COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Mesa District Court Honorable Brian J. Flynn Case Number 07CR339	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Roque Garcia-Castaneda Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender PAMELA A. DAYTON, #19735 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 08CA183
OPENING BRIEF OF DEFENDANT-APPELLANT	

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CERTIFICATE OF COMPLIANCE	

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

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

☐ 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.

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OPENING BRIEF OF DEFENDANT-APPELLANT

INTRODUCTION

Defendant-Appellant, Roque Garcia-Castaneda, 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

1. Whether the conviction must be vacated because the evidence was insufficient to support a conclusion beyond a reasonable doubt that Mr. Garcia-Castaneda had knowledge of the drugs concealed in a secret cavity behind the dashboard of the car in which he was a passenger?

2. Whether the trial court incorrectly held that a passenger may not challenge the constitutional validity of a traffic stop and therefore erroneously denied Mr. Garcia-Castaneda's motion to suppress?

3. Whether the trial court reversibly erred in permitting the investigating officer, over defense objection, to expound on the reasons for his personal belief that Mr. Garcia-Castaneda was aware of the presence of the concealed drugs?

4. Whether the prosecutor's repeated misconduct in closing argument requires a new trial?

STATEMENT OF THE CASE

On February 28, 2007, Mr. Garcia-Castaneda was charged by information filed in Mesa County District Court with possession with intent to distribute a schedule II controlled substance-1000 grams or more[1] and special offender.[2] (v1,p7-9) The charges arose out of an incident alleged to have occurred February 23, 2007. (v1,p8)

Defense lawyer Albert Stork was initially appointed to represent Mr. Garcia-Castaneda. (v1,p11) However, after motions were filed but prior to the hearing on motions, defense counsel Alfonso Cabral entered his appearance. (v1,p34,36)

A jury trial was held August 30-31, 2007. (v7,p3;v8,p3) The jury's deliberations took longer than the presentation of evidence. (v1,p58;v7,p166-247) After seven and a half hours of deliberation, the jury convicted Mr. Garcia-Castaneda of the lesser-included offense of possession of a schedule II controlled substance (cocaine) and found that the amount of cocaine exceeded 1000 grams. The jury also found Mr. Garcia-Castaneda guilty of the special offender (importation) sentence enhancer. (v1,p58,79-80;v8,p75)

Following the reading of verdicts, the trial court made a record concerning remarks made by the prosecutor during closing argument that the court deemed

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[1] Section 18-18-405(1),(2)(a)(I)(A),(3)(a)(III), C.R.S.(2009), a class three felony.
[2] Section 18-18-407(1)(d), C.R.S.(2009), a sentence enhancer.

inappropriate. (v8,p83) The court explained that the prosecutor had improperly commented on the co-defendant's exercise of his right to remain silent and his failure to testify, and in the course of doing so, had also commented on Mr. Garcia-Castaneda's exercise of his right to remain silent. The court noted that the prosecutor was "well aware" that this was improper as the issue had been discussed the day before outside the presence of the jury. The court opined that failure to take remedial action would likely be considered "plain error by the Court of Appeals" and therefore, invited the parties to submit motions regarding the appropriate remedial action to be taken. (v8,p84) However, after defense counsel filed a motion for new trial and the prosecutor filed a response, the court summarily denied the motion. (v1,p85-88,89-92,95-96)

On December 12, 2007, the trial court sentenced Mr. Garcia-Castaneda to serve a term of 14 years in the department of corrections. (v1,p118;v10,p23)

STATEMENT OF THE FACTS

Officer Michael Miller, a drug interdiction officer with the Mesa County Sheriff's Department, has been assigned to the Western Colorado Drug Task Force since 1999. (v7,p166) As such, his work hours are spent at the Greyhound Bus Station or patroling Interstate 70 looking for opportunities to intercept the transport

of illegal drugs into or through Mesa County. (v7,p166) He is also a K-9 handler; he and his dog are certified in drug detection. (v7,p168)

On February 23, 2007, at around 3:30 a.m., Officer Miller, with his dog, was on duty and parked in the center median at mile marker 10 on I-70, about 10 miles from the Utah border. (v7,p175) It was a very cold night. (v7,p220) He saw a passenger car traveling eastbound slow down rapidly as it approached him. (v7,p176) Officer Miller did not indicate that the car was exceeding the speed limit. Nevertheless, Miller turned on his headlights and pulled into the traffic lane to follow the car. He saw the car brake and cross the white line onto the shoulder once and then move back into the travel lane. (v5,p25,43;v7,p176) He followed the car for a mile and a half or so, during which time Officer Miller observed it touch the white shoulder line twice without crossing over it. At that point Officer Miller initiated a traffic stop, directing the car to pull over to the right shoulder. (v5,p25,42-43;v7,p176) During the course of the stop Miller found drugs concealed in a compartment behind the dashboard. (v7,p188-189)

Just two witnesses testified at trial: Officer Miller and Shana Irby, the DEA agent who conducted the lab test that confirmed the substance found was cocaine. (v7,p165,224)

At trial Officer Miller testified as follows: There were two men in the car. The driver was Alejandro Vargas-Ochoa. (v7,p177-178) Mr. Garcia-Castaneda was asleep under a blanket in the passenger seat. (v7,p177-179) Officer Miller noticed that the car's odometer indicated 171,000 miles and that the car's dashboard appeared to be loose and its heater appeared not to be working. (v7,p179) Miller found these things to be "suspicious" because in his experience the dashboard is a common place for drugs to be hidden. (v7,p179)

Officer Miller obtained Mr. Vargas-Ochoa's license, registration and insurance, and began questioning him about their travel plans but Mr. Vargas-Ochoa spoke Spanish and only very little English. (v7,p180-181) However, Mr. Garcia-Castaneda, who is also a Spanish speaker but speaks a bit more English than Mr. Vargas-Ochoa, woke up and joined the conversation. (v7,p180-181) He told Officer Miller that they had been in Las Vegas for two days and were on their way home to Glenwood Springs. (v7,p180) Mr. Garcia-Castaneda told Miller that he had gone to Las Vegas to visit family; Miller testified that he had no reason not to believe him. (v7,p211) When Miller asked who owned the car, Mr. Garcia-Castaneda indicated that he did not know and then asked Mr. Vargas-Ochoa in Spanish who owned the car. Mr. Vargas-Ochoa told Mr. Garcia-Castaneda that the car belonged to Antonio Lopez of

Basalt and Mr. Garcia-Castaneda related that information to Officer Miller. (v7,p180-181)

