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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Adams District Court Honorable Edward Moss Case Number 06CR3423	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. BRADLEY SCOTT HURTT Defendant-Appellant	▲ COURT USE ONLY ▲
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OPENING BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Defendant-Appellant Bradley Scott Hurtt was the defendant in the trial court and will be referred to by name or as the Defendant. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the state. Numbers in parentheses refer to the volume and page number of the record on appeal.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the District Court Committed Reversible Error by Allowing the State to Present Evidence of Mr. Hurtt's Prior DUI Arrests.

II. Whether the District Court Committed Reversible Error by Denying Mr. Hurtt's Motion for a Mistrial.

III. Whether the District Court Committed Reversible Error by Denying Mr. Hurtt's Challenge for Cause.

IV. Whether the State Failed to Prove Beyond a Reasonable Doubt that Mr. Hurtt Committed Aggravated Driving After Revocation Prohibited.

STATEMENT OF THE CASE

The state charged Mr. Hurtt with: (1) aggravated driving after revocation prohibited, a class six felony, in violation of C.R.S. § 42-2-206(1)(b); and (2) driving under the influence, a misdemeanor, in violation of C.R.S. § 42-4-1301(1)(a). (File,p1) The alleged date of the offenses was September 26, 2006. (File,p2) Mr. Hurtt plead

not guilty and tried his case to a jury on March 5-6, 2008. (*See* v8-9) The jury returned verdicts of guilty on both counts. (File,p57-58)

On July 25, 2008, the district court sentenced Mr. Hurtt to 18 months in Community Corrections on the aggravated driving count, and one year of jail on the DUI, to be served concurrently to count one and at Community Corrections. (v12,p9) The district court ordered both sentences to be served consecutively to Mr. Hurtt's six-month jail sentence in another case. (*Id.*) The district court did not award Mr. Hurtt any presentence confinement credit because he was out of custody on bond prior to sentencing. (*Id.*)

Mr. Hurtt, through counsel, timely filed a notice of appeal.

STATEMENT OF THE FACTS

On September 26, 2006, at around 10:30 p.m., Alex Fairfield, a paramedic with Northglenn Ambulance, noticed a gray or silver Mitsubishi driving erratically. (v8,p122) Mr. Fairfield, in the process of transporting a patient to the hospital, advised the dispatch center that he was "following a party that's driving recklessly." (v8,p123) Mr. Fairfield claimed that he advised dispatch of the car's license plate number, but could not recall it at trial. (v8,p125) Mr. Fairfield followed the Mitsubishi as long as he could, but he was on his way to the hospital and eventually lost sight of the car. (v8,p127)

About one minute later Kellen Hassenstab, a Northglenn police officer responding to a call of a possible DUI, saw a gray or silver Mitsubishi in the drive-thru of a Taco Bell near where the ambulance had seen the gray or silver Mitsubishi. (v8,p137-39) Officer Hassenstab testified that dispatch aired the license plate of the car that the ambulance had seen. (v8,p138) However, the state failed to produce any independent evidence, such as a recording of the call from the ambulance to dispatch, to verify the license plate number of the vehicle spotted by the ambulance.

Officer Hassenstab approached the car and asked the driver, Mr. Hurtt, for his driver's license and registration. (v8,p140-42) Officer Hassenstab testified that Mr. Hurtt was moving very slowly and deliberately. (v8,p143) Officer Hassenstab also testified that Mr. Hurtt's eyes were bloodshot and glassy, and his speech was low and incoherent. (*Id.*) At that point, Officers Skattum and Thwaits arrived, and Officer Hassenstab allowed them to take over the situation because Officer Skattum was in training. (v8,p144)

Officer Thwaits asked Mr. Hurtt to step out of the car, and asked Mr. Hurtt if he would perform any roadside maneuvers. (v8,p146-47) Mr. Hurtt declined to perform any maneuvers and he was arrested. (v8,p147) At the police station, Officer Thwaits advised Mr. Hurtt of his rights under Colorado's Express Consent Law, but Mr. Hurtt refused to take any chemical tests. (v8,p161-62)

Mr. Hurtt testified and presented a very different story. Mr. Hurtt testified that, on the night in question, he went to see a movie with a friend. (v8,p210) After the movie, they went to Taco Bell. (*Id.*) After they ordered, the friend, who was riding in the passenger seat, jumped out of the car and ran across the street to a 7-Eleven to get some cigarettes. (v8,p211) Soon after, three Northglenn police officers approached Mr. Hurtt's car and informed him that they had a call about a gray or silver Mitsubishi driving erratically. (*Id.*) Mr. Hurtt explained that he had been at a movie, and was not driving on the street where the other Mitsubishi was seen. (*Id.*) One officer took Mr. Hurtt's identification, then came back and arrested him. (v8,p211-12) Mr. Hurtt testified that he was never asked to perform any roadside maneuvers. (v8,p212) Furthermore, Mr. Hurtt testified that he was never advised of the Express Consent Law or the penalties associated with it. (v8,p212-13) The officers did not obtain Mr. Hurtt's signature on the express consent advisement form. (*See* Def.'s Ex. A.)

SUMMARY OF THE ARGUMENT

The district court committed reversible error by allowing the state to present evidence of Mr. Hurtt's prior DUI arrests. Evidence of Mr. Hurtt's prior DUI arrests was not proper impeachment evidence, was not admissible pursuant to C.R.E. 608(b), and was more prejudicial than probative.

The district court committed reversible error by denying Mr. Hurtt's motion for a mistrial. Despite an agreement between the parties to not introduce evidence of Mr. Hurtt's outstanding warrants in an unrelated matter at the time of his arrest in this case, two different state witnesses disclosed this highly prejudicial information to the jury.

The district court committed reversible error by denying Mr. Hurtt's challenge for cause of potential juror Mr. Winkeller. Mr. Winkeller unequivocally expressed his personal disagreement with a defendant's right not to testify and the appropriate burden of proof.

The state failed to prove beyond a reasonable doubt that Mr. Hurtt committed aggravated driving after revocation prohibited. The state failed to present sufficient evidence that Mr. Hurtt was driving on a "highway."

