Certification of Word Count: 6,610

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
District Court of Adams County Honorable Edward Moss, Judge Case No. 06CR3423	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. BRADLEY SCOTT HURTT, Defendant-Appellant.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General KATHERINE A. AIDALA, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5045 E-Mail: katherine.aidala@state.co.us Registration Number: 39218 *Counsel of Record	Case No.: 08CA1883

PEOPLE'S ANSWER BRIEF

Court of Appeals, State of Colorado **2 East 14th Avenue, Denver, CO 80203** Name of Lower Court: District Court of Adams County Trial Court Judge: The Honorable Edward Moss Case Number: 06CR3423 **THE PEOPLE OF THE STATE OF COLORADO,** **Plaintiff-Appellee,** **v.** **BRADLEY SCOTT HURTT,** **Defendant-Appellant.**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): John W. Suthers, Attorney General Katherine A. Aidala, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5045 E-Mail: katherine.aidala@state.co.us Registration number: 39218 *Counsel of record	Case Number: 08CA1883

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

Choose one:

☒ It contains 6,610 words.

☐ It does not exceed 30 pages.

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

☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.____), not to an entire document, where the issue was raised and ruled on.

☒ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Katherine Aidala

Katherine A. Aidala

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

RULES

TREATISES

INTRODUCTION

The defendant, Bradley Scott Hurtt, appeals the judgment of conviction entered on jury verdicts finding him guilty of aggravated driving after revocation prohibited (F6) and DUI (M).

STATEMENT OF THE CASE AND FACTS

The prosecution's evidence showed that sometime after ten o'clock on the night in question, an ambulance driver observed a silver Mitsubishi swerving along the road (v. 8, p. 123). The ambulance driver, en route to the hospital on a non-emergency routine transport, followed the Mitsubishi for five to ten minutes, during which time its driver swerved into the wrong lane five or six times, and braked erratically seven or eight times (id. at 127). The ambulance driver called the Adams County dispatch and reported the Mitsubishi's license plate and its driver's conduct (id. at 125).

Officer Kellon Hassenstab heard dispatch air a description of the car, the license plate number, 753 NLW, and the location (v. 8, p. 137). Hassenstab responded to the approximate location less than a minute later, and spotted a grey or silver Mitsubishi, license plate number 753 NLW, at a Taco Bell drive thru (id. at 139-40). The defendant was the driver and sole occupant of the car (id. at 141).

When Officer Hassenstab made contact with the defendant, he was unable to answer basic questions, and instead mumbled incoherently (v. 8, p. 141). The defendant's movements were slow and deliberate, his eyes were bloodshot and glazed over, and a strong odor of alcohol emanated from his breath (id. at 143, 147, 178). He denied drinking, but then changed his answer to one beer (id. at 145). Hassenstab ran the defendant's Colorado identification card and learned that his license was revoked for being a habitual traffic offender (id. at 146).

Officer Paul Skattum and Officer Tom Thwaits arrived when Officer Hassenstab was talking to the defendant (v. 8, p. 156). The three decided to have Officer Skattum and Officer Thwaits handle the contact because Officer Skattum was in training (id. at 145). Officer Thwaits asked the defendant to perform roadside maneuvers but the defendant refused (id. at 147, 160). When the defendant stepped out of the car, he had a hard time keeping his balance, and swayed back and forth (id. at 159, 179). Thwaits also detected the smell of alcohol on the defendant's breath, and noticed that his speech was slurred (id. at 178). Thwaits advised Skattum to place the defendant under arrest (id. at 180). The defendant was taken to the police station, where Thwaits advised him of the express consent law (id. at 181). The defendant refused to take the test (id. at 182).

The defendant was charged with aggravated driving after revocation prohibited (F6) and DUI (M). He tried his case to a jury, which returned guilty verdicts on both counts (v. 1, pp. 57-58; v. 9, p. 64). The trial court sentenced him to eighteen months in Community Corrections for aggravated driving after revocation prohibited and one year in jail for DUI, to run concurrently (v. 1, p. 61). However, the sentences were to run consecutively to the defendant's sentence in another case (id.).