According to Officer Miller, he asked the two men if he could search the car and in both Spanish and English, they agreed to the search. (v7,p182) When asked if they had any weapons, Mr. Vargas-Ochoa and Mr. Garcia-Castaneda said they did not and lifted their shirts to demonstrate. (v7,p182) Officer Miller directed them to stand in front of the car and they complied. While Miller waited for a second officer to arrive he conducted a search of the passenger compartment. (v7,p182-183) He noted a portable heater on the floor and also noted that there were loose screws in the dashboard and that the dashboard was somewhat "misaligned." (v7,p183)

Miller got his dog from the car and "deployed him" to conduct "a sniff of the vehicle." (v7,p185) The dog "entered the car and went immediately to the dash, started into an alert," indicating that he had detected the odor of drugs. (v7,p185) As Miller was praising the dog for doing a good job, he noticed that both Mr. Vargas-Ochoa and Mr. Garcia-Castaneda were no longer standing but were "crouched down, I remember like elbows on their knees and their head[s] down towards the ground." (v7,p186)

Moments afterward, Officer Beck of the Fruita police department arrived. (v7,p186) Miller directed Beck to "watch" Mr. Vargas-Ochoa and Mr. Garcia-

Castaneda while Miller continued to search the car. (v7,p186) Miller testified that he was trying to figure out how to get into the dash. (v7,p186) First, he tried to access it through the glove box, pulling off a panel on the left side. (v7,p187) Next, Miller tried to pull the stereo out but though he could move it from side to side, he could not pull it out. (v7,p187) Then, using a mirror and a flashlight, Miller investigated the back of the stereo and found a "trunk-like locking mechanism with a pin going through it securing the stereo in place. The pin was actually welded or attached to the stereo. The trunk lock mechanism was attached to the car." (v7,p187) Though Miller tried several times to unlatch it by pulling on it, these attempts were unsuccessful. (v7,p187) Finally, Miller got "a big screwdriver" and pried the stereo loose. (v7,p187)

Once Miller got the stereo out of the dash he could see a rag. (v7,p187) Miller removed the rag and saw that behind it was some carpet. (v7,p187-188) Miller pushed the carpet down and saw that behind the carpet, in the place where the heating and air conditioning unit normally is, there were five kilo-brick-sized packages of what he believed to be drugs. (v7,p188-189)

Miller took both Mr. Vargas-Ochoa and Mr. Garcia-Castaneda into custody. (v7,p191) He placed them into the patrol car and left a video recorder running for the

20 minutes or so they waited for him. (v7,p193) The only statement made, however, was a comment that it was very cold. (v7,p193)

The bricks were sent to a lab in San Francisco, where Agent Irby tested them and confirmed that the packages contained cocaine. (v7,p190,237-238) The cocaine weighed 4,926 grams, which is nearly five kilos or about 11 pounds. (v7,p191,232, 238) Miller testified that this amount was consistent with distribution rather than personal use. (v7,p199-201) The packaging around the bricks weighed 1,079 grams, more than a kilo or 2.2 pounds. (v7,p191,232,238) Each brick of cocaine was tightly wrapped in three layers of different materials: saran wrap, tinfoil and duct tape. (v7,p234) Mr. Garcia-Castaneda's fingerprints were not found on the concealed compartment or the packaging. (v7,p211,242-244)

SUMMARY OF THE ARGUMENT

The conviction must be vacated because the evidence was insufficient to support a conclusion beyond a reasonable doubt that Mr. Garcia-Castaneda had knowledge of the drugs concealed in a secret cavity behind the dashboard of the car in which he was a passenger.

The trial court incorrectly held that a passenger may not challenge the validity of a traffic stop and therefore erroneously denied Mr. Garcia-Castaneda's motion to suppress.

The trial court reversibly erred in permitting the investigating officer, over defense objection, to expound on the reasons for his personal belief that Mr. Garcia-Castaneda was aware of the presence of the concealed drugs.

The prosecutor's repeated misconduct in closing argument requires a new trial.

ARGUMENT

I. THE CONVICTION MUST BE VACATED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONCLUSION BEYOND A REASONABLE DOUBT THAT MR. GARCIA-CASTANEDA HAD KNOWLEDGE OF THE DRUGS CONCEALED IN A SECRET CAVITY BEHIND THE DASHBOARD OF THE CAR IN WHICH HE WAS A PASSENGER.

A. Applicable Facts

The facts established at trial are set forth above in the Statement of Facts.

B. Law and Analysis

1. Standard of Review

The sufficiency of the evidence to sustain a conviction constitutes a question of law reviewed de novo. *Dempsey v. People,* 117 P.3d 800,807(Colo.2005). When sufficiency of the evidence is challenged, a reviewing court must determine whether any rational trier of fact might accept the evidence, taken as a whole and in a light most favorable to the prosecution, as sufficient to support a finding of guilt beyond a reasonable doubt. *People v. Sprouse,* 983 P.2d 771,777(Colo.1999); *People v. McIntier,* 134 P.3d 467,471(Colo.App.2005). Mr. Garcia-Castaneda preserved this issue by making a motion for judgment of acquittal at the close of the prosecution's case. (v8,p11,67)

2. Mr. Garcia-Castaneda's presence in the car without further evidence linking him to the narcotics is insufficient to sustain the convictions.

The Due Process Clauses of the state and federal constitutions require the state to prove every element necessary to constitute the crime charged beyond a reasonable doubt. U.S.CONST.amend.XIV; COLO.CONST.art.II,§25; *In re Winship,* 397 U.S. 358,363-64(1970); *People v. Hardin,* 607 P.2d 1291,1294(Colo.1980). A conviction based on a record lacking sufficient evidence of the crucial elements of a charged offense constitutes a denial of due process and is constitutionally infirm. *See People v. Sprouse,* 964 P.2d 300,304 (Colo.App.1997).

Sufficient proof is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *See Jackson v. Virginia,* 443 U.S. 307,316(1979). The evidence must be "both substantial

and sufficient to support the determination of guilt beyond a reasonable doubt." *Kogan v. People,* 756 P.2d 945,950(Colo.1988). A "modicum" of relevant evidence will not rationally support a conviction beyond a reasonable doubt. Also, verdicts may not be based on "guessing, speculation, or conjecture." *People v. Gonzales,* 666 P.2d 123,128(Colo.1983).

When the prosecutor fails to present proof of every element of the offense charged, the conviction must be vacated and no retrial may occur. *See People v. Miralda,* 981 P.2d 676,680(Colo.App.1999)(state and federal double jeopardy principles prohibit retrial when a conviction is reversed for lack of sufficient evidence); U.S.CONST.amend.V; COLO.CONST.art.II,§18.

The controlled substances statute provides in relevant part:

> (1)(a)...[I]t is unlawful for any person knowingly to...possess, or to possess with intent to...distribute a controlled substance....
>
> (2)(a)...[A]ny person who violates any of the provisions of subsection (1) of this section:
>
> (I) In the case of a controlled substance listed in schedule I or II of part 2 of this article, commits:
>
> (A) A class 3 felony....