ARGUMENT

I. The District Court Committed Reversible Error by Allowing the State to Present Evidence of Mr. Hurtt's Prior DUI Arrests.

a. Standard of Review

Mr. Hurtt properly preserved this issue for appellate review. Defense counsel repeatedly objected to the challenged evidence on the basis of relevance. (v9,p12-18 (attached as Appendix A)) A district court's decision on an evidentiary issue will be reversed if the court abused its discretion. *See People v. Segovia*, 196 P.3d 1126, 1129

(Colo. 2008) (citing *Masters v. People*, 58 P.3d 979, 996 (Colo. 2002)). A district court "necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Segovia*, 196 P.3d at 1129 (citing *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004)).

b. Applicable Facts

After Mr. Hurtt decided that he would testify, the state asked the district court if it would "have any discretion to go into prior alcohol-related offenses[.]" (v8,p202) The district court initially held: "[n]ot unless they relate to issues of credibility." (v8,p202-03) The court concluded that such evidence would be "in the nature of other wrongful acts under 404(b)," and would therefore be subject to a hearing before the evidence could be admitted. (v8,p203) The court noted that a 404(b) hearing would not be inappropriate at this stage because the issue of Mr. Hurtt's identity was not raised until opening statements. (v8,p204)

Following defense counsel's direct examination of Mr. Hurtt, and just before the state began cross examination, the court cautioned the state: "[g]o ahead with the examination, but stay away from that area that we talked about." (v8,p213) During cross examination, the state asked Mr. Hurtt what Officer Hassenstab told him as he was being arrested. (v8,p222) Defense counsel objected and asked to approach the bench. (*Id.*) However, the court responded:

> THE COURT: What is the objection? ... I mean, there are certain words we use besides objection. So what – give me one of those words.

(*Id.*) Therefore, defense counsel stated, in front of the jury: "[t]his is one of [the] areas we are not supposed to go into." (*Id.*) The court instructed the state to pursue another topic, but the state had reached a point where it believed the rest of its questions "will be weaving in and out of the area I'm not supposed to get to." (v8,p222) Therefore, the court dismissed the jury for the evening. (v8,p224) Just before adjourning for the evening, the court noted that Mr. Hurtt admitted that he was driving on the night in question, so the court believed that identity, for 404(b) purposes, was no longer an issue. (v8,p226)

The next morning, before the jury was brought in, the state informed the court that it was "not going to bring any 404(b) issues at this point." (v9,p5) However, the state noted that "[i]f the defendant's testimony brings up something relevant, I'll certainly approach the bench ...." (*Id.*) During the cross examination of Mr. Hurtt, the following exchange took place:

> Q [by the state]: Do you understand what roadside maneuvers are, sir?
> A [by Mr. Hurtt]: Yes. I do now.
> Q: You do now?
> A: Yes.
> Q: Did you understand what they were at the time?
> A: Vaguely, I would say.

(v9,p12) The state then asked to approach, but the district court responded:

THE COURT: No. It's a matter of credibility. Go ahead.

(*Id.*) The state went on to ask Mr. Hurtt numerous questions relating to his prior DUI arrests, to which defense counsel made repeated objections on the grounds of relevance. (*See* v9,p12-18) The district court repeatedly overruled defense counsel's objections. (*Id.*)

c. Law and Analysis

i. *The Evidence was not Admissible for Impeachment Purposes because it was not Inconsistent with Mr. Hurtt's Statement.*

Mr. Hurtt's statement that he was "vaguely" familiar with roadside maneuvers was not impeachable because the state's evidence was not inconsistent with that statement. "Impeachment" is defined as "[t]he act of discrediting a witness, as by catching the witness in a lie ...." Black's Law Dictionary 332 (2d Pocket Ed. 2001). "The very essence of impeachment evidence is that it tends to cast doubt upon the credibility of a testifying witness." *People v. Welsh*, 80 P.3d 296, 309 (Colo. 2003). The crux of impeachment involves demonstrating that the evidence contradicts the witness' statement. *Id.* (citing *LeMasters v. People*, 678 P.2d 538, 543 (Colo. 1984)). Therefore, to admit evidence for impeachment purposes, the evidence "must actually contradict the impeachable statement." *Id.*; *see also People v. Fisher*, 9 P.3d 1189, 1192 (Colo. App. 2000) (the witness' prior statement had to sufficiently deviate from her

statement at trial in order to admit the prior statement for impeachment purposes pursuant to C.R.E. 801(d)(1)(A)); *Liscio v. Pinson*, 83 P.3d 1149, 1155 (Colo. App. 2003) (under C.R.E. 613, "there must be a material variance between the witness' testimony and the prior statement").

Here, the district court allowed the state to elicit testimony from Mr. Hurtt that he had three previous arrests for suspicion of DUI over the last 13 years. (*See* v9,p12-18) Furthermore, Mr. Hurtt's uncontradicted testimony indicated that, in those three previous arrests, he was asked to do roadside maneuvers in just one of them, which occurred more than a decade before.[1] (v9,p14) Mr. Hurtt went on to explain that "[i]t's a little hard to recollect exactly the details of 13 years ago." (*Id.*) The state's proffered evidence that Mr. Hurtt had been subject to roadside maneuvers 13 years ago was not inconsistent with Mr. Hurtt's comment that, at the time of the arrest in this case, he was vaguely familiar with roadside maneuvers. The state made no effort to ascertain Mr. Hurtt's level of familiarity with roadside maneuvers beyond the fact that he had performed them approximately 13 years earlier. Accordingly, the state's evidence was not properly admitted for impeachment purposes. Therefore, the district court erred by allowing the state to elicit that testimony.

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[1] Although the state attempted to cast doubt on the fact that Mr. Hurtt was only asked to perform roadside maneuvers in one of his three prior arrests, the state took no other steps to discredit that testimony.

ii. *The Evidence was not Admissible for Impeachment Purposes because the State was Attempting to Impeach Testimony which it Elicited.*

Evidence of Mr. Hurtt's prior DUI arrests was not admissible for impeachment purposes where the state elicited the purportedly unfavorable testimony itself. In other words, the state improperly pushed the witness through a door, then utilized that to present evidence for impeachment purposes. "The concept of 'opening the door' represents an effort by courts to prevent one party in a criminal trial from gaining and maintaining an unfair advantage by the selective presentation of facts that, without being elaborated or placed in context, create an incorrect or misleading impression." *People v. Murphy*, 919 P.2d 191, 195 (Colo. 1996) (citing *People v. Miller*, 890 P.2d 84, 98-99 (Colo. 1995)). When one party "opens the door to a topic," the other party then has the right to "explain or rebut any adverse inferences that might have resulted from the questions." *People v. Dunlap*, 124 P.3d 780, 799 (Colo. App. 2004); *see also People v. Skufca*, 176 P.3d 83, 88 (Colo. 2008) (evidence of the defendant's prior drug transactions was only admissible if the defendant "opened the door to that line of inquiry during direct"); *People v. Metcalf*, 926 P.2d 133, 140 (Colo. App. 1996) (evidence of prior arrests is only admissible if the defendant gives "specific contrary testimony" on direct which, if uncontradicted, "would likely result in the trier of fact receiving a false or misleading account of a matter").