SUMMARY OF THE ARGUMENT

Evidence of the defendant's prior DUIs was admissible to impeach his testimony and also pursuant to CRE 404(b) to establish his identity as the driver of the Mitsubishi the ambulance driver reported.

The trial court did not abuse its discretion in denying the defendant's motion for mistrial where it instructed the jury to disregard the officer's vague, isolated, and inadvertent reference to the defendant's criminal history.

The trial court did not err in denying a challenge for cause to a prospective juror because the juror was not biased against the defendant with respect to the right to testify or the burden of proof, and in any event, the court successfully rehabilitated him.

There was sufficient evidence that the defendant drove on a public road because the defendant testified that he drove from the movies to the Taco Bell where he was apprehended and the officers testified that his license plate matched that of the license plate dispatch aired based on the ambulance driver's report.

ARGUMENT

I. Evidence of the defendant's prior DUIs was admissible to impeach his testimony and also pursuant to CRE 404(b) to establish his identity as the driver of the Mitsubishi the ambulance driver reported.

A. Standard of review

The People agree with the standard of review articulated by the defendant. A trial court is granted substantial discretion to decide questions concerning the admissibility of evidence, including similar transaction evidence. People v. Larson, 97 P.3d 246, 249 (Colo. App. 2004).

B. Law and analysis

The defendant contends the trial court erred reversibly by allowing the prosecution to present evidence of his prior DUI arrests. Specifically, he claims the evidence was not admissible for impeachment purposes because it was not inconsistent with his testimony, the prosecution was impermissibly attempting to

impeach testimony it elicited, and the evidence was not admissible pursuant to CRE 608(b).

When the defendant decided that he would testify, the prosecutor asked the trial court whether he would "have any discretion to go into prior alcohol-related offenses" (v. 8, p. 202). The court responded, "Not unless they relate to issues of credibility" (id. at 202-03). The court also stated that any such evidence would be "in the nature of other wrongful acts under 404(b)" given that "the issue of identity was raised in the opening, and defense's opening statement" (id. at 203-04).

On direct examination, the defendant testified that "the officer came up to the car and told me the situation, I said that couldn't have been my car, because we hadn't driven that route ..." (v. 8, p. 211). The defendant testified that he gave the officer his identification and proof of insurance, and the officer came back ten minutes later and arrested him (id. at 212). Defense counsel asked, "And do you recall, um, anyone asking you if you would want to take voluntary roadside tests?" (id.). The defendant responded: "No. As I said, when the officer came back to the car, he ordered me out of the car, arrested me on the spot. There was no talk of roadside sobriety or looking at a pen or any of that" (id.).

However, after the defendant's direct examination, the trial court decided that identity was no longer an issue:

> When I was initially discussing this before the jurors came back, I talked about identity or identification as one of the grounds for 404(b) evidence. There was some discussion in opening statement that the officers got the wrong person. They got the wrong car. It wasn't the defendant. The defendant seems to admit driving. I'm not sure he has, but he seems to have, so I'm not sure identification is an issue for 404(b) analysis.

(v. 8, p. 226).

The next morning, prior to cross-examination, defense counsel asked the trial court "to caution the district attorney to not ask any questions which would cause Mr. Hurtt to open the door. Certainly we didn't go into it on direct, and I wouldn't want him to ask about anything prior" (v. 9, p. 5). The court responded,

> That's an interesting request, given that your client seems to wander off in the questions asked in order to tell a story, and I don't know how I could caution the district attorney not to ask any questions that would cause the defendant to open the door. You need to counsel your client that he needs to listen to the question and answer the question that's being asked of him. But other than that, I'll respond to objections. But I'm not going to suggest to anyone what way his question should be asked of the defendant.

(id. at 5-6). During cross-examination, this exchange occurred:

> PROSECUTOR: Okay. Let's talk about those roadside tests. You didn't perform any roadside maneuvers that night, did you?
>
> DEFENDANT: No.
>
> PROSECUTOR: The officers asked you to perform them, and you refused; isn't that correct?
>
> DEFENDANT: No. I was never asked to.

