COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Mesa District Court Honorable Brian J. Flynn Honorable Brian Whitney Case Number 08CR139	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Suzanne Shepard-Duncan Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender MARY BULLARD, #39382 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 09CA750

OPENING BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE

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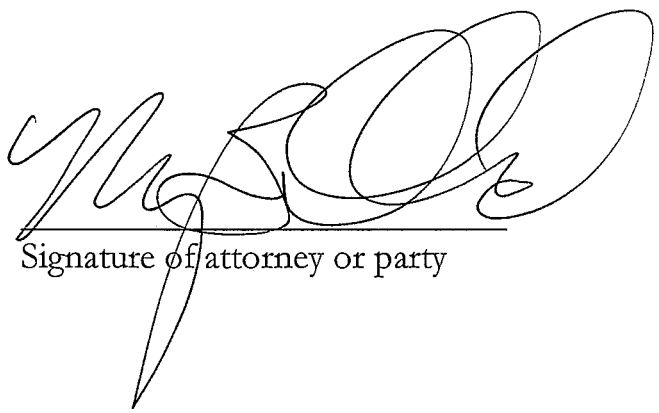

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INTRODUCTION

Defendant-Appellant 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. Did the trial court err in failing to suppress evidence obtained in violation of the Colorado and United States guarantees against warrantless searches and seizures?

2. Were Ms. Shepard-Duncan's constitutional rights to due process and a fair trial violated when, in closing argument, the prosecutor improperly contended that Ms. Shepard-Duncan legally could not be presumed innocent and injected his personal opinion as to Ms. Shepard-Duncan's guilt?

STATEMENT OF THE CASE

The State charged Suzanne Shepard-Duncan with one count of possession of less than one gram of methamphetamine[1] and one count of possession of drug paraphernalia,[2] occurring on or about January 26, 2008.(vI,p7-8) A jury found Ms.

[1] Section 18-18-405(1),(2.3)(a)(II), C.R.S., a class four felony.
[2] Section 18-18-428(1), a class two petty offense

Shepard-Duncan guilty as charged.(vI,p83-84) On February 23, 2009, the district court imposed a sentence of 90 days jail and 5 years of probation. (v1,p90;2-23-09,p19)

Ms. Shepard-Duncan timely filed her notice of appeal on February 23, 2009.(flatfile)

STATEMENT OF THE FACTS

On January 26, 2008, Ms. Shepard-Duncan was away from home, babysitting, when she received a phone call from Officer Carnes, a member of the Grand Junction Police Department. (6-30-08,p4-5,9-10;v1,p48) Officer Carnes had responded to a 911 call of a reported assault at her apartment.(6-30-08,p5) Ms. Shepard-Duncan stated she would be home as soon as she could find someone to take care of the children she was supervising.(6-30-08,p8-9) When Ms. Shepard-Duncan arrived at home approximately thirty minutes later, she found Officer Carnes waiting for her in her kitchen. (6-30-08,p10,22)

Officer Carnes had first appeared at Ms. Shepard-Duncan's residence about two hours prior to her arrival. (12-29-08,p76,78) Emerging from his vehicle, he "found that a number of firemen and emergency medical personnel had already entered the home and contacted the victim," later determined to be Robert Hays. (6-

30-08,p5) A fireman then contacted Officer Carnes and informed him that a knife that had been used during the assault was inside the residence on the kitchen counter, and that he had to enter through the sliding glass door in the backyard as the front door to the apartment was dead bolted. (6-30-08,p6,16-17) Walking around the side of the home with a fellow officer, Deputy Quigley, Officer Carnes encountered firemen and emergency responders helping the apparent victim towards an ambulance. (6-30-08,p6) Deputy Quigley accompanied this man to the hospital, while Officer Carnes proceeded towards the back of the home. (12-29-30,p42-43,46) He noticed that a window in the back of the home had been smashed in. (6-30-08,p6) Officer Carnes passed two fireman leaving the home as he entered and conducted "a basic protective sweep" of the residence "just to make sure there was no one else inside." (6-30-08,p11-12)

Upon entry, Officer Carnes noticed the knife on the counter. (6-30-08,p7,18) Finding no one inside, Officer Carnes "wanted to get consent to search the apartment." (6-30-08,p7) Standing in Ms. Shepard-Duncan's kitchen, Officer Carnes then called Deputy Quigley and asked if the deputy could obtain consent to search from the victim. (6-30-08,p7,18) Officer Carnes did not speak directly with the victim, but simply heard Deputy Quigley's reports of the victim's statements. (6-30-08,p6,12) Officer Carnes testified that Deputy Quigley informed him that the victim stated he

could not consent to search, as it was not his home. (6-30-08,p7-8,12;v1,p48) According to Officer Carnes, Deputy Quigley also told him that the victim had nevertheless indicated that Officer Carnes could go into the living room to get his cell phone and call a "Brandy" among the contacts listed therein, because she would be able to give consent to search. (6-30-08,p8;v1,p48)

Officer Carnes then left the kitchen and went back out into the living room. (6-30-08,p8) He found a cell phone on the living room table and searched through it. (6-30-08,p8,20;v1,p48) Finding a listing under the name Brandy, he called the corresponding number. (6-30-08,p8;v1,p48) Brandy told him that she did not live at the residence and could not give consent. (6-30-08,p8;v1,p48) She refused to provide Officer Carnes with any further identifying information. (6-30-08,p8;v1,p48) Eventually Brandy suggested Officer Carnes should call Ms. Shepard-Duncan, and gave him a phone number. (6-30-08,p8-9;v1,p48) While Officer Carnes was standing in the living room, speaking with Brandy, he noticed a small purple bong on the floor, in between a chair and the couch. (6-30-08,p9;v1,p48) He had not noticed this item during his prior protective sweep. (6-30-08,p12)