To allow, as occurred here, one party to essentially open the door for itself, is contrary to the very purpose of the doctrine. Whereas the purpose of the doctrine is to *protect* one party from an unfair advantage, by allowing the state, as it did here, to open the door and then offer evidence to impeach that testimony, the district court allowed the state to *gain* an unfair advantage. But for the state's own attempt to misinterpret Mr. Hurtt's testimony, there would have been no need for the state to present the alleged impeachment evidence. On cross, the state attempted to twist Mr. Hurtt's testimony about the roadsides. Whereas on direct Mr. Hurtt unequivocally stated that he was not asked to do any roadsides (v8,p212), on cross the state presented its own convoluted theory, which Mr. Hurtt flatly rejected, that perhaps Mr. Hurtt was asked to do roadsides but did not realize it. (v9,p12)

In fact, evidence relating to roadsides maneuvers was irrelevant in this case since, regardless of why, none were performed. The state's questioning was plainly crafted to extract testimony from Mr. Hurtt that would open the door to the admission of his prior DUI arrests. Had Mr. Hurtt responded "yes," the jury would have inferred from that that he had prior DUI arrests. Any answer other than "yes" would, according to the state's argument, open the door to admit evidence of Mr. Hurtt's prior DUI arrests. Accordingly, the district court erred by allowing the state to present evidence to impeach an irrelevant statement it elicited, particularly in light

of the fact that the court, prior to Mr. Hurtt's testimony, ruled that evidence of Mr. Hurtt's prior DUI arrests would only be admissible if "[t]he defendant quote/unquote opens the door ...." (v8,p203)

iii. *The Evidence was Not Admissible Pursuant to C.R.E. 608(b).*

The district court implicated C.R.E. 608(b) by holding that the evidence was inadmissible because it was "a matter of credibility." However, the court failed to consider the proper legal requirements for admitting evidence under that rule. Therefore, the district court committed reversible error by applying the wrong legal standard and improperly allowing the state to elicit testimony regarding Mr. Hurtt's prior DUI arrests.

When evidence of a witness' prior acts is presented for the purpose of impeachment, i.e. to challenge a witness' credibility, the evidence is evaluated pursuant to C.R.E. 608, not C.R.E. 404(b). *Segovia*, 196 P.3d at 1130. Therefore:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness ... may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness ....

C.R.E. 608(b). In *Segovia*, the Colorado Supreme Court considered how to determine whether a prior act was "probative of truthfulness." *See* C.R.E. 608(b). After

conducting a national survey, the court noted that there were three prevailing views: (1) the narrow view requires the prior act to have an element of dishonesty; (2) the middle view incorporates the narrow view, but also acknowledges that "conduct seeking personal advantage by taking from others in violation of their rights reflects on dishonesty or truthfulness[;]" and (3) the broad view allows any evidence suggesting weak or bad character. 196 P.3d at 1131-32.

Colorado adopted the middle view because "some acts that do not involve false statement or misrepresentation are nonetheless probative of truthfulness." *Id.* at 1132. Therefore, the court in *Segovia* concluded that a prior act of shoplifting was admissible because "a person who takes the property of another for her own benefit is acting in an untruthful or dishonest way." *Id.* Conversely, although it has not been addressed by Colorado courts, a number of courts have concluded that a prior DUI is not probative of character for truthfulness. *See United States v. Silver*, No. 08-4198, 2008 WL 4537780, *1 (4th Cir. Oct. 10, 2008) (finding "no error in the district court's determination that the officer's DUI conviction was not relevant to his truthfulness, and therefore was not admissible to impeach the officer's testimony"); *Brown v. Astrue*, No. CIV S-07-1038 EFB, 2008 WL 4279401, *7 (E.D. Cal. Sept. 16, 2008) ("[r]eliance on plaintiff's drug addiction and DUI convictions, without more, are inappropriate for purposes of assessing her credibility").

Here, the district court failed to undertake any analysis, let alone a detailed analysis pursuant to C.R.E. 608, of the disputed evidence prior to admitting it. Furthermore, the district court failed to require the state to make an offer of proof regarding the evidence, and the district court failed to instruct the jury on the limited purpose for which the evidence was purportedly admitted. *See* C.R.E. 105. Rather, the district court simply allowed the state to proceed because it believed the evidence was "a matter of credibility." (v9,p12) However, as in *Silver* and *Brown*, Mr. Hurtt's prior DUI arrests are not probative of truthfulness. Accordingly, the district court erred in admitting the evidence pursuant to C.R.E. 608(b).

iv. *The Probative Value of the Evidence, if any, was Substantially Outweighed by the Danger of Unfair Prejudice.*

Assuming, *arguendo*, that the evidence was properly admissible for impeachment purposes, the probative value, if any, was substantially outweighed by the danger of unfair prejudice, and the district court took no steps to reduce its plainly prejudicial effect. Evidence which is otherwise admissible, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...." C.R.E. 403; *see also Segovia*, 196 P.3d at 1132 (evidence that is admissible pursuant to C.R.E. 608 is still subject to analysis pursuant to C.R.E. 403); *People v. Lesslie*, 939 P.2d 443, 452 (Colo. App. 1996) (same). Evidence of prior crimes is inherently prejudicial. *See People v. Garner*, 806 P.2d 366, 369 (Colo. 1991); *People v. Stull*, 344 P.2d 455 (Colo.

1959). "This is particularly true when there is an identity between the crime charged and other crimes evidence." *People v. Robinson*, 859 N.E.2d 232, 245 (Ill. Ct. App. 2006) (recognizing that the prejudicial effect of the defendant's prior DUIs was magnified because they were similar to and had "an identity with" the charge in that case of aggravated DUI).