PROSECUTOR: You were never asked to perform them, or did you just not understand what roadside maneuvers are?

DEFENDANT: I was never asked to. I was ordered out of the car because I was being placed under arrest.

PROSECUTOR: Okay. Do you understand what roadside maneuvers are, sir?

DEFENDANT: Yes. I do now.

PROSECUTOR: You do now?

DEFENDANT: Yes.

PROSECUTOR: Did you understand what they were at the time?

DEFENDANT: Vaguely, I would say.

(v. 9, pp. 11-12).

Defense counsel asked to approach, but the trial court said, "No. It's a matter of credibility. Go ahead" (v. 9, p. 12). The prosecutor then established that the defendant had been arrested for DUI in 2000 (id. at 13). The defendant testified that he was not asked to perform roadside maneuvers at that time, either (id.). However, the defendant admitted that he was asked to perform them during one of two other times he was arrested for DUI (id. at 13-16). The trial court then instructed the prosecutor to move on to another area (id. at 16).

The prosecutor's line of questioning was permissible impeachment under CRE 608(b) because it contradicted the defendant's statement that he was "vaguely" familiar with roadside maneuvers. See People v. Welsh, 80 P.3d 296,

309 (Colo. 2003). The dictionary defines "vague" as "not clearly defined, grasped, or understood: indistinct." Webster's Third New International Dictionary (Vol. II) 2528 (1977). The fact that the defendant had three prior DUIs and had been asked to perform roadside maneuvers before contradicted his testimony that he had just an unclear, undefined understanding of roadside maneuvers. Moreover, the defendant's testimony that he had only been asked to perform roadside maneuvers once in four DUI arrests was admissible to cast doubt on his credibility, as it is highly unlikely that he was not offered them on three separate occasions.

In addition, the questioning was permissible to rebut the defendant's testimony which gave the jury the impression that he was arrested for no reason because he was not asked to do roadside maneuvers, and that the officers were lying when they testified that they asked him to perform roadside maneuvers but he refused. The prosecutor was entitled to question the defendant's credibility in this area. See People v. Dunlap, 124 P.3d 780, 799 (Colo. App. 2004) ("When the defense opens the door to a topic, the prosecution has a right to explain or rebut any adverse inferences that might have resulted from the questions.").

However, even if this Court concludes the prosecutor's questions were not permissible impeachment, the testimony elicited was nevertheless admissible under CRE 404(b). Although the trial court did not rule on this basis, the law is well-

settled that this Court may do so. See People v. Quintana, 882 P.2d 1366, 1371 (Colo. 1994) (the People may defend the judgment of conviction on any ground supported by the record, regardless of whether that ground was relied upon or contemplated by the trial court).

In Quintana, the prosecution offered the defendant's statements about killing other people immediately after the murder of the victim as "other act" evidence pursuant to CRE 404(b) and never raised the issue of res gestae at trial. 882 P.2d at 1375. The supreme court concluded that the trial court erred in admitting the statements for the purpose of showing intent and lack of mistake or accident. Id. However, the error benefited the defendant because the court instructed the jury to restrict its consideration of the statements, when it could have properly admitted the evidence as res gestae, which would not have required a limiting instruction. Id. An analogous situation is present here.

The trial court ruled incorrectly that evidence of the defendant's prior DUIs was inadmissible under CRE 404(b). The court believed that identity was not an issue because the defendant admitted driving on the night in question (v. 8, p. 226). This ruling was erroneous because the record reveals that identity was the central issue disputed by the defendant at trial.

Defense counsel raised the issue of identity in her opening statement. Counsel's theory of the case was that the police jumped to conclusions: "Police officers saw a Mitsubishi Eclipse sitting in the Taco Bell parking lot, and automatically assumed that this was the same car that the ambulance driver had seen driving recklessly earlier" (v. 8, p. 117). The defendant testified that "the officer came up to the car and told me the situation, I said that couldn't have been my car, because we hadn't driven that route ..." (id. at 211).

