COURT OF APPEALS, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	
On Appeal from the Jefferson County District Court The Honorable Jane Tidball Case Number 10CR45	
Plaintiff-Appellee: **PEOPLE OF THE STATE OF COLORADO** **v.** **Defendant-Appellant:** **SAUL GUZMAN**	▲ COURT USE ONLY ▲
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OPENING BRIEF	

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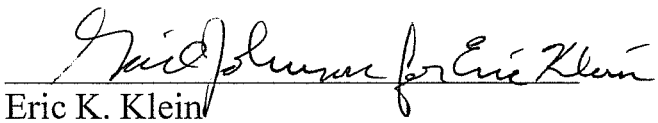
CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening 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 brief complies with C.A.R. 28(g) because it contains 5,268 words.

The brief complies with C.A.R. 28(k) because it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on.



Eric K. Klein

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STATEMENT OF THE ISSUES

1. Whether the evidence is insufficient to support Mr. Guzman's conviction for second degree burglary because the prosecution failed to present any evidence of the necessary element of an intent to steal at the time Mr. Guzman and others entered the residence.

2. Whether the district court committed plain error by issuing an obsolete and incomplete jury instruction regarding complicity liability that had been expressly disapproved by the Colorado Supreme Court in *Bogdanov v. People*, 941 P.2d 247, 252 (Colo. 1997).

STATEMENT OF THE CASE

Mr. Guzman was charged with one count of second degree burglary of a dwelling (a Class 3 felony) (C.R.S. § 18-4-203(1), (2)(a)), one count of theft (a Class 2 misdemeanor) (C.R.S. § 18-4-401(1), (2)(b)), and one count of criminal mischief (a Class 2 misdemeanor) (C.R.S. § 18-4-501). Following a jury trial, Mr. Guzman was convicted on all counts. On July 19, 2010, the trial court sentenced Mr. Guzman to four years of imprisonment on the burglary count, suspending the entire sentence on the condition that, following his expected deportation (despite the fact that he had been in the United States since he was two months old (Tr. 7/19/10 at 2), Mr. Guzman not return to the United States illegally. On each of the

two misdemeanor counts, the trial court sentenced Mr. Guzman to ninety days of probation with ninety days in jail, to run concurrently to each other. A notice of appeal was timely filed on August 25, 2010.

STATEMENT OF FACTS

According to the prosecution's witnesses, on January 6, 2010, four young men went to a residence in Edgewater to return a game console that was broken and to get their money back. When the person who had sold the game console refused to open the door, someone among the group of four forced the door open. After the door was open, someone stole some items from the house.

Prosecution witness Cody Vasquez sold an Xbox 360 video game console to Omar Valles for twenty dollars. (Tr. 6/8/10 at 58-59, 84.) However, the Xbox did not work. (Tr. 6/8/10 at 84.) According to prosecution witnesses, on January 6, 2010, Saul Guzman and Joel Hernandez were at the home of Omar Valles, visiting with him and his brother, Mario Valles.[1] (Tr. 6/8/10 at 66, 83, 100.) While Mr. Guzman and Mr. Hernandez were visiting, the Valles's father, Alberto Urueta, told the young men that they were returning the Xbox and getting back the twenty dollars. (Tr. 6/8/10 at 84.) The four young men and Mr. Urueta went to Cody

[1] Both Omar and Mario Valles testified at trial. For clarity, they may be referred to by their first names herein.

Vasquez's residence. (Tr. 6/8/10 at 66-67, 85.) They arrived at the house right around noon. (Tr. 6/8/10 at 27, 54.)

The prosecution's evidence was uniform that the sole reason for going to the house was to try to return the Xbox and get back Omar Valles's twenty dollars. Prosecution witness Omar Valles explained that the reason for going to the house was to get the money back that he had paid for the game console: "Because he [Cody Vasquez] had ripped me off, sold me a messed up 360, so I was going to go back to try to get my money back." (Tr. 6/8/10 at 100; *id.* at 105 (same).) Mr. Urueta confirmed this intent: "They were going to try to come to an agreement with the person, if it [*sic*] will give them the game, he could give them the money, something like that." (Tr. 6/8/10 at 75; *see also id.* at 67 ("we went to get some money for the—$20 from the person that we have sold a toy from my son—a game. I'm sorry, a game."); 71 ("we went to the house to get the money for the game").) Prosecution witness Mario Valles also testified that the only reason for going to the house was to return the non-working Xbox and get Omar Valles's twenty dollars back. (Tr. 6/8/10 at 84.)

