

104. *See Williams v. Borg*, 139 F.3d 737, 744 (9th Cir. 1998) (finding that the prosecutor telling a jury to ignore the defendant's remarks was not improper because the remarks were not in the record).

105. *See, e.g.*, *United States v. Jackson*, 339 F.3d 349, 356–57 (5th Cir. 2003) (finding it improper for the prosecutor to make indirect reference to the defendant's prior convictions because the reference was more prejudicial than probative); *Le v. Mullin*, 311 F.3d 1002, 1020–21 (10th Cir. 2002).

106. *Beardslee*, 358 F.3d at 584–85.

107. *United States v. Dworken*, 855 F.2d 12, 29–31 (1st Cir. 1988).

108. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005).

109. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

First, when a prosecutor calls someone a “liar,” she reflects a personal opinion, which juries may consider instead of the evidence properly before them.<sup>110</sup> Second, the word “lie” inflames the passions of jurors against the defendant, leading to convictions rooted in emotion rather than evidence.<sup>111</sup> Section A will take a closer look at the idea that the word “lie” necessarily places a prosecutor’s opinion before the jury. Section B will discuss the idea that the word “lie” improperly inflames a juror’s passions.

A. *Use of the Word “Lie” Invokes Prosecutor Opinion*

It is frequently improper for a prosecutor to express a personal opinion.<sup>112</sup> Courts consistently find a prosecutor’s use of the word “lie” improper on this ground.<sup>113</sup> An example will help elucidate why a person, prosecutor or not, often expresses a personal opinion when she calls an individual a liar. In the Colorado case *Domingo-Gomez v. People*, Molotov cocktails<sup>114</sup> were thrown into a home at six o’clock in the morning.<sup>115</sup> This occurred the morning after an alcohol-related fight took place between the defendant and a resident of the home.<sup>116</sup> The defendant was accused of throwing the Molotov cocktails.<sup>117</sup> At trial, the parties disputed the defendant’s whereabouts at the time that the Molotov cocktails were thrown.<sup>118</sup> No physical evidence linked him to the bottles, but a resident of the home identified the defendant as the person who threw the Molotov cocktails.<sup>119</sup> Meanwhile, the defendant and two other witnesses

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110. *Id.*

111. *Id.*

112. *See, e.g.*, *Hennon v. Cooper*, 109 F.3d 330, 333 (7th Cir. 1997) (finding it improper for the prosecutor to imply that the defendant’s election of a jury trial was a sign of guilt).

113. *See, e.g.*, *United States v. Garcia-Guizar*, 160 F.3d 511, 520 (9th Cir. 1998); *Wend*, 235 P.3d at 1096.

114. A Molotov cocktail is a breakable container with an explosive or flammable liquid inside it and a wick or similar device capable of igniting the container. In *Domingo-Gomez*, the Molotov cocktail was a beverage bottle filled with gasoline and a piece of cloth protruding from the bottle’s neck. *Domingo-Gomez v. People*, 125 P.3d 1043, 1046 n.1 (Colo. 2005).

115. *Id.* at 1046.

116. *Id.*

117. *Id.* *Domingo-Gomez* was charged with first degree arson, attempted first degree assault, use of an explosive or incendiary device, and possession of an explosive or incendiary device. *Id.*

118. *Id.* at 1046–47.

119. *Id.* at 1046.

testified that the defendant could not be the perpetrator because he was at a friend's house nursing wounds incurred during the previous night's fight.<sup>120</sup> During closing arguments, the prosecutor claimed that the defendant and his witnesses lied.<sup>121</sup> On appeal, the court found the prosecutor's statements to be improper expressions of personal opinion.<sup>122</sup>

Although the *Domingo-Gomez* prosecutor may have been correct that the defendant and his witnesses lied, his belief was an inferential conclusion and therefore an opinion, not a fact.<sup>123</sup> The defendant did not tell the prosecutor that he lied; rather, a belief in the victim's story, a lack of trust in the defendant and his witnesses, and all of the other information available to the prosecutor led him to this conclusion.<sup>124</sup> This is problematic because the evidence lent itself to other reasonable conclusions.<sup>125</sup> For example, the victim-witness may have been lying to hurt the defendant, who fought the victim-witness's brother hours before the Molotov cocktails were thrown.<sup>126</sup> Furthermore, inconsistent statements do not always mean that someone lied. The defendant and his witnesses may have been correct when they surmised that the victim-witness simply misidentified the defendant.<sup>127</sup>

The Colorado Supreme Court recently explained why jurors are not supposed to hear a prosecutor's personal opinion.<sup>128</sup> In *Wend*, the court noted:

[T]he word "lie" is such a strong expression that it necessarily reflects the personal opinion of the speaker. When spoken by the State's representative in the courtroom, the word "lie" has the dangerous potential of swaying the jury from their duty to determine the accused's guilt or innocence on the evidence properly presented at trial.<sup>129</sup>

Two concerns are apparent from this quote. The first and most pressing concern is that jurors will misuse a prosecutor's

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120. *Id.* at 1046–47.

121. *Id.* at 1047.

122. *Id.* at 1053.

123. *See id.* at 1046–47.

124. *See id.*

125. *See id.*

126. *See id.*

127. *Id.* at 1046.

128. *See Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

129. *Id.* (quoting *Domingo-Gomez*, 125 P.3d at 1050).

opinion.<sup>130</sup> The opinion could distract jurors from the actual evidence presented or, worse, fundamentally mislead the jury if the opinion is incorrect.<sup>131</sup> The second concern is that there is a “dangerous potential” that jurors will misuse the statement because prosecutors, as representatives of the people, carry heightened persuasive powers over juries as a result of their unique role in the judicial system.<sup>132</sup>

*B. The Word “Lie” Inflames the Passions of Jurors*

The second reason courts justify finding the word “lie” improper is that the word prejudices the jurors against the defendant.<sup>133</sup> Although a prosecutor is allowed to “employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance,”<sup>134</sup> such embellishments are improper if they lead a jury to “determine guilt on the basis of passion or prejudice, inject irrelevant issues into the case, or accomplish some other improper purpose.”<sup>135</sup> In 2008, the Colorado Supreme Court explained that “the word ‘lie’ is an inflammatory term, likely (whether or not actually designed) to evoke strong and negative emotional reactions” against the person it is used to describe.<sup>136</sup>

To be sure, as a result of the sensitive nature of some trial proceedings, jurors may experience visceral, emotional reactions to a prosecutor’s comments in the same way an audience can respond to a religious sermon or political rally. When such passionate reactions are the basis for a guilty verdict, the judicial system is not functioning properly. The challenge, however, is determining where acceptable oratorical embellishing ends and improper inflaming of passions begins.<sup>137</sup> The Colorado Supreme Court recently acknowledged this, noting that the prejudicial impact of a statement “cannot be reduced to a specific set of factors, determinative in every

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130. *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992); *Wend*, 235 P.3d at 1096.

131. *Kerr*, 981 F.2d at 1053; *Wend*, 235 P.3d at 1096.

132. *Kerr*, 981 F.2d at 1053 (“Because [a prosecutor] is the sovereign’s representative, the jury may be misled into thinking his conclusions have been validated by the government’s investigatory apparatus.”); *Wend*, 235 P.3d at 1096.

133. *Crider v. People*, 186 P.3d 39, 41 (Colo. 2008).

134. *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010) (quoting *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003)).

135. *People v. Bowles*, 226 P.3d 1125, 1132–33 (Colo. App. 2009).

136. *Crider*, 186 P.3d at 41.

137. *See, e.g., id.* at 43.

case. . . . [T]he likelihood of prejudice must be evaluated in the totality of the circumstances, on a case-by-case basis.”<sup>138</sup> Accordingly, where the trouble with a prosecutor’s conduct is its inflammatory nature, courts should carefully account for context.<sup>139</sup>

#### IV. PROSECUTORIAL MISCONDUCT AND PLAIN ERROR REVIEW IN COLORADO

Once a reviewing court determines that a prosecutor acted improperly, it proceeds to determine whether or not the misconduct warrants reversal.<sup>140</sup> During plain error review, appellate courts give deference to trial court conclusions about the effects of a prosecutor’s improper conduct.<sup>141</sup> Nonetheless, reviewing courts do reverse convictions, and, when reviewing for plain error, this occurs where errors affect substantial rights and interfere with the fundamental fairness of the trial.<sup>142</sup> This Part concerns itself with Colorado’s plain error review of prosecutorial misconduct. It begins by outlining Colorado’s deferential standard, proceeds to review the factors that Colorado courts consider in determining whether to reverse, and concludes by mentioning other factors found in federal cases that could—and should—be contemplated in Colorado.

