COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Mesa District Court Honorable Brian J. Flynn Honorable Brian Whitney Case Number 08CR139	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Suzanne Shepard-Duncan Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender MARY BULLARD, #39382 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 09CA750
REPLY BRIEF OF DEFENDANT-APPELLANT	

COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Mesa District Court Honorable Brian J. Flynn Honorable Brian Whitney Case Number 08CR139	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Suzanne Shepard-Duncan Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender MARY BULLARD, #39382 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 09CA750

CERTIFICATE OF COMPLIANCE

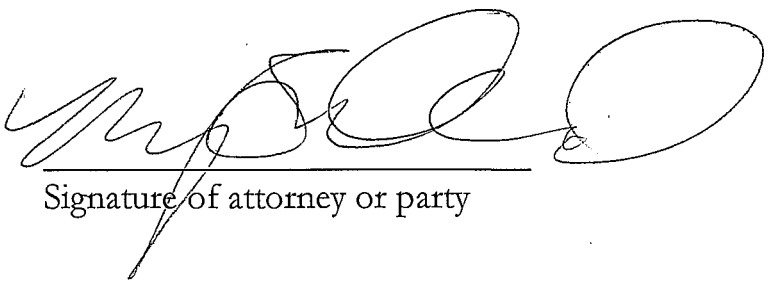
I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The reply brief complies with C.A.R. 28(g).

Choose one:

☑ It contains 4,039 words.

☐ It does not exceed 18 pages.



Signature of attorney or party

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Suzanne Shepard-Duncan, Defendant-Appellant, submits the following Reply Brief.

ARGUMENT

I. Because the police officer's warrantless search exceeded the scope of a permissible protective sweep, the fruits of this search must be suppressed.

Ms. Shepard-Duncan does not contend that the officer had no right to enter her home. Given the broken window he noticed and the reported unlawful entry of the home, the officer did have the right, under the emergency doctrine to conduct a protective sweep of her home to ensure no intruders lurked therein. People v. Berow, 688 P.2d 1123 (Colo.1984). However, when a law enforcement officer enters a home for the purpose of conducting a protective sweep under this doctrine, his right to enter and remain is not unlimited. To the contrary, an emergency cannot be used to support a general exploratory search. People v. Reynolds, 672 P.2d 529 (Colo.1983); People v. Roark, 643 P.2d 756 (Colo.1982). After the emergency has dissipated, a search of the premises may not occur simply because the police are legitimately present. People v. Draper, 196 Colo. 450, 586 P.2d 231,231-32 (1978). Here, Officer Carnes exceed the scope of his initially lawful protective sweep by remaining in the

home and conducting an additional search.(6-30-08,p7-8,12;v1,p48) Maryland v. Buie, 494 U.S. 325, 334-36(1990).

The attorney general contends that Deputy Carnes "needed to conduct a search because of the triggering assault that first brought the officers legitimately to the premises." (AB,p9) However, Deputy Carnes could not remain in the home and conduct such a search without a warrant. U.S. Const. amend. IV; Colo. Const. art. II, § 7; Petersen v. People, 939 P.2d 824, 830(Colo.1997); Payton v. New York, 445 U.S. 573, 585(1980). Once his protective sweep had revealed neither intruders nor victims, he was required to leave. Draper, 586 P.2d at 231-32; Buie, 494 U.S. at 334-36; Wayne R. LaFave, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, §6.6(a) p467 (4thed.2004). Deputy Carnes could not stay in the home to search for anything — whether for evidence of a crime or for a cell phone that might possibly contain the number of someone who might know someone who had the authority to consent to search. Draper, supra; Buie, supra; United States v. Hogan, 28 F.3d 1148 (10th Cir.1994); Davis v. State, 834 So. 2d 322, 328(Fla.App.5thDist.2003); Anderson v. State, 665 So.2d 281, 283(Fla.App.5th Dist.1995).

As argued by the defense at the suppression hearing and in the Opening Brief, although a limited protective sweep of Ms. Shepard-Duncan's residence was permitted under the emergency doctrine, the officer exceeded the permissible scope

of such a sweep under the 4th Amendment, Article 7 of the Colorado Constitution and related federal and state jurisprudence by remaning and conducting additional searches.(6-30-08,p30-31;v1,p18;OB,p10-16) Consequently, all fruits of that unlawful search – including Ms. Shepard-Duncan's subsequent consent and all of the evidence seized – must be suppressed. People v. Medina, 25 P.3d 1216 (Colo.2001), citing Nardone v. United States, 308 U.S. 338, 341 1939); Wong Sun v. United States, 371 U.S. 471, 484 (1963); Brown v. Illinois, 422 U.S. 590, 602(1975).