There was some inconsistency about exactly what happened after the four young men and Mr. Urueta arrived at the house. It was undisputed, however, that the young men initially knocked at the door. (Tr. 6/8/10 at 27, 30, 45, 54, 85, 105.)

Mr. Vasquez was home with his brother, Mark Whatley, and his brother's girlfriend, Natalie Zeschin. (*E.g.*, Tr. 6/8/10 at 54.) Upon hearing the knocking, Mr. Vasquez went to see who was at the door. (Tr. 6/8/10 at 28, 45, 54.) Mr. Vasquez saw either two or three people. (Tr. 6/8/10 at 54, 56.) Mr. Vasquez recognized two of these people as the Valles brothers.[2] (Tr. 6/8/10 at 55.)

After Mr. Vasquez saw the three people at the door, his brother told him not to open the door because Mr. Whatley had recently been burglarized. (Tr. 6/8/10 at 27, 54.) Mr. Vasquez ran back and locked the door. (Tr. 6/8/10 at 30, 54.) The knocking then got louder and louder, eventually growing into a pounding on the door. (Tr. 6/8/10 at 30-31, 46.) Then Mr. Vasquez, Mr. Whatley, and Ms. Zeschin went out of the back of the home and called the police. (Tr. 6/8/10 at 31, 46.) As they were going out of the house, they heard something that sounded like the door being forced in. (Tr. 6/8/10 at 32-33, 54.) According to Mario Valles, when no one answered the door, Mr. Guzman "hit the door twice" to force it open.

[2] Mr. Vasquez at first told the police that the third person was the Valles brothers' cousin, Jose, Joe, or Joel. (Tr. 6/8/10 at 55-56, 130.) Later, when detained at a juvenile facility, Mr. Vasquez was visited by the investigating detective, who informed Mr. Vasquez that the Valles brothers had said Mr. Guzman was with them. (Tr. 5/6/10 at 23-24.) According to the detective, Mr. Vasquez then changed his story to agree that Mr. Guzman was one of the people present. *Id*. At trial, Mr. Vasquez continued to implicate the Valles brothers but denied having seen Mr. Guzman at his house that day. (Tr. 6/8/10 at 55-56, 61.)

(Tr. 6/8/10 at 97.) According to Omar, Mr. Guzman and Mr. Hernandez "pushed the door open." (Tr. 6/8/10 at 101.)

Prosecution witnesses testified that after the door was open, Mr. Guzman and Mr. Hernandez went into Cody Vasquez's home where they were just "looking for things." (Tr. 6/8/10 at 86.) Testimony indicated that upon leaving the house, Mr. Guzman was in possession of a pair of sneakers (Tr. 6/8/10 at 68, 82, 102), and Mr. Hernandez had some jewelry (Tr. 6/8/10 at 70, 87, 101).[3] Prosecution witnesses testified that the shoes were thrown out of the window of Mr. Urueta's truck (Tr. 6/8/10 at 69, 90) and that Mr. Urueta pawned the necklace (Tr. 6/8/10 at 70, 87, 101-02).

Trial in Mr. Guzman's case began on June 8, 2010, and lasted just two days. At the beginning of trial, the prosecution's theory was that Mr. Guzman and Mr. Hernandez, not the Valles brothers, had broken into the house and stolen the items. (Tr. 6/8/10 at 19-20.) By the end of the trial, however, the prosecution recognized that its primary witnesses, the Valles brothers, had serious credibility issues. (Tr. 6/9/10 at 34, 36, 39.) The prosecution thus stressed a theory of complicity liability

[3] Mario and Omar Valles claimed that Mr. Guzman and Mr. Hernandez also had a camera (Tr. 6/8/10 at 87, 101), but none of the individuals from the house claimed that a camera was missing (Tr. 6/8/10 at 41, 47-48, 58, 63), and Mr. Urueta did not claim to have seen a camera. (Tr. 6/8/10 at 68.)

in its closing argument. (Tr. 6/9/10 at 35.) In rebuttal closing argument, the prosecutor once again urged the jury to rely on a complicity theory. (Tr. 6/9/10 at 55.)[4] Prior to closing arguments, the trial court had instructed the jury, including an instruction on complicity liability. (Jury Instruction 14, Sealed Envelope IV.)