Defense counsel argued extensively in her closing argument that the car the ambulance driver reported was not the defendant's because:

- the ambulance driver testified that the Mitsubishi he reported did not have a black convertible top, but the defendant's car did (v. 9, p. 51);
- the ambulance driver did not record the Mitsubishi's license plate number (id. at 52);
- the prosecution did not produce an audiotape of the ambulance driver's call to confirm that the defendant's license plate number matched the license plate number the ambulance driver reported (id.);
- the ambulance driver did not see the driver of the Mitsubishi (id.); and
- there was a lapse of time between the ambulance driver's report and the police officers' locating the defendant (id. at 53).

Accordingly, the trial court's conclusion that identity was not an issue was erroneous.[1] The evidence was admissible pursuant to CRE 404(b) for the purpose of establishing the defendant's identity as the driver of the Mitsubishi the ambulance driver reported. See, e.g., People v. Harrison, 58 P.3d 1103, 1108-09 (Colo. App. 2002) (where defendant was charged with murdering a homeless man, evidence of his subsequent beating of a homeless man admissible under CRE 404(b) to prove identity). The court's ruling that evidence of the defendant's prior DUIs was admissible only as to his credibility inured to his benefit because the evidence could have and should have been admitted as substantive evidence of identity and therefore, guilt. See Quintana, 882 P.2d at 1375. The error further benefited the defendant because the jury was instructed to consider the crimes charged in this case only (v. 1, p. 38).

In any event, assuming the testimony was inadmissible, reversal is not warranted because the testimony was harmless. The prosecutor did not mention

[1] The fact that the defendant has raised the sufficiency of the evidence that he drove on a public road in this appeal lends further support to this conclusion.

the defendant's prior DUIs in his opening statement or closing argument.[2] See People v. Mapps, ___ P.3d ___, 2009 WL 1331104, *7 (Colo. App. May 14, 2009) (any error in admission of allegedly prejudicial testimony was harmless where prosecutor did not mention it in closing argument); compare Salcedo v. People, 999 P.2d 833, 841 (Colo. 2001) (prosecutor's drawing attention to wrongly admitted evidence during closing argument warranted reversal).

In closing argument, counsel for both parties told the jury not to consider the defendant's history. Defense counsel reminded the jury that it would receive an instruction that "The defendant is entitled to be tried for the crimes charged in this case only and no others. You are not to consider his prior DUIs" (v. 9, pp. 55-56). In his rebuttal, the prosecutor concurred, "the defense is correct. This case is not about any prior skeletons in [the defendant's] closet, this case is about what he did on September 26, 2006" (id. at 56).

The jury was instructed that "The defendant is entitled to be tried for the crimes charged in this case only, and no others" (v. 1, p. 38). This Court must

---

[2] In contrast, defense counsel chose to discuss the defendant's prior DUIs. Counsel argued that the prosecutor brought up the DUIs because he did not have enough evidence to convict the defendant, and therefore tried to get the jury to convict him on an improper basis: "[I]n evidence, the district attorney brings up all the skeletons out of Mr. Hurtt's closet. Brings up prior DUIs from 1992, 1995, 2000. Why? Because he feels that he doesn't have enough evidence in this case, so he needs to bring to your mind all the prior problems Mr. Hurtt has had" (v. 9, p. 55).

presume the jury followed the court's instructions. See People v. Moody, 676 P.2d 691, 697 (Colo. 1984) (absent a contrary showing, it is presumed that the jury followed the trial court's instructions); see also People v. Lowe, 969 P.2d 746, 751 (Colo. App. 1998) (absent any evidence to the contrary, a reviewing court must presume that the court's instructions cured any prejudice).

Accordingly, any error in the admission of the evidence was harmless.

II. The trial court did not abuse its discretion in denying the defendant's motion for mistrial where it instructed the jury to disregard the officer's vague, isolated, and inadvertent reference to the defendant's criminal history.

