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Court of Appeals, State of Colorado 2 East 14th Ave., Denver, CO 80203 Direct Appeal; Adams County District Court; Honorable Thomas R. Ensor; Case No. 14CR862	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JAHMAL ALI PRICE, Defendant-Appellant.	
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OPENING BRIEF	

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:

1. The brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 8,878 words.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A). For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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.

s/ Krista A. Schelhaas
Krista A. Schelhaas

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STATEMENT OF THE CASE AND FACTS

On March 23, 2014, police were dispatched to respond to a 911 report of a black male jiggling car door handles at an apartment complex. (R. Tr. 11/3/14, p. 87, ll. 13-14, 23-24; p. 88, 7-8). Police officers arrived at the scene, were unable to locate a suspect, and then noticed an unrelated DUI incident. (*Id*. at p. 88, ll. 19-23). The officers investigated the DUI incident for approximately twenty minutes. (*Id*. at p. 89, l. 1).

Later, Officer C noticed Mr. Price walking along the sidewalk. (*Id*. at p. 92, ll. 16-17). Officer C activated her lights, pulled up alongside Mr. Price, and asked to talk to him. (*Id*. at p. 93, ll. 4-7). Officer C asked for his name, birth date, and the last four digits of his social security number. (*Id*. at ll. 8-13). Officer C testified that Mr. Price responded that his name was "Manuel Price." (*Id*. at l. 11). Officer C asked Mr. Price whether he had anything dangerous or illegal. (*Id*. at p. 95, l. 24). Officer C conducted a pat down search and found nothing dangerous or illegal. (*Id*. at p. 96, ll. 7-8).

Officer C placed Mr. Price's backpack on the ground. She asked him if she could search it and then reached for it. (*Id*. at p. 96, l. 21-22). As she reached for it, Mr. Price also reached for and grabbed the backpack and began to flee. (*Id*. at ll. 24-25). Officer C tried to grab and tase Mr. Price. (*Id*. at p. 97, ll. 6-7).

The police department requested assistance from the Sheriff's K-9 unit. (*Id*. at p. 48, ll. 21-22). The K-9 unit responded and began tracking. (*Id*. at p. 51, ll. 13-15). The K-9 unit located a black backpack and a green "construction flagger type vest." (*Id*. at p. 53, ll. 3-4, 19-20). The backpack contained a handgun and employment paperwork . (*Id*. at p. 105, l. 22; p. 111, ll. 20-21; PR. Env. 2, Ex. 12).

The K-9 unit lost the track, left the scene, and was redeployed a few hours later. (R. Tr. 11/3/14, p. 55, ll. 1-6). The K-9 unit later found Mr. Price in a

garage. At that time, Mr. Price was cornered, unarmed, hunched on the floor, and had his hands tucked underneath his shirt. The officers gave Mr. Price five seconds to show his hands and when the officers were not satisfied with his response, the dog was deployed to bite Mr. Price. (*Id*. at p. 61, ll. 1-3). Mr. Price was bitten in his right rib area. (Id. at p. 61, l. 8; PR. Env. 1, Ex. 10).

After the dog bit Mr. Price, four officers stepped in to strike him with knees, elbows, and fists. (R. Tr. 11/3/14, p. 152, ll. 1-4; p. 153, ll. 6-8; p. 192, ll. 19-20; p. 193, ll. 7-17). During the time Mr. Price was being struck, his hands were tucked inside his shirt and were coming through the neckline of his shirt. (*Id*. at p. 169, ll. 16-18). A fifth officer entered the garage, kneeled beside Mr. Price, and realized that it was hard for Mr. Price to get his hands up because his hands were inside his shirt. (*Id*. at p. 169, ll. 18-21). After that officer stepped in and instructed the others to help thread Mr. Price's arms through his shirt, the officers easily handcuffed him. (*Id*. at p. 170, ll. 6-9).

Mr. Price's injuries are documented in Exhibits 9 and 10, and E, F, and G. (PR. Env. 2, Ex. 9, 10, E, F, G).

Following a jury trial, Mr. Price was convicted of criminal impersonation, possession of a weapon by a previous offender (POWPO), unlawfully carrying a concealed firearm, second degree criminal trespass, resisting arrest, and false

reporting to authorities (PR. CF, Vol. 1, p. 110-116). He was sentenced to eighteen months in the department of corrections. (*Id*. at p. 116). Further facts will be included in the arguments section.

SUMMARY OF THE ARGUMENTS

Officer C conducted an investigatory stop when she initiated her lights, approached Mr. Price, and placed her hands on him. She did not have reasonable suspicion to stop Mr. Price because he was casually walking on the sidewalk, exhibited no signs of suspicious activity, and the only reason articulated by Officer C for the stop was that he was a black male wearing a leather jacket. The backpack searched after the illegal investigatory stop was a product of an unlawful seizure and its contents must be suppressed.

Trial counsel stated that there was a complete breakdown of communications with Mr. Price and Mr. Price asked for substitute counsel. However, the district court did not inquire into the reasons for the breakdown in communication and instead ordered Mr. Price to work with his attorneys.

The district court admitted evidence that Mr. Price was previously convicted of two felonies and a probation violation. The second felony — attempted aggravated assault — was inherently prejudicial but the district court took no curative actions after defense counsel's objection.

Mr. Price moved to sever the POWPO charge from the other charges. The district court refused to sever the POWPO charge from the criminal impersonation charge because it concluded that the prior conviction was evidence used to show that Mr. Price gave a false name to gain a benefit. However, because other evidence — a warrant for Mr. Price's arrest at the time he was stopped — could be used to show the same element, the prior conviction was prejudicial as to the criminal impersonation charge.

ARGUMENTS

I. The District Court Erred in Denying Mr. Price's Motion to Suppress the Backpack and Its Contents.

A. Standard of Review

When reviewing a district court's decision during a suppression hearing, an appellate court defers to the district court's findings of historical fact. *People v. Outlaw*, 17 P.3d 150, 155 (Colo. 2001). However, an appellate court must "correct a lower court's use of an erroneous legal standard or a conclusion of law that the uncontroverted evidence contradicts." *Id*.