The jury retired to deliberate on the morning of June 9, following closing arguments. (Tr. 6/9/10 at 57.) During the course of its deliberations, the jury sent a single inquiry. This inquiry focused on complicity liability: "What is the definition of complicity [and] how it relates to accusing or the charges?" (Sealed Envelope IV.) In response, the trial court was prepared to refer the jury back to the original complicity instruction when it received an additional communication from the jury indicating that the jury had located, and was relying on, that same instruction. (Tr. 6/9/10 at 58.) The trial court never directly addressed the jury's concern about complicity and never provided it with a correct instruction. The next communication from the jury was that same day, indicating that it had reached its verdicts. (Tr. 6/9/10 at 60.)

[4] The defense theory was alibi, and thus trial counsel did not address the merits of a complicity argument other than to state that Mr. Guzman was not present. (Tr. 6/9/10 at 48.)

SUMMARY OF ARGUMENT

The evidence is insufficient to support a conviction for second degree burglary. The evidence did not establish that Mr. Guzman—nor anyone with whom he could have been complicit—had the intent to steal at the time of the unlawful entry into the home of Cody Vasquez. Thus, while the prosecution may have presented sufficient evidence that Mr. Guzman committed criminal trespass, it did not present sufficient evidence that he committed second degree burglary.

The trial court committed plain error when it issued a jury instruction on complicity liability that had been expressly disapproved by the Colorado Supreme Court in *Bogdanov v. People*, 941 P.2d 247, 252 (Colo. 1997), because it failed to describe adequately the dual mental state required for complicity liability. After the district court read the instructions to the jury, the prosecutor focused the jury on a theory of complicity liability, arguing that it could convict Mr. Guzman if he knew that others were committing crimes and he helped them do so. The prosecutor said nothing about the jury needing to find beyond a reasonable doubt that Mr. Guzman intended by his actions to further or facilitate the crime. The jury then demonstrated its focus on complicity liability when, during deliberations, it asked a single question seeking the definition of complicity.

ARGUMENT

I. The Evidence For Mr. Guzman's Conviction For Second Degree Burglary Is Insufficient Because The Prosecution Did Not Present Any Evidence Of The Necessary Element Of An Intent To Steal At The Time Of The Unlawful Entry.

A. Standard Of Review And Preservation.

When reviewing the denial of a motion for a judgment of acquittal, the Court "review[s] the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the convictions." *Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) (quoting *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005)). The Court "must ask whether the relevant evidence, viewed in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Id*. (internal quotations omitted).

Defense counsel moved for a judgment of acquittal at the close of the prosecution's case and at the close of all the evidence. (Tr. 6/8/10 at 134; Tr. 6/9/10 at 30.)

B. Discussion.

The prosecution's evidence was that the four young men went to Mr. Vasquez's house for a single purpose: to return a nonfunctioning Xbox game console that Mr. Vasquez had sold to Omar Valles. The prosecution's evidence

was that the young men went to the house to get back the twenty dollars that had been paid for the game console. There was no evidence that anyone had an intent to steal anything at the time that the young men entered Mr. Vasquez's house. The "relevant evidence, viewed in the light most favorable to the prosecution," is not "substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Montes-Rodriguez*, 241 P.3d at 927 (internal quotation omitted).

The law is clear that for a person to be found guilty of burglary, the prosecution must prove that *at the moment of the unlawful entry*, the defendant possessed the intent to commit the charged crime, in this case theft. "Second degree burglary requires that a defendant possess the intent to commit a crime when he or she breaks an entrance into a building or occupied structure." *Auman v. People*, 109 P.3d 647, 651 (Colo. 2005). As the Colorado Supreme Court has explained,

> [T]o convict a defendant of burglary, a jury must conclude that the defendant had made up his mind to commit some other offense at the point at which he or she becomes a trespasser. If the defendant forms the intent to commit the crime after the trespass is under way, he or she may be guilty of that underlying crime (or attempt) and of trespass – but is not guilty of burglary. Both circumstances reflect criminal acts, but burglary is the more serious. Burglary is the crime that requires that the defendant have a criminal intent to do more than trespass. To hold otherwise would convert burglary into a sentence enhancer for any crime committed in tandem with a trespass.

