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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Morgan District Court Honorable Charles M. Hobbs Case Number 11CR52	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. LORENZO CAMACHO Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender REBECCA R. FREYRE, # 20010 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA237

OPENING BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this 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).

Choose one:

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The brief complies with C.A.R. 28(k).

☐ For the party raising the issue:

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 (R._, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

☑ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Rebecca R. Tew

Signature of attorney or party

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2. Did the court deprive Camacho of his constitutional right to a fair trial by an impartial jury when it denied his challenge for cause to a prospective juror who doubted her ability to follow the court's instructions?

3. Did the court abuse its discretion in denying Camacho's motion to continue the trial to investigate 404(b) evidence the court ruled admissible if Camacho presented evidence of his defense and that was disclosed to him two weeks before trial?

4. Did the court's erroneous 404(b) ruling impermissibly chill Camacho's right to testify and deprive him of his right to present a defense?

5. Did the court plainly violate CRE 702 and reversibly err in allowing expert testimony through a police officer without a proper foundation?

6. Must the conviction for possession be vacated because it is a lesser included offense of possession with intent to distribute?

7. Do the cumulative errors require reversal?

STATEMENT OF THE CASE

The State charged Camacho with unlawful possession with intent to distribute/manufacture marijuana – 5 to 100 pounds[1] and unlawful possession of greater than 12 ounces of marijuana.[2] (v1,p7-9) The jury convicted him of both charges, (*Id.*p91-92) and the court sentenced him to five years in the department of corrections on the distribution conviction and to an eighteen-month concurrent sentence for the possession conviction. (*Id.*p108) Camacho filed a timely notice of appeal. (Flat file)

STATEMENT OF THE FACTS

This case involved a traffic stop for a turn signal violation of a van in which Camacho was the passenger.(Trial Generally) Camacho, the registered owner, consented to a search of the van, and police recovered 51 pounds of marijuana.(*Id.*) The court's evidentiary rulings precluded Camacho from presenting his and his co-defendant's statements that they did not know the van contained marijuana.(*Id.*) Instead, he argued lack of knowledge inferentially.(*Id.*)

On March 7, 2011, Trooper Cutler stopped a van for a turn signal violation at a Conoco station.(10/11/11,p155-156) The driver did not understand English, so the passenger, identified as Camacho, spoke for the driver.(*Id.*p157) Neither man had a

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[1] Pursuant to §18-18-406(6)(b)(I),(III)(B), C.R.S.(2012), a class 4 felony.
[2] Pursuant to §18-18-406(4)(c), C.R.S.(2012), a class 6 felony.

driver's license, Camacho said he owned the van, and Cutler confirmed this through paperwork.(*Id.*p158-159) Cutler called for a translator.(*Id.*p161) Both men separately explained they had been in New Mexico for two weeks working for Camacho's brother and were returning home to South Dakota.(*Id.*p160,163) Cutler said he had no problems communicating with Camacho; however, translator Vasquez said Camacho spoke "very little" English.(*Id.*p161,237)

Cutler suspected the two of drug activities based upon the presence of fast food trash, empty water bottles, empty oil bottles, no luggage and an empty child's car seat in the car.(*Id.*p162-164,185-186,207-208) Camacho consented to a search of the van and police recovered 51 pounds of marijuana.(*Id.*p165-66,179; 10/12/11,p14;v2,People's Exhibit 1,21)

SUMMARY OF THE ARGUMENT

Where Camacho never testified and waived his right of silence, the court plainly and reversibly erred in allowing the prosecution to repeatedly present evidence of his silence, and to argue it as evidence of guilt in closing arguments.

The court abused its discretion in denying Camacho's challenge for cause to a juror who said she would have difficulty following the court's instructions because of strong beliefs.

The court abused its discretion in denying Camacho's motion to continue the trial to investigate the late discovery of informant information implicating Camacho in other drug activities that the court ruled admissible as rebuttal evidence if Camacho denied knowledge of the marijuana.

The court's erroneous 404(b) ruling impermissibly chilled Camacho's constitutional right to testify and deprived him of his right to present a defense.

The court erroneously admitted expert drug testimony through Trooper Cutler without requiring the prosecution to qualify him as an expert under CRE 702.

Camacho's conviction of possession must be vacated because it is a lesser-included offense of possession with intent to distribute.

The cumulative errors require reversal.

ARGUMENT

1. THE PROSECUTION'S REPEATED VIOLATIONS OF CAMACHO'S PRE-ARREST AND POST-ADVISEMENT SILENCE AND ITS ARGUMENT OF THIS SILENCE AS EVIDENCE OF GUILT IN CLOSING DEPRIVED CAMACHO OF A FAIR TRIAL AND REQUIRES REVERSAL.

A. Standard of Review

In determining whether a prosecutor's comments on a defendant's silence constitutes reversible error, a reviewing court should consider (1) whether the improper remarks were used as a means of creating an inference of guilt, and (2)

whether the prosecution argued that the defendant's silence constituted an implied admission of guilt. *People v. Hall,* 107 P.3d 1073,1078(Colo.App.2004); *see Wainright v. Greenfield,* 474 U.S. 284,295(1986)(post-*Miranda* silence inadmissible as substantive evidence in defendant's sanity trial). Where a defendant fails to object at trial, reversal is required when the error seriously affects the substantial rights of the defendant and so undermines the fundamental fairness of the trial itself as to cast doubt on the reliability of the conviction. *People v. Grant,* 174 P.3d 798,806(Colo.App.2007). A defendant's objection to the prosecution's reference to his silence is reviewed for constitutional harmless error. *People v. Miller,* 113 P.3d 743,749(Colo.2005). Reversal is required unless the reviewing court is convinced beyond a reasonable doubt of its lack of prejudicial impact. *Crider v. People,* 186 P.3d 39,42(Colo.2008)(citing *Chapman v. California,* 386 U.S. 18,24(1967)). Here, Camacho failed to object to the evidence of his pre-arrest silence elicited during the trial (10/11/11,p175,208-209,216-217,239) or in the prosecution's closing argument (10/12/11,p60-62,67,68,72-73). He objected to the elicitation of Camacho's post-advisement silence during the trial (10/11/11,p179), but failed to do so during closing argument (10/12/11,p86).

B. Relevant Facts

The prosecution's first witness, Trooper Cutler, described stopping the van, contacting the driver and Camacho, securing consent to search, performing the search

with other officers, and arresting both men.(10/11/11,p153-174) After describing the cuffing of both suspects, Cutler gratuitously added, "The individuals, the two parties, there never said anything to us – to us or each other at any point."(*Id.*p174) The prosecution then asked if Cutler told them the reason for their arrest and he responded, "We told them that we found drugs, and they were under arrest for that. They still didn't say anything to us at that point."(*Id.*p174-75)

Cutler then said Camacho was expressionless when advised of the drugs, and did not show anger, happiness or fear.(*Id.*p175) The prosecution then asked:

> PROSECUTION: The defendant didn't make any statement to you about, that's not my marihuana?
> CUTLER: No.
> PROSECUTION: No statements?
> CUTLER: No statements.