During a suppression hearing, the moving party has the "burden of going forward with evidence of an impermissible seizure." *Id*. The defendant must show (1) the point when he was seized, and (2) that the seizure was unconstitutional. *Id*.

Once the defendant has met this initial burden, the burden shifts to the prosecution to show that the encounter was legal. *Id*. "The burden of proof always remains with the prosecution 'to establish that warrantless conduct on the part of the officers falls within one of the narrowly defined exceptions to the warrant requirement.'" *Id*. (quoting *People v. Jansen*, 713 P.2d 907, 911 (Colo. 1986)).

B. Preservation

Mr. Price has preserved this contention. He filed a motion to suppress the backpack and its contents, contending that the officer lacked reasonable suspicion to justify the investigatory stop. (PR. CF, Vol. 1, p. 31, ¶ 16). Mr. Price also contended that because the backpack was seized following an illegal stop, the evidence must be suppressed as fruit of the poisonous tree. (*Id*. at ¶ 20-21).

At the suppression hearing, Mr. Price reiterated the Fourth Amendment contentions and also argued that the search was not consensual because he was not informed that the search was voluntary and that he had a right to refuse a search, as required by section 16-3-310, C.R.S. (R. Tr. 9/19/14, p. 70, ll. 1-10).

C. District Court Findings

The district court found that the officers were investigating a car prowler incident that occurred in the parking lot of an apartment building at 3:11 a.m. (R. Tr. 9/19/14, p. 71, l. 2). The district court noted that the "incomplete" description

of the possible suspect was for "a black male in a black leather jacket." (*Id*. at p. 70, ll. 24-25, p. 71, ll. 7-8). Initially, the officers did not locate any possible suspects. (*Id*. at p. 71, ll. 6-7). Approximately twenty-five minutes after the officer's arrival on scene, and after completing an unrelated DUI stop, the officer noticed Mr. Price walking on the sidewalk. (*Id*. at ll. 11-18).

The district court found that Officer C was uniformed and in a patrol car, activated her flashing lights, displayed authority or control, and asked Mr. Price for his identification. (*Id*. at p. 72, ll. 2-5). Officer C asked Mr. Price whether he had anything dangerous or illegal in the backpack and asked whether she could search it. (*Id*. at p. 72, ll. 20-22). Officer C conducted a pat down search of Mr. Price. (*Id*. at p. 73, l. 12).

Next, the district court found that the encounter was either consensual or "if this is an investigatory stop, [the officer] is investigating a crime. She's investigating a crime based upon information that was provided by an anonymous citizen through a 911 call, which is presumptively reliable, and she is conducting more information about whether or not this person might be involved in a situation in the wee hours of the morning in the vicinity of where this crime has been reported." (*Id*. at ll. 1-8).

The district court concluded that the once Mr. Price grabbed his backpack and ran, he was resisting arrest and he had no right to resist an illegal arrest. (*Id*. at p. 74, ll. 8-12). The district court clarified that it was not an arrest at that time. (*Id*. at l. 12). Finally, the district court concluded that the backpack had been abandoned by Mr. Price and stated, "If a person abandons property as a result or during a police chase, there are no constitutional protections that exist as to the property since no seizure of the person occurs by virtue of the chase." (*Id*. at p. 75, ll. 9-13).

D. Discussion

"The United States and Colorado Constitutions protect against unreasonable searches and seizures." *Outlaw*, 17 P.3d at 154; *see* U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7. These constitutional protections apply when "police contact 'impermissibly intrudes upon an individual's personal security or privacy.'" *Outlaw*, 17 P.3d at 154 (quoting *People v. Melton*, 910 P.2d 672, 676 (Colo. 1996)).

Analysis under the Fourth Amendment begins by determining when the seizure occurred because that is the moment "the Fourth Amendment becomes relevant." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). After determining the point of seizure, analysis turns to the presence or absence of reasonable suspicion. *Id*.

Although "flight from a lawful frisk or arrest can contribute to a finding of reasonable suspicion," if an unlawful seizure occurs "before the attempted escape, [the flight] plays no role in the reasonable suspicion analysis." *United States v. Brown*, 448 F.3d 239, 245 (3rd Cir. 2006). Therefore, when an officer does not have reasonable suspicion of criminal activity at the time of seizure and before a police chase begins, evidence discovered subsequent to the chase must be suppressed. *See People v. Archuletta*, 980 P.2d 509, 514-15 (Colo. 1999).

This analysis is separated into two parts: (1) Mr. Price was actually seized when his arms were held behind his back and he was searched, (2) the officer lacked reasonable suspicion for the investigatory stop and therefore the backpack evidence should be suppressed.

1. Mr. Price Was Seized at the Moment He Was Grabbed by the Officer

A seizure occurs when there is either (a) "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful," or (b) submission to "a show of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *Terry*, 392 U.S. at 19 n.16 (A seizure occurs when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."). A seizure is effected by even "the slightest application of physical force." *Hodari*, 499 U.S. at 625–26.

The totality of the circumstances — including the behavior of the parties and the physical, temporal, and social context of the police encounter — must be analyzed to determine whether a defendant has been seized. *Outlaw*, 17 P.3d at 156. Examples of a Fourth Amendment seizure include physical touching of the person, display of a weapon by an officer, or the use of language or tone of voice by the officer that indicates that compliance with the officer's request might be compelled. *Id*. A seizure can also occur when officers require a person to alter his direction of travel or remain while officers investigate him. *Id*.