Section 18-18-405, C.R.S.(2009).

To sustain a conviction for possession of a controlled substance, the prosecution must prove both that "the defendant had knowledge that he was in possession of a narcotic drug and that he knowingly intended to possess the drug." *People v. Baca,* 109 P.2d 1005,1007(Colo.App.2004) (quoting *People v. Stark,* 691 P.2d 334,339(Colo.1984)). The state may establish constructive possession of narcotics circumstantially by showing that the defendant had dominion and control over the place where the drugs were found. *Stark,* 691 P.2d at 339. However, where a defendant lacks exclusive possession of the premises where drugs are found, it cannot be inferred that the defendant knowingly possessed the drugs unless other incriminating circumstances link the defendant to the drugs. *Id.; United States v. Valdez-Gallegos,* 162 F.3d 1256,1262(10th Cir.1998).

Access to an area in which a crime was committed is insufficient to show that the person who had access exercised dominion and control of items therein. *See People v. Ray,* 626 P.2d 167,171(Colo.1981). Moreover, because dominion and control must be knowing, mere proximity or accessibility to contraband is not enough and there must be testimony or other direct evidence connecting the defendant with the incriminating circumstances. *United States v. Hernandez,* 780 F.2d 113,117(D.C.Cir.1986); *United States v. Staten,* 581 F.2d 878,885n.60(D.C.Cir.1978); *People v. Steed,* 189 Colo. 212, 540 P.2d 323(1975); *Feltes v. People,* 498 P.2d

1128,1132(1972)("[m]ere presence without another additional link in the evidence will not sustain a conviction for possession").

Here, the only evidence from which a jury could infer knowledge was Mr. Garcia-Castaneda's mere presence as a passenger in the car and his proximity to the drugs found behind the dashboard. The condition of the car was not such that one would necessarily assume there were drugs hidden in a secret compartment behind the dashboard. Loose screws in an old car do not compel an inference of wrongdoing. In fact, to a person aware that the car's heater doesn't work, loose screws in the dash would likely be assumed to be the product of an attempt to fix the heater.

No narcotics or paraphernalia were found on Mr. Garcia-Castaneda's person or in his belongings. Moreover, the drugs were not in plain view and were not even accessible to him. They would not have been seen or smelled by a person in the car under the circumstances that existed when Mr. Garcia-Castaneda was in the car. The drugs were completely concealed in the secret cavity behind the dashboard and were not visible to a person sitting in the car. Indeed, they were not even visible to Officer Miller (a person who was actually *looking* for drugs) until he had expended time and effort to pull apart the dashboard and peer behind the multiple layers of material—the dashboard, the stereo, the rags, the carpet—that concealed them.

The drugs were triple-wrapped in layers of duct tape, foil, and plastic wrap—substances that, especially in combination, would preclude the transmission of any odor. Moreover, it was February and very cold, which means that the drugs were likely frozen. And even if not entirely frozen, the drugs were certainly so cold that any odor that might have been emitted under other circumstances (such as in the warm courtroom after the original packaging had been removed) would not have been emitted under the circumstances that existed then.

That the drugs were not detectable by sight or smell is evident not only from the obvious physical circumstances but also from the fact that in order to determine their presence, Officer Miller had to use a trained K-9—the officer did not see the drugs or detect any odor himself. In addition, once the dog alerted it took a significant amount of time and tools to tear apart the dashboard and locate the drugs in their hiding place. Sitting in the car without dismantling the dashboard, Mr. Garcia-Castaneda would have had no way of knowing that they were there.

Mr. Garcia-Castaneda's fingerprints were not recovered from the packaging surrounding the drugs; he was not the driver or the registered owner of the car; there were no statements or actions suggesting he had knowledge of the presence of drugs. The prosecution suggested that Mr. Garcia-Castaneda's posture of crouching down with his elbows on his knees and his head down was indicative of guilty knowledge, a

response to being "caught." However, this interpretation reads far too much into a posture that could have many innocent explanations. To begin with, the officer was not continuously watching Mr. Garcia-Castaneda and does not know exactly when it was that he crouched down. Miller testified that after conducting the dog sniff of the inside of the car, "I looked back up" and saw that Mr. Vargas-Ochoa and Mr. Garcia-Castaneda were crouched down. (v7,p186) Moreover, it was 3:30 a.m. on a frigid February morning and they were being made to stand outside while the officer was conducting his search. They could have been crouching because they were tired, because they were trying to get out of the wind, or because they were freezing and trying to conserve body heat. Without some other evidence, such as accompanying statements, there is no reason to find the inference the prosecution urged any more reasonable than any other. It is no more than "guessing, speculation, or conjecture" and is therefore, an insufficient basis on which to rest a conviction. *People v. Gonzales,* 666 P.2d 123,128(Colo.1983).

Furthermore, Mr. Garcia-Castaneda's actions demonstrated he had no knowledge of the presence of drugs. Mr. Garcia-Castaneda did not act nervously during his interaction with Officer Miller. He answered Officer Miller's questions and acted as interpreter for Miller and Mr. Vargas-Ochoa. He readily gave Officer Miller permission to search the car. As in *Feltes, supra,* and *Steed, supra,* the absence of any

evidence linking Mr. Garcia-Castaneda to the narcotics found concealed in the dashboard requires the reversal of his convictions.

Even when considered in the light most favorable to the prosecution, the evidence fails to support the convictions. Accordingly, the convictions must be vacated.

II. THE TRIAL COURT INCORRECTLY HELD THAT A PASSENGER MAY NOT CHALLENGE THE VALIDITY OF A TRAFFIC STOP AND THEREFORE ERRONEOUSLY DENIED MR. GARCIA-CASTANEDA'S MOTION TO SUPPRESS.