A. Standard of review

The People agree generally with the standard of review articulated by the defendant. It is well-settled that "[a] trial court has broad discretion in deciding whether to grant or deny a mistrial, and its decision will not be disturbed on appeal absent a gross abuse of that discretion and prejudice to the defendant." People v. Fears, 962 P.2d 272, 281 (Colo. App. 1997); see also Bloom v. People, 185 P.3d 797, 807 (Colo. 2008).

B. Law and analysis

The defendant contends the trial court should have granted a mistrial when Officer Thwaits gave the following testimony:

PROSECUTOR: Okay. And what happened next?

OFFICER THWAITS: He exited the vehicle, um, he stumbled out of the vehicle, at that time, um [dispatch] aired that Mr. Hurtt was wanted on two warrants out of Adams County.

PROSECUTOR: Okay.

OFFICER THWAITS: And that he was revoke -

(v. 8, p. 179). Defense counsel objected and the trial court sustained the objection. The court immediately instructed, "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" (id.).

The trial court allowed defense counsel to make a further record at the next break in the trial. At that time, counsel argued that the statement was so prejudicial that a curative instruction would not be sufficient to "unring the bell" (v. 8, p. 199). The prosecutor responded that he had instructed his witnesses not to mention the defendant's warrants or revocations (id.). He also pointed out that during defense counsel's examination of Officer Skattum, counsel had elicited testimony that the

defendant had been taken into custody, but not for the DUI (id.).[3] The prosecutor believed the curative instruction was sufficient (id.). The trial court 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 naive, 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.
>
> I'm also going to add an instruction that comes out of the instruction that we use when a witness with felonies - excuse me - a defendant with felonies does testify. It will be sent to the jurors, quote, the defendant is entitled to be tried for the crimes charged in this case only and no others. So that will be added. And motion for mistrial is denied.

(v. 8, pp. 200-01). The court's ruling was a proper exercise of its discretion.

---

[3] On cross-examination of Officer Skattum, defense counsel elicited this testimony:

> DEFENSE COUNSEL: And, um, you then testified that he was released. Was he released on a summons, do you recall?
>
> OFFICER SKATTUM: No. He was released pending further - pending the charges of the DUI.
>
> DEFENSE COUNSEL: Okay. So does that mean he was not taken to jail?
>
> OFFICER SKATTUM: He was taken to jail on other reasons.

(v. 8, p. 168).

A mistrial is a drastic remedy and is warranted only when prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means. People v. Jaramillo, 183 P.3d 665, 667 (Colo. App. 2008). The law is well-settled that where a witness makes a vague, isolated, and inadvertent reference to a defendant's criminal history, and the trial court instructs the jury to disregard the remark, the court does not abuse its discretion in denying a motion for mistrial. See People v. Abbott, 690 P.2d 1263, 1269 (Colo. 1984) (trial court did not err in denying a motion for mistrial; "[T]he reference to past criminal acts was a single unelicited remark. No details of any past crimes were discussed, and the statement was not, in any manner, highlighted before the jury."); People v. Lowe, 519 P.2d 344, 347-48 (Colo. 1974) (trial court did not err in denying a motion for mistrial after a prosecution witness mentioned that the defendant was being held in jail on other charges; the reference was not detailed enough to be prejudicial and the court offered to admonish the jury to disregard it); People v. Laurson, 15 P.3d 791, 797 (Colo. App. 2000) (trial court did not err in denying a motion for mistrial after a witness's isolated remark that the defendant had a pending case against him at the time of the crime where court instructed the prosecutor not to use the testimony in closing argument and offered to provide a curative instruction); People v. Early, 692 P.2d 1116, 1119 (Colo. App. 1984)

(rejecting claim that the trial court erred in denying a motion for mistrial based on a police officer's testimony that the defendant was "an experienced burglar" because court instructed jury to disregard the testimony); People v. Carr, 541 P.2d 104, 105 (Colo. App. 1975) (affirming denial of motion for mistrial based on a witness's statement that the defendant had just gotten out of jail; reference was inadvertent, no further references to it were made, and the jury was cautioned to disregard the statement).