Mr. Price met his initial burden of showing a seizure. The record demonstrates that Mr. Price was seized not only by show of authority but also by physical contact. Officer C pulled up next to Mr. Price and activated the emergency overhead blue and red flashing lights. (R. Tr. 9/19/14, p. 13, ll. 14-18). She "spotlighted him" and exited the patrol car. (*Id*. at p. 14, ll. 6-7). After initiating contact with Mr. Price, the officer "checked his person. [She] helped him take the backpack off of him and set it down in front of [them], and then had his hands behind his back, and [she] did a quick pat search just to make sure there was nothing illegal or dangerous." (*Id*. at p. 16, l. 25 – p. 17, l. 4).

The officer described her physical contact with Mr. Price as a "bread basket. . . [where she had Mr. Price] place [his] hands behind [his] back and interlock [his]

fingers like [he] is praying, and then [she] can hold onto that." (*Id*. at p. 17, ll. 8-11). At that point, Officer C seized Mr. Price by physical force. *See Hodari*, 499 U.S. at 625–26. Mr. Price was also seized by show of authority because he could not have felt free to leave. *See Outlaw* (the circumstances show that the defendant was not free to proceed on his way because the police made a show of force by their conduct — followed the pedestrian defendant closely with the patrol car, altered the defendant's direction of travel, and summoned the defendant to the police car).

In *United States v. Brown*, the Third Circuit held that the defendant was seized at the moment he submitted to the officers' show of authority — the defendant yielded, turned to face the police car, placed his hands on the vehicle, and then tried to flee. 448 F.3d at 246. Even though the defendant began to struggle with the officers after his initial submission to their authority, he was seized and the weapon he was carrying was suppressed as the fruit of an unlawful seizure. *Id*.

At the suppression hearing, the prosecutor relied on *People v. Scheffer*, 224 P.3d 279 (Colo. App. 2009), to support her argument that the pat down search did not elevate the encounter to an investigatory stop. In *Scheffer*, the officer's only physical contact with the defendant was a consensual pat-down search. *Id*. at 285.

However, here, Mr. Price's hands were held behind his back, and his fingers were interlocked and grasped by the officer. Additionally, he was separated from his backpack, the officer used flashing lights, and the officer shone a spotlight on Mr. Price. *See People v. Marujo*, 192 P.3d 1003, 1008 (Colo. 2008) (cited in *Scheffer* and noting the importance of a person's separation from belongings and the officer's use of flashing lights during a stop to show that the person would not feel free to leave). Additionally, Mr. Price was not notified that he was free to leave. *Cf. People v. Thomas*, 839 P.2d 1174, 1178 (Colo. 1992) (cited in *Scheffer* and explaining that the defendant was informed that he was free to leave).

The situation here also differs from those in *Hodari*, and *People v. T.H.*, 892 P.2d 301 (Colo. 1995). *Hodari* panicked and began running when he saw a police car approaching him. *Hodari*, 499 U.S. at 622-23. In *T.H.*, an officer asked for identification, *T.H.* made a hand motion as if he were reaching into his pocket for identification, and then he fled. *T.H.*, 892 P.2d at 302. The officers did not physically restrain *Hodari* or *T.H.* Nor did *Hodari* or *T.H.* submit to the officers' show of authority. *Hodari*, 499 U.S. at 624-26; *T.H.*, 892 P.2d at 303.

In *T.H.*, the officer approached the defendant in a nonthreatening manner. *T.H.*, 892 P.2d at 303. The officer requested but did not demand identification from *T.H.* *Id*. The officer did not touch *T.H.* before he fled. *Id*. Therefore, *T.H.*

was not seized. The Colorado Supreme Court cited several cases from other jurisdictions where no seizure occurred because the officers were nonthreatening, non-confrontational, or merely asked for identification. *See United States v. McCarthur*, 6 F.3d 1270, 1276 (7th Cir. 1993); *United States v. Locklin*, 943 F.2d 838, 839 (8th Cir. 1991); *United States v. Evans*, 937 F.2d 1534, 1537 (10th Cir. 1991); *Gomez v. Turner*, 672 F.2d 134, 142-44 (D.C. Cir. 1982). The defendants in those cases were not grabbed by the officers in a show of force. However, Mr. Price was grabbed on the arm, his hands were held behind his back, his fingers were interlocked, and he was separated from his belongings. The position in which Mr. Price was held — hands forcefully held behind his back — is the exact position in which suspects are typically held during an arrest.

Likewise, because *Hodari* did not comply with the officers' orders to halt, he was not seized until he was tackled by the officers. 499 U.S. at 629. Therefore, the cocaine he abandoned while he was running was not the fruit of a seizure. *Id*. Mr. Price, however, complied with the officer's show of authority, was seized when the officer grabbed and held him, and fled *after* the point that he was unlawfully seized.

Because the record demonstrates that Mr. Price was seized, the burden shifts to the prosecution to demonstrate a legal stop. *See Outlaw*, 17 P.3d at 156.

2. The Investigatory Stop Was Not Justified

To justify an investigatory stop, "police must have a reasonable articulable suspicion that the defendant is involved in criminal activity." *People v. Martinez*, 200 P.3d 1053, 1057 (Colo. 2009). Police may perform an investigatory stop if (1) they have a reasonable suspicion that criminal activity has taken place, is in progress, or is about to occur; (2) the purpose of the intrusion is reasonable; and (3) the scope and character of the intrusion are reasonably related to its purpose. *Id*.

a. The Officer Lacked Reasonable Suspicion for the Investigatory Stop

"Reasonable suspicion for an investigatory stop exists when the facts demonstrate that a prudent officer has an articulable basis for suspecting that a defendant is involved in criminal activity." *People v. Brown*, 217 P.3d 1252, 1256 (Colo. 2009). An investigatory stop based in part on information provided by a civilian requires "a minimal level of objective suspicion of criminal activity." *Martinez*, 200 P. 3d at 1057. Reasonable suspicion is evaluated under a totality of the circumstances. *People v. Mason*, 2013 CO 32, ¶ 12. "In determining whether an investigatory stop is valid, a court must take into account the facts and circumstances known to the officer at the time of the intrusion." *People v. Revoal*, 2012 CO 8, ¶ 11.