Here, the defendant admitted that he did not have a valid license and he was driving. (v8,p210;v9,p19) The only issue in dispute was whether defendant was driving under the influence of alcohol. Therefore, there was significant similarity, or "identity with," the dispute in this case and the evidence of Mr. Hurtt's prior DUI arrests. *See Robinson*, 859 N.E.2d at 245. Conversely, evidence of Mr. Hurtt's familiarity with roadside maneuvers had little, if any, probative value because there were no roadside maneuvers conducted in this case. What little probative value the evidence may have was outweighed by the danger of unfair prejudice. And, as noted above, *supra* § I(c)(iii), the state took no steps to minimize the prejudicial effect, such as with a limiting instruction. Accordingly, the trial court erred by admitting the evidence of Mr. Hurtt's prior DUI arrests.

d. Error Mandates Reversal

Evidence of all three of Mr. Hurtt's prior DUI arrests had no permissible purpose. It was not proper impeachment evidence, the state should not have been

allowed to open its own door, it was not admissible pursuant to C.R.E. 608, and, regardless, the danger of unfair prejudice vastly outweighed its minimal, if any, probative value. Furthermore, assuming, *arguendo*, that the one prior DUI arrest for which Mr. Hurtt admitted he performed roadside maneuvers was minimally probative, the other two DUI arrests had no probative value and were extremely prejudicial. Therefore, the admission of the evidence was improper and violated Mr. Hurtt's constitutional right to due process and a fair trial, particularly in light of the additional highly prejudicial testimony regarding the warrants for Mr. Hurtt's arrest in another matter, which will be discussed in detail below, *infra* § II. *See U.S. Const.* amends. V, XIV; *Colo. Const.* art. II, § 16,25. The district court mistakenly believed that the evidence was admissible merely because it was a "matter of credibility," which was an erroneous view of the law. *See Segovia*, 196 P.3d at 1129. Therefore, the district court's error mandates reversal.

II. The District Court Committed Reversible Error by Denying Mr. Hurtt's Motion for a Mistrial.

a. Standard of Review

Mr. Hurtt properly preserved this issue for appellate review. A district court's ruling on a motion for a mistrial is reviewed for an abuse of discretion. *See People v. Cousins*, 181 P.3d 365, 373 (Colo. App. 2007) (internal citation omitted).

b. Applicable Facts

Prior to jury selection, defense counsel made an oral motion in limine to exclude evidence of two warrants for Mr. Hurtt's arrest in an unrelated matter. (v8,p6) Defense counsel argued that the warrants constituted other acts evidence pursuant to C.R.E. 404(b) that was irrelevant and "more prejudicial than probative." (v8,p7) The state responded that "[t]he warrant certainly did play a role in that officer's decision to arrest the Defendant; that said, if that's something that the Defense doesn't go into, the People don't need to go into that either." (*Id.*) Accordingly, the court granted the motion "based on the agreement of the District Attorney as to the evidence to be obtained." (*Id.*)

During the cross examination of Officer Skattum, defense counsel was asking about what happened after Mr. Hurtt was taken into custody, and the following exchange took place:

> Q [by defense counsel]: And, um, you then testified that he was released. Was he released on a summons, do you recall?
>
> A [by Officer Skattum]: No. He was released pending further – pending the charges of the DUI.
>
> Q: Okay. So does that mean he was not taken to jail?
>
> A: He was taken to jail on other reasons.

(v8,p168) The state asked to approach the bench, and argued that "defense counsel just opened the door to why he was taken into custody." (v8,p168-69) Defense counsel responded:

> I still think it's prejudicial. I don't think – obviously I didn't – I did not anticipate that answer. I was just asking if he was released on a summons, so I still, um, state that it's still prejudicial, and I think it's irrelevant.

(v8,p169) The court responded:

> Well, always has been prejudicial. The question, under Rule 403, is whether its unduly prejudicial. I – what were the other charges that he was arrested for?

(*Id.*) The state said it did know what the other charges were for, and the court ruled:

> All right. I'm not going to let you introduce it, just because I think the – the relevance is substantially outweighed by the risk of unfair – undue prejudice.

(*Id.*)

While the state was questioning Officer Thwaits about what happened after he asked Mr. Hurtt to get out of the car, the following exchange took place:

> Q [by the state]: Okay. And what happened next?
> A [by Officer Thwaits]: He exited the vehicle, um, he stumbled out of the vehicle, at that time, um, ADCOM aired that Mr. Hurtt was wanted on two warrants out of Adams County.
> Q: Okay.
> A: And that he was revoked –

(v8,p179) Defense counsel objected and asked to approach the bench. (*Id.*) However, without hearing any argument, the court ruled:

> Objection, sustained. The jury will disregard the testimony about any warrants. That should not have been presented to you, so you are not to consider that during your deliberations. We can talk about it later.

(*Id.*)

Later, the court allowed defense counsel to "make a record" about Officer Thwaits' reference to the warrants. (v8,p198) Defense counsel argued "that would be so prejudicial that, um, even the instruction, that the jury cannot take that into consideration, would not be sufficient to, um, essentially unring the bell." (v8,p199) The state responded that it had instructed its witnesses not to mention the warrants, Officer Thwaits' statement was inadvertent, and, regardless, it was not so prejudicial so as to require a mistrial. (*Id.*) The state also noted that the information was already inadvertently elicited by defense counsel during its cross of Officer Skattum. (v8,p200) Therefore, the state argued that a mistrial was not appropriate because: (1) defense counsel had already elicited the prejudicial information; and (2) the court had instructed the jury to disregard Officer Thwaits' statement. (*Id.*) The state finally noted that there was no prejudice because Officer Thwaits did not tell the jury what the warrants were for or any of the underlying facts. (*Id.*)

The court denied the motion for a mistrial and ruled:

> Had the issue of the warrant not been presented earlier in response to the Defense question, the impact of the statement would have been much greater. In light of the fact that the existence of the warrant – of at least one warrant, if not multiple warrants, was already known to the jury, I don't believe a mistrial is appropriate.
>
> I did instruct the jury to disregard the statement. I will instruct the jurors again, remind them again, in the final instructions, that when I told them not to consider something, they need to – I think the pattern instruction is rather naïve, that they need to put it out of their mind. They don't need to do that. They just need to not include it as part of their deliberations. Nevertheless, I will use the pattern instruction.