A. Applicable Facts

Prior to trial Mr. Garcia-Castaneda filed a motion to suppress evidence, which alleged, among other things, that the traffic stop was unlawful because it was not based on reasonable suspicion that any crime was committed or was about to be committed. (v1,p26-27) Citing *United States v. Gregory*, 70 F.3d 973(10th Cir.1996), the motion asserted that "a single instance of weaving into a highway emergency lane does not give rise to a traffic violation or to reasonable suspicion to justify a stop." (v1,p27) The motion further alleged that the drugs found in the car were the product of the illegal stop and detention and therefore, must be suppressed. (v1,p27)

At the motion hearing held August 13, 2007, Officer Miller testified that right around 3:30 a.m. on February 23, 2007 he was on duty and parked in the center median at milepost 10 on Interstate 70 facing south watching for eastbound traffic when he saw a car pass by him. (v5,p25) As soon as the car passed, it braked and "started to slow down rapidly." (v5,p25) Miller did not indicate that the car was speeding. Officer Miller pulled out into the travel lane to follow the car and saw the car brake and swerve across the white line "a good 12 inches" into the shoulder lane and then come back into the travel lane. (v5,p25) Miller followed the vehicle for a mile and a half and during that time observed the car touch "the white shoulder line, not over it, but just onto it" twice. (v5,p25,42-43) At that point, between mile markers 11 and 12, Officer Miller activated his emergency lights and pulled the car over. (v5,p25)

There were two people in the car. The passenger was asleep under a blanket. Officer Miller started a conversation with the driver and tried to tell him the reason for the stop but "there was a language barrier and he wasn't really – didn't understand what I was telling him." (v5,p26) The driver gave Miller his Mexican driver's license and told Miller that he was coming from Las Vegas and going to Glenwood Springs. (v5,p26)

During the conversation with the driver, the passenger, Mr. Garcia-Castaneda, woke up. (v5,p26,44) Miller noticed that the name on the registration was Lopez and asked who owned the car. (v5,p26) Mr. Garcia-Castaneda told Miller he didn't know who the car belonged to and then spoke in Spanish with the driver, who then told Miller that the car belonged to a friend of his named Antonio Lopez. (v5,p28)

During this exchange, which lasted about ten minutes, Officer Miller was "looking in the car." (v5,p29) He noticed that the dashboard was loose around the stereo and that the passenger had a blanket on, which led him to suspect that drugs might be hidden in the car because in his experience, transporters of drugs will keep the heat off because the heat brings out the odor of the drugs. (v5,p29-30) Still, according to Miller, he returned the driver's paperwork and told them he wasn't issuing any traffic citation and they were free to go. (v5,p29,33,46)

The driver put his license in his wallet and put the wallet in front of the gear shift. (v5,p33) Officer Miller then asked in both English and Spanish whether they were carrying "any drugs, weapons, or large amounts of money." (v5,p33) When Mr. Vargas-Ochoa and Mr. Garcia-Castaneda said they were not, Officer Miller asked "for permission to search the car." (v5,p34,46) According to Miller, both simultaneously said yes and got out of the car. (v5,p34,46-47) Once they were out of the car Miller

asked whether they had "pistolas" and in response they said no and lifted their shirts to show him. (v5,p34)

Miller directed them to stand in front of the car and wait while he searched. (v5,p34) After a cursory search Miller deployed his dog, who "alerted" when he got to the dash. (v5,p36-37) Officer Miller then proceeded to take apart the dashboard and eventually discovered five kilogram-sized packages that he suspected contained cocaine concealed in a compartment behind the dash. (v5,p39) Miller conducted a field test on the contents of one and the result was positive for cocaine. (v5,p39)

Arguments of counsel at the hearing were brief and focused entirely on whether the prosecution had established reasonable suspicion to support the investigatory stop. (v5,p56-59) Defense counsel Mr. Cabral relied on the motion filed by Mr. Stork, specifically the decision in *U.S. v. Gregory*, 70 F.3d 973(10thCir.1996), which held that a single incident of defendant's vehicle crossing over into right emergency lane of interstate highway did not violate Utah's statute, which, like Colorado's statute, requires that a vehicle be operated as nearly as practicable within a single lane and, therefore, did not provide reasonable suspicion to justify investigatory stop. (v1,p27;v5,p56-57)

The prosecution, on the other hand, argued that *Gregory* did not apply and that the driver's conduct in braking and crossing over the shoulder line "under our state

statute, is certainly sufficient to constitute a violation of law." (v5,p58) The prosecutor argued that this conduct coupled with the driver's subsequent touching of the line twice "certainly constitute[s] probable cause for that offense and well beyond reasonable suspicion to contact the vehicle." (v5,p58-59)

The court took the matter under advisement and nine days later, issued a written ruling denying the motion. (v1,p42-51) In its ruling, the court found that Mr. Garcia-Castaneda, as the passenger, was not "seized" by the traffic stop and therefore, his Fourth Amendment rights were not implicated and he had no standing to contest the stop. (v1,p45) The court did not rule on the issue of whether reasonable suspicion of criminal activity existed to justify the stop. (v1,p42-51)

B. Law and Analysis

1. Standard of Review

When reviewing a trial court's suppression order, an appellate court defers to its findings of fact so long as there is record support for them, but reviews its conclusions of law *de novo*. *People v. Haley*, 41 P.3d 666,670(Colo.2001); *Outlaw v. People*, 17 P.3d 150,157(Colo.2001); *People v. Garcia*, 11 P.3d 449,453(Colo.2000). A reviewing court must determine on appeal whether the trial court applied the correct legal standards to the facts of the case, and whether sufficient evidence in the record supports its legal conclusions. *People v. Rivas*, 13 P.3d 315,320 (Colo.2000)("[T]he trial

court's application of legal standards to those facts is treated as a question of law to be reviewed *de novo.*");*People v. Jordan*, 891 P.2d 1010,1015 (Colo.1995). The legality of the detention and search of an automobile and the persons therein is a question appellate courts review *de novo.* *Haley*, 41 P.3d at 670; *see People v. Hopkins*, 870 P.2d 478,482(Colo.1994); *People v. McKinstrey*, 852 P.2d 467,473n.6(Colo.1993).

The suppression issue was preserved by Mr. Garcia-Castaneda's motion to suppress evidence. (v1,p26-30)

2. Under Brendlin v. California, 551 U.S. 249 (2007), automobile passengers are seized within the meaning of the Fourth Amendment during traffic stops and therefore, a passenger is entitled to challenge the constitutional validity of a stop.

The Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution prohibit unreasonable searches and seizures. Evidence obtained during an unreasonable seizure must be suppressed as fruit of the poisonous tree. *People v. Taylor*, 41 P.3d 681,685n.4(Colo.2002).

Here, the prosecution had not contested that Mr. Garcia-Castaneda was seized by the traffic stop. Nevertheless, the trial court ruled that the traffic stop did not constitute a seizure implicating Mr. Garcia-Castaneda's Fourth Amendment rights. (v1,p45) Relying on pre-2007 case law, the trial court concluded that because Mr. Garcia-Castaneda was a passenger and not the driver, he was not seized within the

meaning of the Fourth Amendment by the traffic stop and therefore, could not challenge its validity:

> Accordingly, the routine stop of a driver does not implicate the Fourth Amendment rights of his passengers. . . . [discussion of cases omitted] When Deputy Miller stopped the driver of the car in which Defendant was riding for a violation of the traffic laws, Defendant was stopped, too, "as a practical matter." [citation omitted] But it was Mr. Vargas-Ochoa to whom Deputy Miller's show of authority and control was directed, not Defendant. . . . Accordingly, it was Mr. Vargas-Ochoa, not Defendant, who was seized by the traffic stop itself.