Any evidence obtained pursuant to an investigatory stop that is not based on reasonable suspicious must be suppressed. *Martinez*, 200 P.3d at 1059; *see Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963).

Officer C lacked reasonable suspicion for an investigatory stop. First, Mr. Price was stopped only based on an anonymous citizen's description of a black male. The suspect description received by Officer C was extremely vague and did not include the suspect's age, height, weight, hairstyle or color, and did not include that the suspect was wearing a backpack. (*Id*. at p. 24, ll. 15-25). The only identifying information that Officer C had at the time of the stop was for a "black male wearing [a] leather jacket." (*Id*. at l. 10; PR. Env. 1, Ex. 1). *See People v. Smith*, 620 P.2d 232, 235 (Colo. 1980) (description of race alone is not enough to support reasonable suspicion); *see also People v. Salazar*, 964 P.2d 502, 506 (Colo. 1998) (anonymous caller gave a physical description of a person and a location but reasonable suspicion was absent because those were the only facts corroborated by the police).

The caller would not give her full name or apartment number, and only after prodding by the dispatcher gave a first name. (PR. Env. 1, Ex. 2). First she stated "there is a black man trying to break into cars" then she repeated three times, "there's just this black guy." (*Id*.). The caller did not provide any additional

descriptive information other than the leather jacket, and the operator did not ask for any other descriptive details. (R. Tr. 9/19/14, p. 13, ll. 10-13).

Significantly, when Mr. Price was stopped by Officer C, he was casually walking on the sidewalk and exhibited no signs of suspicious behavior. He was not committing any legal violations at the time of his stop. (R. Tr. 9/19/14, p. 26, ll. 8-10). He was not acting nervous or aggressive, did not place his hands in his pockets, and did nothing to make the officer fear for her safety. (*Id*. at p. 27, ll. 17-24). Officer C's articulated reason for the stop was that Mr. Price was a black male. (*Id*. at p. 28, ll. 8-9). *See Revoal*, ¶ 17 (in a case where the defendant was frisked late at night, the Supreme Court found that reasonable suspicion was lacking and noted that there was nothing suspicious about a person walking along a street); *Salazar*, 964 P.2d at 506 (reasonable suspicion lacking where officer did not observe any suspicious activity by the person described by the informant); *People v. Garcia*, 789 P.2d 190, 193 (Colo. 1990) (no reasonable suspicion where the only information given by an anonymous informant's report that was corroborated by the police included a suspect description and location).

Finally, in the minutes immediately following the call, officers searched the area and did not locate a suspect. Thus, the time elapsed weighs against a finding of reasonable suspicion. Although the district court focused on the late hour, the

Supreme Court has held that a late hour is not sufficient to show reasonable suspicion. *See People v. Padgett*, 932 P.2d 810, 815 (Colo. 1997).

The facts here are similar to those in *Brown*, where the Third Circuit concluded that a caller's vague description of two black males in a general location was insufficient to support reasonable suspicion. 448 F.3d at 247-48. The totality of the circumstances demonstrates that Officer C did not have reasonable suspicion for the investigatory stop. *See Padgett*, 932 P.2d at 815 (no reasonable suspicion for investigatory stop where the facts were: "(1) it was 1:50 a.m.; (2) criminal mischief and car break-ins had recently occurred in the neighborhood, though none had been reported that morning or the previous evening; (3) the streets and sidewalks were snowpacked and icy; (4) two men were walking; and (5) one of them slipped.").

Therefore, the backpack should be suppressed. *See Martinez*, 200 P.3d at 1059 (where investigatory stop was not supported by reasonable suspicion, the evidence collected was derived from the illegal seizure and was therefore inadmissible).

b. The Purpose of the Intrusion Was Not Reasonable and the Scope and Character of the Intrusion Were Not Reasonably Related to the Purpose

After Officer C seized Mr. Price and searched him for weapons, she then

asked Mr. Price whether there was anything dangerous *or illegal* in the backpack. At that point, the officer moved her investigation beyond officer safety because she not only asked about dangerous items, but also about illegal items. This is significant because Officer C explained at the suppression hearing that Mr. Price's behavior did not cause her to fear for her safety.

c. Mr. Price's Subsequent Actions Occurred After the Illegal Investigatory Stop

When Officer C reached for the backpack to search it, Mr. Price grabbed the backpack and tried to flee. Officer C tried to grab Mr. Price and she fell over. (R. Tr. 9/19/14, p. 31, ll. 1-5). Mr. Price landed on his stomach on top of the backpack and Officer C tried to get his hands behind his back. (*Id*. at p. 19, ll. 22-25). The officer tried to tase Mr. Price. (*Id*. at p. 20, l. 4). Mr. Price fled and later dropped the backpack. (*Id*. at p. 21, ll. 22-24). The officer testified at the suppression hearing that Mr. Price was grabbing for the bag, and not for the officer. She explained that she knew he was grabbing for the bag: "I would assume since that's what he took with him when he ran from me." (*Id*. at p. 30, ll. 2-5).

Abandonment of property is not voluntary if it is the product of police misconduct. *United States v. Flynn*, 309 F.3d 736, 738 (10th Cir. 2002). "[P]roperty is considered to have been involuntarily abandoned if the defendant discards it as a consequence of illegal police conduct." *Id*. When evidence is

discarded by a defendant during flight from an unlawful show-of-authority, the evidence should be suppressed as fruit of the poisonous tree. *See Brown*, 448 F.3d at 252 (concluding that Brown was seized prior to his "aborted escape attempt" and evidence obtained after this seizure was inadmissible); *see also* 1 Wayne R. LaFave, *Search and Seizure* § 2.6(b), at 887-89 (5th ed. 2012) (If the "abandonment [of property] was coerced by or otherwise the fruit of unlawful police action ... courts have not hesitated to hold that property inadmissible.").

As explained above, the officer lacked reasonable suspicion to stop Mr. Price. Because the investigatory stop was illegal, Mr. Price's abandonment of property was the direct result of police misconduct. Therefore, the evidence should be suppressed.