In Colorado, “[t]he determination of whether a prosecutor’s statements constitute inappropriate prosecutorial argument is generally a matter for the exercise of trial court discretion.”<sup>143</sup> When prosecutorial misconduct occurs but no contemporaneous objection to the statement is made, plain error review applies.<sup>144</sup> Plain error review maximizes a reviewing court’s deference to the trial court’s determinations.<sup>145</sup> Despite this deferential standard, a reviewing court may order a new trial

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138. *Id.*

139. *See id.*

140. *Id.* at 42.

141. *See, e.g.,* United States v. Stewart, 977 F.2d 81, 83 (3d Cir. 1992) (observing that the trial court is in a better position than the appellate court to weigh the effect of allegedly improper comments by a prosecutor); Domingo-Gomez v. People, 125 P.3d 1043, 1049–50 (Colo. 2005) (deferring to the trial court under plain error review).

142. *See, e.g.,* United States v. Cotton, 535 U.S. 625, 631 (2002); Wend v. People, 235 P.3d 1089, 1097–98 (Colo. 2010).

143. Harris v. People, 888 P.2d 259, 265 (Colo. 1995).

144. *Domingo-Gomez*, 125 P.3d at 1053.

145. *Wend*, 235 P.3d at 1097.

to prevent injustice.<sup>146</sup> Thus, a reviewing court must determine “whether the errors seriously affected the fairness or integrity of the trial.”<sup>147</sup> Misconduct that is “flagrantly, glaringly, or tremendously improper” will warrant plain error reversal.<sup>148</sup>

The particular facts and context of a case are essential to plain error review.<sup>149</sup> Only through an assessment of the totality of the circumstances can a reviewing court accurately decide whether error affected the fundamental fairness of the trial.<sup>150</sup> Often, a non-exhaustive list of factors is considered in an attempt to account for context.<sup>151</sup> For example, courts assess the cumulative effect of a prosecutor’s conduct.<sup>152</sup> If a prosecutor’s poor comments are “few in number, momentary in length, and . . . a very small part of a rather prosaic summation,” then reversal is less likely to be warranted.<sup>153</sup> Likewise, courts look to the nature of the misconduct and the degree of its prejudicial effect.<sup>154</sup> Hence, if a court disapproves of a prosecutor’s language, but the prosecutor nonetheless cabins the language to avoid reflecting her personal opinion, then reversal is less likely to occur.<sup>155</sup> Colorado courts also consider the strength of the other evidence of guilt<sup>156</sup> because the stronger the evidence, the less likely that the jury relied on the prosecutor’s misconduct in deciding to convict.<sup>157</sup> A reviewing court will also consider the trial court’s response to the conduct at issue.<sup>158</sup> If a trial judge *sua sponte*<sup>159</sup> objects and

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146. *Harris*, 888 P.2d at 265.

147. *Wend*, 235 P.3d at 1097 (quoting *Domingo-Gomez*, 125 P.3d at 1053).

148. *People v. Avila*, 944 P.2d 673, 676 (Colo. App. 1997) (quoting *People v. Vialpando*, 804 P.2d 219, 224 (Colo. App. 1990)).

149. *See Crider v. People*, 186 P.3d 39, 43 (Colo. 2008).

150. *Id.*

151. *Domingo-Gomez*, 125 P.3d at 1053 (finding that in plain error review, “[f]actors to consider *include* the language used [and] the context”) (emphasis added).

152. *Wend*, 235 P.3d at 1098.

153. *People v. Mason*, 643 P.2d 745, 753 (Colo. 1982).

154. *Crider*, 186 P.3d at 43.

155. *Id.*

156. *Domingo-Gomez*, 125 P.3d at 1053.

157. *Crider*, 186 P.3d at 43 (finding that the prosecutor’s use of the word “lie” in closing did not warrant reversal because the “physical evidence and the testimony of uninvolved bystanders, as well as the admissions of the defendant himself, left no doubt” about the defendant’s guilt).

158. *Domingo-Gomez*, 125 P.3d at 1053–54.

159. “*Sua sponte*” is Latin for “of one’s own will.” In the trial court setting, *sua sponte* usually refers to a judge’s order that is made without a request by any party to the case. BLACK’S LAW DICTIONARY (9th ed. 2009). For example, in *Wend*, the judge could have *sua sponte* objected to the use of the word “lie” and told the

gives curative instructions to the jury, reversal is less likely.<sup>160</sup> Finally, the defendant's response to the prosecutorial misconduct is also considered.<sup>161</sup> At first blush, inquiring into the defendant's reaction seems odd, because plain error review necessarily implies that the defendant never contemporaneously objected to the prosecutor's conduct.<sup>162</sup> Nevertheless, Colorado finds it probative because "[t]he lack of an objection may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging."<sup>163</sup>

Challenging questions of impropriety arise in various cases because of unique contextual settings. Colorado's flexible totality of the circumstances plain error review is poised to take this into account.<sup>164</sup> Therefore, it is reasonable to predict that contextual factors percolating within the federal system could—and should—be included in future Colorado cases reviewed for plain error, where appropriate.<sup>165</sup> For example, Colorado courts should be willing to consider whether a prosecutor's conduct was deliberate or accidental.<sup>166</sup> Colorado courts should also consider whether the defendant compelled the prosecutor into her misconduct.<sup>167</sup> Indeed, when the defendant invites or forces the prosecutor's conduct, federal courts often will neither reverse nor find the prosecutor's conduct improper, reasoning that because the defendant introduced the matter into the trial, the defendant cannot

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prosecutor to stop using it even though the defendant never objected to the word "lie."

160. See *Domingo-Gomez*, 125 P.3d at 1053–54. Yet, interestingly, where a trial court does not *sua sponte* object, courts also may regard that fact as evidence that the prosecutor's conduct did not seem improper at the time. See *Harris v. People*, 888 P.2d 259, 265 (Colo. 1995).

161. *Domingo-Gomez*, 125 P.3d at 1054.

162. *Id.* at 1053.

163. *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990) (quoting *Brooks v. Kemp*, 762 F.2d 1383, 1397 n.1 (11th Cir. 1985) (en banc), *vacated*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (11th Cir. 1987)).

164. See *Domingo-Gomez*, 125 P.3d at 1053.

165. See *Wend v. People*, 235 P.3d 1089, 1098 (Colo. 2010); *Domingo-Gomez*, 125 P.3d at 1053. The list of factors present in these cases does not explicitly or implicitly suggest that their presence precludes the possibility of other relevant factors. *Wend*, 235 P.3d at 1098; *Domingo-Gomez*, 125 P.3d at 1053.

166. See, e.g., *United States v. Capelton*, 350 F.3d 231, 238 (1st Cir. 2003) (finding that the prosecutor's misquote of the defendant's counsel was unintentional and therefore did not warrant reversal).

167. See, e.g., *United States v. Vázquez-Rivera*, 407 F.3d 476, 484 (1st Cir. 2005) (finding that it was not improper to vouch for the government's witnesses because it was in reaction to defense counsel's attack on the same witnesses).

persuasively claim his right to a fair trial was denied.<sup>168</sup> Regardless of whether these factors find their way into Colorado appellate court opinions, however, plain error review will continue to be an ad hoc assessment of whether the defendant's trial was fundamentally unfair in light of the content and context at issue.

## V. *WEND V. PEOPLE*

The Colorado Supreme Court got right to the point in *Wend*. In the opinion's second sentence, the court asserted that in Colorado the "use of the word 'lie' or any of its other forms is categorically improper."<sup>169</sup> In its fourth sentence, the court reversed *Wend*'s conviction after asserting that the prosecutor's repeated use of the word "lie" in a trial where the defendant's credibility was essential to the defense constituted reversible plain error.<sup>170</sup> Before examining the *Wend* opinion, this Part begins with a review of *Wend*'s factual background in Section A. Next, Section B examines *Wend*'s trial proceedings. Section C then outlines the court's analysis and its two-part holding.