(v8,p200-01) Buried in instruction one, which was the introductory instruction explaining the deliberation process and addressed several matters, the instruction stated: "If I told you not to consider a particular statement, you were told to put that statement out of your mind, and you many not consider any statement in your deliberations which you may have been instructed to disregard." (File,p37)

c. Law and Analysis

The district court committed reversible error by denying Mr. Hurtt's motion for a mistrial. A mistrial is warranted "when the prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means." *Cousins*, 181 P.3d at 373 (citing *People v. Dore*, 997 P.2d 1214, 1221 (Colo. App. 1999); *People v. Salazar*, 920 P.2d 893, 897 (Colo. App. 1996)). Evidence of a defendant's unrelated criminal activity is generally not admissible, and "[w]hen reference is made in the

presence of the jury to such criminal activity, a mistrial is normally required." *People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973).

In *Goldsberry*, the defendant was convicted of receiving stolen goods. *Id.* at 802. One of the state's witnesses who was involved in the theft of the goods, testified that the defendant stated that he had money to buy the stolen goods because he was preparing to go "make an investment in some drugs." *Id.* The objection to the statement was sustained, the jury was instructed to disregard the statement, and the court denied the defendant's motion for a mistrial. *Id.* at 802-03. On appeal, the court noted that the evidence against the defendant "was rather thin" and based entirely on circumstantial evidence. *Id.* at 803. The court reasoned that "[t]he weight which the jury obviously gave to this circumstantial evidence may have quite reasonably been influenced by the inadmissible reference to the defendant's intended trip to Texas to purchase drugs." *Id.* The court acknowledged that instructing the jury to disregard a statement may be sufficient to cure certain improper admissions. *Id.* However, where the evidence is "so highly prejudicial ... it is conceivable that but for its exposure, the jury may not have found the defendant guilty[,]" it was reversible error to deny the defendant's motion for a mistrial. *Id.* at 803, 804; *see also People v. Moore*, 701 P.2d 1249, 1253 (Colo. App. 1985) ("[w]hen a trial court concludes ... that a juror was exposed to information that in the slightest might taint his verdict, it is

within the court's discretion to declare a mistrial," even when the defendant himself objects to the mistrial).

Evidence of outstanding warrants for Mr. Hurtt's arrest was highly prejudicial and not otherwise admissible. Furthermore, the district court's reasoning that Officer Skattum's statement that Mr. Hurtt was taken to jail for "other reasons" somehow diminished the prejudicial impact of Officer Thwaits' statement that Mr. Hurtt was "wanted on two warrants" and "was revoked," and that the repeated admission of highly prejudicial evidence is less harmful than a single admission, defies logic. Therefore, it was improper for the court to later conclude that, but for Officer Skattum's statement, a mistrial would have been appropriate. (*See* v8,p200-01) Interestingly, the district court acknowledged that, even after Officer Skattum's comment, the evidence of the warrants was still unfairly prejudicial and inadmissible pursuant to C.R.E. 403. (v8,p169) Just as in *Goldsberry*, the court's instructions to the jury to disregard the repeated introduction of highly prejudicial evidence were insufficient. The repeated admission of the evidence of outstanding warrants for Mr. Hurtt's arrest in an unrelated matter, particularly when viewed in conjunction with the improper admission of evidence of Mr. Hurtt's prior DUI arrests, violated Mr. Hurtt's constitutional right to due process and a fair trial. *See U.S. Const.* amends. V, XIV;

Colo. Const. art. II, § 16,25. Therefore, the district court abused its discretion in denying Mr. Hurtt's motion for a mistrial.

III. The District Court Committed Reversible Error by Denying Mr. Hurtt's Challenge for Cause.

a. Standard of Review

Mr. Hurtt properly preserved this issue for appellate review. Mr. Hurtt challenged potential juror number seven, Mr. Winkeller, for cause, and the district court denied the challenge. (v8,p82,86) Mr. Hurtt then, in the course of exhausting his peremptory challenges, used a peremptory challenge to excuse Mr. Winkeller. (v8,p97) A district court's ruling on a challenge for cause is reviewed for an abuse of discretion. *Carrillo v. People*, 974 P.2d 478, 485 (Colo. 1999).

b. Applicable Facts

During defense counsel's voir dire, she had a lengthy discussion with Mr. Winkeller about a defendant's right not to testify and the burden of proof. (*See* v8,p67-69 (attached as Appendix B)) Mr. Winkeller ultimately stated that "[i]f they – if the prosecution tells me that your client did this, this and this, and everyone on your side of the bench just shrugs your shoulders, I'm not going to find – find your side innocent, so." (v8,p69)

Defense counsel challenged Mr. Winkeller for cause. (v8,p82) The district court attempted to rehabilitate Mr. Winkeller. (*See* v8,p84-86 (attached as Appendix

C)) The court's attempt at rehabilitation focused on whether, if instructed to do so, Mr. Winkeller could set certain things aside, to which Mr. Winkeller responded that he could. (*See, e.g.,* v8,p85) The district refused to excuse Mr. Winkeller, forcing defense counsel to use a peremptory challenge to excuse him. (v8,p97)

c. Law and Analysis

The district court committed reversible error by failing to excuse Mr. Winkeller. "It is fundamental to the right to a fair trial that a defendant be provided with an impartial jury." *Nailor v. People*, 612 P.2d 79, 80 (Colo. 1980). To protect this right, the district court must excuse prejudiced or biased jurors. *Id.* "A prospective juror should be excused if 'it appears doubtful' that he will be governed by the instructions of the court as to the law of the case." *Morgan v. People*, 624 P.2d 1331, 1332 (Colo. 1981) (citing *Jones v. People*, 47 P. 275 (1896)).

C.R.S. § 16-10-103(1)(j) provides that the district court must sustain a challenge for cause on the following ground:

> The existence of a state of mind in the juror evincing enmity or bias toward the defendant or the state; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial ....

"However, if there is sufficient reason to question the impartiality of the juror, the trial court should grant a challenge for cause and dismiss the juror." *Nailor*, 612 P.2d at 80.