II. The State's claim that the officer's presence in, and search of, Ms. Shepard-Duncan's residence was justified under the "exigent circumstances" doctrine is waived, and would fail on the merits even if it could be raised.

The attorney general does not address Ms. Shepard-Duncan's argument that the officer's presence and search exceeded the scope of a proper protective sweep under the emergency aid exception.(OB,p10-16) Instead, the attorney general argues that the officer's entry was broadly justified under the "exigent circumstances" exception to the warrant requirement.(AB,p7) Although the attorney general contends that any counter argument to this contention is "waived" because it was not raised at the suppression hearing,(AB,p7,n3) this is erroneous because the State itself failed to justify the warrantless search under the "exigent circumstances" exception at the suppression hearing.(6-30-08,p31-33) Below, the State at most argued that (1) the

officer was allowed to conduct a protective sweep to search for additional victims and intruders, and (2) that after the completion of the sweep the officer was allowed to remain in the apartment and search for means to obtain consent to search.(6-30-08,p32-33)

The emergency aid exception is a distinct exception to the warrant requirement. See People v. Herbert, 46 P.3d 473, 478-480(Colo.2002)(discussing the differences between the exigent circumstances exception and the emergency aid exception). Because the "exigent circumstances" exception has been raised as a justification for the first time in the attorney general's Answer Brief, and the State bore the burden of establishing an exception to the exclusionary rule at the suppression hearing, See, e.g., People v. Rodriguez, 945 P.2d 1351 (Colo.1997); People v. Padgett, 932 P.2d 810 (Colo.1997), it is, in fact, the State who has waived this claim. Moody v. People, 159 P.3d 611, 614(Colo.2007). As the State failed to meet this burden after having had a fair and full opportunity to present evidence, the State does not get a second chance. See Steagald v. United States, 451 U.S. 204, 209(1981); People v. Salazar, 964 P.2d 502, 507(Colo. 1998); People v. Davis, 903 P.2d 1, 3, n.5 (Colo. 1995); People v. Sporleder, 666 P.2d 135, 138-39 & n.4(Colo.1983); People v. Hearty, 644 P.2d 302, 311-12(Colo.1982).

Even if it had not been waived, this claim would fail. The circumstances on the evening of January 26, 2008 could not be characterized as "exigent circumstances." Upon his arrival, emergency responders had already contacted and removed the victim of the alleged stabbing, Mr. Hays, from the home.(6-30-08,p5,6) Moreover, Officer Carnes' protective sweep revealed no signs of an ongoing burglary, assault, or other emergency situation.(6-30-08,p7) Nothing in the record suggests exigent circumstances existed which justified the officer's continued presence in, and search of, the home following the completion of his protective sweep. Here, there was no danger of the destruction of evidence and no fleeing suspect the officer needed to follow in hot pursuit. Cf. Mendez v. People, 986 P.2d 275 (Colo.1999)(distinct odor of burning marijuana emanating from motel room indicated that marijuana was being destroyed and would continue to be destroyed before a search warrant could be obtained); People v. Drake, 785 P.2d 1257 (Colo.1990)(possibility that murder suspect might flee or might destroy evidence sufficient to create exigency).

III. The plain view doctrine does not apply.

The plain view exception to the warrant requirement applies when (1) the officer did not violate the Fourth Amendment in arriving at the place where the evidence could be plainly viewed, (2) the item is in plain view, and (3) the incriminating character of the evidence is immediately apparent. See Horton v.

California, 496 U.S. 128, 136(1990). "Where the initial intrusion that brings the police within plain view of ... an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure...[of the article] is legitimate." Id. at 135. Here, the "initial intrusion" which brought Officer Carnes in view of the bong was not supported by one of the recognized exceptions to the warrant requirement. After Officer Carnes had concluded his protective sweep, finding no intruders, he remained in the kitchen of the residence speaking with another officer on the phone.(6-30-08,p7,18) Subsequently, Officer Carnes entered the living room of Ms. Shepard-Duncan's residence, ostensibly in search of Mr. Hay's cell phone, which he could not see from the kitchen.(6-30-08,p8,20) Only then, when Officer Carnes no longer had any right to remain in the home and had exceeded the scope of his protective sweep, did he discover the bong.(6-30-08,p9,12;v1,p48) Because Officer Carnes was not legitimately on the premises when he discovered the bong, the evidence — which Officer Carnes subsequently seized — was not admissible under the "plain sight" exception to the warrant requirement. Horton, 496 U.S. at 136; People v. Coto, 199 Colo. 508, 510, 611 P.2d 969, 971(1980).