### A. *The Facts of the Case*

Early on Christmas morning, 2002, Jennifer Lee-Renee *Wend* shot her roommate, Michael Adamson.<sup>171</sup> Adamson crawled to his room and died shortly thereafter.<sup>172</sup> *Wend* never contacted the police.<sup>173</sup> Instead, she waited two days before contacting her friend, Randy Anderson.<sup>174</sup> She told Anderson that she had killed Adamson because he had threatened her and her dog with a gun.<sup>175</sup> On December 27, *Wend* spoke to Adamson's friend, Debbie Van Tassel, when Van Tassel called

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168. See, e.g., *United States v. Robinson*, 485 U.S. 25, 31 (1998) (finding that it was not improper for the prosecutor to say that the defendant could have taken the stand where the defense counsel earlier said that the prosecution did not let the defendant explain his side of the story); *Darden v. Wainwright*, 477 U.S. 168, 182 (1986).

169. *Wend*, 235 P.3d at 1091.

170. *Id.*

171. *Id.*

172. *Id.* at 1091–92.

173. Respondent's Answer Brief, *supra* note 3, at 6.

174. *Id.*

175. *Id.* at 7.

Wend's house.<sup>176</sup> Wend told Van Tassel that she could come over.<sup>177</sup> When Van Tassel arrived, Wend told her that Adamson got angry and left on Christmas Eve.<sup>178</sup> Van Tassel returned to Adamson's house on December 28 and 29 and asked Wend if she could enter Adamson's bedroom.<sup>179</sup> Wend said no—probably because Adamson's body was still in the room.<sup>180</sup> Undeterred, Van Tassel climbed up a ladder to reach Adamson's open bedroom window and looked inside as Wend yelled at her from below, telling her not to go into the room.<sup>181</sup>

On December 31, six days after Adamson was killed, Anderson moved Adamson's body out of the house and helped Wend move her belongings out as well.<sup>182</sup> On January 1, Van Tassel reappeared at Wend's house and went into Adamson's room to retrieve Adamson's address book.<sup>183</sup> When Van Tassel entered the room she noticed that the room smelled.<sup>184</sup> After pulling back an area of carpet that hid blood on the floor, Van Tassel promptly fled the house.<sup>185</sup> The police were contacted and proceeded to search the house.<sup>186</sup>

On January 3, after the police searched her house, Wend spoke to the police about Adamson's disappearance for the first

176. *Id.* Van Tassel had tried several times to reach Adamson in the previous four days. *Id.*

177. *Id.*

178. *Id.* Wend told Van Tassel that Adamson went to Las Vegas, Nevada or Cripple Creek, Colorado. *Id.* at 7–8.

179. *See id.* at 8. Wend also said she was packing up and leaving because Adamson had kicked her out. *Id.* at 7–8.

180. *See id.*

181. *Id.* at 8.

182. *See id.* at 7. Three days later, Anderson took the body to a Castle Rock dump and hid it inside an abandoned refrigerator. *Id.*

183. *Id.* at 8. Van Tassel probably went into Adamson's room without Wend's permission, as Van Tassel again used a ladder to reach Adamson's bedroom window. *Id.* The reason Van Tassel was intent on getting into Adamson's room was probably not because she was suspicious that Adamson was dead. Rather, Van Tassel was allegedly Adamson's "dope runner," and she had previously expressed a desire to rob him. The defense also presented evidence suggesting that a number of people "rummag[ed] through" Adamson's house. In fact, Anderson might have taken Adamson's methamphetamine laboratory and surveillance equipment. *See* Opening Brief of Defendant-Appellant at 5, *People v. Wend*, No. 07CA1283, 2008 WL 5009627 (Colo. App. Nov. 26, 2008), 2007 WL 4938467, at \*5.

184. Respondent's Answer Brief, *supra* note 3, at 8.

185. *Id.*

186. *Id.* They noticed both a rotten and a Pine-Sol odor, a blood stain in Adamson's room, and cleaning products strewn throughout the house but, of course, found no body. *Id.* at 8–9.

time.<sup>187</sup> She told police that she last saw Adamson on Christmas day, during which they fought right before she went to sleep.<sup>188</sup> She also claimed that she received a text message from Adamson the next day notifying her that he was in Las Vegas.<sup>189</sup> She told police that she thought Adamson was still alive but did not know where he was.<sup>190</sup>

However, the course of events was about to shift dramatically. A few days after Wend's first police interview, Anderson confessed to his role in Adamson's disappearance, agreed to plead guilty to an accomplice charge, and began cooperating with the state.<sup>191</sup> The police set up a second interview with Wend,<sup>192</sup> during which Wend initially denied any knowledge of the shooting.<sup>193</sup> Moments later, she changed her mind and said that Anderson killed Adamson.<sup>194</sup> Finally, Wend admitted to shooting Adamson.<sup>195</sup> She said it was in self-defense.<sup>196</sup>

Wend's self-defense argument was supported by tragic evidence. Adamson was a "methamphetamine manufacturer, dealer, and chronic user for at least seventeen years" with an "unrequited infatuation" for Wend.<sup>197</sup> Adamson apparently escalated his drug use in late 2002 and became so depressed that he attempted suicide.<sup>198</sup> He once bought two guns, gave one to Wend, and proceeded to tell people that "either [he or Wend] would go to jail for murder" and that "[i]f I'm lucky, [Wend will] shoot herself."<sup>199</sup> Previously, Adamson spoke of raping and killing Wend, spied on her with his surveillance equipment, and even put a gun to Wend's head.<sup>200</sup> Wend told

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187. *Id.* at 9.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Wend v. People*, 235 P.3d 1089, 1092 (Colo. 2010). Specifically, Anderson told the police about Wend's cover-up and showed the police the body's whereabouts. Wend was arrested the same day. Respondent's Answer Brief, *supra* note 3, at 9.

192. *Wend*, 235 P.3d at 1092.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Opening Brief of Defendant-Appellant, *supra* note 183, at 2. Apparently, Adamson imposed a sex-for-rent scheme. *Wend*, 235 P.3d at 1091.

198. Opening Brief of Defendant-Appellant, *supra* note 183, at 2.

199. *Id.* at 3.

200. *Id.*

people she feared for her life.<sup>201</sup> One night Wend even dialed 911 just so the dispatcher could listen to Adamson threatening to shoot Wend.<sup>202</sup>

According to Wend, on the night of the shooting, Adamson was angry and demanded that she have sex with him.<sup>203</sup> Both were high on methamphetamine, and they began to argue.<sup>204</sup> When she went to her room, Adamson followed, his gun pointed at her.<sup>205</sup> He said he was going to kill her.<sup>206</sup> Although she had heard this before, Wend claimed that the look in Adamson's eyes that night made her believe he was serious this time.<sup>207</sup> So when Adamson pointed his gun at Wend's dog after it began to growl, Wend took the opportunity to shoot him with her own gun.<sup>208</sup>

### B. Trial Proceedings

At her trial for first-degree murder, Wend maintained that she killed Adamson in self-defense.<sup>209</sup> During trial, videos of both interrogations of Wend were introduced into evidence.<sup>210</sup> Those videos included the statements noted above, as well as her statement to the police that "I have not been telling you the truth," which accompanied her January 17 admission that she did in fact shoot Adamson.<sup>211</sup> The prosecutor repeatedly used

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* Adamson's autopsy revealed a methamphetamine level three times the lethal range. He also had an amphetamine level in the lethal range, "thirty plus times" any therapeutic level, and alcohol in his system equivalent to one or two drinks. The coroner determined that Adamson's drug combination would have been lethal to anyone other than a chronic abuser. *Id.* at 4–5. Methamphetamine at this high dosage and chronic use can cause "psychosis, paranoia, visual and auditory hallucinations, aggression, extraordinary strength, and a complete lack of judgment." *Id.* at 5.

205. *Id.* at 3.