Cooper v. People, 973 P.2d 1234, 1236 (Colo. 1999), disapproved of on other grounds by *Griego v. People*, 19 P.3d 1 (Colo. 2001).[5]

Accordingly, the prosecution bore the burden to establish that at "the moment of trespass," *Cooper*, 973 P.2d at 1240, Mr. Guzman had the intent to steal and that this intent was not formed after the trespass was under way. If Mr. Guzman unlawfully entered but *thereafter* formed the intent to steal, this is not a burglary but an unlawful trespass. *Id*. at 1236; *see also People v. Barnhart*, 638 P.2d 814, 816 (Colo. App. 1981) ("In order to sustain a conviction for second degree burglary there must be evidence that the accused entered the building with intent to commit a crime.").

Even viewing the evidence in the light most favorable to the prosecution, the evidence is insufficient to find that at the time of the unlawful entry, Mr. Guzman or anyone with him had the intent to commit a theft as opposed to, say, seek a return of Omar Valles's twenty dollars for the defective Xbox. This case was about an attempt to get money back for the Xbox. The young men went to an

[5] Given the evidence in this case, it cannot be argued that this was a situation of remaining unlawfully. *See Cooper*, 973 P.2d at 1241 ("We find that the purpose of the General Assembly in amending the burglary statute to include remaining unlawfully was to address situations in which the defendant lawfully entered a premise, but subsequently remained after his presence was no longer lawful.").

occupied house in the middle of the day. (Tr. 6/8/10 at 27, 54.) They knocked on the door. (Tr. 6/8/10 at 27, 30, 45, 54, 85, 105.) They were standing at the door when Mr. Vasquez locked it. (Tr. 6/8/10 at 30.) They even tried to open the door while three people were still inside. (Tr. 6/8/10 at 54.) Then, when Mr. Vasquez—the person whom Omar said "had ripped me off, sold me a messed up 360" (Tr. 6/8/10 at 100)—refused to open the door, they continued knocking, even banging, on the door, louder and louder, until finally, knowing that someone was inside, they burst through the door. (Tr. 6/8/10 at 31-33, 54.) Only when realizing that no one was any longer in the house did they then look for, as the prosecutor characterized it, some "random things." (Tr. 6/8/10 at 19.)

There was no evidence, however, that the intent upon entry was to steal. There was never any discussion about stealing. There was never any discussion about anything other than returning the game system. Indeed, there was never *any* evidence of Mr. Guzman's state of mind until he was inside of the house and then looking for "random" things. The evidence thus could not support a finding that Mr. Guzman possessed the intent to steal at the time of entry. Rather, the evidence was more consistent with an intent to steal acquired only *after* the entry into the house. Consequently, while the entry may have amounted to an unlawful trespass, it was not a burglary. A conviction of Mr. Guzman on this evidence violated his

right to due process under the United States and Colorado Constitutions. *See People v. Mersman*, 148 P.3d 199, 201 (Colo. App. 2006) ("The Due Process Clauses of the United States and Colorado Constitutions prohibit criminal conviction except on proof of guilt beyond a reasonable doubt on each of the essential elements of a crime.").

Therefore, this Court should reverse Mr. Guzman's conviction for second degree burglary and remand for entry of judgment of acquittal on that offense. If the Court does not order a new trial on the grounds of the erroneous complicity instruction, discussed, *infra* § II, then the Court should order entry of judgment on the lesser included offense of criminal trespass. "Where a conviction for an offense is invalidated on grounds of insufficient evidence, but the evidence is sufficient to uphold a conviction on a lesser included offense, the appropriate remedy is to remand the case to the trial court with directions to enter judgment and sentence on the lesser included offense." *People v. Jamison*, 220 P.3d 992, 995 (Colo. App. 2009); *see also Auman*, 109 P.3d at 651 (criminal trespass "is a lesser included crime of second degree burglary and is not burglary"). If the Court does order a new trial on the grounds of the erroneous complicity instruction, the Court should order the entry of judgment of acquittal on burglary and a new trial on criminal trespass, theft, and criminal mischief, since a retrial on the burglary

count is barred by the double jeopardy protections of the United States and Colorado Constitutions. U.S. Const. amends. V & XIV; Colo. Const. art. II, § 18. It is a fundamental constitutional principle that the prosecution does not get "the proverbial 'second bite at the apple'" with respect to presenting sufficient evidence to convict a defendant of a criminal charge. *Burks v. United States*, 437 U.S. 1, 17 (1978).