(v1,p45)

In so ruling, the trial court erred. The trial court was apparently unaware of the decision of the United States Supreme Court issued two months before the hearing in this case that directly addressed this issue. In *Brendlin v. California*, 551 U.S. 249(2007), the Supreme Court explicitly held that when police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality. *Id.* at 255-256. The Court noted that it had repeatedly stated in *dicta* in previous cases that "during a traffic stop an officer seizes everyone in the vehicle, not just the driver" but that this was the first time it had "squarely answered the question." *Id.* [collecting cases, including "*Colorado v. Bannister*, 449 U.S. 1, 4, n.3(1980)(*per curiam*)("There can be no question that the stopping of a

vehicle and the detention of its occupants constitute a seizure within the meaning of the Fourth Amendment')].

Because the trial court's ruling is directly contrary to the United States Supreme Court's holding in *Brendlin*, it is incorrect and must be reversed. *Id.*, *see People v. Marquez*, 195 P.3d 697,700(Colo. 2008); *People v. Bowles*, ___ P.3d ___, WL 1012922(Colo.App.2009).

3. *The investigatory stop was not supported by reasonable suspicion and therefore, suppression of the evidence is required.*

The trial court did not complete the Fourth Amendment analysis of the traffic stop. Once it concluded that Mr. Garcia-Castaneda was not seized, the court terminated the analysis of the initial stop and proceeded to consider the Fourth Amendment implications of the subsequent interaction. (v1,p45-51) Thus, the trial court did not reach Mr. Garcia-Castaneda's claim that the initial investigatory stop was unreasonable because it was not justified by reasonable suspicion of criminal activity, as required by the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889(1968); *People v. Cervantes-Arredondo*, 17 P.3d 141, 147(Colo.2001). Remand is not required, however, because the facts leading up to the stop were undisputed and

the trial court's written findings concerning the facts known to the officer prior to the stop, with one exception[3], accurately reflect the record.

Once a warrantless seizure has been established, the burden of proof is on the prosecution "to establish that warrantless conduct on the part of the officers falls within one of the narrowly defined exceptions to the warrant requirement." *People v. Jansen*, 713 P.2d 907,911(Colo.1986).

"All searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347,357(1967). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge v. New Hampshire*, 403 U.S. 443,455(1971), quoting *Jones v. United States*, 357 U.S. 493,499(1958).

In cases involving investigative stops of automobiles, articulable reasonable suspicion of criminal activity is required to justify the stop. *People v. Litchfield*, 918 P.2d 1099,1103(Colo.1996). "Under the reasonable suspicion standard, an officer may stop

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[3] In its written findings the trial court misstates the location of the stop as "between mileposts 10 and 11." (v1,p42) Officer Miller testified that the stop occurred between mileposts 11 and 12. (v5,p25)

an automobile if: (1) he has an articulable and specific basis in fact for suspecting criminal activity has occurred, is taking place, or is about to occur; (2) if the purpose of the intrusion is reasonable; and (3) if the scope and character of the intrusion is reasonably related to its purpose." *Litchfield*, 918 P.2d at 1103; *see also People v. Weston*, 869 P.2d 1293(Colo.1994).

An officer's undefinable hunch of criminal activity cannot constitute a reasonable suspicion, regardless of the fact that a later search may corroborate the accuracy of an experienced officer's so-called sixth sense. *See People v. Trujillo*, 773 P.2d 1086(Colo.1989).

The exclusionary rule requires courts to suppress evidence that has been obtained in violation of an accused's constitutional rights under the Fourth Amendment of the United States Constitution or Article II, Section 7 of the Colorado Constitution. *See,e.g., People v. Schoondermark*, 759 P.2d 715,718(Colo.1988). "The exclusionary rule applies both to the illegally obtained evidence itself and 'fruit of the poisonous tree' –any other evidence derived from the primary evidence." *Id.* citing *Nardone v. United States*, 308 U.S. 338(1939); *see Wong Sun v. United States*, 371 U.S. 471(1963). In other words, the exclusionary prohibition extends to both the direct and indirect products of an unconstitutional invasion. *Wong Sun, supra.*

Here, as previously noted, the facts leading to the stop were undisputed and are reflected in the written findings of the trial court. (v1,p42) The record established that prior to the stop Officer Miller had observed the vehicle in which Mr. Garcia-Castaneda was a passenger for approximately one and a half to two miles as it traveled eastbound on Interstate 70 at 3:30 a.m. During this time the officer observed the vehicle (1) slow down rapidly as it approached, (2) brake and cross the white line into the right shoulder lane by 12 inches and then return to the travel lane, and (3) touch the white line twice without crossing over.

Officer Miller did not allege that the vehicle was speeding and did not offer any testimony regarding the road or weather conditions, except to acknowledge that it was very cold.

These facts are insufficient to satisfy the prosecution's burden of proof. As a matter of law, they do not add up to reasonable suspicion of criminal activity. There is nothing unlawful about applying one's brakes and slowing down rapidly when one encounters a car in the center median of a lightly trafficked highway in the middle of the night. Officer Miller testified that his lights were not on. Therefore, it may not have been immediately apparent that the car was a police car. The driver might have slowed down for any number of reasons, including concern about the welfare of the occupants of the car or simple curiosity about the car's presence in that place at that

time. Even if it was immediately apparent that the car was a police car, slowing down in the presence of a police car is not an unlawful or even an unusual response. To the contrary, it is a natural and predictable response. The presence of a police car typically makes drivers self-conscious about their driving and their speed. Anyone who has ever driven on any street when a patrol car is in sight can attest to the effect a police officer's presence has on traffic.

There is also nothing unlawful or inherently suspicious about a driver's slight swerve across the white line to the right shoulder lane when the brakes are hastily applied. Officer Miller testified that the car's tires crossed over by about 12 inches when the driver applied his brakes. This is not an unusual occurrence. Again, anyone who has ever driven in traffic and observed a driver hastily apply his brakes has observed a car pull to the right in response. There are a number of possible explanations for this. The presence of a police officer following a driver can make even the most law-abiding driver nervous and a driver understandably may overreact under such circumstances. There are also simple mechanical explanations. For instance, the car's brakes may be in need of adjustment or the wheel alignment of the car may be imperfect. These are common conditions that can cause a car to pull to the right when the brakes are applied.

Similarly, "touching" the white line without crossing over it in the course of a mile and a half drive implies no criminal activity.