206. *Id.* Wend's report of Adamson's verbal abuse is chilling. She claimed that he called her "a piece of shit [who] deserved to die . . . deserved to be eliminated" and "didn't have any family who would give a fuck anyway." *Id.* (second alteration in original).

207. *Id.*

208. *Wend v. People*, 235 P.3d 1089, 1091 (Colo. 2010).

209. *Id.* at 1092.

210. *Id.* The prosecutor played segments of the video for the jury in conjunction with questioning the government's witness, Detective Graham, who interrogated Wend in both interviews. *Id.*

211. Respondent's Answer Brief, *supra* note 3, at 42. The prosecutor misquoted Wend in his closing slightly, saying that she said, "I haven't been honest with you from the beginning." *Wend*, 235 P.3d at 1092.

the word “lie”—particularly in his opening and closing—when referencing Wend’s interviews.<sup>212</sup> For example, during his opening statement, the prosecutor referred to the video interrogations and told the jury, “you’ll hear lie after lie after lie after lie from Jennifer Wend about what happened to Michael Adamson” and “for about the first half of [the interrogation video,] same lies, same lies.”<sup>213</sup> At trial, the prosecutor played segments of the videotaped interviews while Detective Derek Graham, who conducted both of Wend’s interviews, was on the stand.<sup>214</sup> After playing various segments, the prosecutor asked Graham a number of questions, including Graham’s sense of the veracity of Wend’s comments.<sup>215</sup> Graham stated that Wend was “lying” at different stages of the interview.<sup>216</sup> And, in closing, the prosecutor began by saying:

“I shot him.” “I haven’t been honest with you from the beginning.” “I’m the one who shot him.” January the 17th, 2003, the defendant tells that to Detective Derek Graham after weeks of games, calling back and forth, of lies and lies and lies and lies. You could hardly keep count of all the lies told in two interviews . . . .<sup>217</sup>

The prosecutor continued with more discussion of what the Colorado Supreme Court described as Wend’s “misleading”<sup>218</sup>

212. *Wend*, 235 P.3d at 1092. The defense raised prosecutorial misconduct issues aside from opening and closing, including: asking Anderson and Van Tassel whether Wend lied on specific occasions, goading a detective into testifying about Wend’s truthfulness on specific occasions, arguing in closing that Wend would sell drugs if she were released, and divulging personal opinions about the defendant and her defense counsel. Respondent’s Answer Brief, *supra* note 3, at 11–12.

213. *Wend*, 235 P.3d at 1092 (alteration in original).

214. *Id.* at 1092 n.1.

215. *Id.* Notably, the prosecutor did not use the word “lie” in his exchanges with Graham. Instead, he asked if Wend was truthful. *Id.* This can be just as improper as using the word “lie” under a totality of the circumstances review. *United States v. Thomas*, 246 F.3d 438, 439 n.1 (5th Cir. 2001) (finding that the prosecutor’s statement that the defense witness was not telling the truth was improper). Yet, because the Colorado Supreme Court thinks that using the word “lie” is always improper, it is odd that the opinion did not comment on the difference in form.

216. *Wend*, 235 P.3d at 1092 n.1.

217. *Id.* at 1092–93.

218. *Id.* at 1093. The *Wend* opinion, of course, never calls Wend’s statements lies. But an awkward dichotomy of form does emerge in the court’s opinion. While vigorously disapproving of the prosecutor’s use of the word “lie” to describe Wend’s actions, the opinion refers to the same actions by Wend as “misleading” or “actively misleading.” *Id.* at 1092 n.1, 1093. For now, ponder the substantive

comments. In the middle of his closing argument, the prosecutor gave a particularly inelegant narrative, saying, “[t]he people propose that the defendant was at least waist deep in denial, if not over her head. . . . Oh, and [Anderson] did it. Yeah, yeah, [Anderson]. *The fucking liar.*”<sup>219</sup> The phrase “the fucking liar” was the prosecutor’s attempt to quote the pinnacle of Wend’s second interview, where she called Anderson “a fuckin’ liar” after learning that Anderson had confessed to his role and told the police that Wend killed Adamson.<sup>220</sup> The court was quite clearly displeased with the prosecutor’s restatement of that phrase.<sup>221</sup> Defense counsel, however, did not object to the prosecutor’s use of the phrase.<sup>222</sup>

Notably, at trial, Wend’s counsel also acknowledged that Wend lied in her police interviews.<sup>223</sup> In opening statements, defense counsel referred to the interrogation interviews and said, “[Wend] does lie to people about what happened to Michael Adamson. She lies because she’s afraid of what’s going to happen to her if she tells the truth.”<sup>224</sup> In closing, defense counsel again repeatedly admitted that Wend “lied,” first saying, “[y]es, Jennifer Wend lied. . . . She lied to a number of people. She lied about what happened . . . .”<sup>225</sup> Defense counsel continued: “And Jennifer Wend told a lie, and it takes on a life of its own. That lie had been told. . . . [S]he continued with it, and continued with it, and continued with it until there was no place left to go but to the truth.”<sup>226</sup> He also later said: “[Wend] didn’t trust the police, that’s why she lied, ladies and gentlemen. She didn’t lie because she didn’t act in self-defense, she lied because she figured whatever happened, it was gonna be the same result.”<sup>227</sup> Given defense counsel’s own statements, it should come as no surprise that he never objected to the prosecutor’s use of the word “lie” during trial.<sup>228</sup> The presiding judge did not find anything wrong with both sides’ use of the

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distinction between lying to someone and actively misleading someone. The issue is discussed *infra* Part VI.A.1.

219. *Wend*, 235 P.3d at 1093 (emphasis added by the court).

220. *See id.*

221. *See id.*

222. *Id.*

223. *Id.* at 1092.

224. *Id.* (alteration in original).

225. Respondent’s Answer Brief, *supra* note 3, at 65 (second alteration in original).

226. *Id.*

227. *Id.*

228. *Wend*, 235 P.3d at 1093.

word “lie” either; he did not request that either attorney change the way Wend’s video statements were characterized.<sup>229</sup>

### C. *The Colorado Supreme Court’s Analysis*

In *Wend*, the Colorado Supreme Court cited to, and claimed to be using, the traditional prosecutorial misconduct framework.<sup>230</sup> The court said that the first step in the two-step analysis for prosecutorial misconduct is determining “whether the prosecutor’s questionable conduct was improper based on the totality of the circumstances.”<sup>231</sup> But the court never actually applied the traditional totality of the circumstances framework.<sup>232</sup> Instead, the court held that, in Colorado, “prosecutorial use of the word ‘lie’ and the various forms of ‘lie’ are categorically improper.”<sup>233</sup> The categorical prohibition is based on two assumptions. First, that “[t]he word ‘lie’ is such a strong expression that it necessarily reflects the personal opinion of the speaker.”<sup>234</sup> Second, when prosecutors, as state representatives, use the word “lie,” this has the dangerous potential of inflaming the passions of the jury and distracting it from determining guilt or innocence on evidence properly presented at trial.<sup>235</sup> Of course, because the court determined that a prosecutor’s use of the word “lie” is categorically improper, the court did not reference or analyze context.<sup>236</sup>

Next, the court considered whether the prosecutor’s improper conduct warranted reversal according to the proper standard of review—in this case plain error because defense counsel did not object at trial.<sup>237</sup> The court noted that

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229. *See id.* at 1092–93. The court never expressly said that the trial judge did not object to the use of the word “lie,” but the word’s pervasive presence demonstrates that the judge did not tell either counsel to stop using the word. *See id.*

230. *See id.* at 1096.

231. *Id.*

232. *See id.*

233. *Id.*

234. *Id.* (alteration in original) (quoting *Domingo-Gomez v. People*, 125 P.3d 1043, 1050 (Colo. 2005)).

235. *Id.*

236. *Id.* The court disposes of the first step of its analysis in three brief paragraphs. *Id.* This is reasonable in light of its categorical rule. On the other hand, the traditional prosecutorial misconduct framework and its incorporation of context (which the court stated it was applying) would make the conclusory section wholly inadequate.