(*Id.*) It later inquired about a *Miranda* advisement, and Cutler said, "We did that in the jail on the 9th when we went to go ahead and interview him. We went ahead and me and Master Trooper Jeffries-" to which counsel lodged an objection.(*Id.*p179) In a bench conference, the court ruled the prosecutor could not elicit Camacho's invocation of silence following the advisement, so the jury heard only that Cutler read Camacho his rights.(*Id.*p180-181)

During cross-examination, Cutler said he told Camacho he could stop the search at any time and that Camacho never asked him to stop it and never asked for a

lawyer.(*Id.*p198-199) In re-direct and presumably partially in response to cross-examination, the prosecution improperly elicited silence evidence in the following exchange:

> PROSECUTION: And in your training and experience, when you are dealing with defendants, regardless of what they've been caught with, when they're caught with something illegal and it doesn't belong to them, do they make a statement?
>
> CUTLER: I have had them allow me to go ahead and search vehicles. And we still find drug paraphernalia, drugs, in the vehicle. And they knew they were there; and they have said, Yeah, that was mine.
>
> PROSECUTION: Have you ever had occasion where somebody has said, Hey, that is not mine. I don't know where that got there. Or that belongs to somebody else in the vehicle?
>
> CUTLER: We have had people that will say, I don't know what that bag is. That's not mine. But the ones that I've had the right – found the drugs and they signed it, that they did admit that they were their drugs.
>
> PROSECUTOR: But in this case, as defense counsel pointed out, Mr. Camacho never made any statement?
>
> CUTLER: That's correct.
>
> PROSECUTOR: Regarding whether those were his drugs or not?
>
> CUTLER: That's correct.

(*Id.*p208-209)

During the next witness's examination, the prosecution ended its direct examination with the following exchange:

> PROSECUTION: And when you do that[perform searches], the owner, occupant, or other people of the vehicle or passengers of the vehicle are present when you're searching the vehicle?
>
> CORPORAL NELSON: That's correct.
>
> PROSECUTION: And have you ever had occasion where you found something in the vehicle that one of the occupants of the vehicle said that that did not belong to them?
>
> CORPORAL NELSON: Yes.
>
> PROSECUTION: And do they make that statement to you when you find it?
>
> CORPORAL NELSON: Yes.
>
> PROSECUTION: Did you hear any sort of statement like that coming from the defendant when you were finding these packages of marihuana?
>
> CORPORAL NELSON: No, I did not.

(*Id.*p216-217)

The prosecution's last law enforcement witness was Officer Vasquez, who acted as a Spanish interpreter and who stood with both men during the search of the van.(*Id.*p235-238) Vasquez said both men kept talking to each other during the search, that he didn't know what they talked about, and that he told them both to stop

talking.(*Id.*p238) After affirming Vasquez's presence at the arrest, the prosecution asked:

> PROSECUTION: Officer Vasquez, when - and you may or may not recall; but when Trooper Cutler and Corporal Nelson came back from searching the vehicle and explained to the defendant and Mr. Chavez, I think you said, what they were being charged with, did either of the gentlemen make a statement?
>
> VASQUEZ: That I recall, no.
>
> PROSECUTION: Did either of them say, That's my marihuana?
>
> VASQUEZ: No.
>
> PROSECUTION: Or, That's not my marihuana?
>
> VASQUEZ: That I can recall, no.
>
> PROSECUTION: Okay. And specifically pointed to the defendant, did you recall the defendant making any statements at all regarding the ownership or the possession of that marihuana?
>
> VASQUEZ: No.

(*Id.*p239)

During closing, the prosecution argued:

> And after the search. What did Trooper Cutler tell you? The defendant was standing 25 feet away. Office Vasquez said he could clearly see the marihuana being pulled out of the van. And so could the defendant and the co-defendant. No emotion. When they came up to arrest

> him for possession of marihuana, no emotion. And no statements. Never did he make a statement, That's not my marihuana. He was never surprised. He showed no emotion.

(10/12/11,p60) The prosecution continued by eliciting facts not in evidence when it argued:

> Now then, Deputy Gibson testified. And he brought his dog Radar. He alerted at three separate points on that van. And in those three separate points, there was marihuana; in the passenger door, in the driver's door, and in the rear panel back by the speaker. *And again, he said no statements were ever made by the defendant. That's not my marihuana. How did that get in my car? I can't believe it. No emotion. Nothing.*

(*Id.*p61)(Emphasis added). It then argued Nelson's testimony saying:

> And Corporal Nelson took the stand... .Again, the defendant and the co-defendant watched the search, and again, Trooper Nelson, a third person, didn't see any emotion, didn't hear any statements made by the defendant after the marihuana was discovered in his van *and after he was taken into custody.*

(*Id.*p61-62)(Emphasis added). The prosecution moved on to Vasquez's testimony, arguing:

> But at no time does he[co-defendant] ever say, well, no, wait this is my van. It doesn't belong to him[defendant]. Or this is my marihuana. When he's talked to, when Officer Vasquez speaks to the co-defendant, he doesn't own anything. He just merely says, We were in New Mexico. And Officer Vasquez stands next to both the defendant and the co-defendant and no statements were

made by the defendant at all after the marihuana was discovered.

(*Id.*p62) It then argued inferences the jury should make saying:

> If he did not own that marihuana, if he did not possess that marihuana, if that had – he had no idea that marihuana was in the car, where was his reaction? He should have been appalled. Fifty-one-who put 51 pounds of marihuana in my van? How could that have happened? And I'm getting arrested for it. It's not mine. I didn't put it there. I had no idea.
>
> At the very least a gasp? A sigh? A look of dismay? Crying? Some sort of emotion. And we should expect that he would have said, Okay. Wait a minute. We have to talk about this. This is not mine. I'm not going down for this. Nothing. No statements. No emotion. In fact, Trooper Cutler said it was a lack of emotion. It wasn't lackadaisical. It was just kind of like nothing. Nothing at all.
>
> What does that tell you? Reason and common sense. And what can you infer? Remember you can make inferences. Okay. You can make inferences. So you make an inference. You can make an inference from all those things up there. But specifically you can make an inference from his lack of – his lack of any sort of demeanor at all. Just to kind of a blankness about him.
>
> Was he in shock? Was he in shock because, I just got busted. And I had no way of knowing that they would find that. I thought I hid it pretty well. How did they find that? Was it shock because, What am I going to do now? And if it was, then where's the look of shock? It was a lack of emotion at all. According to Trooper Cutler.
>
> And again, if in fact after kind of regaining his composure from shock why didn't he make any statements? Why didn't he say, Please I need to talk about this. Think about it. The answer is no. He was not surprised, upset, shocked. No statements.