Officer Miller testified that the vehicle's crossing over the white line into the shoulder lane was a violation of Colorado traffic law and that this violation was the reason for the stop. (v5,p25-26) Colorado traffic law is not so rigid, however. Section 42-4-1007(1)(a), C.R.S.(2009), provides that "[a] vehicle shall be driven *as nearly as practicable* entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." A violation of this provision is a class A traffic infraction.

A single brief instance of crossing over the right hand shoulder white line, however, cannot constitute a violation of this law and therefore does not justify an investigatory stop. *See United States v. Gregory,* 9 F.3d at 978. In *Gregory*, the Tenth Circuit considered a Utah case in which the defendant was stopped after the officer observed the defendant's U-haul truck cross two feet into the right shoulder emergency lane of the interstate. The officer conducted the stop based on his view that the crossing into the emergency lane was a violation of Utah law. *United States v. Gregory*, 79 F.3d at 976-978. The Utah statute that was at issue in *Gregory* is virtually identical to the Colorado "weaving" statute at issue here. *Id.* at 976; *United States v. Gastellum*, 927 F.Supp. 1386,1391n.4(D.Colo.1996). The *Gregory* court noted that the

statute requires only that the vehicle remain entirely within a single lane "as nearly as practicable" and concluded that the single occurrence of crossing over into the right shoulder lane could not constitute a violation of the law "and therefore does not warrant the invasion of Fourth Amendment protection." *United States v. Gregory*, 79 F.3d at 978; *see United States v. Lyons,* 7 F.3d 973,976(10th Cir.1993) ("Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of privacy."), *overruled on other grounds by United States v. Botero-Ospina,* 71 F.3d 783,787(10thCir.1995); *United States v. Gastellum*, 927 F.Supp. at 1391-1393(applying *Gregory* to Colorado statute and concluding in *dicta* that initial stop of defendant's vehicle based on single instance of its weaving one to three feet over right hand shoulder solid white line was unlawful).

Here, the driver's conduct did not constitute a traffic violation and did not add up to reasonable suspicion of criminal activity. Therefore, it was not sufficient to justify the investigatory stop. Because the initial stop was unlawful, the fruits of the unlawful seizure, which include the cocaine unearthed in the search of the car, must be suppressed. U.S.CONST.amendIV,XIV; COLO.CONST.art.II,§7;*Wong Sun,supra.*

III. THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING THE INVESTIGATING OFFICER, OVER DEFENSE

OBJECTION, TO EXPOUND ON THE REASONS FOR HIS PERSONAL BELIEF THAT MR. GARCIA-CASTANEDA WAS AWARE OF THE PRESENCE OF THE CONCEALED DRUGS.

A. Applicable Facts

Officer Miller testified as both a fact witness and an expert on drug interdiction. (v7,p169,174) During his cross examination of Officer Miller, defense counsel Mr. Cabral asked, "In fact, we don't even know, we have no evidence that [Mr. Garcia-Castaneda] even knew about these drugs. Good solid direct evidence." (v7,p215) The officer failed to respond directly to the question and instead answered, "I, if you are asking my opinion, I believe he did." (v7,p215) Mr. Cabral then asked the officer "why are you stating that[?] I mean, give me some." By "some" Mr. Cabral was presumably referring to the "good solid direct evidence" of Mr. Garcia-Castaneda's knowledge that he had previously asked the officer to identify. (v7,p215) In response, however, the officer stated, "Based on my experience, like I said, this car is built for the sole purpose of trafficking drugs." (v7,p216) The officer then began explaining the common practice of using "mules" to transport drugs, how the transport commonly occurs, and why he personally believed that Mr. Garcia-Castaneda knew about the presence of the drugs:

> The main supplier or main person hires two mules to take money or whatever, go buy drugs...[i]t could be

> one, it could be several, to go pick up drugs. They may not be participating in the concealment of the drugs themselves. It could be dropped off at a hotel or a parking lot, which would be very common, for somebody to then come pick up the drugs, take it away to a garage, conceal the drugs back into it, and give the car back to the mules. The mules will then drive it. The reason why I think he would have to know about it is, we are talking about a lot of cocaine that is very valuable. Why run the risk, especially in the dash area where the heater does not work, to have somebody say, well, the heater doesn't work, what's wrong with the heater, let's take a look at it. And then they....

(v7,p216) At that point Mr. Cabral interrupted Officer Miller and cut off the narrative. (v7,p216) The prosecutor objected that Officer Miller should be allowed to finish his answer. (v7,p216) The court overruled the objection and indicated the prosecutor could "cover that on cross [sic]" if he wished. (v7,p216-217)

On re-direct examination, the prosecutor asked Officer Miller to "finish that statement" that he had begun to make "about why you believe that Mr. Castaneda [sic] knew that the illegal substances were in the car." (v7,p219) Mr. Cabral objected that the question was "leading;" the court overruled that objection. (v7,p219) The officer then began to expound on the reasons for his personal belief that Mr. Garcia-Castaneda was aware of the drugs:

> I'm trying to remember where I left off. It's very significant, the amount of the drugs. It's very valuable. Something that in my experience wants to be closely guarded and *entrusted with somebody so that they're not, they don't*

> *screw up, they don't go tell on the main person. They are being paid money to transport the drugs.*

(v7,p219-220) Mr. Cabral objected again, this time on the grounds that the testimony was "purely speculation," "contrary to the *Masters* case," and beyond the witness's expertise. (v7,p220) The court overruled the objection and the officer continued his narrative explaining the reasons for his opinion that Mr. Garcia-Castaneda knew of the drugs:

> The fact of where it's located. It is concealed deeply within the car and it does take some doing to get it out. But what is significant is that there is no heat source in the car and we are talking February, it was very cold. Driving without any heat. But they did have the forethought to bring two very large comforters to keep warm and a space heater. The thing that drew my attention was just that. It was very cold. A person knowing there is no heat in the car could very well go in and figure out why it's not working. The heat's not working, we turn it on, what's going on? Why risk somebody not know and then try to fix the car or go take it to a mechanic or if the car breaks down and they leave it on the side of the road and it's okay for a tow truck driver to come and get it. *That's going to be a closely guarded product that they don't want to have just somebody unknown off the street transport it.* It's very valuable, they want to get it there so they can sell it.

(v7,p220-221) In permitting this testimony from the officer, the trial court erred.

B. Law and Analysis

1. Standard of Review

A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *People v. Veren*, 140 P.3d 131(Colo.App.2005). A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. *People v. Pagan*, 165 P.3d 724,729 (Colo.App.2006). Where, as here, a defendant preserves the error by objection (v7, p219-220), reversal is required unless the error may properly be deemed harmless. *People v. Stewart*, 55 P.3d 107,124(Colo.2002). An error is harmless only if a reviewing court can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial. *Id.*

2. Irrelevant and Improper Opinion Testimony

Both CRE 702, which governs the admission of expert testimony, and CRE 701, which governs the admission of lay opinion testimony, incorporate a requirement of relevance. *See People v. Shreck*, 22 P.3d 68, 77(Colo.2001); *People v. Collins*, 730 P.2d 293,306-307(Colo.1986). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. Even if relevant, evidence is excludable if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." CRE 403.