237. *Id.* at 1096–97. No contemporaneous objections to the prosecutor’s opening and closing statements were made, resulting in plain error review. However, the

traditional plain error review requires maximum deference to the trial court and that reversal occurs only where errors seriously affect the fairness and integrity of the trial.<sup>238</sup> The court also stated that a fair trial is determined by “the particular facts and context of the given case, because only through an examination of the totality of the circumstances can the appellate court deduce whether error affected the fundamental fairness of the trial.”<sup>239</sup> In accounting for context, the court considered the cumulative effect of the prosecutor’s statements, the exact language used, the degree of prejudice associated with the misconduct, the surrounding context, and the strength of the other evidence of guilt to be probative factors.<sup>240</sup>

The court then held that plain error review warranted reversal in the case because the repeated use of the word “lie” was improper and the context surrounding the statements failed to substantially mitigate their prejudicial impact.<sup>241</sup> The court found that the context actually aggravated the use of the word “lie” because Wend’s self-defense argument depended largely on the defendant’s credibility.<sup>242</sup> The court reasoned that the context imputed a “heightened degree of prejudice because the prosecution, with its inflammatory and extraneous language, improperly led the jury to distrust Wend.”<sup>243</sup>

The court in *Wend* compared and contrasted the case’s particular contextual dynamics to previous cases that upheld similar prosecutorial conduct under plain error review.<sup>244</sup> For example, *Wend* noted that *Domingo-Gomez* was not reversed on plain error review even though that prosecutor called the defendant a “liar” in closing.<sup>245</sup> *Wend* distinguished *Domingo-Gomez*, noting that in *Domingo-Gomez*, once the judge interjected *sua sponte* to disapprove of the prosecutor’s use of the word “lie,” the prosecutor adjusted his wording to say that

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defendant did object to some of the prosecutor’s direct examination questions that tended to elicit witnesses’ opinions of Wend’s truthfulness. The court declined to address whether or not these objections preserved review for other statements regarding Wend’s propensity to “lie,” focusing instead on the prosecutor’s opening and closing statements. *Id.* at 1099 n.6.

238. *Id.* at 1097.

239. *Id.* at 1098.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

the defendant “did not tell you the truth.”<sup>246</sup> Accordingly, the judge’s objection and prosecutor’s correction made reversal unwarranted.<sup>247</sup> The *Wend* court therefore felt *Domingo-Gomez*’s situation was similar only because in both cases the defense failed to object at trial.<sup>248</sup> Yet, immediately after explaining that *Domingo-Gomez* was not factually similar, the *Wend* court found that the absence of *Domingo-Gomez*’s mitigating factors counted against the prosecutor in *Wend*.<sup>249</sup> Specifically, the court suggested that because he did not use “weaker” euphemistic words such as “untruthful” alongside the “stronger” word of “lie,” the prosecutor’s use of the word “lie” in *Wend* was actually worse.<sup>250</sup>

After disposing of *Domingo-Gomez*, the court favorably compared *Wend* to *Wilson v. People*, a sexual assault case that had warranted plain error reversal.<sup>251</sup> In *Wilson*, a prosecutor stated that the defendant and his wife had lied on the stand.<sup>252</sup> No contemporaneous objection occurred, but because the sexual assault charges depended primarily on conflicting testimony between the victim, the defendant, and the defendant’s wife, the court held that plain error warranted reversal due to the inherently critical role credibility plays in a sexual assault defense.<sup>253</sup> The *Wend* court concluded that, as in *Wilson*, credibility was a critical issue in the case.<sup>254</sup> Thus, the court held that the pervasive use of the word “lie” denied *Wend* a fair trial.<sup>255</sup>

The court’s plain error, totality of the circumstances review therefore weighed, on the one hand, the following aggravating factors: (1) the cumulative nature of the word “lie”; (2) the absence of clear evidence undermining *Wend*’s self-defense theory; (3) the court’s failure to *sua sponte* correct the prosecutor; (4) the absence of weaker language alongside the word “lie”; and (5) the relevance of the defendant’s credibility to

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246. *Id.*

247. *Id.*

248. *Id.*

249. *See id.* at 1098–99.

250. *Id.* As a factual matter, the court is incorrect to say that the prosecutor did not use weaker comments. *See id.* at 1098. The prosecutor did use euphemisms like “untruthful” throughout trial. *See, e.g.*, Respondent’s Answer Brief, *supra* note 3, at 67.

251. *Wend*, 235 P.3d at 1099.

252. *Wilson v. People*, 743 P.2d 415, 417 (Colo. 1987).

253. *Id.* at 420–21.

254. *Wend*, 235 P.3d at 1099.

255. *Id.*

her theory of the case.<sup>256</sup> On the other hand, the court did not acknowledge the existence of a single potentially mitigating factor.<sup>257</sup>

## VI. WHERE THE COLORADO SUPREME COURT WENT WRONG IN *WEND*

The final Part of this Note makes two broad arguments. First, the Colorado Supreme Court's categorical rule prohibiting prosecutors from using the word "lie" is premised on dubious assumptions and is ultimately a rule of form more than substance. Second, the court's plain error review lacks the necessary completeness to be a genuinely impartial accounting of whether *Wend* was truly denied a fair trial.<sup>258</sup> Therefore, Section A of this Part begins with an argument against *Wend*'s categorical rule prohibiting the word "lie." Section B then critiques *Wend*'s failure to confront relevant, contextually mitigating factors that weighed against reversal in its plain error review. The failure to address these factors is particularly regrettable considering the court's elimination of context from the first step of its prosecutorial misconduct framework.

### A. *Calling the Word "Lie" Categorically Improper Is Unnecessary and Elevates Form over Substance*

As an initial matter, the court's opinion is structurally disappointing and confusing in the way it set up the first part of its analysis. The court claimed to apply the first step of the traditional two-part analysis for prosecutorial misconduct when it said it must determine "whether the prosecutor's questionable conduct was improper based on the totality of the

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256. *See id.* at 1097–99.

257. *See id.*

258. While this Note questions the forcefulness, wisdom, and thoroughness of *Wend*, it is in no way intended to suggest either that the prosecutor's constant use of the word "lie" was clearly proper or that the prosecutor's conduct in *Wend* clearly did not warrant reversal. Pre-*Wend* prosecutorial misconduct jurisprudence, specifically as it relates to the use of the word "lie," admittedly makes the court's finding of impropriety reasonable, even if the court's categorical rule is unnecessary. Likewise, although the finding of plain error is quite questionable, it is also true that aspects of this case make the court's decision justifiable. This was a challenging case; given *Wend*'s unique facts, whatever decision the court made, it was going to subject itself to scrutiny from the losing side.

circumstances.”<sup>259</sup> But the court never engaged in a totality of the circumstances review. Instead, it created (or, at minimum, further expanded)<sup>260</sup> a contradictory rule when it held that a prosecutor’s use of the word “lie” is categorically improper.<sup>261</sup> The court therefore held that it is categorically improper to use the word “lie” without addressing the fact that a categorical rule contradicts the totality of the circumstances framework that the court claimed to be using.<sup>262</sup> This rule necessarily implies that the traditional framework does not apply to all forms of prosecutorial misconduct. Implicitly avoiding a longstanding framework as applied to one word creates confusion. But *Wend*’s opinion went one step further. It implicitly avoided a longstanding framework as applied to one word while it claimed to be using the very same framework that it avoided.

Ultimately, the implicit disregard for the traditional prosecutorial misconduct framework is a mere collateral concern to the bigger question of the categorical rule’s wisdom. *Wend*’s categorical rule is unwise for three reasons. First, the two justifications that the court gave do not warrant the categorical rule. Second, the categorical rule elevates form over substance because it forecloses any inquiry into context, which

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259. *Wend*, 235 P.3d at 1096.

