SUMMARY
July 26, 2018

2018COA104

No. 15CA1811, People v. Yeadon — Criminal Law — Drug Offender Surcharge; Constitutional Law — Fifth Amendment — Double Jeopardy

A division of the court of appeals considers whether a trial court's late imposition of a drug offender surcharge that is mandated by section 18-19-103(1), C.R.S. 2017, violated the defendant's right against double jeopardy. Disagreeing with *People v. McQuarrie*, 66 P.3d 181 (Colo. App. 2003), the division concludes that the late imposition of the drug offender surcharge did not violate the defendant's right against double jeopardy. The division concludes that section 18-19-103(1) mandates that the drug offender surcharge be imposed in all cases in which a defendant is convicted of a drug offense and, thus, failure to impose the surcharge renders a sentence illegal. The division, relying on *People*

v. Smith, 121 P.3d 243 (Colo. App. 2005), concludes that an illegal sentence may be corrected at any time without violating a defendant's right against double jeopardy.

The division also concludes that the evidence was sufficient to support the defendant's conviction and that the prosecution's remarks at trial were reasonably supported by the evidence and did not improperly affect the verdict.

Accordingly, the division affirms the judgment of conviction and sentence.

COLORADO COURT OF APPEALS **2018COA104**

Court of Appeals No. 15CA1811
Adams County District Court No. 13CR2650
Honorable Craig R. Welling, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Gerald Adrian Yeadon,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE FURMAN
Fox and Ashby, JJ., concur

Announced July 26, 2018

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¶ 1 A jury found Gerald Adrian Yeadon guilty of driving under restraint, failure to report an accident or return to the scene, and possession of less than two grams of a controlled substance — methamphetamine. The district court sentenced Yeadon to sixteen months in the custody of the Department of Corrections and eleven days later imposed a drug offender surcharge of $1250.

¶ 2 On appeal, Yeadon contends that (1) the prosecution presented insufficient evidence to support his conviction for possession; (2) certain statements made by the prosecutor during closing argument constituted misconduct; and (3) the district court's late imposition of the drug offender surcharge violated his right against double jeopardy. Because we disagree with each of Yeadon's contentions, we affirm his judgment of conviction and sentence, but we remand for the district court to give Yeadon the opportunity to show that he is financially unable to pay any portion of the surcharge. *See* § 18-19-103(6)(b), C.R.S. 2017.

I. The Accident

¶ 3 The jury heard the following evidence. One morning, police officers responded to a report of a rollover crash involving a 2007 Pontiac G6. The driver had abandoned the Pontiac in a field along

a highway. A search of the vehicle identification number revealed that the car had been reported stolen about two weeks earlier. The officers did not find a set of keys in the car, and the vehicle's steering column did not appear to have been hot-wired.

¶ 4 The officers concluded that, earlier that morning, the Pontiac left the highway while traveling northbound and rolled over twice before coming to a rest. An officer testified that, based on the tire marks, the vehicle had been "partially airborne and traveling at a high rate of speed." The officer noted that only the driver's side airbag had deployed.

¶ 5 Inside the Pontiac, the officers observed, among other things, a scale on the front passenger seat used to measure, in grams, very small quantities; and a smaller baggie in a compartment of the driver's side door, which contained a substance later confirmed to be 0.46 grams of methamphetamine.

¶ 6 An officer also found a black toiletry bag near the rear of the vehicle that contained a pawn receipt with Yeadon's name and birthdate on it.

¶ 7 The investigating detective testified that the small baggie of methamphetamine in the driver's side door compartment was "open

to view upon approach" of the vehicle. Although the prosecutor presented a photograph of the driver's side door compartment to the jury, the small baggie of methamphetamine had already been removed at the time the picture was taken.

¶ 8 The detective testified that he recovered the driver's side airbag, a baseball hat, and gloves from the back seat during an inventory of the vehicle. He explained that he cut out and secured the airbag because — based on his training and experience — he believed there would be DNA evidence on the airbag from "whoever was in the driver's side seat of that car" at the time of the crash. When asked why he recovered the hat and gloves, the detective testified that "there was no one on scene," he "needed to find out who was in that car," and he was "looking for any type of identifying information that [he] could use as a lead for the case."

¶ 9 When asked if a 2007 Pontiac G6 has a passenger side airbag, the detective testified that, while he was not an expert and did not know "a hundred percent," he "would believe it does" based on the National Highway Traffic Safety Administration requirements. When asked if there had only been one person in the vehicle, the detective could only speculate.