(*Id.*p67-68) The prosecution then ended its closing arguing inferences and saying:

> You can make all kinds of inferences from that; but I suggest to you, ladies and gentlemen, that you can infer specifically three things. Nobody has 51 pounds of marihuana in a closed van without smelling it and knowing it. Nobody has a van that's been tampered with, their own personal van, that they don't look at it and say, That's odd. How did that happen? And begin to put two and two together if there were not party to putting the marihuana in those doors to begin with.
>
> And, No.3, if in fact somebody else snuck that marihuana in that van unbeknownst to Lorenzo Camacho and he got in the van and he drove all the way to Colorado without ever smelling it without ever knowing anything was wrong with the van, when he finally got the van pulled over and the troopers finally started pulling out brick after brick of marihuana right in front of him, and then walked up to him and said, You're under arrest, you can infer that the fact that – from the fact that he never made a statement, never showed an emotion ever at any time, would suggest he knew darn well what was in that van.
>
> And he's guilty. He's guilty of possession with intent to distribute. And he's guilty of unlawful possession. And I ask that you find him guilty. Thank you.

(*Id.*p72-73)

During his closing, defense counsel argued in response that Camacho had a constitutional right of silence.(*Id.*p74) In rebuttal, the prosecutor personally denied any intent to tread on Camacho's right of silence saying:

> Let me be clear about one thing, ladies and gentlemen. I did not intend nor did I talk about a violation of the Constitutional rights. When the defendant did not make any statements, he was not yet Mirandized. Let me

> be clear about that. You heard testimony when he was Mirandized.
>
> Trooper Jeffries told you about that. His statements or lack of statements made by the defendant were prior to that. Pre-Miranda silence, ladies and gentlemen. He had not been read his rights yet. So my statements did not inflict upon the defendant's Constitutional rights. Let me be clear about that. I'm well aware of that, the Constitutional right that everyone has to remain silent. And when he invoked his Miranda, he did remain silent.

(*Id.*p85-86)

C. Legal Analysis

Both the Fifth Amendment and article II, section 18 of the Colorado Constitution provide that no person shall be compelled to testify against himself in any criminal case. *People v. Welsh,* 58 P.3d 1065,1069(Colo.App.2002)(*Welsh I*) *aff'd on other grounds, People v. Welsh,* 80 P.3d 296(Colo.2003)(*Welsh II*); *Lefkowitz v. Turley,* 414 U.S. 70 (1973). It is well-settled that "a prosecutor may not refer to a defendant's silence during custodial interrogation to create an inference of guilt because such comment penalizes the defendant for exercising his or her right to remain silent and violates due process of law." *People v. Richardson,* 58 P.3d 1039,1046(Colo.App.2002); *see also People v. Quintana,* 665 P.2d 605(Colo.1983); *People v. Taylor,* 159 P.3d 730,739-740 (Colo.App.2006). The law is also settled that a *testifying* defendant waives his Fifth Amendment rights and may be impeached with pre-arrest silence. *See Jenkins v. Anderson,* 447 U.S. 231,236(1980). However, as a division of this Court noted, "[t]he

use of a defendant's pre-arrest silence as substantive evidence of guilt is significantly different from its use to impeach the defendant's credibility on the stand." *Welsh I,* 58 P.3d at 1069. Thus, the prosecutor's use of pre-arrest silence when the defendant does not testify impermissibly burdens the privilege guaranteed by the Fifth Amendment and thus, is inadmissible in the prosecutions' case-in-chief as substantive evidence of guilt. *Id.* at 1071; *see also United States v. Burson,* 952 F.2d 1196(10thCir.1991); *Combs v. Coyle,* 205 F.3d 269(6thCir.2000).

In *Welsh I,* the prosecutor repeatedly elicited evidence of the defendant's refusal to respond to questions about what happened to medical and law enforcement personnel and contrasted that with her willingness to answer questions about her occupation and herself. *Welsh I,* 58 P.3d at 1071. It then argued in closing that remaining silent and refusing to explain what happened in the face of a dead loved one was not normal, and that such refusals showed the defendant knew exactly what happened. *Id.* at 1072. A division of this Court concluded such comments violated the defendant's Fifth Amendment rights and reversed her conviction. *Id.*

Similarly, here, the prosecution deliberately and through nearly every witness elicited Camacho's silence, his lack of emotion, and his failure to deny the marijuana was his as substantive evidence of the knowingly mental state. Moreover, it attempted to introduce evidence of his post-advisement silence during trial. Despite the court's

sustaining of that objection and its explanation at the bench that such evidence was not admissible, the prosecutor nevertheless argued in rebuttal closing that even after Camacho was advised, he remained silent. And, the prosecutor explained to the jury that consideration of Camacho's pre-arrest silence was absolutely proper and not contrary to the Constitution, clearly contrary to well-settled law.

The prosecution's use of Camacho's silence was obvious and substantial, undermined the fairness of the trial and was not harmless beyond a reasonable doubt. Its use of Camacho's failure to deny the drugs were his while watching the officers search the van, while watching them remove drugs from the van, while being arrested, and after being advised of his rights was not a mere inadvertent interjection into the case or an isolated example of an overzealous argument. *See,e.g. People v. Rosa,* 928 P.2d 1365,1372(Colo.App.1996)(reversal not required where investigator made one brief remark about defendant's silence followed by court's curative admonishment). Instead, the prosecution's elicitation and use of this evidence was its strategy from the outset. Its references to Camacho's silence were indisputably used not just to imply guilt, but to expressly argue his guilt and to tell the jury such silence constituted an implied admission of guilt. *See People v. Hardiway,* 874 P.2d 425,428(Colo. App.1993)(not harmless where prosecutor directly used defendant's silence as means

of implying guilt in both cross-examination and rebuttal argument and did more than merely allude to or unintentionally evoke such testimony).

Moreover, Camacho's pre-arrest silence lacked any probative value under the circumstances here. Indeed, the record established that Camacho answered Cutler's questions and consented to the search. It also established that Vasquez specifically directed both Camacho and the co-defendant to stop talking during the search and that both complied. The prosecutor never mentioned this evidence, but instead, argued Camacho's silence as evidence that he knew exactly what was in the van. *See Quintana,* 665 P.2d at 611 ("Due to the many possible explanations for the defendant's postarrest silence, we hold that in the circumstances of this case evidence of his failure to make a statement to the arresting officers was so ambiguous and lacking in probative value as to be inadmissible as substantive evidence when offered to disprove the affirmative defense of duress."). Accordingly, this Court should reverse Camacho's convictions.