In *Morgan*, a potential juror questioned the right of the defendant to choose not to testify, stating that he "wanted to hear both sides of the story." 624 P.2d at 1332. The district court responded with an explanation of the presumption of innocence and the right to remain silent, to which the potential juror replied that he "could go along with that." *Id.* On appeal, the court concluded that the failure to excuse the juror was an abuse of discretion and mandated reversal because "there was no dispute that the juror doubted his ability or willingness to apply the law." *Id.*

Another division of this Court recently called into question the efficacy of "rehabilitative questioning" by the district court. *See People v. Merrow*, 181 P.3d 319, 323 (Colo. App. 2007) (Webb, J., concurring), *cert. denied*, 2008 WL 1700521 (Colo. Apr. 14, 2008). Judge Webb, in his concurring opinion, pointed out that "attempted rehabilitation of the prospective juror by the trial court, often effected through leading questions, raises two new problems." *Id.* Of particular relevance here, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight." *Id.* (quoting *Bollenbach v. United States*, 326 U.S. 607, 612 (1946)). And "rehabilitative questions by the trial court risk abusing that influence." *Id.* Specifically, "[t[he

answers to such questions may suggest overt acquiescence in the trial court's efforts to elicit a commitment to neutrality." *Id.*

Here, Mr. Winkeller clearly expressed his doubt over his ability to apply the presumption of innocence and a defendant's right to remain silent. Furthermore, Mr. Winkeller's comment that if he heard something "plausible" and "reasonable," then he would "begin leaning [his] decision in that direction," is contrary to the requirement that the state prove the charges beyond a reasonable doubt. (v8,p67-68) Although the district court attempted to rehabilitate Mr. Winkeller, its efforts were misguided. Rather than addressing the presumption of innocence, right to remain silent, and burden of proof, the court engaged in a lengthy and complicated hypothetical suggesting the issue was Mr. Winkeller's ability to disregard certain information. (v8,p84) The court failed to address Mr. Winkeller's predisposition to disregard Mr. Hurtt's right to remain silent and the state's burden in this case. Regardless, the district court's highly suggestive and leading questions, even if they had been relevant to Mr. Winkeller's biases, produced answers which "suggest[ed] overt acquiescence in the trial court's efforts to elicit a commitment to neutrality." *Merrow*, 181 P.3d at 323 (Webb, J., concurring).

Mr. Winkeller "doubted his ability or willingness to apply the law." *Morgan*, 624 P.2d at 1332. Accordingly, the district court's denial of Mr. Hurtt's challenge for cause was an abuse of discretion and mandates reversal.

IV. The State Failed to Prove Beyond a Reasonable Doubt that Mr. Hurtt Committed Aggravated Driving After Revocation Prohibited.

a. Standard of Review

Mr. Hurtt properly preserved this issue for appellate review. At the close of the state's case-in-chief, defense counsel moved for a judgment of acquittal. (v8,p190-91) The district court denied the motion. (v8,p196) Whether the state failed to prove an element of a charged offense is a question of law subject to *de novo* review. *See, e.g., People v. Humphrey*, 132 P.2d 352, 356 (Colo. 2006) (the application of a legal standard to facts is a question reviewed *de novo*); *see also People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973).

b. Law and Analysis

The Due Process Clauses of the United States and Colorado Constitutions require the prosecution to prove the existence of every element of an offense charged beyond a reasonable doubt. *U.S. Const.*, amends. V, XIV; *Colo. Const.*, art. II, § 25; *see also In re Winship*, 397 U.S. 358 (1970); *People v. Hardin*, 607 P.2d 1291, 1294 (Colo. 1980); *People v. Noland*, 739 P.2d 906, 907 (Colo. App. 1987). When a defendant asserts on appeal that the evidence presented at trial was insufficient to support a

conviction, the reviewing court must determine "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." *Bennett*, 515 P.2d at 469; *see also Jackson v. Virginia*, 443 U.S. 307 (1979); *People v. Gonzalez*, 666 P.2d 123 (Colo. 1983); *Noland*, 739 P.2d at 907. Verdicts in criminal cases may not be based on guessing, speculation, or conjecture. *People v. Stark*, 691 P.2d 334, 339 (Colo. 1984); *Gonzalez*, 666 P.2d at 128.

The jury convicted Mr. Hurtt of aggravated driving after revocation prohibited.

> A person commits the crime of aggravated driving with a revoked license if he or she is found to be an habitual offender and thereafter operates a motor vehicle in this state while the revocation of the department prohibiting such operation is in effect and, as a part of the same criminal episode, also commits any of the following offenses:
>
> (A) DUI or DUI per se ....

C.R.S. § 42-2-206(1)(b)(I). Furthermore, based on the language in C.R.S. § 42-2-206(2), the Colorado Supreme Court held that in order to violate the above section, the defendant must operate a motor vehicle "on the highways of this state." *People v. Moore*, 615 P.2d 726 (Colo. 1980); *see also* C.R.S. § 42-2-206(2). The state here failed to

prove beyond a reasonable doubt that Mr. Hurtt drove his car on a public road, as required by the statute and Supreme Court precedent.

In *People v. Wood*, 767 P.2d 790, 791 (Colo. App. 1988), the defendant was arrested after police saw him driving erratically in the parking lot of a closed restaurant. The defendant was convicted of aggravated driving after revocation prohibited. *Id.* On appeal, the court concluded that "since no evidence was presented here that his driving occurred anywhere other than on private property, the judgment of conviction may not stand." *Id.* at 791-92.

Similarly, here, the state did not prove beyond a reasonable doubt that Mr. Hurtt drove on a public road. The district court, in denying Mr. Hurtt's motion for judgment of acquittal, relied on the testimony of the ambulance driver. (v8,p195-96) Despite Mr. Fairfield's testimony that he gave dispatch the license plate number, he could not recall that license plate number at trial. (v8,p125-26) Furthermore, the state failed to present any objective evidence to verify the license plate number of the car that Mr. Fairfield saw (e.g. a recording of Mr. Fairfield's call to dispatch). Moreover, two police officers testified that the reasons Mr. Hurtt was arrested were: (1) the odor of alcohol; (2) Mr. Hurtt's alleged balance issues; and (3) Mr. Hurtt's allegedly extremely slow movements while he was looking for his identification. (v8,p160-61;180-81) Initially, the officers failed to mention any reliance on the

information from Mr. Fairfield purporting to connect Mr. Hurtt to the reckless driving on a public road. Rather, it was not until the state prompted each witness with a leading question that the two officers suddenly agreed that Mr. Hurtt's arrest was also based on the information from Mr. Fairfield, the ambulance driver, of a silver Mitsubishi being driven erratically. (v8,p161;181)

Mr. Hurtt's conviction is based wholly on speculation and guessing that Mr. Hurtt ever drove on a public road. The evidence presented at the time of Mr. Hurtt's motion for judgment of acquittal was not sufficient to support Mr. Hurtt's conviction for aggravated driving after revocation prohibited.