Reaching Ms. Shepard-Duncan at the number given him by Brandy, Officer Carnes did not ask her for consent to search or inform her that he had discovered incriminating drug paraphernalia inside her home during a search he had already

conducted. (6-30-08,p10) After terminating the call with Ms. Shepard-Duncan, Officer Carnes went into the kitchen and "secured the knife and collected it in the evidence box." (6-30-08,p10,21) "There was a small dog in her residence that [Officer Carnes] played with" while he waited "primarily in the kitchen." (6-30-08,p10) Under the impression that the dog "needed to use the restroom," Officer Carnes found a leash hanging in the living room by the front door, attached it to the dog, and took the dog outside to the backyard. (6-30-08,p10,13,22-23) Officer Carnes also went to his patrol car in the interim to retrieve a consent to search form. (12-29-08,p52) Officer Carnes testified that he then returned to the apartment and resumed waiting for Ms. Shepard-Duncan in her kitchen. (6-30-08,p10)

Officer Carnes testified that Ms. Shepard-Duncan arrived some thirty minutes after his call to her. (6-30-08,p10) Officer Carnes informed her that he was there to investigate a stabbing and orally requested her consent to search "for evidence relating to the crime that had occurred."(6-30-08,p11,24) Ms. Shepard-Duncan agreed and signed the written consent form Officer Carnes provided. (6-30-08,p11;Ex.UU)

Accompanied by Ms. Shepard-Duncan, Officer Carnes then proceeded to conduct a very thorough search of the home, beginning with the living room where he had initially discovered the bong. (6-30-08,p11) Officer Carnes did not point out the bong to Ms. Shepard during the search of this room. (12-29-08,p58) After

continuing on to inspect the bathroom and the contents of its cabinets, Officer Carnes returned to the living room and noticed that the bong was missing from the location where he had spotted it previously. (6-30-08,p15;12-29-08,p60) Officer Carnes confronted Ms. Shepard-Duncan with this fact. (6-30-08,p27) At trial, Officer Carnes testified that Ms. Shepard Duncan admitted she had placed the bong in a zippered bag. (12-29-08,p61-62)

Officer Carnes also conducted a search of Ms. Shepard-Duncan's bedroom. (6-30-08,p27) Officer Carnes found a small glass pipe containing methamphetamine residue. (6-30-08,p27-28) Officer Carnes then arrested Ms. Shepard Duncan for possession of drug paraphernalia. (6-30-08,p28) Officer Carnes placed her in his police vehicle and returned to the home to search further. (12-29-08,p92-93) Officer Carnes subsequently found two small plastic baggies containing methamphetamine residue in the bedroom, one on top of a dresser, and another within a small metal Band-aid container.(6-30-08,p27)

The Arguments of Counsel Regarding Supression

The defense argued that Officer Carnes exceeded the scope of the protective sweep when he continued to search after he learned that no other persons were present. (6-30-08,p30;v1,p18) The defense noted that Officer Carnes was denied permission to search the home, and nevertheless proceeded to search, despite the

knowledge that the person from whom he was seeking consent could not provide it. (6-30-08,p30-31;v1,p18) The defense further argued that Ms. Shepard-Duncan was seized, without requisite reasonable suspicion "at the site of contact." (v1,p18) The defense also contended that Officer Carnes obtained Ms. Shepard-Duncan's consent to search under false pretenses, as he stated he wished to search for evidence of the assault only and did not informed her of his prior unlawful search. (v1,p18) The defense argued that the bong, the subsequent purported consent to search, and all other fruits of the deputy's unlawful warrantless search required suppression. (6-30-08,p31;v1,p18)

The prosecution asserted that simply because Officer Carnes "had secured the knife" did not "indicate that there wouldn't be more evidence" to be found in the apartment." (6-30-08,p32) The prosecution conceded that the Deputy did not obtain permission to search, but contended that "what he was given was...an immediate way to get ahold of someone who at that point he believed could give him permission." (6-30-08,p32-33) The prosecution contended that the deputy merely took "a couple of steps into another room," picked up a phone, made calls "in order to try and get permission or consent to search," and "did not begin searching the residence." (6-30-08,p33) The prosecution acknowledged that Officer Carnes "[d]id end up taking the little dog inside the home on a walk in the back yard," and then "went back to the

kitchen, hung out there waiting" for some time. (6-30-08,p33) Nevertheless, the prosecution argued that because Officer Carnes subsequently did obtain consent from Ms. Shepard-Duncan, the suppression motion should be denied. (6-30-08,p33)

The District Court's Order Denying the Defense Suppression Motion

In its subsequent written order, the trial court found that when Officer Carnes arrived he "found that firemen had already entered the residence and contacted the reported victim who was inside." (v1,p47) The court noted that Officer Carnes "immediately performed a protective sweep of the residence" after observing a broken window. (v1,p47) With regard to the deputy's failure to obtain consent to search after the completion of this protective sweep, the trial court found as follows:

> Although the man who had been stabbed inside the residence would not give deputies consent to search the residence, because it was not his residence, he did give deputies permission to go into the living room of the apartment to obtain his cell phone so that they could contact a person named "Brandy" who would be able to give them permission to search. Officer Carnes then went into the apartment and observed a knife laying on the kitchen counter as he was walking to the living room. While he was in the living room, Officer Carnes found a cell phone on the coffee table that was located in the center of the room and also observed a bong...on the floor next to a couch. He looked at the phone list and found a "Brandy" listed. Officer Carnes called "Brandy" and she told him that she did not live at the residence and refused to provide any further identifying information and also refused to give him permission to search. "Brandy" then

> told Officer Carnes to call a person name Suzanne Duncan and she gave him a number to call.