IV. Ms. Shepard-Duncan's consent was invalid because it was involuntary and a fruit of the officer's prior unlawful search of her home.

Where evidence is obtained by a purported consent that follows improper conduct by police, the prosecution bears the burden of establishing that the consent

was both voluntary and not obtained through an exploitation of the prior illegality. People v. Rodriguez, 945 P.2d 1351, 1364(Colo.1997). Here, the prosecution failed to meet either prong. The attorney general cites People v. Benson, 124 P.3d 851 (Colo. App. 2005), in support of its claim that Ms. Shepard-Duncan's consent was sufficiently attenuated from Officer's Carnes illegal presence in, and search of, her home. However, the facts in Benson are distinguishable. In Benson, the officers asked the defendant for permission to search over the phone. 124 P.3d at 854. Here, Officer Carnes testified he did not seek permission to search over the phone.(6-30-08,p10) Instead, Officer Carnes waited until Ms. Shepard-Duncan entered her home and found him, in uniform, sitting in her kitchen, before he asked her for consent to search.(6-30-08,p22,23;12-29-08,p41) There was no intervening time between the officer's illegal presence in Ms. Shepard-Duncan's home and her subsequent consent.

Although the attorney general asserts Ms. Shepard-Duncan arrived at her home "knowing the police already were there," there is no indication in the record that until her entry into her home, Ms. Shepard-Duncan had any idea that the police officer was actually inside her home and had been there for two hours.(12-29-08,p76,78; AB,p8) Nor did the officer, when asking for Ms. Shepard-Duncan's consent, inform her that he had discovered incriminating evidence during his previous unlawful search of her home.(6-30-08,p10) Because of the lack of attenuation between the unlawful police

conduct and Ms. Shepard-Duncan's consent, and because the officer's deceptive practices and the coercive presence in her home made that consent involuntary, the invalid consent could not authorize the search or seizure of evidence within her home. People v. Donald, 637 P.2d 392, 394(Colo.1981); Rodriguez, 945 P.2d at 1364; People v. Coghlan, 189 Colo. 99, 537 P.2d 745, 745-46(1975); McCall v. People, 623 P.2d 397,403(Colo.1981); Turbyne v. People, 151 P.3d 563,572 (Colo.2007); People v. Reddersen, 992 P.2d 1176, 1182(Colo.2000); People v. Davis, 187 P.3d 562,564 (Colo.2008); People v. Santistevan, 715 P.2d 792,796 (Colo.1986).

In Benson, police came to the defendant's home based on an internet tip they received concerning the illegal possession and distribution of marijuana. 124 P.3d at 853. Here, the officers arrived on the scene due to reports of an alleged stabbing.(6-30-08,p5) Officer Carnes solely informed Ms. Shepard-Duncan that he was there to investigate a stabbing, and he solely requested permission to search "for evidence relating to the crime that had occurred."(6-30-08,p11,24) Consequently, Ms. Shepard-Duncan's consent to waive her constitutional right to privacy was neither knowing nor intelligent. See Brady v. U.S., 397 U.S. 742, 748(1970)(Holding that a knowing and intelligent waiver of a fundamental right requires that the accused have "sufficient awareness of the relevant circumstances and likely consequences" of forfeiting the right). Here, unlike occurred in Benson, the officer affirmatively mislead Ms. Shepard-

Duncan about the purpose of the search.(6-30-08,p11,24) Officer Carnes' discovery of drug paraphernalia while he was unlawfully in the home and conducting an unlawful search surely alerted him to the possible presence of drugs in the home. Thus, the officer's unlawful search and discovery of the bong led him to subsequently search for evidence that would not necessarily have been searched for in the context of an investigation into the reasons for a home invasion and alleged stabbing.(6-30-08,p27-28)

The attorney general makes much of the fact that Ms. Shepard-Duncan told the officer "about her use of methamphetamine."(AB,p2,8) This is misleading. Unlike Benson, Ms. Shepard-Duncan certainly did not admit that she and the officers "both knew there was marihuana going on at that residence." Benson, 124 P.3d at 854. In fact, it appears that sometime after arriving to find Officer Carnes unlawfully inside her home, Ms. Shepard-Duncan began speculating about possible reasons why someone might have broken into her home. Ms. Shepard-Duncan noted that since she had not been using methamphetamine for over a year and a half and had improved her life, others might now be interested in obtaining her possessions.(6-30-08,p13-15) Such statements in no way justified the use of deception and implied authority to obtain her purported consent. Because Ms. Shepard-Duncan's consent

was tainted by unlawful police conduct, involuntary, and constitutionally invalid, all of the evidence subsequently seized should have been suppressed.