The People disagree with the defendant's characterization of the testimony as highly prejudicial. The jury did not hear any information as to why there were warrants out for the defendant's arrest. See Abbott, 690 P.2d at 1269; Lowe, 519 P.2d at 347-48. Moreover, the trial court found that the prejudicial impact of the testimony was lessened because defense counsel had already elicited similar testimony from another officer. The defendant argues that the court's reasoning defies logic. However, the court's reasoning reflects the common-sense notion that that an arguably shocking piece of information is less so the second time it is heard. See also Mapps, 2009 WL 1331104, *6 (admission of evidence harmless where cumulative to other evidence).

When Officer Thwaits made the challenged statement, the trial court sustained the defendant's objection and instructed the jury to disregard it. The jury

is presumed to have heeded the court's instructions. See, e.g., People v. Smith, 620 P.2d 232, 239 (Colo. 1980); People v. Smith, 685 P.2d 786, 790 (Colo. App. 1984). Moreover, the evidence was not elicited intentionally; the prosecutor's question that prompted the challenged response was, "And what happened next?" (v. 8, p. 179). See Lowe, 519 P.2d at 347-48 (no reversible error occurs where the information was inadvertently given, not the focus of the witness's testimony, and not mentioned again).

The trial court was in the best position to gauge the effect of the testimony on the jury, see People v. Roy, 723 P.2d 1345, 1348 (Colo. 1986), and this Court should defer to its assessment of its effect. See People v. Gladney, 570 P.2d 231, 235 (Colo. 1977) (trial court is in the best position to gauge the effect of courtroom occurrences). This Court should not engage in "abstract speculation" to find prejudice not evidenced by the record, and the mere possibility of prejudice is not sufficient to warrant reversal. See id.

Accordingly, the trial court acted within its discretion in denying the motion for mistrial.

III. The trial court did not err in denying a challenge for cause to a prospective juror because the juror was not biased against the defendant with respect to the right to testify or the burden of proof, and in any event, the court successfully rehabilitated him.

A. Standard of review

The People agree generally with the standard of review articulated by the defendant. An appellate court reviews a trial court's ruling on a challenge for cause for an abuse of discretion, and must accord great deference to the court's handling of such challenge, recognizing the trial court's unique role and perspective in evaluating the prospective juror's credibility, demeanor, and sincerity. Morrison v. People, 19 P.3d 668, 672 (Colo. 2000).

B. Law and analysis

The defendant contends the trial court erred in denying his challenge for cause to a prospective juror who 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" (v. 8, p. 69). He further contends that the court's attempt to rehabilitate the juror was misguided because it did not address his right to remain silent and the prosecution's burden of proof.

A plain reading of the voir dire shows that the juror was not biased against the defendant with respect to his right to remain silent or the prosecution's burden of proof. The juror stated several times that he understood and respected the defendant's right not to testify:

> DEFENSE COUNSEL: 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?
>
> JUROR: Um, if - if he remains quiet in this case, I don't have a problem with that ...
>
> ...
>
> JUROR: ... I'm not suggesting that the defendant needs to present his side of the case or speak or do anything ...

(v. 8, p. 68). The juror's statements are not comparable to those of the juror in Morgan v. People, 624 P.2d 1331 (Colo. 1981). In Morgan, this Court reversed the trial court's denial of a challenge for cause where the juror maintained throughout voir dire that he would "find it hard" to remain unbiased if the defendant did not testify. Here, the juror clearly and unequivocally stated that he would not hold it against the defendant if he did not testify. 624 P.2d at 1332.

The juror did not make any statements suggesting a bias against the defendant with respect to the burden of proof, either:

> DEFENSE COUNSEL: Once you hear from the prosecution, you kind of are then waiting for us to discredit -

JUROR: Depends on what I hear from the prosecution. 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.

DEFENSE COUNSEL: 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?

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.

DEFENSE COUNSEL: 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?

JUROR: I mean, all of that - all of that, in my mind, could help discredit anything that - that the prosecution presents ...