(v1,p47-48)

The trial court further found that Officer Carnes "waited in the kitchen of the residence for approximately 30 minutes until the defendant arrived."(v1,p48) The court did not acknowledge the deputy's testimony, and the prosecution's admission, that the deputy had gone into the living room to find a leash, played with Ms. Shepard-Duncan's dog, and then taken it for a walk.(6-30-08,p10,13,22-23,33)

The trial court found that upon her arrival, Ms. Shepard-Duncan voluntarily provided both verbal and written consent to search. (v1,p48) Finding that Ms. Shepard-Duncan had standing to object to the search, the court nevertheless found that she was not seized prior to being handcuffed and informed of her arrest. (v1,p49) The court determined that the prosecution "clearly met its burden of establishing that the warrantless search was proper as the defendant voluntarily consented to the search that Officer Carnes conducted." (v1,p49) In addition, despite the defense motion to exclude all fruits of the unlawful search, the trial court found that Ms. Shepard-Duncan "had not asked for statements she made during the search to be suppressed." (v1,p50)

The bong, pipe, baggies with methamphetamine residue, and several statements made during the search were admitted at trial. (12-29-08,p26,57,62,64,68,70)

SUMMARY OF THE ARGUMENT

The trial court erred in failing to suppress evidence that was obtained in violation of the Colorado and United States guarantees against warrantless searches and seizures. In addition, Ms. Shepard-Duncan's constitutional rights to due process and a fair trial were violated when, in closing argument, the prosecutor improperly contended that Ms. Shepard-Duncan legally could not be presumed innocent and injected his personal opinion as to Ms. Shepard-Duncan's guilt.

ARGUMENT

I. The trial court erred in failing to suppress evidence obtained in violation of the Colorado and United States guarantees against warrantless searches and seizures.

A. Standard of Review and Preservation.

In reviewing the district court's refusal to grant a suppression motion, the appellate courts will defer to a district court's findings of fact absent clear error. People v. Galvadon, 103 P.3d 923, 927 (Colo. 2005). However, the district court's conclusions of law are subject to de novo review. People v. Brandon, 140 P.3d 15, 18 (Colo. App. 2005). The appellate court determines whether the district court "applied the correct legal standards to the facts of the case, and whether sufficient evidence in the record supports its legal conclusions." Id. As defense counsel moved to suppress

the fruits of law enforcement's unlawful warrantless search, this issue is preserved for appellate review. (6-30-08,p31;v1,p18)

B. The trial court erred in failing to suppress evidence seized during a warrantless search conducted after the completion of a protective sweep.

Unreasonable searches and seizures are prohibited by both the United States and Colorado Constitutions. U.S. Const. amend. IV; Colo. Const. art. II, § 7. "Unreasonable 'physical entry of the home' is the 'chief evil' against which the Fourth Amendment is directed." People v. O'Hearn, 931 P.2d 1168, 1173 (Colo.1997) (quoting Payton v. New York, 445 U.S. 573, 585(1980)). Warrantless searches and seizures are presumptively unreasonable unless they are justified by an exception to the warrant requirement. Petersen v. People, 939 P.2d 824, 830 (Colo. 1997).

Under the emergency exception to the warrant requirement, police officers may enter private property without a warrant where there is a reasonable belief that the premises have been or are being burglarized in order to secure the premises and to search for suspects and victims. People v. Berow, 688 P.2d 1123 (Colo.1984). Any search justified under the emergency doctrine, however, is limited by the nature of the emergency; an emergency cannot be used to support a general exploratory search. People v. Reynolds, 672 P.2d 529 (Colo.1983); People v. Roark, 643 P.2d 756

(Colo.1982). After the emergency has dissipated, a search of the premises may not occur simply because the police are legitimately present. People v. Draper, 196 Colo. 450, 586 P.2d 231,231-32 (1978).

The United States Supreme Court has taken pains to particularize the necessary limits upon a protective sweep, holding that it is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." Maryland v. Buie, 494 U.S. 325, 334-36 (1990). In addition, such a sweep "lasts no longer than is necessary to dispel the reasonable suspicion of danger." Id. "Once it is determined that the suspicion which led to the entry is without substance, the officers must depart rather than explore the premises further." Wayne R. LaFave, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 6.6(a) p467 (4th ed. 2004); see United States v. Hogan, 28 F.3d 1148 (10th Cir. 1994)(assuming grounds for entry, two-hour stay "a fishing expedition for evidence;" sweep should have ended "once the officer discovered that nobody else was in house"); United States v. Noushfar, 78 F.3d 1442 (9th Cir. 1996) (Buie not complied with where "the agents went through the apartment for more than a half-hour"); United States v. Akrawi, 920 F.2d 418 (6th Cir. 1990)(Buie not complied with where "the agents remained in the house for forty-five minutes" and sweep occurred at undetermined time during that interval).