2. THE COURT DEPRIVED CAMACHO OF HIS RIGHT TO A FAIR TRIAL BY A FAIR AND IMPARTIAL JURY WHEN IT DENIED HIS CAUSE CHALLENGE TO A JUROR WHO SAID HER STRONG BELIEFS MADE IT DIFFICULT TO FOLLOW THE INSTRUCTIONS.

A. Standard of Review

A trial court's denial of a challenge for cause is reviewed under an abuse of discretion standard. *Carrillo v. People,* 974 P.2d 478,485(Colo.1999). Despite this

discretion, "appellate courts 'must not abdicate their responsibility to ensure that the requirements of fairness are fulfilled.'" *People v. Luman,* 994 P.2d 432,435(Colo.App.1999) quoting *Morgan v. People,* 624 P.2d 1331,1332(Colo.1981); *People v. Hancock,* 220 P.3d 1015,1016(Colo.App.2009). When a court abuses its discretion by erroneously denying a challenge for cause and the defendant exercises all peremptory challenges, prejudice is presumed and requires a new trial. *People v. Merrow,* 181 P.3d 319,320(Colo.App.2007) citing *People v. Macrander,* 828 P.2d 234,244(Colo.1992). Camacho preserved this issue by challenging JurorH for cause (10/11/11,p126-132), exercising his first peremptory challenge on her (*Id.*p133), and exhausting all peremptory challenges.(*Id.*p133-134)

B. Relevant Facts

At the end of the prosecution's questioning, JurorH raised her hand in response to whether anyone would feel uncomfortable with the role of sitting in judgment of another.(*Id.*p101-102) JurorH explained this was because of her up-bringing and that she did not believe it was her place to judge.(*Id.*p102) She also said she understood it was her civic duty and would put forth her best effort, but that she still would feel very uncomfortable.(*Id.*)[3]

[3]Earlier and not relevant here, JurorH said she worked for the CPA firm that audited the district attorney's office, (*Id.*p55) and that she believed everyone who testified had a motive.(*Id.*p88)

Defense counsel questioned the jury about the potential 404(b) evidence and confidential informant (CI) testimony by using an example of a rum-runner bring rum from Texas to Colorado.(*Id.*p121-123) Later, counsel moved on to credibility and the burden of proof.(*Id.*p123-126) He elicited JurorH's agreement that as an accountant, she follows the rules and would determine whether all the pieces to the puzzle of this case fit.(*Id.*p126-127) When asked about the hesitation portion of the reasonable doubt instruction, JurorH raised the Texas hypothetical in the following exchange:

> JURORH: Going back to the scenario with the – the whether it's conviction or not in Texas, what have you, if you were in that situation at one point and were not smart enough to not let yourself be put in the situation again, then you're probably –
>
> COUNSEL: Well, the CI says you were there. This CI says you were. Does that mean you were?
>
> JURORH: More likely than not at this point.
>
> COUNSEL: And you haven't heard a No. 1 of evidence. But you think more likely than not. Now, what is the burden of proof? Is it more likely than not?
>
> JURORH: No, it's beyond a reasonable doubt.
>
> COUNSEL: Okay. So –
>
> JURORH: But if there is a previous situation that has already happened, my thought process starts that more likely than not.

COUNSEL: More likely than not. All right. Anyone else feel that same way? So without hearing any evidence, if you want – you went back in the jury box, you would say if this were a civil case, you would say award the plaintiff damages?

JURORH: If it happened previously, yes, or even – even –

COUNSEL: Somebody said if happened previously. Are you going to believe them or not?

JURORH: It will definitely affect my thought process.

COUNSEL: If you believed them?

JURORH: Uh-huh.

COUNSEL: Okay. But you haven't heard them whether you're going to believe them or not. I mean they may be you know – is it – is it going to matter if –

COURT: Counsel[Mr. Kelly].

COUNSEL: I – I – I'll try to finish up, Your Honor.

Is it going to matter if the person you hear is James Earl Ray or if it is Justice Scalia?

JURORH: Yes, it would matter.

COUNSEL: It would matter? That would – that would fit into your puzzle?

JURORH: Possibly. Hopefully.

COUNSEL: Possibly or not? You told me that you had trouble – you told me is what sitting in judgment on

somebody. So are those strong beliefs? Or I think you also said, no, I'm going to be able to do this.

JURORH: I do have very strong beliefs.

COUNSEL: Okay. Are those strong beliefs you think going to outweigh, what Judge Hobbs –

JURORH: I think it's entirely possible, yes.

COUNSEL: It isn't because – if they're not – I mean you can sit down here and say truthfully, no, they're not. You know I will follow the instructions. That's what we want. But if you're saying, you know I can't say that. Those feelings may very well get in the way.

JURORH: And I – they very well may get in the way. And without knowing the – the exact situation and seeing the evidence, I couldn't tell you for sure.

(*Id.*p127-130) Counsel then challenged JurorH for cause.(*Id.*p130) The prosecution then asked a lengthy leading question stating it thought JurorH previously said she could follow the law despite her strong feelings and asked if this was a misstatement. (*Id.*) JurorH said it was not a misstatement, but qualified saying, "And – and here again without being in the situation I cannot answer for sure either way."(*Id.*) Neither the court nor prosecutor asked JurorH whether she could follow the burden of proof, properly follow the credibility instruction, follow a limiting instruction concerning use of a prior act, or whether she could put propensity out of her mind when considering prior act evidence.

Defense counsel persisted in his cause challenge and argued this was not the typical situation because JurorH said her beliefs may very well affect her decision and ability to follow the instructions and that she could not say it would not happen.(*Id.*p131) He said he did not think this was a juror to take a chance on because her responses were so equivocal, and that if she had unequivocally said she would follow the instructions despite her strong feelings, then the situation would be different.(*Id.*) The prosecution argued her belief that probably every juror had strong feelings and that JurorH said she believed she could follow the law despite her feelings and was thus, an appropriate juror.(*Id.*) The court denied the challenge finding JurorH said she could follow the instructions, said she would follow the law and thus, met the statutory requirements.(*Id.*p131-132)

C. Legal Analysis

The Due Process clauses of the United States and Colorado constitutions guarantee Camacho the right to a fair trial. *People v. Morrison,* 19 P.3d 668,672 (Colo.2000); U.S.Const.amends.VI, XIV; Colo.Const.art.II,§§16,25. Fundamental to this right is the right to an impartial jury. *Id.* Impartiality ensures that a defendant will be tried only on the evidence presented at trial. *Beeman v. People,* 565 P.2d 1340,1342(Colo.1977). A defendant's right to an impartial jury is violated if the trial

court fails to remove a juror who is biased against the defendant. *Morrison,supra*; *Nailor v. People,* 612 P.2d 79(Colo.1980).