II. The District Court Erred in Denying Mr. Price's Request for Substitution of Counsel Based on a Complete Breakdown in Communications

A. Standard of Review

An appellate court reviews a district court's denial of an indigent defendant's request for substitution of counsel under an abuse of discretion standard. *People v. Thornton*, 251 P.3d 1147, 1151 (Colo. App. 2010); *People v. Gonyea*, 195 P.3d 1171, 1172 (Colo. App. 2008). A trial court abuses its discretion by failing to "make careful inquiries as to defendant's desire for counsel,

investigate whether he had good cause to request new counsel, or advise him of the dangers and disadvantages of self-representation." *People v. Wallin*, 167 P.3d 183, 191 (Colo. App. 2007).

When a defendant has been erroneously denied his request for new counsel and proceeds with court-appointed attorneys, "the error will generally be examined for prejudice or under principles of harmless error before a new trial is ordered." *People v. Bergerud*, 223 P.3d 686, 696 (Colo. 2010).

A trial court's failure to inquire into the reasons for a defendant's objections to court-appointed counsel is also subject to harmless error review. *People v. Kelling*, 151 P.3d 650, 656 (Colo. App. 2006). When a trial court fails to properly inquire into the reasons, the defendant is entitled to a remand for a hearing on his or her allegations. *Id*.

B. Preservation

Mr. Price's contention is preserved. He filed a pro se "motion to dismiss ineffective assistance of counsel" on September 23, 2014. (PR. CF, Vol. 1, p. 62). On October 14, 2014, defense counsel stated, "there's been a complete breakdown in communication. When we went to visit him the last time, those were substantiated to the point where he's unable to assist us in the preparation of his defense." (R. Tr. 10/14/14, p. 3, ll. 18-21).

C. Facts Specific to the Request for Substitution of Counsel

On September 25, 2014, Mr. Price filed a pro se motion to dismiss ineffective assistance of counsel. Mr. Price alleged that (1) he had not been fully informed of his rights and the methods of practice during court proceedings, (2) additional information and discovery was available but not pursued by trial counsel, and (3) a difference in defense theories created insurmountable differences between Mr. Price and trial counsel. Mr. Price stated that he did not wish to waive his right to counsel. (PR. CF, Vol. 1, p. 62).

On September 30, 2014, the trial court addressed Mr. Price's motion. The following exchanged occurred:

> The Court: Why are you asking to dismiss counsel?
>
> Mr. Price: I feel like he's not representing me the way I need to be represented.
>
> The Court: How do you explain that?
>
> Mr. Price: I would like to keep that between me and my future lawyer. I would not like to dispose that in court.
>
> The Court: If you're not going to tell me what the conflict is, I'm not going to address your motion. At this point, I find that he is providing effective assistance of counsel.
>
> Mr. Price: You actually need me to explain why?

> The Court: Why do you think there's a conflict between you and counsel?
>
> Mr. Price: The things I asked for, he's not doing for me. I'm asking for things that he's not interested in doing.
>
> The Court: He's the attorney and you're not. He's the one that makes the calls. I'm not going to dismiss him. I believe he provided effective assistance of counsel.

(R. Tr. 9/30/14, p. 3, l. 14 – p. 4, l. 11).

Two weeks later, trial counsel stated that there was "a complete breakdown in communication" and requested a *Bergerud* hearing. Trial counsel continued, "When we went to visit him the last time, [the breakdown in communication was] substantiated to the point where he's unable to assist us in the preparation of his defense." (R. Tr. 10/14/14, p. 3, ll. 18-21). The trial court asked Mr. Price whether he would like to represent himself. (*Id*. at p. 3, l. 25 – p . 4, l. 1). Mr. Price responded, "I thought about it to myself. I don't want to restart my case or none of that. I'd like to go ahead with it." (*Id*. at p. 4, ll. 2-4). The trial court clarified, "You don't want to act as your own attorney?" (*Id*. at ll. 7-8). Mr. Price responded, "No." (*Id*. at l. 9). The trial court inquired, "You want Mr. Robinson and Mr. Couture to represent you; is that correct?" (*Id*. at ll. 11-12). Mr. Price answered, "I guess, yeah." (*Id*. at l. 13).

The trial court told Mr. Price, "We've appointed you two very skilled attorneys. They both practiced in front of my court. I think they're good attorneys and they know what they're doing. If you want to get the most out of them, you have to work with them and cooperate with them." (*Id*. at ll. 17-21).

Mr. Price continued to ask questions that indicated a complete breakdown in communication with his trial attorneys. He had questions about his rights and the procedures, and asked whether he could file a motion. (*Id*. at p. 5, ll. 10-11). Mr. Price also questioned the defense strategy, explaining that he "didn't do it." (*Id*. at l. 4). He explained:

> I was just trying to figure it out. I wasn't doing anything wrong on the day I got arrested. When I did my own research, this guy got locked up on the same day and he was charged with these things that the lady claimed to be messed up for. It was bothering me for something I didn't do. Now I'm sitting here for something she said I didn't do again. I wanted to see what motions I could file.

(*Id*. at p. 6, ll. 15-24).

The trial court did not address the breakdown in communication but ordered Mr. Price to "Make sure you work with your attorneys." (*Id*. at p. 7, ll. 7-8).

D. Discussion

The Sixth Amendment right to representation includes that "attorneys should not labor under conflicts of interest or a complete breakdown in communications

with their clients that prevent them from putting on an adequate defense." *Bergerud*, 223 P.3d at 694. Therefore, an indigent defendant is entitled to new counsel if he or she can establish that there has been a complete breakdown in communication with his or her court-appointed attorney. *Thornton*, 251 P.3d at 1151; *see People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989). When a defendant establishes that there has been a complete breakdown in communication, the defendant has established good cause for the substitution of counsel. *Arguello*, 772 P.2d at 94; *Kelling*, 151 P.3d at 653. If good cause exists, the court must substitute new counsel. *Arguello*, 772 P.2d at 94; *Wallin*, 167 P.3d at 190.