"Any conduct within by the officer which is in any way inconsistent with the purported reason for the entry is a just cause for healthy skepticism by the courts." LaFave, supra, at § 6.6(a) p468-69. Here, Officer Carnes had completed his protective sweep and discovered no other persons. Yet, he remained inside, not because of any continuing suspicion of danger lurking in the home, but because he wanted to call the officer accompanying the victim and seek consent to search. (6-30-08,p7,18) This was improper. Buie, 494 U.S. at 334-36; LaFave, supra. The desire to contact a person who may give consent is not an exigent circumstance that supports a warrantless search of a home. Davis v. State, 834 So. 2d 322, 328 (Fla. Dist. Ct. App. 5th Dist. 2003) (Although apparent burglary justified investigator's initial warrantless entry into home, investigator's efforts to find information on how to contact the residents was not an exigent circumstance supporting a two–hour warrantless search of the home; once the house was searched and no burglar or person in need of aid was located, there was no further excuse for the police to be in the residence); Anderson v. State, 665 So.2d 281, 283 (Fla. App. 5th Dist. 1995)(After deputy had completed his search of the defendant's home to locate the intruder and to ascertain no one was in need of assistance inside the apartment, the exigency that allowed the warrantless search of the premises had ended; "The desire to contact the owner did not justify any further search of the apartment or its contents").

Even when Officer Carnes was informed that the victim could not give consent to search, he did not leave.(6-30-08,p7-8,12;v1,p48) Instead, the officer went into the living room of Ms. Shepard-Duncan's apartment to search for a phone. (6-30-08,p7-8,12) It was then, while he then unlawfully remained in the home attempting to contact someone on this phone who could consent to a search, that he observed an item of contraband he had not seen during his initial protective sweep.(6-30-08,p9,12;v1,p48) Despite the continued absence of consent to remain in the home, the officer stayed. He played with Ms. Shepard-Duncan's dog, located a leash in the living room, and took the dog for a walk before re-entering the home. (6-30-08,p10,13,22-23,33)

The prosecution offered no justification for this extraordinary conduct. Rather, the State alleged that Ms. Shepard-Duncan's subsequent consent negated any need for suppression.(6-30-08,p33) But whether or not her purported later consent to search met constitutional standards, as discussed *infra*, it could not serve to justify Officer Carnes' prior unlawful warrantless search. A defendant's voluntary consent to search after an illegal search has been completed does not transform the prior illegal search into a legal one. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (holding that a search unlawful at is inception cannot be validated by what it turns up); Bumper v. North Carolina, 391 U.S. 543, 549 (1968) ("A search conducted in reliance upon a

warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid."); People v. Castro, 159 P.3d 597, 600 (Colo. 2007)(holding that where evidence is obtained as a result of an allegedly consensual search, admissibility rests on "consent given *before* the search")(emphasis added).

Moreover, the prosecutor's attempts to minimize the officer's conduct as consisting of simply "a few steps into another room" are not only inaccurate but irrelevant. (6-30-08,p33) As the Ninth Circuit, sitting en banc, recognized, "The intrusiveness of the search is *not* measured by its scope, *but by the expectation of privacy upon which the search intrudes.*" United States v. Winsor, 846 F.2d 1569, 1574 (9th Cir.1988) (en banc) (emphasis added). The Supreme Court has never suggested that a search of a home, however limited in scope, could ever be considered less than a major intrusion. See, Arizona v. Hicks, 480 U.S. 321, 325 (1987); see also O'Hearn, 931 P.2d at 1173.

Because the officer's unlawful warrantless search was not justified by Ms. Shepard-Duncan's subsequent consent, the trial court erred in denying the motion to suppress the evidence discovered as a result of that search, i.e. the bong. See People v. Coto, 199 Colo. 508, 510, 611 P.2d 969, 971 (1980) ("Accordingly, since the officers were not legitimately on the premises, the contraband discovered ... in plain

view must be suppressed. In addition, evidence seized pursuant to the resulting search warrant ... issued on the basis of the illegal entry, must be suppressed.").

C. The trial court erred in determining that Ms. Shepard-Duncan's consent permitted the warrantless search, where the consent was a fruit of law enforcement's prior unlawful search.

The fruit of the poisonous tree doctrine precludes the prosecution's use of evidence derived from a constitutional violation. People v. Medina, 25 P.3d 1216 (Colo. 2001); citing Nardone v. United States, 308 U.S. 338, 341 (1939); Wong Sun v. United States, 371 U.S. 471, 484 (1963); Brown v. Illinois, 422 U.S. 590, 602 (1975). Where an officer's entry into an apartment is unlawful, a consent to search obtained thereafter is likely constitutionally infirm as a product of the illegal entry. People v. Donald, 637 P.2d 392, 394 (Colo. 1981); People v. Rodriguez, 945 P.2d 1351, 1364 (Colo. 1997). To determine whether consent or evidence was obtained as a result of police illegality, the relevant inquiry is whether it "was 'come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Rodriguez. 945 P.2d at 1363-64, citing Wong Sun, 371 U.S. at 488.

No single factor is dispositive in determining whether a defendant's purported consent is sufficiently attenuated from the underlying illegality. Id. at 1364. Among the factors a reviewing court must consider in determining whether the consent was

an exploitation of the prior illegality are the "temporal proximity of the [unlawful police action] and the consent, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Id., quoting Brown v. Illinois, 422 U.S. 590, 603-04 (1975). Evidence obtained by a purported consent is admissible "only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality." Id. It is the burden of the prosecution to show that the consent is not the fruit of the prior illegality. People v. Heilman, 52 P.3d 224, 229 (Colo. 2002).