¶ 10 The Pontiac's owner told the police that he thought his ex-girlfriend, C.D., had stolen his car. The owner reported that he and C.D. had broken up, but the car did not appear to have been forcibly entered. C.D. possessed the only other set of keys to the car, and the owner asked her to return the keys the night before he reported the car stolen.

¶ 11 A detective who interviewed C.D. two weeks after the incident testified that he did not observe any obvious injuries that would have indicated C.D.'s recent involvement in an automobile crash.

¶ 12 The detective also interviewed Yeadon about two months after the incident based on the receipt found in the toiletry bag. The detective testified that he did not observe any injuries to Yeadon at the time. The prosecutor played a recording of this interview to the jury.

¶ 13 During the interview, Yeadon said that he had had a prior sexual relationship with C.D., that he believed the Pontiac belonged to her, and that she had previously picked him up in that car. He admitted that he had left some of his belongings in the car, but claimed that he had not retrieved these items because he and C.D. had ended their relationship. Yeadon also admitted to the detective

that he occasionally drove the Pontiac, but denied both knowing that the vehicle had been in a crash and being in the vehicle when it crashed. He told the detective that his DNA would not be found on the driver's side airbag.

¶ 14 The detective sent the driver's side airbag, the baseball hat, and the gloves to the Colorado Bureau of Investigation (CBI) for DNA testing. The detective also submitted to the CBI a buccal swab obtained from Yeadon for comparison.

¶ 15 At trial, the prosecutor qualified a CBI forensic scientist as an expert in serology and DNA. This expert testified as follows:

- the hat and gloves recovered from the Pontiac's back seat both contained a DNA mixture, and the major component of the mixture matched Yeadon's DNA profile;
- the airbag contained a DNA mixture from more than one individual; and
- the major component of the mixture on the airbag matched Yeadon's DNA profile.

¶ 16 The expert admitted that she could not "totally eliminate" the possibility that Yeadon's DNA could have been deposited on the airbag if he had been seated in the vehicle's passenger seat and had

moved across the driver's seat to exit through the driver's side door. But she opined that, based on the large amount of DNA on the airbag, it was not likely that the DNA had been deposited in this manner.

¶ 17 When asked how an airbag could identify the person sitting behind the wheel of a vehicle, the expert explained that because of the force generated on the airbag's deployment, the individual sitting in front of the airbag at the time of impact would deposit a lot of cellular material onto the airbag.

II. Sufficiency of the Evidence

¶ 18 Much of the dispute in this case centers on whether the prosecution presented sufficient evidence to support the "knowingly" element of possession of less than two grams of a controlled substance. We conclude that the prosecution presented sufficient evidence.

A. The "Knowingly" Element of Possession

¶ 19 It is unlawful for a person to knowingly possess a controlled substance. § 18-18-403.5(1), C.R.S. 2017 (noting certain exceptions). The knowingly element applies to "knowledge of possession and to knowledge that the thing possessed is a

controlled substance." *People v. Perea*, 126 P.3d 241, 244 (Colo. App. 2005) (citation omitted). "A person acts 'knowingly' . . . with respect . . . to a circumstance described by a statute defining an offense when he [or she] is aware . . . that such circumstance exists." § 18-1-501(6), C.R.S. 2017.

B. Standard of Review

¶ 20 We review the record de novo to determine whether the evidence before a jury was sufficient in quantity and quality to sustain a conviction. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). In doing so, we employ the substantial evidence test, which considers "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010) (quoting *People v. Bennett*, 183 Colo. 125, 130, 515 P.2d 466, 469 (1973)).

¶ 21 "An appellate court is not permitted to act as a thirteenth juror and set aside a verdict because it might have drawn a different conclusion had it been the trier of fact." *People v. McIntier*, 134

P.3d 467, 471-72 (Colo. App. 2005). Instead, we afford the prosecution the benefit of every reasonable inference that might fairly be drawn from the evidence and, where reasonable minds could differ, deem the evidence sufficient to sustain a conviction. *See People v. Padilla*, 113 P.3d 1260, 1261 (Colo. App. 2005); *People v. Carlson*, 72 P.3d 411, 416 (Colo. App. 2003). This is so because it is the fact finder's task to determine "the weight to be given to all parts of the evidence" and to resolve "conflicts, inconsistencies, and disputes in the evidence." *Padilla*, 113 P.3d at 1261.

C. Analysis

¶ 22 We conclude that the prosecution presented sufficient evidence that Yeadon was the driver of the Pontiac at the time of the crash. We reach this conclusion because the CBI expert testified that Yeadon was the major source of the DNA found on the driver's side airbag and that such evidence suggested that he was sitting in the driver's seat when the airbag deployed. *See People v. Warner*, 251 P.3d 556, 564 (Colo. App. 2010) ("A conviction for possession of a controlled substance may be predicated on circumstantial evidence.").