V. Mr. Hays, who stated he could not give consent to search the residence, did not have the actual or apparent authority to give police permission to search for a means to obtain consent.

The attorney general contends that Officer Carnes had the right to remain in the home in part because the alleged stabbing victim, Mr. Hays, had directed the officer to retrieve his cellular telephone from the defendant's living room.(AB,p11) However, Mr. Hays had already informed Officer Quigley, who in turn informed Officer Carnes, that he could not give consent to search and that the apartment was not his residence.(6-30-08,p7-8) Although Mr. Hays nevertheless suggested to Deputy Quigley that Officer Carnes could go into the living room to get his cell phone, wherein he might find the number of a woman who could give consent to search, Mr. Hay's previous statements indicated that he did not have either the actual or apparent authority to consent to the officer's further search of Ms. Shepard-Duncan's home. (6-30-08,p7-8)

Here, the State did not meet its burden to prove, by clear and convincing evidence, that Mr. Hays had common authority over Ms. Shepard-Duncan's home. United States v. Matlock, 415 U.S. 164, 177(1974); People v. Hopkins, 870 P.2d 478, 480(Colo.1994); People v. Wiley, 51 P.3d 361, 363(Colo.App.2001). The evidence did

not show that Mr. Hays had such mutual and coextensive use of the residence that it was reasonable to recognize that he had the right to permit inspection of her home and that Ms. Shepard-Duncan had assumed the risk that Mr. Hays might permit the area to be searched. People v. Kellum, 907 P.2d 712, 714(Colo.App.1995), quoting Matlock, 415 U.S. at 171, n.7.

While Mr. Hays was contacted inside Ms. Shepard-Duncan's home, no evidence was presented at the suppression hearing as to how he came to be there. At trial, Mr. Hays testified that he was a guest at her home, but as the United States Supreme Court recognized in Minnesota v. Olson, 495 U.S. 91 (1990), while overnight guests have a right to privacy in their host's home, they normally "do not have the legal authority to determine who may or may not enter the household." Id. at 99. A guest cannot be said to have "common authority" over the premises, in the sense in which that phrase is used in Matlock. 4 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §8.5(e) at 233-34 (4th ed. 2004). Therefore, an overnight guest generally does not have the authority to consent to a search of his host's home. Id.; People v. White, 64 P.3d 864, 871(Colo.App.2002).

Here, Mr. Hays informed officers he did not live at the residence. Therefore, he was not a cohabitant. Matlock, 415 U.S. at 171 n7. No evidence was presented that Mr. Hays was allowed to bring other persons onto the premises. Cf. People v.

Briedenbach, 875 P.2d 879, 889(Colo.1994). As a result, the State failed to meet its burden of establishing that Mr. Hays had joint access and control of the house for most purposes, such that he had the right to permit inspection and the owner had assumed the risk that he would exercise that right. Kellum, 907 P.2d 712, 714. Consequently, Mr. Hays lacked actual authority to consent to search.

In addition, Mr. Hays lacked apparent authority to search. He informed Officer Quigley, who in turn informed Officer Carnes, that he could not give consent to search and that he did not reside in Ms. Shepard-Duncan's apartment.(6-30-08,p11) He then suggested that someone else, "Brandy," might be able to give consent to search.(6-30-08,p8;v1,p48) These statements demonstrated that Mr. Hays lacked the authority to grant permission to the officer to conduct a limited search of the living room. Consequently, it did not "reasonably appear[ ], based on all the surrounding circumstances" that Mr. Hays possessed common authority to give consent to search any part of the home. Hopkins, 870 P.2d at 480 n. 3. As the facts available to the Officers Quigley and Carnes did not "warrant a man of reasonable caution" in the belief that Mr. Hays had authority over the premises, Officer Carnes' warrantless entry without further inquiry was unlawful. Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990) Here, Officer Carnes "proceed[ed] in deliberate ignorance of the facts," and failed to inquire further where the surrounding circumstances indicated that Mr. Hays

lacked "common authority" to give consent to search. Petersen v. People, 939 P.2d 824, 831(Colo.1997), citing Rodriguez, 497 U.S. at 188; see also, People v. McKinstrey, 852 P.2d 457, 473(Colo.1993); 4 Wayne R. LaFave, SEARCH AND SEIZURE § 8.3(g) at 177(4th ed.2004).