CONCLUSION

For the reasons and authorities presented in Arguments I, II, and III, Mr. Hurtt requests this Court reverse his convictions and remand his case for a new trial. For the reasons and authorities presented in Argument IV, Mr. Hurtt requests this Court vacate his conviction for aggravated driving after revocation prohibited.

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CERTIFICATE OF SERVICE

I certify that, on April 3, 2009, a copy of this Opening Brief of Defendant-Appellant was served on Catherine P. Adkisson of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us.

A. No.
Q. The officers asked you to perform them, and you refused; isn't that correct?
A. No. I was never asked to.
Q. You were never asked to perform them, or did you just not understand what roadside maneuvers are?
A. I was never asked to. I was ordered out of the car because I was being placed under arrest.
Q. Okay. Do you understand what roadside maneuvers are, sir?
A. Yes. I do now.
Q. You do now?
A. Yes.
Q. Did you understand what they were at the time?
A. Vaguely, I would say.
MR. MASON: Your Honor, may we approach?
THE COURT: No. It's a matter of credibility. Go ahead.
Q. (By Mr. Mason) Mr. Hurtt, you say that you vaguely understood them at the time?
A. Yes.
Q. Have you ever been asked to perform roadside maneuvers before?
MRS. HERBST: Objection, Your Honor. Irrelevant.
THE COURT: Overruled.

Q. (By Mr. Mason) Have you ever been asked to perform roadside maneuvers before?

A. I believe so, yes.

Q. When?

MRS. HERBST: Objection, Your Honor. It's irrelevant.

THE COURT: Overruled.

THE WITNESS: I would say approximately eight years ago.

Q. (By Mr. Mason) Were you pulled over at that time on suspicion of DUI?

A. Yes.

Q. Was that in 2001?

A. No.

Q. When was it, then, sir?

A. It was in 2000.

Q. Okay. And were you asked to perform voluntary roadsides at that time?

A. No, I don't believe I was.

Q. You weren't. Did you just automatically get arrested at that point as well?

A. I don't recall -- would you rephrase the question. I'm not sure if I'm understanding.

Q. I'm asking you if they asked you to perform voluntary roadsides when you were pulled over on suspicion

of DUI back in 2000.

A. I don't believe so.

Q. You were not. Sir, what happened with that case, then?

MRS. HERBST: Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

Q. (By Mr. Mason) Were you pulled over for suspicion of DUI in 1995?

A. I believe so.

MRS. HERBST: Objection. Irrelevant.

THE COURT: Overruled.

Q. (By Mr. Mason) And were you asked to perform voluntary roadsides in 1995 when you were pulled over that time?

A. Yes.

Q. Okay. So you understood what voluntary roadsides were, then?

A. As I said, vaguely.

Q. Okay. But you -- did you actually perform them in 1995?

A. It was 13 years ago, I'm calculating. It's a little hard to recollect exactly the details of 13 years ago.

Q. Okay. But when you were pulled over on suspicion

of DUI in 1995, did you perform the voluntary roadside maneuvers?

MRS. HERBST: Objection. Asked and answered. He says he can't recall.

THE COURT: Well, it hasn't been answered yet.

Please answer the question that's been asked, sir.

THE WITNESS: In 1995?

Q. (By Mr. Mason) Correct.

A. Would you please restate the question.

Q. In 1995 when you were pulled over by the police on suspicion of DUI, did you perform the voluntary roadside maneuvers?

A. I believe I did.

Q. When you were pulled over in 1992 on suspicion of DUI, did you perform the voluntary roadside maneuvers then?

A. No.

Q. Were you instructed or asked to perform them?

A. No.

Q. So on two times that you've been pulled over for DUI, the police officers simply didn't ask you to perform voluntary roadside maneuvers at all?

A. Yes, sir.

Q. Did they just place you into custody without giving you the opportunity to say yes or no?

A. This -- this last September of '06, yes, I was

just --

Q. That wasn't my question, sir. I'm asking on these prior two times when you were pulled over on suspicion of DUI, you testified that you were pulled over three times, the second time you did perform the roadside maneuvers, but you said on the first and the third time you did not. I'm asking you, on those two times, once was in '92, the other was in 2000, did the police officers ask you to perform voluntary roadside maneuvers?

A. Not in '92.

Q. Not in '92. What about in 2000?

A. No.

MRS. HERBST: Your Honor, asked and answered.

THE COURT: Sustained. Go on another area, please.

Q. (By Mr. Mason) Okay, sir. So my question to you is, when you were pulled over on this occasion, on September 26th, 2006, did you or did you not understand what a voluntary roadside maneuver is?

A. I was never asked to perform roadside maneuvers, to answer your question, I guess I vaguely understood from my recollection from 13 years ago.

Q. You were just not asked at all?

A. No.

Q. Okay. When you got to the police station that

night, the night in question, September 26, 2006 --

A. Yes.

Q. -- the officers asked you to submit to a chemical test to test your blood alcohol level, either a blood test or a breath test, correct?

A. No.

Q. They didn't ask you that at all?

A. No.

Q. Did they advise you of Colorado's Express Consent Law?

A. No.

Q. Did they not advise you or did you not understand what Colorado's Express Consent Law was?

A. I don't remember them advising me of anything along those lines.

Q. Okay. Had you been advised before about what Colorado's Express Consent Law was?

MRS. HERBST: Objection, Your Honor. Irrelevant.

THE COURT: Sustained.

Q. (By Mr. Mason) Do you understand that Colorado law you have to submit to a blood or a breath test or you automatically lose your license for a year?

A. I do now.

Q. You do now?

A. Yes.

Q. Did you understand that on September 26th, 2006?
A. I was never asked that.
Q. That's not my question. Did you understand that on September 26, 2006?
A. No.
Q. You didn't?
A. Not fully.
Q. Okay. Did you understand that when you were picked up for DUI back in 2000?
A. No.
MRS. HERBST: Objection. Irrelevant.
THE COURT: Overruled. Goes for credibility.
Q. (By Mr. Mason) In 2000 when you were picked up for DUI were you advised of Colorado's Express Consent Law?
A. That I don't recall.
Q. Okay. In 1995 when you were picked --
MRS. HERBST: Objection. I don't believe there was a law in 1995 about the Express Consent.
THE COURT: The objection is that there's no good-faith basis for that question. Any response?
MR. MASON: Your Honor, it's my understanding that the law was in place. If I'm incorrect, I will withdraw the question.
THE COURT: Just go on to something else, then. Objection sustained with that response.

sides of the story?