260. *Wend* asserts that *Crider v. People*, 186 P.3d 39, 41–42 (Colo. 2008), and *Domingo-Gomez v. People*, 125 P.3d 1043, 1050–51 (Colo. 2005), explicitly held that a prosecutor’s use of the word “lie” was categorically improper. *Wend*, 235 P.3d at 1096. Those cases did no such thing. *Domingo-Gomez*, although clearly distrustful of prosecutors’ use of the word “lie,” neither expressly nor categorically prohibited its use. See *Domingo-Gomez*, 125 P.3d at 1048–51 (finding the use of the word “lie” to describe *witness testimony* improper because it was an improper statement of personal opinion). In fact, *Crider* supports the idea that *Domingo-Gomez* did not make an express rule by citing to *Domingo-Gomez*’s discussion about the impropriety of using the word “lie” to describe *witness testimony* with a “see” citation, thereby acknowledging an inferential rather than express rule. *Crider*, 186 P.3d at 41. And while *Crider* does make an express rule about the use of the word “lie,” the rule is both broader and narrower in scope than *Wend*’s categorical rule. Compare *id.* at 44 (“[T]here should be no question that it is improper in this jurisdiction for an attorney to characterize a *witness’s testimony* or his character for truthfulness with any form of the word ‘lie.’”) (emphasis added), with *Wend*, 235 P.3d at 1096 (“[P]rosecutorial use of the word ‘lie’ and the various forms of ‘lie’ are categorically improper.”) (emphasis added). The distinctions matter in *Wend* because the statements by the prosecutor did not refer in any way to witness testimony, which is what *Crider* and *Domingo-Gomez* contemplate. Thus, neither the *Crider* rule nor the *Domingo-Gomez* rule squarely covers the factual scenario confronted in *Wend*, which might explain its more expansive holding.

261. *Wend*, 235 P.3d at 1096.

262. *Id.*

is essential to an accurate determination of whether a statement is improper. The inquiry also enables for more flexible rulings when it serves the interest of justice. Third, the court's rule is unnecessary because the traditional rule adequately ensures that defendants receive fair trials. This Section will discuss these three topics in turn.

### 1. The Categorical Rule's Justifications Are Inadequate

*Wend's* categorical rule is founded upon two justifications.<sup>263</sup> First, “[t]he word ‘lie’ is such a strong expression that it necessarily reflects the personal opinion of the speaker.”<sup>264</sup> Second, “the word ‘lie’ is an inflammatory term, likely (whether or not actually designed) to evoke strong and negative emotional reactions against the witness.”<sup>265</sup> These are not compelling justifications for a categorical prohibition against prosecutors’ use of the word “lie.”

The first justification—that the word “lie” necessarily reflects the personal opinion of the speaker—is questionable for several reasons. First, it misconstrues the complex dynamic between facts and opinions.<sup>266</sup> “[F]acts’ and ‘opinions’ are regions in a continuum, and they differ in degree rather than kind . . . .”<sup>267</sup> This continuum concept—where some statements are almost wholly fact, other statements are almost wholly opinion, and yet other statements are in an ethereal position of seemingly being neither wholly fact nor opinion—is an observation of linguistics and logic applicable to matters of all dialogue, including a prosecutor’s use of the word “lie.” Accordingly, the claim that a prosecutor’s use of the word “lie” necessarily imputes a prosecutor’s opinion into a case ignores that, in reality, a prosecutor’s use of the word “lie” can be a statement of fact in the right context.<sup>268</sup>

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263. *See id.*

264. *Id.* (alteration in original) (quoting *Domingo-Gomez*, 125 P.3d at 1050).

265. *Id.* (quoting *Crider*, 186 P.3d at 41).

266. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 605 (6th ed. 2008).

267. *Id.* Mueller’s and Kirkpatrick’s point is relevant to *Wend’s* theory that the use of the word “lie” is necessarily an opinion. It should be noted, however, that they make their observation in the context of introducing another form of trial dialogue: opinion and expert testimony. *Id.* at 605–06.

268. *See, e.g.,* *United States v. Gartmon*, 146 F.3d 1015, 1023–25 (D.C. Cir. 1998) (finding that the prosecutor calling the defendant a liar was not improper

Where a prosecutor nakedly asserts to a jury that a witness's trial testimony was a "lie," with nothing to substantiate the statement, the prosecutor's words seem accurately classified as a statement tending toward opinion.<sup>269</sup> But *Wend's* circumstances make it a unique, and therefore informative, case. The prosecutor's statements were almost certainly factual observations. Recall that the prosecutor classified comments Wend made during her interviews as lies in the following context: (1) Wend admitted in her second interview that she had been lying;<sup>270</sup> (2) the statements giving rise to Wend's admission to lying were captured on video and introduced into evidence;<sup>271</sup> (3) at trial, Wend's lawyer conceded multiple times during opening and closing that Wend lied;<sup>272</sup> and (4) the trial judge, through his silence, apparently also thought that the fact that Wend lied was beyond dispute.<sup>273</sup>

The most likely reason that neither defense counsel nor the judge objected to the prosecutor's classification of Wend's interrogation statements as lies is that the only reasonable explanation for her various incompatible comments is that Wend did lie. Indeed, aside from the possibility of Wend having lied, the only conceivable explanation for the discrepancies among her statements is that Wend was mentally infirm during her interviews. Consider just one example of the wholly contradictory statements that Wend made. She told the police that (1) Adamson was alive, (2) Anderson killed Adamson, and (3) she killed Adamson in self-defense.<sup>274</sup> Each one of those statements is logically irreconcilable with the other two. They can never exist together, and no rational individual could believe each one to be true at the same time. Moreover, the mental infirmity possibility, while very unlikely to begin with, is almost wholly implausible considering Wend was not found too incompetent to stand trial or insane.<sup>275</sup> Realistically, Wend's counsel was probably correct when he chalked Wend's

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because the word was an accurate description of the conduct alleged and not a statement of opinion).

269. See, e.g., *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987).

270. *Wend*, 235 P.3d at 1092–93.

271. *Id.* at 1092.

272. *Id.*

273. See *id.* at 1098–99.

274. *Id.* at 1092; Respondent's Answer Brief, *supra* note 3, at 9.

275. See *Wend*, 235 P.3d at 1092 (reviewing Wend's trial, meaning she was not deemed incompetent to stand trial).

lies up to Wend being scared of the consequences of the police finding out about Adamson's death.<sup>276</sup>

Some of the Colorado Supreme Court's very own prose suggests that Wend's statements were lies. The court certainly never called Wend's statements "lies," even though *Wend's* context suggests that the prosecutor's use of the word "lie" was a correct observation of fact and not a statement of opinion. Yet, the court described Wend's statements in a disconcerting manner. While it vigorously disapproved of the prosecutor's use of the word "lie" to describe Wend's actions, the opinion refers to the same actions by Wend as "misleading" or "actively misleading."<sup>277</sup> There is no substantive distinction between someone who "lies" and someone who "misleads"; those two words are synonyms.<sup>278</sup> The court's prose therefore puts the *Wend* opinion in an absurd posture because it condemned as improper the prosecutor's description of Wend's statements while describing Wend's statements in an essentially identical manner.

Most importantly, the logical implications of *Wend's* categorical rule are troubling when viewed in light of the court's first justification for it. If some of Wend's statements were in fact lies, or at least in *some* cases whether someone lied is a knowable fact, then the uncomfortable reality is that the court's categorical rule makes it improper for a prosecutor to refer to probative facts properly admitted into evidence and accepted by all parties involved.

Alternatively, even assuming that prosecutors do necessarily express their personal opinion when they use the word "lie," this still does not justify the categorical rule's sweeping nature. Prosecutors do receive a reasonable (and linguistically vital) degree of flexibility in espousing personal opinions rooted in evidence.<sup>279</sup> During argument, prosecutors may discuss trial evidence and reasonable inferences gleaned from that evidence.<sup>280</sup> When a prosecutor puts forth an inference drawn from trial evidence, she is usually expressing her personal opinion. In *Wend*, the prosecutor's use of the word "lie" in opening, in closing, and even during the direct

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276. *Id.*

277. *Id.* at 1092 n.1, 1093.

278. *E.g.*, ROGET'S INTERNATIONAL THESAURUS 275 (Barbara Ann Kipfer ed., 6th ed. 2001).

279. *See* *People v. Rodriguez*, 794 P.2d 965, 975 (Colo. 1990).