In the present case, the district court failed to evaluate whether the purported consent was an exploitation of the prior illegality. (v1,p47-50) Nevertheless, the record plainly reveals that the consent was, in fact, a product of the prior illegality. First, the limited amount of time that passed between Officer Carnes' unlawful entry, search, and continuing presence in Ms. Shepard-Duncan's home and her subsequent purported consent did not serve to dissipate the taint of the initial illegality. Officer Carnes was unlawfully present in Ms. Shepard-Duncan's home upon her arrival, and her alleged consent was obtained shortly thereafter.(6-30-08,p10,22) The testimony at the suppression hearing indicates that Ms. Shepard-Duncan's consent was obtained some 30 minutes after the deputy called her from inside her home.(6-30-08,p10) The amount of time that passed here was less than that involved in Brown, *supra*, and

seems to suggest exploitation. See 422 U.S. at 604 (finding the passage of less than two hours indicated exploitation).

Second, there were no, or no significant, intervening circumstances between the illegal entry and search and the purported consent to search. Intervening circumstances that speak in favor of attenuation must be sufficiently important to ensure that potentially tainted evidence was "come at by way of" some process other than the exploitation of an illegal search. Wong Sun, 371 U.S. at 487-88. Here, no such circumstances arose. Because the illegal search "provided the means of gaining access to the person from whom the consent was obtained," the consent obtained by exploitation of that information was a fruit of the earlier illegal search. Wayne R. LaFave, 4 SEARCH AND SEIZURE § 8.2(d), p88 (4th ed.2004).

Officer Carnes unlawfully remained in Ms. Shepard-Duncan's residence after the completion of his protective sweep, unlawfully entered her living room, and unlawfully searched for a phone. See Argument I(B) supra. Via the phone he discovered, he was able to locate the number for and contact a "Brandy" who gave him Ms. Shepard-Duncan's phone number.(6-30-08,p8-9;v1,p48) But for his unlawful presence and search, he would not have been able to secure Ms. Shepard-Duncan's presence at the home or her subsequent alleged consent. As the nexus between the unlawful search and the purported consent obtained could not be more clear, the

latter is plainly a fruit of the prior illegality. See State v. Poaipuni, 98 Hawai'i 387, 49 P.3d 353, 359-60 (2002) (holding father's voluntary consent to search tool shed was the result of exploitation by the police of an unlawful search warrant, thereby rendering both consent and the firearms seized in the shed "tainted fruit of the poisonous tree").

In addition, the prior illegal entry into and search of the living room "provide[d] a significant lead in terms of indicating what other evidence [the police officer] ought to seek [and] where [he] ought to seek it." LaFave, *supra* at § 8.2(d), p88. As a result of the prior illegal search, Officer Carnes knew not only whom to seek out in order to obtain consent and where he could reach her, but he knew what to search for. His search for the victim's cell phone resulted in his discovery of a bong, and put him on notice of the likely presence of illegal drugs, items Officer Carnes would not ordinarily have been searching for in order to investigate the reported assault that initially brought him and other officers to the scene. (6-30-08,p9;v1,p48)

Finally, and most significantly, a consideration of the "purpose and flagrancy of the official misconduct," Brown, 422 U.S. at 604, supports the conclusion that the consent was not sufficiently attenuated from unlawful conduct to dissipate the taint. This factor is "particularly" important because it is tied to the rationale of the exclusionary rule: deterring police misconduct. See, Id. at 604. Here, Officer Carnes'

search was a flagrant violation of the Fourth Amendment. He had no authority and apparently knew he had no authority to remain in the home or search further after his initial protective sweep had been completed.(6-30-08,p7-8,12;v1,p48); Buie, 494 U.S. 325, 334-36. The sweep yielded no justification for remaining. He was informed that the victim of the assault could not give consent to search the apartment, as it was not his residence. By remaining on the scene and searching, ostensibly in order to find a means of obtaining the owner's consent to search, Officer Carnes blatantly disregarded settled Fourth Amendment principles. Draper, 586 P.2d at 231-32. The fact that the officer took the liberty of walking the defendant's dog only highlights his disregard for her privacy rights.

By allowing Ms. Shepard-Duncan's subsequent purportedly voluntary consent to justify the officer's search, when that consent was obtained as a result of a prior illegal search, the district court effectively ratified the officer's unlawful behavior. Such ratification removes the incentive for police officers to respect an individual's constitutional guarantees. Likewise, the court's actions prevented a defendant whose rights were violated from having a bona fide remedy for the violation, and undermined the integrity of the judiciary by ignoring a clear violation of the Constitution.

Although the district court failed to determine whether the defendant's later consent dissipated the taint of the police illegality, the record here is sufficient for this Court to conduct its own "taint analysis." See People v. Brandon, 140 P.3d 15, 22-23 (Colo. App. 2005) (conducting its own analysis "because the proceedings in the trial court 'resulted in a record of amply sufficient detail from which the determination may be made,'" citing United States v. McSwain, 29 F.3d 558, 562 (10th Cir. 1994)). In the alternative, should this Court determine the record to be insufficient, reversal and remand to the district court would be appropriate, with directions for further findings of fact to be made with regard to whether the officer's illegal search tainted Ms. Shepard-Duncan's purported consent. See United States v. Melendez-Garcia, 28 F.3d 1046, 1056 (10th Cir. 1994); State v. Gorup, 745 N.W.2d 912 (Neb. 2008).

D. The trial court erred in concluding that Ms. Shepard-Duncan's consent was knowing, intelligent, and voluntary, where such consent was obtained through use of deception and affirmative misrepresentations by a law enforcement officer whom she knew had already entered and remained in her home without her consent.