A court must excuse jurors who are unwilling or unable to accept the basic principles of criminal law and to render a fair and impartial verdict based upon the evidence admitted at trial and the court's instructions. §16-10-103(1)(j); *Nailor,* 612 P.2d at 80. Moreover, well-settled law requires jurors to unequivocally, either expressly or impliedly, state an ability to set aside personal experiences and be fair. *Luman,* 994 P.2d at 435-36. When a juror expresses bias, the record must contain rehabilitative questioning or other counter-balancing information demonstrating that juror's unequivocal impartiality. *Merrow, supra*; *People v. Chavez,* __P.3d__, 2011 WL 2899625 *6 (Colo.App.2011); *Hancock*, 220 P.3d at 1019 (reversal required where juror's "probably" and "really not sure" responses never rehabilitated by court or prosecution). If a trial court has any doubt about a juror's ability to be impartial, it should resolve that doubt by sustaining the challenge. *Luman,* 994 P.2d at 435; "This standard protects the interests of justice and promotes judicial efficiency." *Nailor,* 612 P.2d at 80.

Here, contrary to the court's finding, JurorH never stated she could follow the instructions or would follow the law. JurorH raised her feelings in response to a general question to the panel, and said even though she knew it was her civic duty to

sit in judgment of another, it would still make her uncomfortable because of her upbringing. The prosecutor never asked whether she could/would set aside those feelings and follow the law given by the court. Moreover, during defense questioning, JurorH characterized her feelings as "very strong beliefs," said it was "entirely possible" those beliefs would outweigh the court's instructions, and reiterated that they "very well may get in the way." JurorH said without seeing the evidence, she couldn't be sure, but importantly, she never retreated from her position that there was a strong possibility her beliefs would get in the way. The prosecution's leading question assuming JurorH previously stated she would follow the law despite her strong feelings is not supported by the record. And, JurorH's agreement with it was quickly qualified by her own uncertainty and inability to say for sure either way she could follow the law. Accordingly, the court abused its discretion in finding JurorH expressed an ability to follow the instructions and the law.

Additionally, JurorH raised the issue of the prior act evidence on her own and expressed a "propensity opinion," saying that if someone were in a similar situation previously and was not smart enough to avoid that situation again, then it was more likely than not that person committed the current act. Despite recognizing that the proper burden was beyond a reasonable doubt, JurorH nevertheless said in her mind and thought process, the existence of a previous situation made it more likely than not

it occurred here. She never retreated from this position but instead reiterated it saying, "It will definitely affect my thought process." Despite this unequivocal statement of bias, no further questioning occurred concerning JurorH's ability to set aside her thought process and apply the proper burden of proof or her ability to use the evidence for a limited purpose. As argued by counsel, the record of JurorH's responses demonstrates equivocation requiring the court to err on the side of caution by sustaining the challenge for cause. *Luman,supra.* In the absence of any rehabilitative questioning or counter-balancing information demonstrating JurorH's ability to follow the law, this Court should reverse Camacho's convictions. *Merrow, supra; Chavez, supra.*

3. THE COURT ABUSED ITS DISCRETION IN DENYING CAMACHO'S MOTION TO CONTINUE THE TRIAL TO INVESTIGATE THE 404(b) EVIDENCE DISCOVERED TWO WEEKS BEFORE TRIAL THAT THE COURT RULED ADMISSIBLE IN REBUTTAL IF CAMACHO DENIED KNOWLEDGE OF THE DRUGS.

A. Standard of Review

Motions to continue are reviewed for an abuse of discretion. *People v. Ellis,* 148 P.3d 205,211(Colo.App.2006). A court abuses its discretion when it acts "in a manifestly arbitrary, unfair or unreasonable manner." *Id.* The court's preclusion of defense evidence is reviewed under the constitutional harmless error standard of review. *Krutsinger v. People,* 219 P.3d 1054,1061(Colo.2009); *Chapman v. California,* 386 U.S. 18, 21-11(1967). Under this standard, a reviewing court must be convinced

beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* Camacho preserved this issue for constitutional harmless review by moving to continue the trial following the court's ruling on the late discovery and asserting a denial of his constitutional right to a fair trial, (10/11/11,p23) by renewing this request under both the Colorado and Federal constitutions, (*Id.*p24-25) and by articulating the impact these rulings had on his right to testify and present a defense.(10/12/11,p18,25)

B. Relevant Facts

Before trial, Camacho filed a motion for disclosure of information related to any confidential informants.(v1,p27-28) He asserted knowledge of at least two similar cases being filed in Morgan and Logan, and one in Kit Carson counties and suspected the stop here was pretextual based upon its similarities to these other five cases, namely a stop for a minor traffic infraction.[4] (*Id.*) At the hearing, counsel further argued that most of these other stops involved the Colorado State Patrol rather than local law enforcement, that most of the searches were consensual and that all of them occurred in the previous 6-8 months.(6/28/11,p2) Based upon these other cases, counsel suspected the involvement of one or more confidential informants, although none had been disclosed in discovery.(*Id.*) He asserted Camacho's right to any and all

[4] Counsel failed to file a separate motion challenging the constitutionality of the stop.

information related to any CIs, including criminal histories.(*Id.*p2-3) The prosecutor affirmatively stated there were no CIs involved in this case.(*Id.*p3-4)

Two weeks before trial, the prosecution filed a notice of intent to introduce 404(b) evidence alleging it just learned of the existence of two CIs working with the FBI who provided information to the U.S. Attorney's office concerning Camacho.(v1,p44-48) The feds refused to release the identities of those informants, but the notice stated this information was conveyed to the defense.(*Id.*) Camacho immediately filed a written response objecting to the introduction of this evidence and arguing that the lateness of the disclosure, coupled with the lack of discovery surrounding this evidence (identities, criminal histories, inducements, etc.) prejudiced his right to a fair trial.(*Id.*p49-50) One week later, the prosecution filed an amended notice adding *res gestae* as a theory of admissibility and including an offer of proof with redacted reports attached.(*Id.*p52-63)