A district court's decision whether to grant a defendant's motion for substitute counsel "requires an inquiry laden with factual determinations." *Bergerud*, 223 P.3d at 694. Therefore, upon hearing about a potential conflict, the trial court's first duty is to inquire into the nature of the objection. *See Arguello*, 772 P.2d at 94 ("when an indigent defendant voices objections to court-appointed counsel, the trial court has the obligation to inquire into the reasons for the dissatisfaction"); *Gonyea*, 195 P.3d at 1173. "Hearings typically are crucial for what they add to a district court's knowledge in this context." *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002).

A "well-developed record regarding attorney decisions and the nature of the disagreement between counsel and [his or] her client is critical to the evaluation of alleged Sixth Amendment violations." *Bergerud*, 223 P.3d at 705. The trial court's inquiries into the nature of the dispute should occur without the prosecuting attorneys present so as not to "seriously prejudice the accused's defense." *Id*.

It is only after concluding that the attorney-client relationship has not deteriorated to the point where counsel is unable to give effective assistance that the trial court is justified in refusing to appoint new counsel. *People v. Schultheis*, 638 P.2d 8, 15 (Colo.1981).

The four-part test used to measure the constitutional implications of a defendant's request for substitute counsel includes evaluating: (1) the timeliness of the motion, (2) the adequacy of the trial court's inquiry into the defendant's complaint, (3) whether the conflict resulted in a total lack of communication or otherwise prevented an adequate defense, and (4) whether defendant "substantially and unreasonably contributed to the underlying conflict." *Bergerud*, 223 P.3d at 695 (quoting *Lott*, 310 F.3d at 1250–51)).

1. Timeliness of the Motion

Under the first factor, although the district court made no findings regarding the timing of Mr. Price's motion, the record demonstrates that his request for

substitute counsel was made as soon as the breakdown in communication arose, and was renewed when the communication problems did not resolve. *See Bergerud*, 223 P.3d at 697 ("both the defendant and his attorneys have an obligation to bring conflicts to the attention of the court at the earliest practicable time"). Additionally, at the October 14th hearing, the district court explained that defense counsel had requested a *Bergerud* hearing the previous week but the district court was unavailable at that time. (R. Tr. 10/14/14, p. 3, ll. 9-13).

2. Failure of the District Court to Inquire Into the Breakdown of Communication

Under the second factor, the record demonstrates that the district court failed to inquire into the basis for the breakdown of communications. However, the record demonstrates a breakdown in communication not only as described by Mr. Price but because trial counsel actually stated that the relationship had deteriorated to a point where Mr. Price could not assist in his defense. (R. Tr. 10/14/14, p. 3, ll. 18-21). The trial court did not inquire into the conflict and instead ordered Mr. Price to work with his attorneys. (*Id*. at p. 7, ll. 7-8). The only inquiry made by the district court as to the nature of the dispute occurred in front of the prosecutor, and before trial counsel stated on the record that there was a complete breakdown in communication. (R. Tr. 9/30/14, p. 3, ll. 14-15). Mr. Price tried to protect his rights by stating that he did not want to explain the conflict in open court. (*Id*. at ll.

19-21). At the later hearing requested by defense counsel, the district court did not ask for any details about the dispute or make any of the findings required under *Bergerud*. Instead, the district court simply asked whether Mr. Price wanted to represent himself.

In *Wallin*, 167 P.3d at 190 -191, another division of this Court evaluated a trial court's denial of a defendant's request for substitute counsel during sentencing. Although the defendant chose self-representation in that case, the division concluded that the trial court failed to make adequate inquiries as to the defendant's desire for new counsel, and failed to investigate whether the defendant had good cause to request new counsel. *Id*. at p. 191. Instead, like the district court here, the trial court in *Wallin* relied only on the qualifications and capabilities of the defense attorney." *Id*. (The trial court refused to appoint substitute counsel finding "the attorney highly qualified and capable and find[ing] her representation of [the defendant] in this case to be exceptional."). The *Wallin* division vacated the sentence because the trial court failed to address the communication issue. *See id*.

3. Total Lack of Communication

Under the third factor, the record here demonstrates that a complete breakdown of communication had occurred between Mr. Price and his attorneys.

A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case." *Bergerud*, 223 P.3d at 704; *see Lott*, 310 F.3d at 1250. First, trial counsel stated on the record that there was a "complete breakdown in communication." (R. Tr. 10/14/14, p. 3, ll. 18-19). Second, Mr. Price's pro se motion and comments at the hearings show a breakdown of communication. The motion stated that "insurmountable differences" existed and Mr. Price's open-court statements included "I'm asking for things that [defense counsel] is not interest in doing." (R. Tr. 9/30/14, p. 4, ll. 6-7; PR. CF, Vol. 1, p. 62). Third, Mr. Price's questions to the trial court indicated that he did not understand his rights, the process, or the nature of the hearings.

At no time did Mr. Price indicate that he wanted to waive his right to counsel. In his pro se motion for ineffective assistance of counsel, he stated, "the defendant does not wish to waive the right to assistance of counsel." (PR. CF, Vol. 1, p. 62). When the district court asked Mr. Price about the nature of the conflict with his attorneys and the prosecutor was present, Mr. Price responded, "I would like to keep that between me and my future lawyer." (R. Tr. 9/30/14, p. 3, ll. 19-20). However, even after trial counsel stated that a "complete breakdown in communication" existed, the district court only gave Mr. Price the option of

continuing with his current counsel or representing himself. (R. Tr. 10/14/14, p. 3, ll. 18-19). It made no inquiry into the nature of the conflict.