(v. 8, p. 68).

Nothing in the juror's statements indicates that he was biased against the defendant with respect to the burden of proof. When asked if he needed to hear from the defense, the juror said "Depends on what I hear from the prosecution" (v. 8, p. 68). In other words, the juror was expressing that if the prosecution presented an air-tight case that the defense was wholly unable to discredit, he would find that the prosecution had met its burden of proof. Conversely, if the prosecution presented an implausible or unreasonable case, the juror would be inclined to find

the defendant not guilty. The juror's statements do not indicate a bias, and the trial court need not have questioned him further. See People v. Merrow, 181 P.3d 319, 321 (Colo. App. 2007) (if a prospective juror's responses do not compel the inference that he cannot decide the crucial issues fairly, the trial court may deny the challenge for cause without further inquiry).

However, even assuming rehabilitation was required, the trial court successfully rehabilitated the juror. The court used an analogy to see if the juror could set aside any preconceived notions he may have had and abide by the instructions given to him by the court:

> [Juror], 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 Robbins, 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, a 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?

(v. 8, pp. 84-85). The juror responded, "Yes, Your Honor, and I - yes, I can set that aside" (id. at 85). The court continued:

> 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?

(id.). The juror responded, "Yes, I can, Your Honor" (id.). Finally, the court asked, "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?" (id. at 85-86). The juror responded, "Yes, Your Honor" (id.).

The trial court's rehabilitation of the juror was adequate to address the juror's ability to set aside his preconceived notions about how the case should proceed. The defendant's reliance a special concurrence in Merrow is misplaced. In addition to the fact that it is not the majority opinion, the special concurrence articulates a general opinion that the trial court should not ask rehabilitative questions during voir dire. 181 P.3d at 323 (Webb, J., specially concurring). Judge Webb's

concerns are not applicable to this case because the juror did not have a "strong preconceived bias," and the trial court did not subject him to a "barrage of leading questions." See id.

To the contrary, applicable, binding authority supports the trial court's ruling. See People v. Drake, 748 P.2d 1237, 1243 (Colo. 1988) (where a juror is able to put aside his personal opinion or preconceived notion as to the defendant's guilt or innocence, and render a verdict based upon the evidence presented and the law at issue, a defendant's right to a fair trial is not violated). This court must give deference to the trial court's assessment of the credibility of the prospective juror's responses. People v. Wilson, 114 P.3d 19, 22 (Colo. App. 2004). "It is the trial court's prerogative to give considerable weight to a potential juror's statement that she could fairly and impartially serve on the case." People v. Robinson, 874 P.2d 453, 457 (Colo. App. 1993).

Accordingly, the trial court did not abuse its discretion in denying the challenge for cause.

IV. There was sufficient evidence that the defendant drove on a public road because the defendant testified that he drove from the movies to the Taco Bell where he was apprehended and the officers testified that his license plate matched that of the license plate dispatch aired based on the ambulance driver's report.

A. Standard of review

The People agree with the standard of review articulated by the defendant. An appellate court reviews de novo a challenge to the sufficiency of the evidence. Dempsey v. People, 117 P.3d 800, 807 (Colo. 2007).

B. Law and analysis

The defendant contends the evidence is insufficient to sustain his conviction because the prosecution failed to prove beyond a reasonable doubt that he drove on a public road. He notes that despite the ambulance driver's testimony that he gave dispatch the license plate number, the driver could not recall that license plate number at trial (v. 8, pp. 125-26). He asserts that the prosecution failed to present any objective evidence to verify the license plate number of the car that the ambulance driver saw.

The test for the sufficiency of the evidence is whether the evidence, viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the

crime charged beyond a reasonable doubt. People v. Dunaway, 88 P.3d 619, 625 (Colo. 2004). There are several basic rules an appellate court must follow in reviewing the sufficiency of the evidence: (1) the jury has the authority to accept or reject expert testimony and determine the facts from the evidence; (2) the defendant's mental state may be inferred from his conduct and other evidence, including the circumstances surrounding the commission of the crime; (3) if there is evidence upon which the jury may reasonably infer an element of the crime, the evidence is sufficient to sustain that element; (4) the prosecution, not the defendant, must be given the benefit of every reasonable inference that can be drawn from the evidence; and (5) where reasonable minds could differ, the evidence is sufficient to sustain the conviction. People v. Grant, 174 P.3d 798, 812 (Colo. App. 2007).