Furthermore, there is no indication in the record that Mr. Hays was informed that Officer Carnes lacked the legal authority to be in Ms. Shepard-Duncan's home while seeking consent to search. Under the impression that the officer was lawfully in the home at the time, Mr. Hays might have believed that, under such circumstances, he could give the officer limited permission to search the living room for his cell phone. Thus, his consent was neither knowing nor intelligent. Brady, 397 U.S. at 748. Moreover, Mr. Hay's limited grant of permission to the officer to enter the living room to find his phone could not suffice to justify the officer's continuing presence in any part of the home following the completion of his protective sweep.

As the prosecution failed to satisfy its burden to establish that Mr. Hays had either actual or apparent authority to consent to the entry and search of Ms. Shepard-Duncan's home, Mr. Hay's limited grant of permission for Officer Carnes to search the living room for his cell phone did not justify the officer's search, let alone the officer's two-hour presence in Ms. Shepard-Duncan's home prior to her return.(12-29-08,p76,78); Peterson, 939 P.2d at 827. Because the jury was allowed to consider

evidence that was the fruit of an illegal search in violation of the U.S. and Colorado Constitutions, Ms. Shepard-Duncan's convictions for possession of drugs and paraphernalia must be reversed. Wong Sun, supra; People v. McFall, 672 P.2d 534, 537(Colo.1983).

VI. The evidence was not admissible under either the independent source doctrine or the inevitable discovery rule.

First, because the prosecution did not argue these exceptions to the warrant requirement below, they have been waived, and may not be raised on appeal. Moody, 159 P.3d 614. In any event, as argued *supra*, and in the Opening Brief, Ms. Shepard-Duncan's consent was not obtained in lawful manner. Consequently, Ms. Shepard-Duncan's tainted consent, subsequent to the unlawful search, cannot serve to support the admission of the seized evidence under either the independent source or inevitable discovery rule.

Under the independent source exception, unconstitutionally obtained evidence may be admitted if the prosecution can establish that it was also discovered "by means *wholly independent* of any constitutional violation." Nix v. Williams, 467 U.S. 431, 443(1984); People v. Lewis, 975 P.2d 160, 171(Colo.1999)(emphasis added). Here, Ms. Shepard-Duncan's consent was tainted by Officer Carnes' unlawful prior presence in, and search of, her home. See supra Sections I,IV. As Ms. Shepard-Duncan's consent

was not "wholly independent" of the officer's unlawful and unconstitutional actions, Officer Carnes' later search, purportedly pursuant to that consent, could not serve as an "independent source" for discovery of the evidence. In addition, Officer Carnes' later search was not sufficiently independent of the initial unlawful search to serve as an "independent source" because Officer Carnes had discovered drug paraphernalia during his initial search, which led him to search for drug related evidence during his subsequent search. Here, the connection between his earlier lawless conduct and the discovery of the challenged evidence was not so attenuated as to dissipate the taint. Nardone v. United States, 308 U.S. 338, 341(1939).

The inevitable discovery exception requires that the prosecution establish that evidence initially discovered in an unconstitutional manner ultimately or inevitably would have been discovered by a lawful means. People v. Burola, 848 P.2d 958,962 (Colo.1993); Nix, 467 U.S. at 444. Moreover, "the prosecution must show that the police were pursuing an independent investigation at the time of the illegal discovery, which inevitably would have led to the discovery of the evidence." People v. Syrie, 101 P.3d 219,223(Colo.2004); People v. Breidenbach, 875 P.2d 879,889(Colo.1994). "The fact that makes discovery of the evidence inevitable must 'arise from circumstances other than those disclosed by the unlawful search itself' because otherwise the inevitable discovery exception will swallow the exclusionary rule."

Burola, 848 P.2d at 962, citing United States v. Thomas, 955 F.2d 207,211(4th Cir.1992).