II. The Trial Court Plainly Erred In Giving An Erroneous Complicity Instruction.

A. Standard Of Review And Preservation

The defense did not specifically object to the form of the complicity instruction as given. Therefore, this Court reviews for plain error. *Auman*, 109 P.3d at 660 n.15.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim. P. 52(b). Plain-error review requires this Court "to focus upon whether the instructional error prevented the jury from making a finding that the law requires so as to affect a substantial right of [the defendant] and undermine the fundamental fairness of [the] trial." *Auman*, 109 P.3d at 665. This Court "must determine whether a reasonable possibility exists that the erroneous instruction contributed to [Mr. Guzman]'s conviction such that serious doubt is cast upon the reliability of the jury's verdict."

Id. If the evidence of Mr. Guzman's guilt "is not overwhelming, and if there existed an evidentiary dispute as to whether" Mr. Guzman was complicit in the actions of the others, "then it is likely that [his] substantial rights were affected, and a reasonable possibility exists that the improper instruction contributed to [his] conviction." *Id*. In such a case, reversal is required. *Id*.

B. Discussion.

Four young men went to the home from which items were eventually stolen. The only witnesses whose testimony truly implicated Mr. Guzman in the theft were the two Valles brothers, who had the greatest interest in recovering something from Mr. Vasquez, and their father, who was the one who told them that they were going to get Omar Valles's money back and who himself had four prior felony convictions, two for forgery, one for possession of a controlled substance, and one for theft. (Tr. 6/8/10 at 73-74.) Thus, as even the prosecution tacitly acknowledged, *see infra* (discussing prosecution closing argument), there existed a reasonable belief that the Valles brothers were themselves involved in the offense, especially given that Mr. Vasquez initially did not report even seeing Mr. Guzman and continued to assert as much at trial when under oath. (Tr. 6/8/10 at 55-56, 61, 130.)

Complicity, however, provided the prosecution with a theory to support an argument that it did not matter if Mr. Guzman himself broke into the house or if Mr. Guzman himself took any items. And that is exactly what the prosecution argued, urging the jury to convict on a complicity theory. (Tr. 6/9/10 at 35, discussed, *infra*.) In fact, based on the jury's sole question during deliberations, there is a very good likelihood that complicity is the basis on which the jury convicted.

Unfortunately, the jury did not have the proper legal guidance and standard in deciding if the prosecution had proven complicity beyond a reasonable doubt, for the trial court's Instruction 14 (Sealed Envelope IV) incorrectly stated the law and is an instruction that the Colorado Supreme Court has rejected. *Bogdanov*, 941 P.2d at 252.

The instructional error violated Mr. Guzman's federal and state constitutional rights to due process and a fair jury trial. U.S. Const. amends. VI & XIV; Colo. Const. art. II, §§ 16 & 25. Therefore, the Court must reverse Mr. Guzman's convictions.

1. <u>The Trial Court Erred In Giving An Erroneous Complicity Instruction.</u>

The complicity instruction the trial court provided the jury did not conform to the statute defining complicity. C.R.S. § 18-1-603. Instead, it was an obsolete

version of a pattern jury instruction of which the Colorado Supreme Court expressly disapproved in *Bogdanov* . This was plain error. *See People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005) (finding plain error where trial court gave "obsolete," previously disapproved instruction).

The instruction given stated:

> A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:
>
> 1. The crime must have been committed.
> 2. Another person must have committed all or part of the crime.
> 3. The defendant must have had knowledge that the other person intended to commit all or part of the crime.
> 4. The defendant must have intentionally aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

(Jury Instruction 14, Sealed Envelope IV.) This instruction omits the statutory requirement that a person not only aid, abet, advise, or encourage but also must do so with the "intent to promote or facilitate the commission of the offense[.]" C.R.S. § 18-1-603. As the Colorado Supreme Court has held, complicity liability requires proof of a dual mental state:

> First, the complicitor must have the culpable mental state required for the underlying crime committed by the principal. Second, the

> complicitor must intend that his own conduct promote or facilitate the commission of the crime committed by the principal.