The defendant testified and admitted that he drove on the night in question (v. 9, p. 210). He testified that he went to a movie at 104th and the Boulder Turnpike, and then drove to the Taco Bell at 104th and Melody to get a bite to eat (id.). He testified that he was driving his mother's Mitsubishi Eclipse (id.). Although the defendant disputed that he was driving the car that the ambulance driver reported, he admitted that he drove on a public road.

The prosecution also presented convincing circumstantial evidence that the defendant drove on a public road. The ambulance driver contacted the Adams County dispatch, reported that a silver or grey Mitsubishi was driving erratically from 120th and Race to 104th and Huron, and gave the car's license plate number (v. 8, pp. 125-27). Officer Hassenstab testified that the license plate number dispatch aired based on the report was 753 NLW (id. at 138). Less than a minute later, Hassenstab encountered the defendant in a car matching that description at a Taco Bell on 104th and Melody, and confirmed that the license plate number matched (id. at 139). Officer Thwaits also testified that the license plate number of the defendant's car matched that of the one dispatch aired (id. at 183). Then, when called as a rebuttal witness, Officer Hassenstab repeated that the license plate number reported was 753 NLW (v. 9, p. 25). Thus, the defendant's assertion that the prosecution failed to present evidence to verify the license plate number of the car the ambulance driver reported is inaccurate.

To the extent the defendant claims that nothing short of a recording or transcript of the ambulance driver's call would have been sufficient to prove he drove on a public road, his claim fails. In determining the sufficiency of the evidence, the law makes no distinction between direct and circumstantial evidence. People v. Taylor, 159 P.3d 730, 734 (Colo. App. 2006); People v. Medina, 51 P.3d

1006, 1013 (Colo. App. 2001). The jury was given an instruction setting forth this principle (v. 1, p. 42). Based on the officers' testimony that dispatch aired license plate 753 NLW, and the defendant's license plate matched the license plate dispatch aired, and the jury was permitted to infer that the ambulance driver reported license plate 753 NLW. Thus, the jury could permissibly conclude that the defendant drove on a public road.

The defendant's reliance on People v. Wood, 767 P.2d 790 (Colo. App. 1988), is misplaced. In Wood, this Court reversed the defendant's conviction for aggravated driving after revocation prohibited because there was no evidence that he drove on a public road; police observed him driving erratically in a private parking lot. 767 P.2d at 791. Here, in contrast, there was both direct and circumstantial evidence that the defendant drove on a public road.

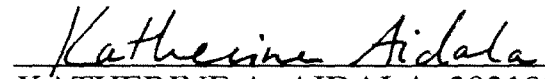
Accordingly, there was sufficient evidence to sustain the defendant's conviction for aggravated driving after revocation prohibited.

Finally, although the defendant does not notice this error, in the interests of justice, the People inform this Court that DUI is a lesser-included offense of aggravated driving after revocation prohibited where the aggravator is DUI. See People v. Carlson, 119 P.3d 491, 494 (Colo. App. 2004). Thus, the defendant's DUI conviction should be vacated.

CONCLUSION

Based on the foregoing reasons and authorities, the People respectfully request that the judgment of conviction of aggravated driving after revocation prohibited be affirmed.

JOHN W. SUTHERS
Attorney General



KATHERINE A. AIDALA, 39218*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for the Plaintiff-Appellee
*Counsel of Record

AG ALPHA: DAQQ QGGU
AG File: Q:\AP\APAIDAKA\AUGUST 2009\HURTT.AB LSS-COPY.DOC

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **ARI KRICHIVER**, Colorado State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 24th day of September, 2009.