A defendant has a constitutional right to trial by a fair and impartial jury. U.S.CONST.amend.VI;COLO.CONST.art.II,§§16,23; *see also Harris v. People,* 888 P.2d 259(Colo.1995). This constitutional right requires that an impartial jury determine guilt or innocence based solely on properly admitted evidence at trial. *Domingo-Gomez v. People,* 125 P.3d 1043(Colo.2005).

Here, Officer Miller's testimony regarding his personal opinion that Mr. Garcia-Castaneda was aware of the drugs was completely irrelevant and therefore, not properly admitted. His opinion had no tendency to make the existence of any of the facts of consequence to the jury's determination of the question of Mr. Garcia-Castaneda's knowledge more or less probable. It was not probative of any fact in issue.

Instead, the officer's testimony constituted a personal opinion on guilt, offered in the guise of expertise and authority, and invaded the province of the jury. *See,e.g., Domingo-Gomez v. People*, 125 P.3d 1043,1052(Colo.2005)(prosecutor's comment during closing argument that prosecutor's office engaged in a "screening process," and that the evidence in the case against the defendant was sufficient to pass that process, was improper); *People v. Snook*, 745 P.2d 647(Colo. 1987); *People v. Higa*, 735 P.2d 203(Colo.App.1987); *People v. Koon,* 724 P.2d 1367,1371(Colo.App.1986); *People v. Koon*, 713 P.2d 410(Colo.App.1985).

Under CRE 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, as the Colorado Supreme Court noted in *People v. Collins*, 730 P.2d 293(Colo.1986), "while Rule 704 does not prohibit a lay witness from testifying to an issue of ultimate fact, obviously, it does not mean a witness may testify that a particular legal standard has or has not been met. Colorado Rules of Evidence 701 and 403 afford ample assurances against the admission of opinions which would merely tell the jury what result to reach." *Id.* at 305-307.

Officer Miller's testimony constituted an opinion that the legal standard for establishing the element of knowledge ("knowingly") required for conviction of the charged offense had been met. Such testimony may have encouraged the jury to improperly rely on Officer Miller's assessment of the facts and his application of the law to those facts rather than their own. Thus, the admission of this testimony was unfairly prejudicial and violated Mr. Garcia-Castaneda's constitutional right to due process, constitutional right to a fair trial, and constitutional right to a fair and impartial jury. U.S.CONST.amends.V,VI,XIV;COLO.CONST art.II,§§16,23,25.

The error was not harmless. As set forth in Argument I, the only evidence linking Mr. Garcia-Castaneda to the drugs hidden in the car was his presence in the car and his proximity to the drugs. Apart from this, the prosecutor presented no

substantive evidence from which the jury could infer that he had knowledge of the drugs. Given Officer Miller's testimony about his experience with drug interdiction, the jury could have inferred from his opinion that he had knowledge of evidence not presented to them. His testimony suggested that he believed Mr. Gacia-Castaneda fit the profile for drug couriers. *See Salcedo v. People*, 28 P.3d 340(Colo.2000). It also suggested that he had information that Mr. Garcia-Castaneda was "known" and trusted by drug lords. Officer Miller's opinion that Mr. Garcia-Castaneda had the requisite knowledge could have caused the jury to ignore the absence of substantive evidence establishing knowledge and rely instead on the officer's experience and opinion. Because the error was not harmless, the conviction must be reversed.

IV. THE PROSECUTOR'S REPEATED, FLAGRANT AND EGREGIOUSLY IMPROPER MISCONDUCT DURING CLOSING ARGUMENT, WHICH INCLUDED COMMENTS ON THE RIGHT AGAINST SELF-INCRIMINATION, REFERENCE TO FACTS NOT IN EVIDENCE, AND DENIGRATION OF DEFENSE COUNSEL, DEPRIVED MR. GARCIA-CASTANEDA OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

A. Standard of Review

The prosecutor's misconduct abridged Mr. Garcia-Castaneda's substantial state and federal constitutional rights to due process and fair trial. U.S.CONST.amends.V,VI,XIV;COLO.CONST.art.II,§16,25; s*ee Oaks v. People*, 150 Colo. 64,68, 371 P.2d 443,446-47(1962). Mr. Garcia-Castaneda lodged a contemporaneous objection to some but not all of the prosecutor's misconduct. (v8,p60,61) Therefore,

some of the error was preserved and is subject to the constitutional harmless error standard of review. Under that standard, reversal is required "unless a court is confident beyond a reasonable doubt that the error did not contribute to the guilty verdict." *Golob v. People*, 180 P.3d 1006,1013(Colo.2008).

The error that was not preserved is subject to the plain error standard of review. *People v. Miller,* 113 P.3d 743,749(Colo.2005). Prosecutorial misconduct amounts to plain error if, alone or in combination, it undermines the fundamental fairness of the trial so as to cast serious doubt on the reliability of the jury's verdict. *Domingo-Gomez v. People*, 125 P.3d 1043,1053(Colo.2005).

B. The Prosecutor's Misconduct Requires Reversal

A prosecutor, "while free to strike hard blows, is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78,88(1935); *Harris v. People*, 888 P.2d 259(Colo.1995); *Wilson v. People*, 743 P.2d 415,418(Colo.1987). A defendant has a constitutional right to a fair trial and to trial by a fair and impartial jury. U.S.Const.amend.VI,XIV;Colo.Const.art.II,§§16,23,25; *see also Harris v. People,* 888 P.2d 259(Colo.1995). These constitutional rights require that an impartial jury determine guilt or innocence based solely on properly admitted evidence at trial. *Domingo-Gomez v. People,* 125 P.3d 1043(Colo.2005). When a jury has been misled by

inadmissible evidence or argument, it is no longer impartial. *Harris v. People, supra; Oaks v. People,* 150 Colo. 64,68, 371 P.2d 443,446-47(1962).