Bogdanov, 941 P.2d at 252; *see also People v. Duran*, No. 06CA1850, 2011 WL 1587414, at *3 (Colo. App. April 28, 2011) ("To be a complicitor, the person must have knowledge that the principal intends to commit the crime, must intend to promote or facilitate the commission of the offense, and must aid, abet, advise, or encourage the principal in the commission or planning of the crime."); *People v. Bass*, 155 P.3d 547, 551 (Colo. App. 2006) ("First, the defendant must have the mens rea required for the underlying crime committed by the principal. Second, the defendant must intend for his or her own conduct to further the principal's crime.").

Because of this required dual mental state, the *Bogdanov* court rejected the pattern instruction given in this case, 941 P.2d at 254, and held that the complicity instruction should be changed to replace the fourth element with:

> 4. The defendant must have had the intent to promote or facilitate the commission of the crime.
>
> 5. The defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

Id. at 254 n.10; *see also People v. Elie*, 148 P.3d 359, 364-65 (Colo. App. 2006) (quoting *Bogdanov* instruction as what the complicity "instruction should now state"); *People v. Ramirez*, 18 P.3d 822, 826-27 (Colo. App. 2000) (citing

Bogdanov as example of Colorado Supreme Court "intend[ing] to invalidate or correct pattern jury instructions"). Consequently, there can no longer be any question that "[a] jury must be instructed of this dual mental state requirement." *Bass*, 155 P.3d at 551.

The instruction given at Mr. Guzman's trial, which omitted half the statutory requirement that the complicitor possess the required mental state, lessened the prosecution's burden of proving that Mr. Guzman was complicit in any offense committed by the Valles brothers or Mr. Hernandez. Because the jury instruction lessened the prosecution's burden of proving complicity, the erroneous instruction violated Mr. Guzman's federal and state constitutional rights to due process and a fair jury trial. U.S. Const. amends. VI, & XIV; Colo. Const. art. II, §§ 16 & 25; *Kaufman v. People*, 202 P.3d 542, 550 (Colo. 2009) (finding plain error where erroneous instruction lessened prosecution's burden).

2. The Erroneous Instruction Requires Reversal.

The error in giving the disapproved jury instruction was obvious and substantial in light of the language of C.R.S. § 18-1-603 as well as *Bogdanov* and its progeny. *See Duran*, No. 06CA1850, 2011 WL 1587414, at *11 (holding that error was obvious where statute and case law were clear). The Colorado Supreme Court has "frequently recognized a trial court's duty to correctly instruct a jury on

the applicable law by drafting its instructions to substantially model the language of the statute at issue." *Kaufman*, 202 P.3d at 549 .

Here, "a reasonable possibility exists that the erroneous instruction contributed to [Mr. Guzman]'s conviction such that serious doubt is cast upon the reliability of the jury's verdict." *Auman*, 109 P.3d at 665. That such a reasonable possibility exists is clear because (a) the prosecutor stressed complicity liability, and (b) the jury demonstrated through its sole question that complicity liability likely factored into its decision. *See Weinreich,* 119 P.3d at 1078; *see also People v. Fell*, 832 P.2d 1015, 1019 (Colo. App. 1991) ("The fact of [the jury's] inquiry itself demonstrates that they were confused by the definitional instruction.").

By the time of closing arguments, the prosecutor recognized that his main witnesses had serious credibility issues and that this was not a particularly strong case for the prosecution. Indeed, the prosecutor began his closing argument by acknowledging that there was "plenty of reason for [the jury] not to believe everything that was said on the stand, there's lots of doubts about what happened that day." (Tr. 6/9/10 at 34.) The prosecutor went on to admit that the jury had "good reason to disbelieve some of what came off of the stand." (Tr. 6/9/10 at 36.) In fact, the prosecutor went as far as declaring that the Valles brothers and their

father—the key prosecution witnesses—were "fudging the truth" about what happened. (Tr. 6/9/10 at 39.)