¶ 23 Even so, we must determine whether the prosecution presented sufficient evidence to support a conclusion that Yeadon, while driving the Pontiac, knowingly possessed the methamphetamine that was found in the compartment of the driver's side door. This determination turns on whether Yeadon was the sole occupant of the vehicle or whether another person was with him in the car at the time of the crash.

¶ 24 Generally, the "controlled substance need not be found on the person of the defendant, as long as it is found in a place under his or her dominion and control." *People v. Atencio*, 140 P.3d 73, 75 (Colo. App. 2005). The parties dispute whether the evidence supported an inference that the methamphetamine found in the compartment of the driver's side door was under Yeadon's exclusive dominion and control. Our resolution of this dispute affects the inferences that support the "knowingly" element of possession.

¶ 25 If a "defendant has exclusive possession of the premises in which drugs are found, the jury may infer knowledge from the fact of possession." *People v. Baca*, 109 P.3d 1005, 1007 (Colo. App. 2004); *see also People v. Stark*, 691 P.2d 334, 339 (Colo. 1984). "[K]nowledge can be inferred from the fact that the defendant is the

driver and sole occupant of a vehicle, irrespective of whether he is also the vehicle's owner." *Baca*, 109 P.3d at 1007.

¶ 26 Conversely, "where a person is not in exclusive possession of the premises in which drugs are found, such an inference may not be drawn 'unless there are statements or other circumstances tending to buttress the inference.'" *Stark*, 691 P.2d at 339 (quoting *Petty v. People*, 167 Colo. 240, 246, 447 P.2d 217, 220 (1968)); *see also Feltes v. People*, 178 Colo. 409, 417, 498 P.2d 1128, 1132 (1972) ("Mere presence without another additional link in the evidence will not sustain a conviction for possession.").

¶ 27 We conclude that, even under the stricter inference applied to nonexclusive possession, the prosecution presented sufficient evidence to buttress a reasonable inference that Yeadon knowingly possessed the methamphetamine found in the driver's side door compartment. *See Stark*, 691 P.2d at 339.

¶ 28 The evidence demonstrated that (1) Yeadon, as driver of the vehicle, was in direct proximity to the visible baggie of methamphetamine in the driver's side door compartment; (2) Yeadon was in close proximity to the scale found on the front passenger seat; and (3) Yeadon fled from the accident. *See People v.*

Poe, 2012 COA 166, ¶ 18 (The evidence presented at trial, "including the location of the drugs and paraphernalia in [the defendant's] one-bedroom apartment . . . , the location of the items within certain areas of the apartment . . . , the fact that several of the items were in plain sight, and testimony that there was no evidence of a houseguest," was sufficient to support the jury's determination that the defendant had "knowing possession" of the controlled substances.).

¶ 29 Because we must view the relevant evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to support Yeadon's conviction for possession of less than two grams of a controlled substance. *See id.* at ¶ 15 ("A finding of [knowing] possession may be based on the jury's reasonable inferences from the evidence, including circumstantial evidence.").

III. Prosecutorial Misconduct

¶ 30 We next conclude that certain statements made by the prosecutor during closing argument did not constitute misconduct because they fell within the wide latitude afforded to a prosecutor during argument.

¶ 31 The Sixth Amendment to the United States Constitution and article II, sections 16 and 23, of the Colorado Constitution guarantee a defendant the right to trial by a fair and impartial jury. *Harris v. People*, 888 P.2d 259, 263 (Colo. 1995). This right imposes on a prosecutor the responsibility to refrain from using improper methods to produce a conviction. *Id.* A jury misled by an inadmissible argument cannot be considered impartial. *Id.* at 264.

¶ 32 Closing argument should be based on the evidence in the record and reasonable inferences drawn therefrom. *People v. Ortega*, 2016 COA 148, ¶ 26.

¶ 33 When reviewing a claim of prosecutorial misconduct during closing argument, we employ a two-step analysis. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, we must determine whether the prosecutor's argument was improper based on the totality of the circumstances. *Id.* "[P]rosecutorial remarks that evidence personal opinion, personal knowledge, or inflame the passions of the jury are improper." *Domingo-Gomez v. People*, 125 P.3d 1043, 1050 (Colo. 2005). But the scope of closing argument should not be unduly restricted. *Id.* at 1048.

¶ 34 If a prosecutor's argument was improper, we must then move to the second step and determine "whether such actions warrant reversal according to the proper standard of review." *Wend*, 235 P.3d at 1096.