The defendant's right to a fair trial and to trial by an impartial jury gives rise to a clear duty on the part of the prosecutor to refrain from improper methods calculated to produce a wrong conviction. U.S.CONST.amends.VI,XIV;COLO. CONST.art.II,§§16,23,25; *Harris v. People, supra; People v. Fierro,* 651 P.2d 416(Colo.App.1982). To safeguard a defendant's right to a fair trial, a prosecutor must stay within the limits of appropriate prosecutorial advocacy during closing argument. *Domingo-Gomez v. People, supra; Harris v. People, supra.* Prosecutorial argument is "restricted to the evidence and reasonable inferences to be drawn therefrom on the issue of whether guilt is proved beyond a reasonable doubt." *Harris*, 888 P.2d at 264. Thus, a prosecutor may discuss facts in evidence and reasonable inferences that can be drawn therefrom. He may not make statements of personal opinion on the issue of guilt or on the truth or falsity of any witness testimony. *See Domingo-Gomez v. People*, 125 P.3d at 1043.

In this case, the prosecutor's argument far exceeded the bounds of permissible argument by referring to facts not in evidence, misstating the evidence, offering his personal opinion, denigrating defense counsel, commenting on Mr. Garica-

Castaneda's exercise of his right not to testify, and commenting on co-defendant Mr. Vargas-Ochoa's exercise of his right to remain silent.

First, during his initial closing argument the prosecutor stated that Mr. Vargas-Ochoa had made a statement implicating Mr. Garcia-Castaneda and blaming the offense on him:

> [Y]ou send two people so they can do this if they ever get caught. *Mr. Ochoa said no, it's Mr. Castaneda.* Why do you think they send two people? Don't check your common sense at the door when it comes to stuff like that.

(v8, p39)

There was no evidence that Mr. Vargas-Ochoa had ever made such a statement. Mr. Vargas-Ochoa did not testify and there were no statements admitted indicating that he had ever blamed responsibility for the drugs on Mr. Garcia-Castaneda. This was an impermissible reference to alleged facts not in evidence and amounted to unsworn, unchecked testimony cloaked in the credibility of a governmental official. *See* CRE 603 (setting forth requirement of oath or affirmation before any witness may testify); *See* ABA *Standards for Criminal Justice*, § 3-5.8(a)(3rd ed.1993)(prosecutor should not misstate evidence or mislead jury as to inferences it may draw); §3-5.8(d)(prosecutor should refrain from methods designed to divert the jury from deciding case based on the evidence); §3-5.9(prosecutor should not argue "facts" outside of record).

The comment on an alleged statement of the co-defendant was particularly troubling for its powerful inference of guilt and in light of the previous day's record regarding Mr. Vargas-Ochoa's exercise of his Fifth Amendment right not to testify in Mr. Garcia-Castaneda's trial. (v7,p247-248)

The harm was exacerbated by the prosecutor's subsequent comments regarding Mr. Vargas-Ochoa's decision not to testify. Despite having acknowledged his understanding that it was plain error to inform the jury that a witness had exercised his right to remain silent (v7,p247-248), the prosecutor explicitly referred in his rebuttal closing argument to Mr. Vargas-Ochoa's exercise of this right. In doing so, the prosecutor also improperly commented on Mr. Garcia-Castaneda's exercise of his right not to testify. Throughout the discussion, the prosecutor improperly denigrated defense counsel, accusing him of lying, misconduct and fraud. *See People v. Perea*, 126 P.3d 241,247(Colo.App.2005)*citing People v. Jones*, 832 P.2d 1036,1038-39(Colo.App.1991).

First, in discussing Mr. Cabral's emphasis on the lack of direct evidence that Mr. Garcia-Castaneda had knowledge of the drugs, he told the jurors, "*Mr. Cabral wants you to do something that is just not permitted by law.*" (v8, p56)

Second, he told them that Mr. Cabral "*may want you to disregard the law* on some circumstances, specifically in regards [sic] to circumstantial evidence, but he clearly wants you to do other things and try and poke issues at the People's case." (v8,p57)

Third, the prosecutor stated: "What I say is not evidence. What Mr. Cabral says is not evidence. And I will submit to you that *his entire opening, none of it is evidence.* His *entire closing, none of it is evidence* and he did not refer to one single piece of evidence that was *true.*" (v8,p58)

Fourth, continuing in this vein, the prosecutor stated that Mr. Cabral "makes a statement about well, Mr. Castaneda didn't even know who the owner of the car was. Well, *that's not true.*" (v8,p59)

Fifth, the prosecutor asserted, "Now, Mr. Cabral says, well, you know, we didn't get to hear from Mr. Ochoa and what he has to say. You know, that's just wrong, who knows what he would have said. Well, *that's just improper.*" (v8,p59)

Sixth, the prosecutor then said:

> People have the right to remain silent. And we know that Mr. Ochoa is facing criminal charges just like Mr. Castaneda. We know that Mr. Ochoa didn't show up to testify, and we cannot hold it against Mr. Castaneda for not testifying. He has that right. But you know what, so does Mr. Ochoa. And do not speculate on what Mr. Ochoa would say because you're not allowed to. He wants you to speculate and say, he didn't say anything. Well, you can speculate and say well maybe he didn't. But you can't do that so don't do it. Talked about well they're not talking

> in the back of the patrol car. Well, they are told not to talk, they don't want to start getting in trouble."

(v8,p60)

Mr. Cabral objected to these comments on the grounds of "facts not in evidence" but the court overruled the objection. (v8,p60)

Finally, in response to Mr. Cabral's comment that the police didn't even investigate whether Mr. Garcia-Castaneda had relatives in Las Vegas (v8,p52), the prosecutor stated: "There *are* no relatives in Las Vegas. There *are* no relatives that he visited in Las Vegas. *It's all a sham.*" (v8,p60,61) Mr. Cabral's objection was sustained, but no instruction to disregard the comment was provided.

The foregoing remarks by the prosecutor were improper. The comment regarding the alleged co-defendant statement implicating Mr. Garcia-Castaneda and the comments concerning Mr. Garcia-Castaneda's and Mr. Vargas-Ochoa's exercise of their rights not to testify alone constitute reversible error. *See Namet v. United States*, 373 U.S. 179(1963); *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374(1961); *People v. Todd,* 189 Colo. 117,122, 538 P.2d 433,436(1975)(comment directing att ention to defendant's exercise of his right not to testify constitutes reversible error.); *People v. Isom,* 140 P.3d 100,105 (Colo.App.2005). Considered together with the other misconduct, the cumulative effect of the prosecutorial misconduct in this case requires reversal. *See Wilson*, 743 P.2d at 419-421.

CONCLUSION

For the reasons and authorities presented in Argument I, Mr. Garcia-Castaneda respectfully requests that this Court vacate his convictions. For the reasons and authorities presented in Argument II, Mr. Garcia-Castaneda respectfully requests that this Court reverse the trial court's order denying his suppression motion. Assuming, *arguendo*, this Court does not vacate the conviction or reverse the suppression order, for the reasons and authorities presented in Arguments III and IV, Mr. Garcia-Castaneda respectfully requests that this Court reverse his convictions and remand for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on December 4, 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.