The morning of trial, the court heard arguments on the prosecution's request to introduce this evidence.(10/11/11,p12-21) The court concluded that the evidence was relevant since Camacho's defense was lack of knowledge of the drugs in the van.(*Id.*p21) It decided to allow admission of the evidence for rebuttal purposes only if Camacho either called the co-defendant or testified himself that he lacked knowledge of the drugs in the van.(*Id.*p21-22) Based upon this ruling, defense counsel

stated his intention to present the co-defendant's testimony, asked for a continuance of the trial to more adequately prepare to meet this evidence, and asserted that this evidence shifted the burden of proof and violated Camacho's constitutional right to a fair trial.(*Id.*p22-23) The court denied the continuance finding the defense had adequate time to anticipate these issues.(*Id.*p23-24) Counsel reiterated that this was not an evidentiary objection but a state and federal constitutional one and renewed his continuance request.(*Id.*p24-25) The court denied that request.(*Id.*p25) Later, the court ordered the prosecution to make the 404(b) witnesses available for defense interviews, given the fact that the information was disclosed less than 30 days before trial.(*Id.*p27) It also expressed surprise at the absence of documentation pertaining to agreements with the CIs and said, "— normally in cases like this with the CI we would see some written documentation." (*Id.*p27-28)

Despite the court's ruling that this evidence was only admissible in rebuttal, the prosecution ended its opening statement saying:

> Ladies and gentlemen, Lorenzo Camacho will want you to believe that he had nothing to do with this. Didn't know how that marihuana got in the car. He didn't put it there. He didn't get it. He has no knowledge of it. He basically is – had nothing to do with any of this incident that I've just described to you. That is what he will want you to believe.
>
> However, the evidence and testimony that we'll present will tell you otherwise. In fact, ladies and gentlemen, we'll have witnesses that will testify to Mr.

> Camacho's drug dealing, the fact that he is known to sell drugs, is known to possess drugs. And after you've heard the evidence and the testimony today, you will have no doubt that Lorenzo Camacho is guilty.

(*Id.*p150-151)

Finally, at the conclusion of the prosecution's case, defense counsel reiterated his objection to the 404(b) evidence on constitutional grounds asserting that the evidence violated Camacho's rights to due process.(10-12-11,p18) He stated his original intent to present the co-defendant's and Camacho's testimonies, argued that the court's rulings deprived Camacho of his right to present a defense and said based on those ruling, he had decided not to present evidence and would rest in front of the jury. (*Id.*)

C. Legal Analysis

The Due Process clauses guarantee every defendant the right to a fair trial. U.S.Const.amends.V,XIV; Colo.Const.art.II,§§16,25; *see Oaks v. People,* 371 P.2d 443,447(1962); *People v. Harlan,* 8 P.3d 448,459(Colo. 2000). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284,294(1973). A criminal defendant's right to present a defense is essential to a fair trial. *United States v. Valenzuela-Bernal,* 458 U.S. 858,875(1982)(O'Connor, J. concurring). The Fifth, Sixth and Fourteenth amendments concomitantly provide a criminal defendant the right to

present a defense by compelling the attendance and presenting the testimony of his own witnesses. *Washington v. Texas,* 388 U.S. 14,18-19(1967). Indeed, a defendant's right to offer testimony at trial is a fundamental element of due process of law and few rights are more important than the right of the accused to put before the jury evidence that might influence the determination of guilt. *People v. Chastain,* 733 P.2d 1206,1212(Colo.1987); *People v. Searce,* 87 P.3d 228,233-234(Colo.App.2004).

"In a criminal case, a defendant is entitled to all reasonable opportunities to present evidence which might tend to create a doubt as to his guilt." *People v. Bueno,* 626 P.2d 1167,1169(Colo.App.1981). While the right to present a defense does not guarantee a defendant a right to question witnesses in violation of the rules of evidence or to produce inadmissible hearsay, it does require that the accused be permitted to introduce all relevant and admissible evidence. *Searce,* 87 P.3d at 233; *People v. Harris,* 43 P.3d 221,227(Colo.2002). Further, a defendant must "make some plausible showing of how [the] testimony would have been both material and favorable to his defense" to establish a due process violation. *People v. Melendez,* 102 P.3d 315,320(Colo.2004) quoting *Valenzuela-Bernal,supra.* While the court may exclude unnecessarily duplicative evidence, even cumulative evidence that may corroborate a defendant's statement should be admitted. *Id.* at 320.

The granting or denial of a motion to continue is a matter within the sound discretion of the trial court. *People v. Gagon,* 703 P.2d 661,663(Colo.App.1985). An abuse of discretion will be found if a defendant suffers substantial prejudice as a result of the denial of the continuance. *See id.* An appellate court must look at the totality of the circumstances when determining whether the court abused its discretion by denying the continuance. *See People v. Crow,* 789 P.2d 1104,1106(Colo.1990). *See also People v. McCabe,* 546 P.2d 1289,1290-91(Colo.1975)(finding an abuse of discretion in denying continuance to secure presence of a defense witness and stating that "an appellate court, in reviewing such a decision, must consider the totality of the circumstances surrounding the request as reflected by the record."). Factors considered include whether the request for a continuance was intended to "delay the proceedings unnecessarily," or whether the opposing party would have been prejudiced by the delay requested. *People v. Bakari,* 780 P.2d 1089,1093(Colo.1989).

Here, there is no dispute that the prosecution disclosed the evidence at issue two weeks before trial or that such disclosure was outside the 30-day time limit set forth in Crim.P.16(I)(b)(3).[5] And, the reports disclosed one week before trial show the involvement of numerous individuals, both known and unknown, involved in drug transactions from 2008-2011. The court's simultaneous finding that this evidence was

[5] Time limit in 2011 is now 35 days. Camacho does not argue a discovery violation.

admissible in rebuttal if Camacho presented evidence in his defense and the denial of the continuance effectively precluded Camacho from defending against the charges here and thus, resulted in substantial prejudice. The record clearly shows the need to further investigate the numerous witnesses disclosed in the offer of proof as well as the CIs themselves. Indeed, when the court inquired whether any promises were made to the CIs, the prosecution stated there were no immunity agreements, but then proceeded to describe how one of the CIs was arrested for possession of marijuana but had no charges filed, how both CIs understood they could be charged at any time, and how both were compensated for meals and travel expenses in connection with their work for the FBI, all of which constitute "inducements" on which they could be cross-examined concerning motive for cooperation. Thus, the court's conclusion that counsel had adequate time to anticipate the issues is simply not supported by the record and is contradicted by the prosecutor's statement that she only received this information two weeks before trial.(10/11/11,p18) Even when describing what she knew, the prosecutor could only relate what she was told by the FBI, further evidence that her office had not personally spoken with the CIs and of defense counsel's need to investigate this new information.(*See Id.*p19)

Additionally, the record contains no evidence that defense counsel's request was intended to delay the proceedings unnecessarily. Counsel consistently argued that

the timing and character of this evidence required a continuance of the trial, implicitly to thoroughly investigate these new allegations. Counsel could not make a strategic decision about whether to present a case without fully knowing the consequences of that decision, and those consequences were only obtainable through a continuance and further investigation. The court's denial of a continuance left counsel with no choice except to present no evidence of a defense, because to do otherwise left him with no ability to rebut the prosecution's rebuttal evidence. Accordingly, under the totality of the circumstances here, the court's denial of Camacho's request for a continuance of the trial constituted an abuse of discretion that deprived him of his constitutional right to present a defense, and this Court should reverse his convictions. *Gagnon,supra; Crow,supra.*

4. THE COURT'S RULINGS IN ISSUE 3, *SUPRA*, IMPERMISSBLY CHILLED CAMACHO'S CONSTITUTIONAL RIGHT TO TESTIFY IN HIS DEFENSE.