280. *Id.*

examination of Detective Graham were, if not statements of fact, at least reasonable inferences gleaned from evidence properly admitted in trial.<sup>281</sup> After all, both interviews were admitted at trial, so the jury saw Wend's inconsistent statements and also saw her admit to lying at the end of the second interview.<sup>282</sup>

At a minimum, surely there are *some* cases for which use of the word "lie" would be considered a reasonable inference from trial evidence.<sup>283</sup> Accordingly, ruling that a prosecutor's use of one word is categorically improper on the premise that it invokes the prosecutor's opinion outruns the justification behind it. A prosecutor does not always invoke her opinion when she says the word "lie," and it is not categorically improper for a prosecutor's opinion to be put to the jury.

The court's second justification for its new categorical rule is that, when prosecutors use the word "lie," the word has the dangerous potential of inflaming the passions of the jury and distracting it from determining guilt or innocence on the evidence properly presented at trial.<sup>284</sup> This is another tenuous justification for a categorical rule. Sometimes evidence properly admitted at trial is the very basis for the prosecutor's claim that a defendant or witness lied.<sup>285</sup> In such instances, with *Wend* being an example, the use of the word "lie" does not distract the jury from evidence properly admitted at trial but instead points them toward it. Moreover, inflaming jurors' passions can certainly be acceptable if it is the result of referring to evidence at trial or making reasonable inferences from that evidence.<sup>286</sup>

What is legally prohibited is inflaming the passions of jurors through statements bearing no relation to evidence admitted at trial or making arguments related to evidence but "calculated to appeal to the prejudices of the jury," both of which may lead a jury to base its decision on factors outside the

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281. See *Wend*, 235 P.3d at 1091–93.

282. *Id.* at 1092 n.1.

283. See, e.g., *United States v. Beaman*, 361 F.3d 1061, 1065–66 (8th Cir. 2004) (finding that it was not improper for the prosecutor to state that a witness lied to police out of fear because it was a reasonable inference from trial evidence).

284. *Wend*, 235 P.3d at 1096.

285. See *id.*

286. Compare *People v. Rodriguez*, 794 P.2d 965, 974–75 (Colo. 1990), with *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005) (quoting COLO. R. PROF'L CONDUCT 3.4(e)).

evidence presented at trial.<sup>287</sup> Accordingly, even granting that a prosecutor's use of the word "lie" has the dangerous potential of inflaming the passions of the jury, the court's rule overextends itself beyond its justification because sometimes the word "lie" can be used to directly address evidence and is in no way calculated to inflame the jurors' passions. The word "lie" should be permitted in those circumstances where its use directs the jurors toward the evidence and does not appear to have been used to inflame the jurors' passions but instead to properly describe a piece of evidence. Therefore, neither of the court's justifications warrants the court's categorical rule.

## 2. The Categorical Rule Elevates Form over Substance by Foreclosing Any Contextual Inquiry

The previous Section demonstrated that the court's categorical rule is not warranted by either of the court's justifications for it. This Section will show that because context can shape the ultimate meaning of a statement, which the Colorado Supreme Court has recognized in other cases,<sup>288</sup> *Wend's* categorical rule elevates form over substance by foreclosing any inquiry into context. The court's categorical rule will inevitably lead to cases where conduct is deemed improper due to its form, while in substance the conduct is proper. To the extent that this is true, the court does the judicial system a disservice by using a specific word as a proxy for a statement's categorical substantive impropriety.

Even though the court ultimately concluded that the prosecutor's repeated use of the word "lie" was improper in light of the defendant's self-defense argument, the court should have grappled with the contextual factors relevant to its impropriety and left itself the flexibility to decide future cases that involve the use of the word "lie" differently. After all, other reasonable first-step conclusions can apply to *Wend* or cases similar to it. For example, *Wend's* facts suggest that the court could have concluded, as the court in *United States v. Gartmon* did, that the prosecutor's use of the word "lie" in this context was not improper because the prosecutor did not assert an

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287. *Domingo-Gomez*, 125 P.3d at 1049 (emphasis removed) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE § 3-5.8(c) (3d ed. 1993)).

288. *See, e.g., id.* at 1050 ("Factors to consider when determining the propriety of statements include the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction.").

opinion but correctly described the conduct in question.<sup>289</sup> *Wend*'s facts also lead to the conclusion, found in *United States v. Moreland*, that calling a defendant a liar is not improper where it is a reasonable inference from the evidence.<sup>290</sup> As a final option, the court could have determined, like in *United States v. Virgen-Moreno*, that the prosecutor's use of the word "lie" was not improper because the defendant's own conduct was what invited the prosecutor to use the word.<sup>291</sup> Justice Oliver Wendell Holmes once noted that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."<sup>292</sup> Regardless of its rule, Colorado's Supreme Court cannot escape the reality that the ultimate meaning—and impropriety—of the word "lie" cannot be summarily reduced to the statement's content.

### 3. The Traditional Prosecutorial Misconduct Framework Is Adequate

If the categorical rule in *Wend* was in fact correct, then one of two disturbing implications would logically follow. Because the new rule discards the first-step analysis of the traditional rule by not looking into context, it suggests that either the use of the word "lie" is unique from all other potential forms of misconduct or the first step of the traditional prosecutorial misconduct test is generally insufficient. Notably, in *Wend*, the court never tried to distinguish the word "lie" from other forms of improper conduct, and understandably so.<sup>293</sup> It is hard to fashion a compelling argument that the word "lie" is somehow distinct from all other verbal forms of potential misconduct.<sup>294</sup>

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289. See *United States v. Gartmon*, 146 F.3d 1015, 1023–24 (D.C. Cir. 1998) (finding that calling the defendant a liar and abusive toward women was not improper because the words were not expressions of opinion but rather correct descriptions of the alleged conduct).

290. See *United States v. Moreland*, 622 F.3d 1147, 1162 (9th Cir. 2010).

291. See *United States v. Virgen-Moreno*, 265 F.3d 276, 292 (5th Cir. 2001) (finding that the prosecutor's rebuttal comments referring to the defendant's failure to call witnesses were not improper because they were made in response to the defense's argument).

292. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

293. See *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

294. Maybe the reason the court never acknowledged that it was departing from its traditional misconduct analysis was that it could not form a cogent

However, devising that argument is no easier than arguing that the first step of the traditional framework is incapable of adequately protecting defendants from prosecutorial misconduct. For example, if the traditional framework's contextual first step is truly inadequate, that would suggest that a prosecutor's misstatement of fact is always improper. An outcome of that sort would render the term "improper" meaningless as a legal term of art in light of the unrehearsed nature of a trial setting and the imperfections of human memory and dialogue.

Regardless of whether the court believes that the word "lie" is different from all other forms of misconduct or instead believes that the traditional framework is insufficient, the court is incorrect. The new rule does not protect defendants from improper conduct that they were not already protected from. Indeed, anything deemed categorically improper can also be found improper under a totality of the circumstances review. The traditional rule protects defendants from the denial of a fair trial and was capable of doing so in *Wend*.<sup>295</sup>

#### *B. The Court's Plain Error Review Is Inadequate*

Probably the most disappointing aspect of the *Wend* decision is its plain error analysis. Although the court engaged in a contextual inquiry in its plain error review, it evaded tough issues that the case presented and that the court should have confronted. This Section argues that the court's plain error review thoroughly discussed only contextual factors in favor of reversal, distorted the impact of certain mitigating factors, and wholly failed to address other factors that it had a duty to confront. Subsection 1 begins with a review of the contextual issues that the court did address. Then, Subsection 2 looks at those contextual factors that the court had an obligation to address but did not. In light of the court's decision to forgo the traditional, context-driven first-step analysis in *Wend*, the inadequacy of the court's plain error review is disappointing because it foreclosed an appropriate contextual inquiry in the case. The court's plain error review also raises

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explanation for why this one form of misconduct is distinct enough to justify its own rule.

295. See, e.g., *Wilson v. People*, 743 P.2d 415 (Colo. 1987). The Colorado Supreme Court found *Wilson* to be the most analogous case to *Wend*. *Wilson* was reversed under the traditional test. See *Wend*, 235 P.3d at 1099.

concerns about whether the court was completely focused on the question of whether Wend was actually denied a fair trial.