In light of these problems, the prosecution sought to make up for the weakness of its case by asking the jury to convict on a complicity theory. Taking full advantage of the erroneous instruction, the prosecutor argued to the jury that it could convict Mr. Guzman without the critical finding that he had the intent to promote or facilitate the crime:

> Well, I want to talk to you about one important instruction, and that's complicity. Complicity answers the question—or rather, complicity is the theory of liability when the question is who did it, and the answer is they did it.
>
> That's what complicity is about. So you don't have to find that the defendant himself broke in, stole the shoes, broke anything, but if he knew that others were doing it and he helped them do it, he is guilty as a complicitor in the exact same way.

(Tr. 6/9/10 at 35.) In rebuttal closing argument, the prosecutor once again urged the jury to rely on a complicity theory: "Either he did it himself or he was a complicitor." (Tr. 6/9/10 at 55.) But what the prosecutor argued, and what Instruction 14 stated, is not a correct statement of the law. As *Bogdanov* and its progeny make clear, the culpable mental state for the underlying crime is only one part of the dual mental state required for complicity liability:

> Complicity liability exists when (1) the complicitor has the culpable mental state required for the underlying crime committed by the principal; and (2) the complicitor assists or encourages the

> commission of the crime committed by the principal "with the intent to promote or facilitate," § 18-1-603, such commission.

Bogdanov, 941 P.2d at 250-51. Thus, a complicitor must actually aid, abet, advise, or encourage the crime *and* must intend by his actions to further or facilitate the crime and thus must possess the required mens rea. While the prosecutor argued the first, consistent with the instruction given, he completely disregarded the second.

The prosecution's misleading statements in closing argument made a proper instruction critical. The jury was under the mistaken impression that by mere knowledge and assistance, regardless of an intent to promote or facilitate the commission of the crime, Mr. Guzman could be convicted on a complicity theory. *See Duran*, No. 06CA1850, 2011 WL 1587414, at *6 (even if defendant acquiesced in co-defendant's provocative acts and knew that co-defendant had a gun, "such inferences do not support a determination that he intended to facilitate or promote the later shooting").

The jury made clear through its inquiry that complicity played a central role in its deliberations. The jury had but one question: "What is the definition of complicity [and] how it relates to accusing or the charges?" (Sealed Envelope IV.). There is a strong likelihood that this jury had concerns about the credibility of the Valles brothers and their father. There is a reasonable possibility that the

jury strongly suspected that these individuals were the true perpetrators of the acts at issue, even if Mr. Guzman went along with them. Whatever underlay the jury's concerns, it made clear through its inquiry that complicity was a part of its decision. *Fell*, 832 P.2d at 1019.

Here, since, as even the prosecutor tacitly acknowledged (Tr. 6/9/10 at 34, 36, 39), the evidence of Mr. Guzman's guilt "is not overwhelming, and … there existed an evidentiary dispute as to whether" Mr. Guzman was complicit in the actions of the others, "then it is likely that [his] substantial rights were affected, and a reasonable possibility exists that the improper instruction contributed to [his] conviction." *Auman*, 109 P.3d at 665. As a result, the Court must find that the erroneous instruction amounted to plain error and reverse Mr. Guzman's convictions.

CONCLUSION

For all the reasons stated herein, this Court should reverse Mr. Guzman's conviction for second degree burglary and remand for entry of judgment of acquittal thereon. If the Court does not reverse based on the erroneous complicity instruction, the Court should order entry of judgment on the lesser included offense of criminal trespass. If the Court reverses based on the erroneous complicity

instruction, the Court should remand for a new trial on the offenses of criminal trespass, theft, and criminal mischief.

Respectfully submitted this 12th day of January 2012.

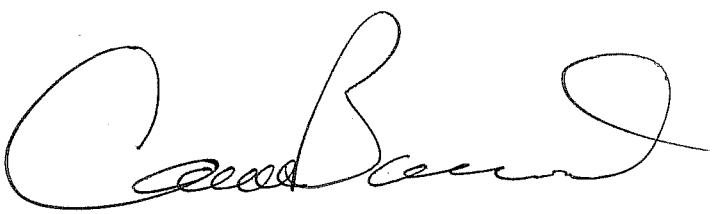
JOHNSON & BRENNAN, PLLC

Eric K. Klein
Attorney for Saul Guzman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing OPENING BRIEF was delivered to the address below via U.S. Mail, postage prepaid, on this 12th day of January 2012, to:

Office of the Attorney General
1525 Sherman Street
Denver, CO 80203



Carrie Bowers