Mr. Price's concerns substantiated to the point where, on the morning of trial, he almost changed his mind about proceeding with trial. At that point, his experience with the justice system included being seized without reasonable suspicion, being chased and bitten by dogs, being beaten by officers, and being ordered to work with attorneys with whom he could not communicate. Mr. Price explained, "by me being hospitalized by these cops and stuff, and I still in a way fear for my life . . . [and I'm] scared of going to trial, because I don't know what will happen to me with these officers saying this and, you know, stuff dishonest." (R. Tr. 11/3/14, p. 12, ll. 20-25).

Some of Mr. Price's concerns were brought to light during trial. The officer who initially claimed that Mr. Price assaulted her admitted that she later realized Mr. Price was merely trying to grab the backpack. (*Id*. at p. 131, ll. 2-8). In fact, Mr. Price was not the suspect officers were looking for that night, did not assault an officer, and was not armed at the time of his arrest. These details are significant because, in trial counsel's words, a complete breakdown in communication existed, and Mr. Price was unable to communicate with his attorneys to help with his defense.

4. Record Does Not Indicate that Mr. Price Contributed to the Conflict

Regarding the final factor, the district court made no findings, and the record does not indicate that Mr. Price contributed to the underlying conflict. Rather, the record suggests that Mr. Price and his attorneys could not effectively communicate.

E. Remedy

The error here is not harmless. Defense counsel stated on the record that Mr. Price could not assist with his trial due to the breakdown in communication. Mistakes and confusion during trial resulted, including the introduction of prejudicial evidence (see discussion *infra* section III). Under these circumstances, Mr. Price is entitled to a new trial. *See Bergerud*, 223 P.3d at 656 (when a defendant demonstrates a breakdown in communication with his trial attorney, a new trial is ordered unless the error is harmless)

In the alternative, the district court failed to properly inquire into the reasons for the breakdown in communication, the reasons are not readily apparent from the record, and Mr. Price is entitled to a hearing on his allegations. *See Kelling*, 151 P.3d at 656.

III. The District Court by Admitting Evidence of Prior Criminal Conduct

A. Standard of Review

A district court's evidentiary rulings are reviewed for an abuse of discretion. *People v. Brown*, 2014 COA 130M, ¶ 6. Defense counsel's objection here was not contemporaneous, and therefore, the issue is subject to plain error review. Plain error review addresses error that is obvious and substantial and that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *People v. Chase*, 2013 CO 27, ¶ 59.

B. Preservation

Defense counsel did not object at the time the exhibit was admitted into evidence; however, he objected immediately following the officer's testimony during which it was admitted. Defense counsel stated, "The charging document regarding the possession of a weapon by a previous offender indicates that Mr. Price was convicted of theft from a person. The documents include also, in addition to that conviction, apparently, convictions for criminal attempt aggravated assault." (R. Tr. 11/3/14, p. 121, l. 25 – p. 122, l. 5). Defense counsel objected, "I don't see how those documents are relevant in this case given that we're just going on the theft of property and that's all they have to show. I think the added perhaps felony conviction additional to the one that we have would be even more

prejudicial than the, you know, bifurcation issue. He now apparently is being alleged to have two felony convictions." (*Id*. at p. 122, ll. 7-13).

The district court responded, "Well, but when the testimony was given there was no objection to that." (*Id*. at ll. 14-15). The prosecutor stated, "And [defense counsel] did look at the documents provided for a couple of minutes." (*Id*. at ll. 16-17). The district court responded, "I'm not planning on taking any action on that." (*Id*. at ll. 18-19).

C. Discussion

"[E]vidence of a defendant's criminal activity, which is unrelated to the offense charged, is inadmissible." *People v. Goldsberry*, 181 Colo. 406, 409, 509 P.2d 801, 803 (1973). This is because "[e]vidence of criminal activity other than that for which the defendant is being tried has an inherent tendency to prejudice the jury against the defendant and induce it to find him guilty on the basis of his past activities rather than on the basis of the crime charged." *People v. Elmarr*, 2015 CO 53, ¶ 35.

Evidence of a defendant's prior criminal acts should be excluded because, (1) "there is a concern that a jury will convict a defendant as a means of punishment for past deeds or merely because the jury views the defendant as undesirable," . . . (2) "there is a 'possibility that a jury will overvalue the character

evidence in assessing the guilt for the crime charged.'" . . . (3) "it is unfair to require a defendant to defend not only against the crime charged, but moreover, to disprove the prior acts or explain his or her personality." *Kaufman v. People*, 202 P.3d 542, 552 (Colo. 2009) (quoting *Masters v. People*, 58 P.3d 979, 995 (Colo. 2002)).

Here, count 4 of the complaint (possession of a weapon by a previous offender) alleged that Mr. Price was previously convicted of "theft of property, as defined by Tennessee WO9055109, on March 11, 2010." (PR. CF, Vol. 1. p. 7, p. 83 (Jury Instruction #9)). However, the evidence received by the jury included that Mr. Price had also been convicted of criminal attempted aggravated assault, violated the conditions of his probation, and was also charged with aggravated robbery. (Ex. 13). Further, Officer C testified that Mr. Price pled guilty to both theft and criminal attempt aggravated assault. (R. Tr. 11/3/14, p. 119, ll. 21-23; p. 120, ll. 7-9).

This evidence is highly prejudicial. First, the felony used for the POWPO charge was theft of property. However, the additional felony was a violent crime: attempted aggravated assault. The jury's exposure to the additional violent felony could easily cause them to convict Mr. Price based on his past deeds or use the evidence as character evidence.

Second, the attempted aggravated assault conviction also included information that Mr. Price violated the conditions of his probation. The cumulative effective of this inadmissible evidence is particularly damaging.

Third, this exhibit was sent back to the jury room for the juror's examination. Therefore, the evidence was highlighted for the jury and vastly different from those cases where evidence of past criminality was merely a fleeting or an ambiguous reference. *Cf. People v. Lahr*, 2013 COA 57, ¶ 27 (fleeting, ambiguous reference to prior criminality was remedied by court's instruction); *People v. Shreck*, 107 P.3d 1048, 1060 (Colo. App. 2004) (no abuse of discretion where reference to uncharged criminality was brief, not repeated for the jury, and almost immediately suppressed by the court).