As discussed *supra*, in order to be admissible, evidence obtained by a purported consent that follows police conduct must be both voluntary and not an exploitation

of the prior illegality. Rodriguez, 945 P.2d at 1364. Even where an officer's entry into an apartment is lawful, "the consent to search still must satisfy constitutional standards of voluntariness-that is, it must be 'the product of an essentially free and unconstrained choice by its maker.'" Donald, 637 P.2d at 394, citing Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1974). The prosecution has the burden of proving, by clear and convincing evidence, that consent was obtained before a search was initiated and that it was freely and voluntarily given. Castro, 159 P.3d at 600; People v. Wilry, 51 P.3d 361, 363 (Colo. App.2001).

In assessing the voluntariness of consent, a trial court must first determine "whether there is objective evidence of coercion, duress, deception, promises, threats, intrusive conduct or other undue influence by the police, which critically impaired the defendant's judgment." People v. Reddersen, 992 P.2d 1176, 1182 (Colo.2000). Then, the court must "decide whether the police conduct could reasonably have appeared to be coercive to a person in the defendant's circumstances." Id.

In the present case, the trial court erred in determining that the prosecution had met its burden of proving, by clear and convincing evidence, that Ms. Shepard-Duncan's purported consent was freely and voluntarily given under circumstances. First, her alleged consent appears to have been the result of the officer's intrusive conduct and implicit claim of lawful authority. See Reddersen, 992 P.2d at 1181

(holding consensual searches involuntary where they are "the result of duress or coercion, express or implied, or any other form of undue influence against the defendant," including "intrusive police conduct"); Bumper v. North Carolina, 391 U.S. 543,548-50 (1968) (holding voluntariness of consent cannot be based on a defendant's "mere acquiescence to a claim of lawful authority" by law enforcement).

Ms. Shepard-Duncan arrived at her home that January night to find Officer Carnes waiting for her inside her kitchen. (6-30-08,p10,22) It is difficult to see how a person in Ms. Shepard-Duncan's position would believe that she could freely decline the officer's subsequent request to search, or that her refusal would have any effect, given that the officer had already asserted his right to be present within her home by physically intruding upon her private domain. See State v. Reiner, 628 N.W.2d 460, 467-68 (Iowa 2001)(police entry of enclosed porch without consent when defendant answered door "subtly implied authority by police" and "gave the impression the police were authorized to act in the manner that they did," and thus was factor, together with subsequent events, in finding defendant's consent involuntary); Burton v. State, 204 P.3d 772 (Okla.Crim.App. 2009)(where prior warrantless protective sweep throughout defendant's home unlawful, defendant's consent, given "with full knowledge that police were already positioned throughout his house with incriminating evidence in plain view," was a fruit of that illegality).

Moreover, the officer deceived Ms. Shepard-Duncan in order to gain her consent. "A valid consent to search must be voluntary rather than the result of intimidation, coercion, or deception." Turbyne v. People, 151 P.3d 563, 572 (Colo. 2007), citing Reddersen, 992 P.2d at 1182; People v. Lehmkuhl, 117 P.3d 98, 101-02 (Colo.App.2004). Although police deception is but one factor to be considered under the totality of the circumstances, that factor may weigh heavily against a finding of consent.[3] Officer Carnes had already unlawfully entered Ms. Shepard-Duncan's home

[3] See People v. Coghlan, 189 Colo. 99, 537 P.2d 745, 745-46 (1975) (consent involuntary where given as a result of officers' deception that they desired to consult the defendant further about an unsolved crime of which she was a victim); McCall v. People, 623 P.2d 397,403(Colo.1981)(where entry into defendant's home "was gained by a preconceived deception as to purpose," the consent to that entry was constitutionally infirm)(overturned on other grounds, see People v. Davis, 187 P.3d 562,564 (Colo.2008)); People v. Santistevan, 715 P.2d 792,796 (Colo.1986) (noting that "misrepresentation by the police about the purpose of a search may weigh against a finding of consent"); see also People v. Longoria, 717 P.2d 497,500 (Colo.1986) (extent to which a suspect has been informed of the subject matter of police interrogation may be a major or determinative factor in assessing voluntariness of confession under totality of circumstances); United States v. Hearn, 496 F.2d 236 (6th Cir.1974)(where illegal search revealed stolen traxcavator, and officers failed to inform defendant of this discovery before obtaining his consent, consent was involuntary because consent was obtained in exploitation of the prior illegal search, was also a "fruit of the poisonous tree."); State v. Schweich, 414 N.W.2d 227,230 (Minn.App.1987) (misrepresentation of the purpose of a search can be so deceiving as to invalidate the consent; by not informing defendant he was under investigation before obtaining consent, the state engaged in improper deceptive conduct). United States v. Turpin, 707 F.2d 332,334-35 (8thCir.1983)(misrepresentations about the nature of an investigation may be evidence of coercion and the misrepresentation may even invalidate the consent if it was given in reliance on the officer's deceit); United States v. Tweel, 550 F.2d 297,299(5thCir.1977)(consent to search is unreasonable

and searched the living room, discovering a bong in the process.(6-30-08,p9;v1,p48) However, when requesting consent, Officer Carnes failed to mention this. Instead, he affirmatively misrepresented that he solely sought consent to search "for evidence relating to the crime that had occurred," namely, the alleged stabbing that had taken place in her kitchen.(6-30-08,p11,24) There is no indication in the record that Officer Carnes informed Ms. Shepard-Duncan that any evidence uncovered in the search could be used against *her*, as opposed to the participants in the alleged assault Officer Carnes was supposedly investigating.