THE JUROR: No. I think it's his right to make a decision to not avail himself of that situation, so no.

MS. HERBST: Wouldn't bother you?

THE JUROR: (Shakes head)

MS. HERBST: Anyone else? Does it bother anyone if you didn't hear both sides of the story? If you were picked -- how about Mr. Winkeller, how do you feel about that?

THE JUROR: I think that -- I think that if he doesn't want to present his side of the story, um, um, and you are not going to present anything like his side of the story, and you have got, um, credible police officers and -- and defense attorney up here presenting evidence against him, then I may be more inclined to -- to take -- take the prosecutor's side, if there is no -- if there is no way that you or your client can discredit anything that's presented to me today then I --

MS. HERBST: Once you hear from the prosecution, you kind of are then waiting for us to discredit --

THE JUROR: Depends on what I hear from the prosecution. If they -- if they tell me something that, um, is plausible and sounds reasonable to me, then, um, I'm going to be -- that's going to begin leaning my

decision in that direction.

MS. HERBST: Okay. And so if you were picked as a juror in this case, um, and you went back to deliberate, you might kind of wonder why Mr. Hurtt didn't take the stand and testify; is that fair to say?

THE JUROR: Um, if -- if he remains quiet in this case, I don't have a problem with that, but I think that someone should at least explain what -- whether the charges are unfounded, because if the charges are presented, and no one says -- no one negates any of the information that's present, then I would be inclined to side with the prosecution.

MS. HERBST: And by, um, by that, do you mean not putting on any other witnesses, or do you mean by -- what about in closing argument or argument or cross-examination of the cop?

THE JUROR: I mean, all of that -- all of that, in my mind, could help discredit anything that -- that the prosecution presents. So I mean, that -- that -- that -- I'm not suggesting that the Defendant needs to present his side of the case or speak or do anything, but if the Prosecution is going to get up and present all of this information and build a case.

MS. HERBST: Right.

THE JUROR: Um, I'm going -- I mean, I'm -- I'm

probably going to go the direction of the prosecution.

MS. HERBST: And that makes sense. Certainly that makes sense. You are kind of saying that they've produced enough evidence, in your mind, to prove the case beyond a reasonable doubt.

THE JUROR: If they -- if the prosecution tells me that your client did this, this and this, and everyone on your side of the bench just shrugs your shoulders, I'm not going to find -- find your side innocent, so.

MS. HERBST: Got you. And Mr. --

THE JUROR: Winkeller.

MS. HERBST: Hildebrand. I saw you shaking your head. How do you feel about that?

THE JUROR: I agree. If one side presents a strong case, and the other side does not rebut, there is no choice in my mind.

MS. HERBST: How do you feel about, um, whether or not Mr. Hurtt takes the stand and testifies?

THE JUROR: Um ...

MS. HERBST: It's a tough one.

THE JUROR: Yeah. I'm -- I'm not sure about that. It would depend on the credibility of the witnesses that you produced.

MS. HERBST: Okay. Would you kind of wonder, in your mind, why he didn't testify?

going to inquire of Mr. Winkeller, and I will excuse the others.

THE COURT: Mr. Winkeller, let me just ask you something, and this really applies to a number of you. I want you to picture in your mind going to Baskin Robins, okay. Going to order a hot-fudge sundae, and you have got two scoops of vanilla ice cream, the clerk is going to go back where they keep the hot fudge in the stainless steel thing with the ladle. She is going to ladle that hot fudge over the top of that ice cream, and the person is going to put some whip cream on there, put some nuts, crushed peanuts, cherry on there. You got that image? Pretty clear in your mind, isn't it?

Here is what we do in the court system. I know -- I now instruct you to disregard that image, as part of your deliberations. Okay. I'm telling you that you are not allowed to think about a hot-fudge sundae. Just saying that, when you get back to the jury room, that can't be part of your deliberations. You are picked for this jury, whoever is going to be picked for this jury is going to see me, I'm working on the jury instructions, and we've got the elements of the charges here, and you know element number one is this, and two is that, and I will read these to you, go over them together, whoever is on the jury, and you have to see

whether the evidence fits, you know, number one, number two, number three. If I tell you, though, that there is something going to happen, it's hot-fudge sundae, there's no question, you just can't include that as part of your deliberations, can you set that aside?

THE JUROR: Yes, Your Honor, and I -- yes, I can set that aside.

THE COURT: All right. That's what we're talking about. You are entitled -- jurors are entitled to go back in the jury room, discuss things, in light of their own observations and experiences in life, and everybody has their own experiences, whether it's being pulled over for, you know, jaywalking or a speeding ticket or whatever it is, all come in here with your own backgrounds and experiences, and you are allowed to use that, and there's some things that you just have to set aside and try the person on the evidence in the case, and you can make that distinction?

THE JUROR: Yes, I can, Your Honor.

THE COURT: And I will tell you, it's not all that hard, in this kind of a case. We have cases dealing with little children, crimes against little children, it is really hard there. Okay. But that's -- that's what we're talking about.

You can follow the instructions that I give you

of what -- what the law is, and then just base your ruling on the evidence that you hear? You can do that?

THE JUROR: Yes, I can, Your Honor.

THE COURT: Okay. All right. I am going to excuse some people for cause, bring up some more folks, and then we will talk about whether we want to stay here for another 15 minutes or we want to break for lunch. I will leave it up to you folks.

Ms. Lovato, thank you very much, ma'am. If you will go down to the jury commissioner's office, and tell them you have been excused from this case. Ms. Predmore, if you will go down to the jury commissioner's office, and tell them that you have been excused, please. Ms. Beebe, if you will go downstairs, tell them you have been excused. There may be some other cases that you would be better suited for, ma'am. Thank you. And lastly, Ms. Fassmann, if you would go down to the jury commissioner's office, and tell them you have been excused.

I need to call up four other persons and fill up the chairs.

THE CLERK: Steven Leyba, Timothy McCawley.

THE COURT: Mr. McCawley, I need you to go in the chair -- in the last chair in the back row that's open. If you want to come around this way, you might