D. Prosecutorial Misconduct

A prosecutor has a duty to "see that justice is done by seeking the truth by the presentation of proper evidence." *Goldsberry*, 181 Colo. at 411, 509 P.2d at 804. Here, it was clear that the prosecutor knew that the jury would receive the inadmissible evidence because she offered it as an exhibit. Such conduct cannot be condoned. *Id*. (where it was clear from the record that "the district attorney was fully cognizant that the prosecution witness would respond in the manner he did

and thus, expose to the jury inadmissible and highly prejudicial evidence," the conduct "can only be condemned.").

The error here rose to plain error. Even though the trial court was alerted to the error immediately after the officer's testimony, the error in admitting a defendant's prior convictions is so prejudicial that it should be obvious to the trial court. Thus, the error satisfies the obvious and substantial requirements for plain error analysis, and so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)

IV. The District Court Erred in Denying Mr. Price's Request to Sever

A. Standard of Review

A district court's denial of a motion to sever is reviewed for an abuse of discretion. *Ruark v. People*, 158 Colo. 287, 291, 406 P.2d 91, 93 (1965). A district court abuses its discretion when the joinder caused actual prejudice to the defendant and the trier of fact was not able to separate the facts and legal principles applicable to each offense. *People v. Aalbu*, 696 P.2d 796, 806 (Colo. 1985).

B. Preservation

Mr. Price preserved this issue in his "motion for order for a separate trial or a bifurcated trial." (PR. CF, Vol. 1, p. 25). He also renewed his motion before

trial arguing that the People could prove the criminal impersonation by other means. (R. Tr. 11/3/14, p. 9, ll. 11-14). The district court noted the objection and stated that defense counsel did not have to continue to object throughout trial. (*Id*. at ll. 19-20). When the district court reiterated its offer to sever only the three misdemeanor cases, defense counsel stated, "we're not waiving our objection to the bifurcated portion of the POWPO." (*Id*. at p. 10, ll. 13-14).

C. Facts Specific to the Bifurcation Issue

At the pretrial conference, the district court ruled that the same jury would hear all of the evidence and the charges, but that the case would be bifurcated into two trials. First, the jury would decide the second degree trespassing, resisting arrest, and the concealed weapon. Next, the jury would decide the POWPO charge and the criminal impersonation charge because the People intended to use the prior conviction to show that Mr. Price gave a false name because he knew that he should not be carrying a weapon. (R. Tr. 10/30/14, p. 7, ll. 15-23).

On the morning of trial, the district court explained that it wanted to try the two felony charges — criminal impersonation and POWPO — together and then sever the three misdemeanor charges. (R. Tr. 11/3/14, p. 10, ll. 8-12). The district court reasoned that the People had "the right in the criminal impersonation to show the reason why he may have given a false name and benefit that he received. The

benefit includes the fact that he was in possession of a weapon and he had a prior felony conviction. That's legitimate testimony for the People to present." (*Id*. at p. 9, ll. 1-6).

Defense counsel objected, arguing that the People could use Mr. Price's outstanding warrant as evidence of the reason why he would have given a false name and did not need the evidence of his prior conviction. (*Id*. at p. 5, ll. 21-25).

D. Discussion

"Upon motion any defendant shall be granted a separate trial as of right if the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant, and that such evidence would be prejudicial to those against whom it is not admissible." Crim. P. 14.

When a "defendant is charged with a substantive offense and with possession of a weapon by a previous offender . . ., procedural safeguards such as separate trials or a bifurcated procedure should be available to ensure a fair trial." *People v. Peterson*, 656 P.2d 1301, 1305 (Colo. 1983). Because evidence of a prior conviction is prejudicial, a district court abuses its discretion when it fails to sever a charge that requires evidence of a prior conviction from those charges that

do not require evidence of a prior conviction. *Ruark*, 158 Colo. at 291, 406 P.2d at 93.

Mr. Price was prejudiced by the district court's denial of his motion to sever the POWPO charge because evidence of a prior conviction is extremely prejudicial. *See id*. Additionally, the prosecution did not need the prior conviction for the criminal impersonation charge because it could use the outstanding warrant. In fact, an outstanding warrant would be a more plausible reason for a person to give a false name because a warrant is something an officer could determine by running a warrant check and would not require a search of the person's belongings. However, for a POWPO to be the reason for the giving of a false name, the officer would need to determine not only that a defendant was a prior felon but also that the defendant was carrying a weapon. Particularly in this case, where the prior convictions were from another state, the POWPO charge is a less reasonable explanation for the giving of a false name.

Mr. Price suffered actual prejudice as a result of the district court's denial of his motion to sever the criminal impersonation charge. Therefore, he is entitled to a new trial. *See id*. (trial court abused its discretion in failing to sever charges because evidence of a prior conviction would be prejudicial when applied to the first three counts).

V. Correction of Mittimus

The mittimus incorrectly states that Mr. Price pled guilty to the charges. (PR. CF, Vol. 1, p. 116). Because Mr. Price was convicted based on jury verdicts, the mittimus must be corrected. *See People v. Doubleday*, 2012 COA 141, ¶¶ 68-70 (cert. granted Oct. 7, 2013).

CONCLUSION

WHEREFORE, Mr. Price respectfully requests that this Court reverse his judgment of conviction and remand for a new trial, correct the mittimus, and grant such other relief as the Court deems necessary.

Respectfully submitted,

s/ Krista A. Schelhaas
Krista A. Schelhaas, #36616

CERTIFICATE OF SERVICE

I certify that on the 20th day of July 2015, a true and correct copy of the foregoing OPENING BRIEF was filed through the Integrated Colorado Courts E-Filing System (ICCES), with a copy checked to be sent to the Office of the Attorney General, Appellate Division.

s/ Krista A. Schelhaas
Krista A. Schelhaas