¶ 35 Where, as here, a defendant does not contemporaneously object to the alleged misconduct, we review for plain error. *People v. Lovato*, 2014 COA 113, ¶ 58. Plain error is "obvious and substantial and so undermine[s] the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Kaufman v. People*, 202 P.3d 542, 549 (Colo. 2009) (quoting *People v. Weinreich*, 119 P.3d 1073, 1078 (Colo. 2005)).

¶ 36 "To constitute plain error, prosecutorial misconduct must have been so flagrant, glaring, or tremendously improper that the trial court should have intervened sua sponte." *People v. Cordova*, 293 P.3d 114, 121 (Colo. App. 2011). "Prosecutorial misconduct amounts to plain error which provides a basis for reversal only where there is a 'substantial likelihood that it affected the verdict or deprived a defendant of a fair and impartial trial.'" *Harris*, 888 P.2d at 267 (quoting *People v. Constant*, 645 P.2d 843, 847 (Colo. 1982)).

¶ 37 Yeadon contends that during closing argument the prosecutor overstated the CBI expert's findings by arguing that the DNA testing done to the driver's side airbag definitively established that he was driving the Pontiac at the time of the accident. Yeadon points to the following comments:

- "You heard from the expert. DNA puts him behind the wheel. He's the one driving."
- "The only thing is[,] is he the driver? Absolutely. Expert tells you that. How do you know that? Because the air bag shows who's behind the wheel at the time it crashed, from the saliva that was picked up from that air bag."
- "'Being the driver of a vehicle.' Same thing that the expert just told you about."
- "So . . . defendant, as you can see from his DNA and his possessions, had dominion and control over the entire vehicle."
- "[D]efendant is in control of this vehicle. His DNA is behind the wheel."

¶ 38 Yeadon also contends that the prosecutor impermissibly overstated the visibility of the small bag of methamphetamine in the

driver's side door compartment, and that the prosecutor provided his personal opinion regarding his guilt. He points to the following comments:

- "This is something that's open and notorious. More so is the item to his direct left [in] the pocket. It was clear to anyone getting in and out of that vehicle that there's meth there."
- "At a minimum, he had the small bag of meth. That's not at issue. He is . . . fully in control and fully having dominion over the methamphetamine directly to his left. I would argue that . . . at a minimum, he's in control of the baggy to his left."

¶ 39 These comments have support in the record and, therefore, fall within the wide latitude afforded to a prosecutor during closing argument. *See Domingo-Gomez*, 125 P.3d at 1048 ("Final argument may properly include the facts in evidence and any reasonable inferences drawn therefrom."); *see also People v. Bondsteel*, 2015 COA 165, ¶¶ 137-41 (*cert. granted on other grounds* Oct. 31, 2016).

¶ 40 The CBI expert testified that Yeadon, as the source of the major component of the DNA found on the airbag, was likely in the

driver's seat when the airbag deployed. The detective also testified that, based on his training and experience, he believed that there would be DNA evidence on the airbag from "whoever was in the driver's side seat of that car" at the time of the crash and that the baggie in the driver's side door compartment was "open [to view] upon approach."

¶ 41 Due to the wide latitude afforded to the prosecutor during closing argument, and because the prosecutor's remarks were reasonably supported by the testimony, we are not convinced that there was a substantial likelihood that the comments improperly affected the verdict or deprived Yeadon of a fair and impartial trial. *Harris*, 888 P.2d at 267; *see Hagos v. People*, 2012 CO 63, ¶ 23 ("Plain error review allows the opportunity to reverse convictions in cases presenting particularly egregious errors . . . ."); *People v. Nardine*, 2016 COA 85, ¶ 66 ("Even if the prosecutorial remarks are improper, they do not necessarily warrant reversal if the combined prejudicial impact of the statements does not seriously affect the fairness or integrity of the trial."); *People v. Smalley*, 2015 COA 140, ¶ 37 ("Prosecutorial misconduct in closing argument rarely constitutes plain error.").

¶ 42 We also note that, in response to Yeadon's objection to some of the prosecutor's closing arguments, which are not being challenged in this appeal, the district court instructed the jury as follows:

> [W]hat you are hearing right now are closing arguments. Closing arguments, like opening statements, are not evidence. You have the evidence. You are the sole judges of the credibility of the testimony that you received and make the determinations as to what . . . the evidence showed. These are . . . just arguments of counsel. You determine what the evidence showed.

In the absence of evidence to the contrary, we assume the jury followed this instruction. *See People v. Doubleday*, 2012 COA 141, ¶ 62, *rev'd on other grounds*, 2016 CO 3.

IV. Drug Offender Surcharge

¶ 43 We last conclude that the district court's late imposition of the drug offender surcharge was a permissible correction to an illegal sentence and, thus, did not violate Yeadon's double jeopardy rights.