A. Standard of Review

See Issue 3 – Standard of Review. Camacho preserved this issue by stating he would testify in his own defense but for the court's ruling on the 404(b) evidence and its refusal to grant him a continuance.(10/12/11,p18,25)

B. Relevant Facts

See Issue 3 – Relevant Facts.

C. Legal Analysis

A defendant has both a federal and state constitutional due process right to testify on his or her own behalf. *People v. Skufca,* 176 P.3d 83,85(Colo.2008); *Rock v. Arkansas,* 483 U.S. 44 (1987); *Curtis v. People,* 681 P.2d 504,509-510(Colo.1984); U.S.Const.amends.V,VI,XIV; Colo.Const.art.II,§25. This right is sufficiently fundamental that only a defendant can waive it. *Curtis,* 681 P.2d at 514. This is so for three reasons. First, "[a] defendant's testimony is compelling to the fact-finder because it gives an immediate and visible impression of the defendant and it may provide direct evidence of some elements of the crime. Thus, the defendant's testimony may be crucial in determining his fate." *People v. Kruger,* 296 P.3d 294,301(Colo.App.2012) citing *Curtis,* 681 P.2d at 513. Secondly, a defendant's desire to tell his side of the story may be of overriding importance to him, and whatever the consequences to his case, "it is fundamentally wrong to allow a conviction "by a jury which never heard the sound of his voice."" *Id.* at 514, citing *McGautha v. California,* 402 U.S. 183,220(1971). Finally, the opportunity to be heard and to place the accused's viewpoint before the fact-finder lies at the heart of due process and legitimates the outcome of the trial. *Curtis,* 681 P.2d at 513-514. "He has the right to know, as he suffers whatever consequences there may be, that it was the claim that he put forward that was considered and rejected." *Id.* at 514. Equally important is the

public's perception that "persons accused of crimes have not been silenced at trial by undue influence, mistaken impressions, or ignorance." *Id.*

Here, the court's ruling admitting the 404(b) evidence for rebuttal if Camacho testified, without giving him the opportunity to investigate it and determine whether it was rebuttable, deprived him of his constitutional right to testify and to have the jury hear, "in his own words," what happened in this case. Counsel stated this at the close of the evidence and presented no direct evidence in Camacho's defense. The jury's question during deliberations requesting transcripts of the officers' testimonies demonstrates the error was not harmless beyond a reasonable doubt. Accordingly, the court's rulings deprived Camacho of his fundamental constitutional right to testify, of his right to present a defense, (Issue 3, *supra*) and requires reversal.

5. THE COURT PLAINLY ERRED IN ALLOWING CUTLER TO TESTIFY THAT FAST FOOD TRASH, WATER AND OIL BOTTLES, NO LUGGAGE AND AN EMPTY CAR SEAT SHOWED THE DRIVER/PASSENGER WERE IN A HURRY TO GET SOMEPLACE AND EVIDENCED POSSIBLE DRUG-RUNNING ACTIVITY WITHOUT PROPER QUALIFICATION AS AN EXPERT UNDER CRE 702.

A. Standard of Review

The admissibility of expert testimony is reviewed under an abuse of discretion standard and will be overturned when it is manifestly erroneous. *People v. Ramos,* 2012 COA 191,¶5; *People v. Ramirez,* 155 P.3d 371,380(Colo.2007). When there is no objection, review is for plain error. *Miller,* 113 P.3d at 750. Reversal is required when

the error is both obvious and substantial. *Id.* Camacho failed to preserve this error through objection.

B. Relevant Facts

Trooper Cutler described calling Vasquez to the scene to act as a translator. (10/11/11,p162) When asked what he told Vasquez, Cutler said that he had stopped them for a signaling violation and then non-responsively added, "Some of the things that I was seeing and hearing from Mr. Camacho wasn't really – didn't seem like everything was up front for me. I had extensive training that has allowed me to know certain things. So when we have items on the floor like water bottles, quarts of oil, fast food bags. And at one point I did ask them if they had any luggage. And he said they didn't. So that also made me start wondering what was going on. So I told them I was interested in finding out what the driver's story was." (*Id.*p162-163) The prosecution specifically asked what these indicated in the following exchange:

> PROSECUTOR: And then you made mention of fast food wrappers and water bottles and quarts of oil. Now, in your training and experience, Trooper Cutler, what are those indications of?
>
> CUTLER: When you have a lot of items that are in there it looks like somebody's basically living out of their car, which means that when we're looking at that, we see that it's somebody who doesn't really want to stop somewhere very often. They're heading somewhere. And so they want to get to their destination fast as they can.

> So, if you got water bottles, they're drinking the water while they're going down the road. They stop for fast food just to grab it, and then they eat on the way. And you want to have anything that would help you if you got a car that needs oil, extra water, things like that. You want to have these things in your vehicle so that you don't have to stop anywhere any longer than you have to.
>
> One of the things that kind of peaked my interest when I saw the out-of-state plates with the car seat in the back was I had two male occupants, out of state with no child in it. I – I've never known anybody that I know anyways that can afford to have a car seat not with the child. We usually have one car seat since we don't have it for multiple vehicles. So that was something I thought was a little odd for somebody to be able to go ahead and do that.

(*Id.*p164-165) Cutler then testified about the search, seeing all sorts of tools "scattered around on the floor," and finding bricks of marihuana in the door.(*Id.*p166-184) He also described photographs of the van admitted into evidence.(*Id.*) When describing People's Exhibit 2, Cutler said, "This is the first stuff that I noticed in the vehicle. You got water bottles and drink cans there, along with the quarts of oil. Not something I standardly see when stopping vehicles. This was another indicator to me when I saw the fast food and just eating in the vehicle and looked like they had been there for a while."(*Id.*p185)

In response to cross-examination concerning other reasons for the presence of these items in the car, the prosecution directly asked Cutler whether he had any "special training" that caused him to be suspicious of these items.(*Id.*p207) Cutler said

yes, that he had taken a drug interdiction course called "Desert Snow" in June of 2010 during which he saw vehicles used in drug trafficking, learned how drugs were transported and learned the items to look for.(*Id.*p207) He said an empty car seat with out-of-state plates meant the family was not present and looked more to him like the car was trying to "fit in" with all the other cars on the road and thereby avoid detection. (*Id.*p207-208) This was one of the specific items he was trained to look for. (*Id.*p208)