### 1. *Wend's* Context According to the Court

To some extent, *Wend's* plain error review did look to both content and context.<sup>296</sup> In holding that the repeated use of the word "lie" merited reversal, the court found that the context actually aggravated the word's use.<sup>297</sup> However, this is because the court only addressed contextual factors that arguably worked against the prosecution.<sup>298</sup> In its analysis, the court weighed the following factors: (1) the cumulative nature of the word "lie"; (2) the centrality of the defendant's credibility to her theory of the case; (3) the absence of clear evidence against her self-defense theory; (4) the trial court's failure to *sua sponte* correct the prosecutor; and (5) the prosecutor's failure to use weaker language alongside the word "lie."<sup>299</sup> The court found every one of these factors to be aggravating.<sup>300</sup>

While the cumulative use of the word "lie" and the fact that credibility was critical to Wend's self-defense theory of the case can reasonably be viewed as contextually aggravating circumstances,<sup>301</sup> the court's analysis of the other contextual factors is dubious. For example, the lack of a *sua sponte* objection from the trial court is arguably evidence that the prosecutor's use of the word "lie" did not come across as inflammatory. Indeed, note the court's incongruent tension in concepts. It first asserted that plain error review imposes deference to the trial court because it is "in the best position to assess [the] potential prejudicial impact" of a statement.<sup>302</sup> Yet, the court then immediately turned around and concluded that the trial court's lack of an objection supported the conviction's reversal.<sup>303</sup>

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296. *See Wend*, 235 P.3d at 1098.

297. *Id.*

298. *See id.* at 1097–99.

299. *See id.*

300. *Id.*

301. *See, e.g., Wilson v. People*, 743 P.2d 415, 420–21 (Colo. 1987) (finding that the use of the word "lie" was aggravated by the fact that credibility was critical to the case, given that the charge was sexual assault); *but see United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1996) (finding that the prosecutor's use of the word "liar" was not improper partly because the case turned on the defendant's credibility).

302. *Wend*, 235 P.3d at 1096.

303. *Id.* at 1098.

Additionally, the court's finding that a prosecutor's isolated use of the word "lie" is actually *worse* than a prosecutor's use of the word "lie" alongside a euphemism, such as "did not tell you the truth,"<sup>304</sup> is perplexing and disappointing. Using euphemisms in conjunction with the word "lie" simply reinforces the prejudicial impact of the substantive meaning of the word "lie." Moreover, intended or not, this particular argument gives the impression that the court holds a considerable lack of faith in the people of Colorado. The state's jurors understand that saying that someone was "dishonest," was "untruthful," or "did not tell you the truth" is substantively equivalent to saying that someone "lied."

The entire analysis of euphemisms is another illustration of the Colorado Supreme Court's elevation of form over substance in *Wend*. Although in this instance the court's focus on form benefits the defendant, the court's reasoning should worry future defendants as well. *Wend*'s bright line between the word "lie" and similar words like "untrustworthy" portends by negative inference that future courts are more likely to give disproportionate weight to the fact that a prosecutor merely used a euphemism. Calling a defendant "untrustworthy" certainly can be just as improper as calling him a "liar,"<sup>305</sup> whether or not the *Wend* opinion suggests otherwise.

## 2. The Court's Contextual Omissions

In the court's effort to demonstrate how context aggravated the prosecutor's conduct, the court did not acknowledge a single mitigating factor in its plain error review.<sup>306</sup> In one instance, the court did not ignore but rather turned a critical mitigating factor on its head by neutralizing the defense counsel's use of the word "lie."<sup>307</sup> The court found that while defense counsel's use of the word "lie" only related to the interrogation video, the prosecutor's use of the word "lie" implicitly included *Wend*'s entire self-defense story.<sup>308</sup> It is fair to claim that defense

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304. *Id.*

305. *See, e.g.,* United States v. Thomas, 246 F.3d 438, 439 n.1 (5th Cir. 2001) (finding that the prosecutor's declaration to the jury that a defense witness was not telling the truth to be improper).

306. *See Wend*, 235 P.3d at 1097–99.

307. *See id.* at 1098–99.

308. *Id.* at 1099.

counsel's use of the word "lie" related only to the videos.<sup>309</sup> But it is less than clear how the prosecution's use of the word "lie" went beyond describing the same videos.<sup>310</sup> Moreover, by correctly approving of defense counsel's use of the word "lie" because it referred to evidence admitted at trial, the court exposed its one-sided perspective on the matter. Where the prosecutor's use of the word "lie" simply refers to evidence, the impropriety of its use is at least mitigated. But the court never addressed this either.<sup>311</sup> Not surprisingly, the court also did not acknowledge that defense counsel's use of the word suggested that the prosecutor's use of the word "lie" was not a personal opinion but rather a fact accepted by all.<sup>312</sup> Nor did the court confront the idea that defense counsel's willingness to call the defendant a liar demonstrates that the prosecutor's use of the word "lie" was not actually inflammatory.<sup>313</sup>

Given the court's unwillingness to reconcile defense counsel's use of the word "lie" with the court's new categorical rule, it is not surprising that the court never addressed many of the most critical contextual factors bearing on whether the defendant's trial was fundamentally unfair. The court's avoidance is all the more unfortunate because the facts that it did not address were mitigating. Indeed, the court failed to address that Wend made statements on video to police officers that cannot reasonably be regarded as anything but lies and that those statements were admitted into evidence for the jury's consideration.<sup>314</sup> Likewise, the court also failed to address the fact that the defendant herself admitted that her statements to the police were lies and that her admission was captured on video and admitted into evidence for the jury's consideration.<sup>315</sup>

By failing to address the impact of those contextual factors, the court failed to conduct an impartial plain error review. The

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309. See Respondent's Answer Brief, *supra* note 3, at 64–65. Although, defense counsel did attempt to justify Wend's lies, claiming that she did so only because "she didn't trust the police." *Id.* at 65. This is defense counsel's opinion, not a reflection of the record.

310. *Wend*, 235 P.3d at 1099. The court did give an explanation for why the prosecution's use of the word "lie" implicitly included Wend's self-defense story. It amounted to noting that there was "indiscriminate" and repeated use of the word "lie." *Id.*

311. See *id.* at 1096–99.

312. See *id.*

313. See *id.*

314. See *id.*

315. See *id.*

court itself noted that plain error review “maximizes deference” to the trial court, with reversal occurring only where, under a contextual, totality of the circumstances analysis, the defendant was denied her right to a fair trial.<sup>316</sup> Needless to say, Wend’s lies and admission to telling them are factors of critical significance to a review of whether the trial was fundamentally fair. To reverse a conviction because a prosecutor referred to a defendant’s very own statements captured on video and admitted into evidence, which defense counsel also regularly referred to, is an exceptionally rare outcome. At a minimum, before an appellate court reverses on those peculiar grounds under plain error review, it should confront how the defendant’s own conduct and inculpatory statements that served as the basis for the prosecutor’s actions impacted the trial’s fundamental fairness. In *Wend*, the Colorado Supreme Court simply failed to do that. The court avoided the case’s hard issues and abruptly overturned a murder conviction.

#### CONCLUSION

*Wend* is a regrettable example of a result-oriented appellate decision. The opinion occasionally defies common sense and generally avoids confronting the tough and important questions that the case presented. The Colorado Supreme Court articulated a categorical rule prohibiting the use of one word by one kind of lawyer. In doing so, it refused to use the traditional legal test that it and other courts nationwide use for all other forms of prosecutorial misconduct without explaining why this one word was different than every other potential form of misconduct. It explained why the word “lie” is improper, yet the explanations do not logically suggest that the word “lie” is always improper. It created a superfluous rule that affords no more protection than the traditional test does. And it elevated form over substance by expressly making context irrelevant in the first step of any prosecutorial misconduct review.

In addition, the opinion’s plain error review was incomplete. It only addressed contextual factors that it could classify as aggravating. It never addressed Wend’s statements and the reality that they were lies. It never addressed that

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316. *Id.* at 1097.

Wend admitted that those statements were in fact lies. And it never addressed that Wend's lies and admission to making them were placed into evidence for the jury to consider. Regardless of whether the final outcome of a reversal of this case was correct, the Colorado Supreme Court ought to have written a more measured and open opinion that better reflected and confronted the unique reality of this fascinating case.