Here, taking into consideration Officer Carnes' intrusive and deceptive conduct, as well as Ms. Shepard-Duncan's likely distressed state, given that she had only just learned that a violent act had taken place within her home, the prosecution failed to prove by clear and convincing evidence that Ms. Shepard Duncan's purported consent was voluntary. The warrantless entry into, and search of, her

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under the Fourth Amendment if induced by deceit, trickery, or misrepresentation); see also Commonwealth v. Slaton, 608 A.2d 5,9-10 (Pa.1992)(affirmative misrepresentation by government agent constitutes consent through deception, which is implied coercion); State v. Bailey, 417 A.2d 915,918 (R.I.1980)(consent to enter one's home cannot be deemed free or voluntary unless person said to be consenting is aware of purpose for police entry); but see, People v. Zamora, 940 P.2d 939,942-46(Colo.App.1996)(holding that although "deception by police is not condoned by the courts," where defendant was not a suspect at the time police entered and obtained consent to search; failure to inform him of purpose of search was not determinative, consent voluntary).

apartment by Officer Carnes was not made pursuant to valid consent; it was, thus, unreasonable and violated the Fourth Amendment and article II, section 7 of the Colorado Constitution. Consequently, any evidence seized as a result of that entry, e.g., her statements, the bong, the pipe, and the baggies containing methamphetamine residue, should be suppressed. People v. Diaz, 53 P.3d 1171, 1175 (Colo.2002). Such suppression is necessary to deter future instances of intrusive police conduct and improper reliance on deception to gain consent. See Krause v. Commonwealth, 206 S.W.3d 922, 926 (Ky. 2006)("if the type of ruse utilized...was sanctioned by this Court, citizens would be discouraged from 'aiding to the utmost of their ability in the apprehension of criminals' since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them").

E. Conclusion.

The purported consent in this case flowed directly from Officer Carnes' unlawful search and was in close temporal proximity to it. The prosecution did not carry its burden of proof to demonstrate that the purported consent was attenuated from the prior illegal conduct. See Rodriguez, 945 P.2d at 1364-65. Further, because Ms. Shepard's consent was obtained through unfair deceptive misrepresentations and under circumstances in which she could not have believed she had any option but to

consent to the search, the trial court erred in finding it to be knowing, intelligent and voluntary. See Turbyne, 151 P.3d at 572. Consequently, this Court should reverse the trial court's suppression order.

II. Ms. Shepard-Duncan's constitutional rights to due process and a fair trial were violated when, in closing argument, the prosecutor improperly contended that Ms. Shepard-Duncan legally could not be presumed innocent and injected his personal opinion as to Ms. Shepard-Duncan's guilt.

A. Preservation and Standard of Review.

In this argument, Ms. Shepard-Duncan addresses improper statements that the prosecutor made to which Mr. Martinez did not object. The harm of these statements should be reviewed for plain error. See People v. McBride, No. 06CA2524, 2009 WL 3128746, *2 (Colo. App. October 1, 2009). Prosecutorial misconduct amounts to plain error if, alone or cumulatively, it undermines the fundamental fairness of the trial itself 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. Law and Analysis.

The presumption of innocence "is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503(1976). "The principle that there is a presumption of innocence in favor of the accused is the

undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). To implement the presumption, courts "must be alert to factors that may undermine the fairness of the fact-finding process" and "must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Williams, 425 U.S. at 503, citing In re Winship, 397 U.S. 358, 364 (1970). The enforcement of this principle "lies at the foundation of the administration of our criminal law.'" In re Winship, 397 U.S. at 363. Every jury must be instructed that the presumption of innocence "prevails throughout the trial" until the defendant's guilt is established beyond a reasonable doubt. Balltrip v. People, 157 Colo. 108, 116, 401 P.2d 259, 264 (1965).

In the present case, however, the prosecutor informed the jury that, as a matter of law, Ms. Shepard-Duncan could not be presumed innocent:

> Ladies and gentlemen, ***all of the evidence in this case points to the possession by one person. That's the Defendant.*** Now, the interesting thing here at this point is ***you can't have any reasonable doubt of that. It is by law not possible*** because you're not allowed to contemplate the evidence.

(12-30-08,p87) (emphasis added) The prosecutor went on to argue that only "after [the jury had] given a fair and rational consideration, and that's the Judge's instruction, a fair and rational consideration of all the evidence" would the jury be "allowed to

make a determination" as to Ms. Shepard-Duncan's guilt or innocence. (12-30-08,p88).

Thus, the prosecutor argued, first, that the jury could not presume Ms. Shepard-Duncan innocent, as they were prohibited from making any judgments until after retiring to the jury room. Secondly, the prosecutor contended that, given the evidence, the jury *legally* could not have any reasonable doubt of her guilt.(12-30-08,p87) These arguments were flawed because a defendant "retains a presumption of innocence throughout the trial process." Martinez v. Court of Appeal, 528 U.S. 152, 162 (2000) (emphasis added). This presumption remains until after a jury returns a guilty verdict. See District Attorney's Office v. Osborne, 557 U.S. - ---, ----, 129 S.Ct. 2308, 2320, 174 L.Ed.2d 38 (2009) ("[a]t trial, the defendant is presumed innocent," but this presumption disappears upon conviction); Portuondo v. Agard, 529 U.S. 61, 76, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (Stevens, J., with Breyer, J., concurring) ("the presumption of innocence ... survives until a guilty verdict is returned"). The "presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt." Delo v. Lashley, 507 U.S. 272, 278 (1993).