The prosecution argued these items as evidence of guilt during closing:

> What else did we learn yesterday? Well, Trooper Cutler, when he took the stand, he talks to you about some of the training that he received. He's trained in drug interdiction. He told you about the things that he noticed immediately when he pulled the van over. He noticed a few clues he called them. Empty water bottles, quarts of oil, fast food wrappers, half eaten fast food, and a car seat.
>
> Now remember what he said about the car seat. Well, first of all, Lorenzo Camacho said that car seat belonged to him. But the interesting thing is that there are two men in the car. They've supposedly been away for over a week. And this is Lorenzo Camacho's child's seat. And Trooper Cutler said, well, two things cause him concern.
>
> First of all, very few people have two car seats that they can afford to keep in two separate vehicles. And, secondly, the other thing is that one of the things he was trained on is that individuals who are running drugs or anything illegal try to blend in. One of the ways they try to blend in is to make it look like a family or just a normal vehicle. And thus the use of the car seat.
>
> The other thing. What's the importance of water. Well, lot of people keep bottles of water in their car. I do.

> You do. That's not the point. The point was a lot of water and fast food and oil all suggest that this is somebody who is in a hurry. They don't stop. They don't spend the night. They're on their way somewhere. That was the other thing.

(10/12/11,p59-60)

C. Legal Analysis

A police officer may offer testimony as a lay witness as long as that opinion is (1) rationally based on his perceptions, (2) helpful to a clearer understanding of his testimony or the determination of a fact in issue and (3) is not based on scientific, technical or other specialized knowledge. *People v. Tallwhiteman,* 124 P.3d 827 (Colo.App.2005); CRE 701. "Generally, a witness is precluded from providing an opinion on issues that are based on scientific, technical, or other specialized knowledge unless that witness is qualified as an expert." *Medina v. People,* 114 P.3d 845, 859(Colo.2005); CRE 702.

In *People v. Stewart,* 55 P.3d 107,123(Colo.2002), the Court observed that "[o]fficer testimony becomes objectionable when what is essentially expert testimony is improperly admitted under the guise of lay opinions." The Court held, therefore, that "where... an officer's testimony is based not only on her perceptions and observations of the crime scene, but also on her specialized training or education, she must be properly qualified as an expert before offering testimony that amounts to expert testimony." *Id.* at 124.

In determining whether an opinion is based on specialized training or knowledge, a court should consider whether ordinary citizens could be expected to know such information and whether such information results from a process of reasoning familiar in everyday life or a process of reasoning that can only be mastered by specialists in the field. *People v. Rincon,* 140 P.3d 976(Colo.App.2005); *United States v. McDonald*, 933 F.2d 1519,1522(10thCir.1991).

Here, Cutler's opinions were not based simply on his observations under CRE 701. The significance of the items Cutler saw in the van and what they indicated to him was not the type of information resulting from reasoning familiar in everyday life. Only a person specially trained in narcotics investigations and drug interdiction is qualified to render such an opinion, as evidenced by Cutler's later testimony concerning that training (Desert Snow). Consequently, there was no basis from which it could be determined that the basis of Cutler's opinions and observations were trustworthy. *See People v. Caldwell,* 43 P.3d 663,667(Colo.App.2001)(permitting expert testimony in the guise of law opinion "would encourage the Government to offer all kinds of specialized opinions without pausing first to establish the required qualifications of their witnesses.")(quoting *United States v. Figuera-Lopez,* 125 F.3d 1241, 1246(9thCir.1997)). Moreover, the prosecution's framing of the question as one based on "training and experience" improperly conferred an aura of expertise" on Cutler

and demonstrated that his answers were based on specialized knowledge. *Ramos,* ¶21. Accordingly, the court should not have admitted these opinions in the absence of pre-trial disclosure and proper expert qualification. *See Stewart*, 55 P.3d at 124 (concluding the court abused its discretion in admitting, as lay opinion, the testimony of a police officer about accident reconstruction and the inferences he drew therefrom).

The error here was both obvious and substantial. First, it was well-settled that police testimony concerning specialized knowledge required pre-trial disclosure and proper expert qualification. *Stewart,supra.* Had such disclosure occurred, Camacho could have retained his own expert to refute the items' significance, to undermine Cutler's opinions, or to preclude the evidence's admission based on the lack of a sound scientific basis. Moreover, the prosecution used these improper opinions to characterize Camacho as a drug-runner and to tell the jury that because Cutler believed Camacho was running drugs, it should too, thereby lowering its burden of proving knowledge. Accordingly, this Court should reverse Camacho's convictions.

6. STATE AND FEDERAL DOUBLE JEOPARDY REQUIRE THE MERGER OF THE COUNTS.

A. Standard of Review

Double Jeopardy issues are reviewed *de novo. People v. Abiodun,* 111 P.3d 462,471(Colo.2005). Because double jeopardy implicates a defendant's fundamental rights and the State's power to prosecute, they can be raised for the first time on

appeal. *People v. Vigil,* 251 P.3d 442,449(Colo.App.2010); *Patton v. People,* 35 P.3d 124,128(Colo.2001).

B. Legal Analysis

The Double Jeopardy clauses of the U.S. and Colorado constitutions prevent multiple convictions and punishments for the same offense. U.S.Const.amend.V; Colo.Const.art.II,§18. The legislature may choose to punish the same offense with more than one conviction and sentence, but it must make its intent to do so clear. *Abiodun,* 111 P.3d at 465. Moreover, an accused in Colorado "may not be convicted of two offenses if one is included within the other." *Id.* at 465; §18-1-408(1)(a). An offense is a lesser-included offense if "proof of the facts establishing the statutory elements of the greater offense necessarily establishes all of the elements of the lesser offense." *Patton,* 35 P.3d at 130 (quoting *People v. Leske,*957 P.2d 1030,1036 (Colo.1998)); *Blockburger v. United States,* 284 U.S. 299,304(1932).

Here, the record established that both charges arose from the same evidence – the stop and search of the van. Moreover, all of the elements of possession of more than 12 ounces of marihuana are subsumed in possession with intent to distribute 5-100 pounds of marihuana. Accordingly, this Court should vacate the conviction and sentence for count 2.

CONCLUSION

Based upon the facts and authorities set forth in Issues 1-5, Mr. Camacho respectfully asks this Court to vacate his convictions. Based on the facts and authorities set forth in Issue 6, he respectfully requests this Court to vacate his possession conviction.

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CERTIFICATE OF SERVICE

I certify that, on January 10, 2014, a copy of this Opening Brief of Defendant-Appellant was electronically served through ICCES on Catherine P. Adkisson of the Attorney General's office through their AG Criminal Appeals account.