Here, at the time the illegality occurred — e.g. while Officer Carnes remained in Ms. Shepard Duncan's house, conducted an additional search, and in the process, discovered a bong — no independent lawful investigation was ongoing by any other officers which would inevitably have led to the discovery of the bong. Certainly, Officer Carnes' continued efforts to obtain Ms. Shepard-Duncan's consent could not serve as an "independent investigation" because they arose from circumstances "disclosed by" his own initial unlawful search of her home. Syrie, 101 P.3d at 223; Burola, 848 P.2d at 962. Moreover, Officer Carnes' later search pursuant to Ms. Shepard Duncan's tainted consent was not a "lawful means" with which to discover the evidence in question. Burola, 848 P.2d at 962.

VII. The prosecutor's misconduct in closing argument constituted plain error.

The attorney general contends that the prosecutor's argument that the jury could *legally* not have any reasonable doubt of Ms. Shepard-Duncan's guilt, was "precisely the prosecution's job."(AB,p21) The attorney general further argues that the prosecutor, by making such statements, was simply arguing that Ms. "Shepard-Duncan must be presumed innocent."(AB,p21) To the contrary, the prosecutor's

argument that the jurors could *not* presume the defendant innocent, but were legally required to presume her guilt, was legally erroneous, misleading, and certainly not part of the prosecutor's duties.(12-30-08,p87); Martinez v. Court of Appeal, 528 U.S. 152, 162(2000)(a defendant "retains a presumption of innocence throughout the trial process"); People v. McBride, No. 06CA2524, 2009 WL 3128746, *5 (Colo.App. October 1, 2009)(prosecutor erred by misstating the presumption of innocence); People v. Rodriguez, 794 P.2d 965, 977 (Colo.1990)("[I]t is improper for counsel to misstate or misinterpret the law during closing argument" or "usurp the trial court's duty and authority to instruct the jury on the law"). The fact that the prosecutor informed the jury that he had the duty to prove Ms. Shepard-Duncan's guilt did nothing to ameliorate his argument that the jurors were legally required to presume that she had met this burden.

The attorney general further argues that the prosecutor did not inject his personal belief in Ms. Shepard-Duncan's guilt.(AB,p21) However, the implication of the prosecutor's statement that the jury could possibly look at the evidence and determine no wrongdoing had occurred, but *he* "d[id not] believe [*he* was] seeing those things here," and "it would be hard to imagine a person doing that," was a clear expression of the prosecutor's personal belief in Ms. Shepard-Duncan's guilt.(12-30-08,p65) Moreover, the prosecutor's statement that while it was "possible" for juror's

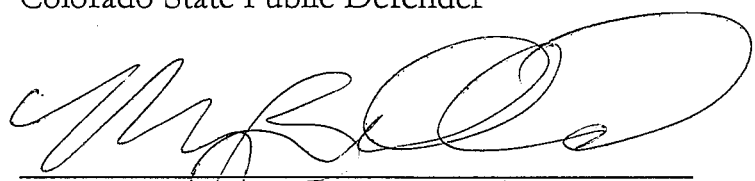
to think otherwise "it would be hard to imagine a person doing that," clearly suggested that the prosecutor thought it would be incomprehensible for a juror to disagree with his belief.(12-30-08,p65) Such statements of personal belief are grossly improper and constitute prosecutorial misconduct. Domingo-Gomez v. People, 125 P.3d 1043, 1053(Colo.2005); People v. Mason, 643 P.2d 745, 752(Colo.1982); ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-5.8 (3rd ed.1993).

Because the prosecutor's misconduct was egregious and not ameliorated by the court's instructions, it amounts to plain error requiring reversal of Ms. Shepard-Duncan's convictions. Wilson v. People, 743 P.2d 415, 421(Colo.1987); McBride, 2009 WL 3128746 at *6; Mahorney v. Wallman, 917 F.2d 469, 474 (10th Cir. 1990).

CONCLUSION

WHEREFORE, based on the arguments and authorities outlined above and in the Opening Brief, Ms. Shepard-Duncan respectfully requests that this Court reverse her convictions for possession of drugs and drug paraphernalia.

DOUGLAS K. WILSON
Colorado State Public Defender



MARY BULLARD, #39382
Deputy State Public Defender
Attorneys for Suzanne Shepard-Duncan
1290 Broadway, Suite 900
Denver, CO 80203
303-764-1400

CERTIFICATE OF SERVICE

I certify that, on September 14, 2010, a copy of this Reply Brief of Defendant-Appellant was served on Joseph G. Michaels of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us:

K. Root