The prosecutor's misstatement of law constituted an error of constitutional magnitude. See Mahorney v. Wallman, 917 F.2d 469, 471 (10th Cir. 1990) (prosecutor

committed error of constitutional magnitude where he told jury, *inter alia*, that, "under the law and under the evidence, [the] presumption [of innocence] has been removed, that that presumption no longer exists, that that presumption has been removed by evidence and he is standing before you now guilty"). Moreover, the instruction provided to the jury by the district court in this case did not ameliorate the harm caused by this unconstitutional misconduct. Instruction No. 5 reads in relevant part:

> Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

(v1,p64)

This instruction, when combined with the prosecutor's claim, that it was "by law not possible" for the jury to "have any reasonable doubt" of Ms. Shepard Duncan's guilt, negates the instruction's direction that the presumption "*should* be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt." (12-30-08,p87;vI,p64)(emphasis added). This jury was not told that it *must* give the presumption of innocence effect throughout deliberations. The instruction only informed the jury that the presumption of innocence was held by someone charged with a crime and was maintained throughout trial. The prosecutor made clear that at

the end of the trial Ms. Shepard-Duncan could not legally be presumed innocent. This was fallacious and unconstitutionally misleading. See e.g., People v. McBride, 2009 WL 3128746 at *5 (prosecutor erred by misstating the presumption of innocence); People v. Carroll, 663 N.E.2d 458, 461-61 (Ill. App. 1996)("It is improper for the prosecution to imply that the State's evidence enjoys a presumption of veracity which defendant must defeat or negate if he is to be acquitted.")

It is wholly improper for a prosecutor to make such gross misstatements of the law in closing argument. People v. Rodriguez, 794 P.2d 965, 977 (Colo. 1990). A prosecutor may not usurp the trial court's duty and authority to instruct the jury on the law. Id.; People v. Alvarez, 187 Colo. 290, 530 P.2d 506, 507 (Colo. 1975). Accordingly, this Court has reversed under the plain error standard where, during argument, the prosecutor misstated the law. See McBride, 2009 WL 3128746 at *6 (reversing under plain error standard in part because in argument the prosecutor distorted a key element of one of the charged crimes); see also, Miller v. State, 843 P.2d 389, 390 (Okla. App. 1992) (where prosecutor argued in closing that "the cloak of innocence" defendant wore "is all through now" and "gone," plain error resulted requiring reversal due to the violation because "the error goes to the very fundamental principal of our jurisprudence"); Mahorney, 917 F.2d at 473-74 ("[T]he trial court's overall charge on the presumption of innocence and burden of proof was not

sufficiently specific to preserve that presumption in light of the prosecutor's specific statement that it had been extinguished from the case."); Wilson v. People, 743 P.2d 415, 421 (Colo.1987)(although jurors are instructed that arguments of counsel are not evidence, "we cannot ignore the fact that jurors do pay heed to the arguments of counsel in arriving at a result").

Furthermore, by asserting that it was legally impossible for Ms. Shepard-Duncan to be innocent, the prosecutor improperly conveyed his personal belief in Ms. Shepard-Duncan's guilt. See Domingo-Gomez, 125 P.3d at 1049 (misconduct for prosecutor to express his or her personal belief or opinion as to the guilt of the defendant) (citing ABA Standards, § 3-5.8(b)). The prosecutor professed his personal beliefs even more blatantly when beginning his initial closing statement:

> We talked in jury selection about who is the fact finder here. Who is the person who determines what is true and what is not true. It is entirely possible for you to look at all that evidence and say absolutely nothing ever happened, ever, nothing. ***I don't believe that I'm seeing those things there. It would be hard to imagine a person doing that***, but you are the ultimate finder of fact.

(12-30-08,p65)

Both the Colorado Supreme Court and the American Bar Association have long disapproved of a prosecutor's expression of his or her personal belief in the guilt of the accused. People v. Mason, 643 P.2d 745, 752 (Colo.1982); ABA, STANDARDS

FOR CRIMINAL JUSTICE, Standard 3-5.8 (3rd ed.1993). "[A]ny statement of personal belief by counsel is improper." People v. Foster, 971 P.2d 1082, 1086 (Colo.App.1999). H ere, the prosecutor fell far afoul of these standards when he professed his personal belief in Ms. Shepard-Duncan's guilt and claimed an inability to conceive of any other finding. Mason, 643 at 752; People v. Fernandez, 687 P.2d 502 (Colo.App.1984); ABA STANDARDS, supra.

By misleading the jury as to the presumption of innocence and injecting his personal opinion, the prosecutor impinged on Ms. Shepard-Duncan's fundamental constitutional rights to due process and a fair trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25. Whether viewed separately or in conjunction, the prosecutorial misconduct in closing argument so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. See e.g., Wilson v. People, 743 P.2d 415, 420 (Colo. 1987). The evidence here was not overwhelming; an admitted illegal drug user was in Ms. Shepard-Duncan's home just prior to Officer Carnes discovery of the drugs and paraphernalia. (12-29-08,p115-16,118-120) Under the circumstances of this case, the aggravated prosecutorial misconduct, which directly undermined the fundamental constitutional precepts guiding the jury's evaluation of Ms. Shepard-Duncan's guilt or innocence,

cannot be harmless. Mahorney, supra, at 474. Wilson, 743 P.2d at 421; McBride, 2009 WL 3128746 at 6. Accordingly, reversal is required.

CONCLUSION

WHEREFORE, based on the arguments and authorities set forth above, Ms. Shepard-Duncan respectfully requests that this Court reverse her convictions for possession of methamphetamine and drug paraphernalia.

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CERTIFICATE OF SERVICE

I certify that, on June 7, 2010, a copy of this Opening Brief of Defendant-Appellant was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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