¶ 44 The Double Jeopardy Clauses of the United States and Colorado Constitutions protect a defendant from being twice punished for the same offense. *Reyna-Abarca v. People*, 2017 CO 15, ¶ 49 (citing U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18). "[I]ncreasing a lawful sentence after it has been imposed and

the defendant has begun serving it may, in certain circumstances, violate this aspect of double jeopardy protection." *People v. McQuarrie*, 66 P.3d 181, 182 (Colo. App. 2002).

¶ 45 But "a sentence that is contrary to legislative mandates is illegal and may be corrected at any time by a sentencing court without violating a defendant's rights against double jeopardy." *People v. Smith*, 121 P.3d 243, 251 (Colo. App. 2005); *see also* Crim. P. 35(a); *People v. Green*, 36 P.3d 125, 126 (Colo. App. 2001). We review the legality of a sentence de novo. *People v. Bassford*, 2014 COA 15, ¶ 20.

¶ 46 Section 18-19-103(1) provides that "each drug offender who is convicted . . . shall be required to pay a surcharge." The statute also states that "[t]he court may not waive any portion of the surcharge required by this section unless the court first finds that the drug offender is financially unable to pay any portion of said surcharge." § 18-19-103(6)(a). Such a finding "shall only be made after a hearing at which the drug offender shall have the burden of presenting clear and convincing evidence that he is financially unable to pay any portion of the surcharge." § 18-19-103(6)(b).

¶ 47 In *McQuarrie*, a division of this court concluded that "the drug offender surcharge, a criminal sanction, . . . constitutes punishment for purposes of double jeopardy analysis." 66 P.3d at 183. The division then concluded that, "because the drug offender surcharge is considered punishment and is not mandatory in all cases, the Double Jeopardy Clause required the trial court to impose such a fine at the time that it imposed [the] defendant's sentence in open court." *Id.*

¶ 48 If we accept *McQuarrie*, the district court would have plainly erred by not imposing the drug offender surcharge at sentencing. *See Scott v. People*, 2017 CO 16, ¶ 16 ("To qualify as plain error, an error must generally be so obvious that a trial judge should be able to avoid it without the benefit of an objection" and "[f]or an error to be this obvious, the action challenged on appeal ordinarily 'must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law.'" (quoting *People v. Pollard*, 2013 COA 31M, ¶ 40)).

¶ 49 But because we disagree with *McQuarrie*'s interpretation of section 18-19-103, we conclude that there was no error. *See People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008) (one division of

the court of appeals is not bound by the decision of another division).

¶ 50 We interpret the "shall be required to pay" language of section 18-19-103(1) as rendering the imposition of the drug offender surcharge mandatory in all cases in which a defendant is convicted of a drug offense. *See People v. Hyde*, 2017 CO 24, ¶ 28 ("The legislature's use of the word 'shall' in a statute generally indicates its intent for the term to be mandatory."). Indeed, the district court may not waive any portion of the required surcharge unless it "first finds" that the drug offender is financially unable to pay — a finding that "shall only be made after" a hearing on the issue. § 18-19-103(6)(a), (b).

¶ 51 Because Yeadon's sentence did not include the drug offender surcharge and was not accompanied by a district court finding of his financial inability to pay, the sentence was contrary to the statutory provisions of section 18-19-103 and, thus, illegal. *See Green*, 36 P.3d at 126. Accordingly, we conclude that the district court was required, pursuant to Crim. P. 35(a), to amend the mittimus to correct Yeadon's illegal sentence by including the imposition of the mandatory drug offender surcharge. *See Craig v.*

People, 986 P.2d 951, 966 (Colo. 1999) (because a parole term is statutorily mandated, the trial court was required to correct the mittimus to include a parole period); *Smith*, 121 P.3d at 251 (A sentence is illegal if it does not include the statutorily required consideration of restitution and, "because consideration of restitution is [statutorily] mandat[ed] . . . , we conclude that the sentencing court was . . . required to correct the mittimus.").

¶ 52 But the court imposed the drug offender surcharge without affording Yeadon an opportunity to present at a hearing clear and convincing evidence that he is financially unable to pay any portion of the surcharge. § 18-19-103(6)(b). Accordingly, we remand the case for the court to afford Yeadon that opportunity.

V. Conclusion

¶ 53 The judgment of conviction and sentence are affirmed, and the case is remanded for the district court to afford Yeadon an opportunity to present at a hearing clear and convincing evidence that he is financially unable to pay any portion of the surchage.

JUDGE FOX and JUDGE ASHBY concur.