COURT OF APPEALS STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Mesa County District Court Honorable Brian J. Flynn & Brian Whitney, Judges Case No. 08CR139	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. SUZANNE SHEPARD-DUNCAN, Defendant-Appellant.	▲**COURT USE ONLY**▲ Case No. 09CA0750
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ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

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

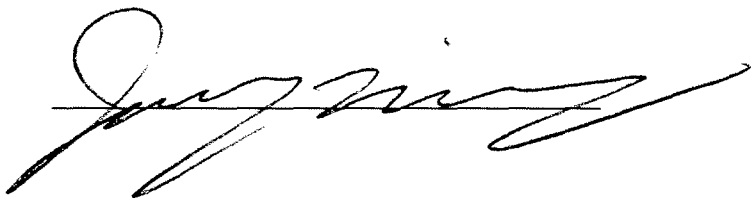
The brief complies with C.A.R. 28(g).

It does not exceed 9,500 words.

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

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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STATEMENT OF THE CASE

A jury convicted Suzanne Shepard-Duncan of possession of less than one gram of methamphetamine[1] and possession of drug paraphernalia.[2] (V1, pp.83-84.) The trial court sentenced her to ninety days in jail and five years probation. (V1, p.90; CD, 2/23/09, p.19.)

STATEMENT OF THE FACTS

In January 2008, Deputy Ben Carnes responded to a 911 call reporting a stabbing at an apartment. (CD, 6/30/08, p.5.) When he arrived, he observed firemen and emergency personnel entering and exiting the apartment and the victim being led to an ambulance. (*Id.*) A fireman informed Deputy Carnes that the knife used in the stabbing was inside the apartment on a kitchen counter. (*Id.* at 6.) Deputy Carnes observed a broken window in the apartment's backyard. (*Id.* at 6.) He did a basic protective sweep of the apartment. (*Id.* at 10-11.)

Through another deputy, Deputy Quigley, Deputy Carnes asked the stabbing victim for permission to search the apartment. (*Id.* at 7.)

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[1] § 18-18-405(1), (2.3)(a)(II), C.R.S. (2008).

[2] § 18-18-428(1), C.R.S. (2008).

The victim told Deputy Quigley and Deputy Carnes that it was not his home, but that Deputy Carnes could use his cellular telephone, which was on a table in the living room in plain sight, to contact "Brandy," who would consent. (*Id.* at 7-8.)

When he retrieved the telephone, Deputy Carnes observed, in plain sight on the floor, a purple "bong." (*Id.* at 9, 27.)

Deputy Carnes called "Brandy," who told him he should call Shepard-Duncan. (*Id.* at 8-9.) Deputy Carnes called Shepard-Duncan, who was babysitting Brandy's children, and she told him she would be there shortly. (*Id.* at 9-10.) Deputy Carnes then waited for Shepard-Duncan in the kitchen, with a brief exception to let Shepard-Duncan's dog outside to relieve itself. (*Id.* at 10.)

When Shepard-Duncan arrived approximately thirty minutes later, Deputy Carnes, using a conversational, non-threatening tone, requested her consent to search the apartment. (*Id.* at 11, 24.) Shepard-Duncan consented both orally and in writing. (*Id.*) She placed no restrictions on Deputy Carnes's search. (*Id.* at 23.) She also admitted drug use to Deputy Carnes. (*Id.* at 13.)

Deputy Carnes then searched the apartment with Shepard-Duncan following him. (*Id.*) As Deputy Carnes searched the bathroom, Shepard-Duncan left him and hid the bong. (*Id.* at 15, 27.) Deputy Carnes found baggies of methamphetamine in Shepard-Duncan's bedroom as well as a glass pipe for smoking methamphetamines. (*Id.* at 27-28.)

Deputy Carnes found the baggies and the pipe after Shepard-Duncan's consent. (*Id.* at 28-29.) Shepard-Duncan admitted she hid the bong. (*Id.* at 27.)

The trial court determined that exigent circumstances justified the initial entry, that Shepard-Duncan voluntarily consented to the search, and that Deputy Carnes discovered the methamphetamine baggies and pipe after her consent. (V1, pp.47-50.)

ARGUMENT

I. The trial court did not err in denying Shepard-Duncan's motion to suppress evidence.

Shepard-Duncan argues that the trial court erred when it denied her motion to suppress evidence seized at her house. Her claim fails.

A. Standard of review

The People agree that this issue is preserved and that in suppression cases, appellate courts defer to the trial court's factual findings and do not disturb them if they are supported by competent evidence contained in the record. *People v. Bonilla-Barraza*, 209 P.3d 1090, 1094 (Colo. 2009); *People v. Gothard*, 185 P.3d 180 (Colo. 2008). Appellate courts review the trial court's ultimate legal conclusions de novo. *Bonilla-Barraza*, 209 P.3d at 1094.

Appellate courts may uphold the trial court's ruling on any ground supported by the record, regardless of whether it was relied upon by the district court. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006); *People v. Scott*, 116 P.3d 1231, 1233 (Colo. App. 2004).

B. Law and analysis

There are three reasons why the trial court properly denied Shepard-Duncan's motion to suppress: (1) Shepard-Duncan consented to the search, placed no limitations on the search, and no items were seized until after she consented; (2) the bong, the first item seen, was in plain view; and (3) all evidence would have been discovered inevitably.

1. Shepard-Duncan consented to the search.

Warrantless searches generally are invalid under the federal and Colorado constitutions. U.S. Const. amend. IV; Colo. Const. art. II, sec. 7; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *People v. Pitts*, 13 P.3d 1218, 1222 (Colo. 2000).

However, numerous exceptions exist to this warrant requirement, most notably, here, (1) where the owner consents to the search or (2) where exigent circumstances justify the entry and the item is in plain view. *Payton v. New York*, 445 U.S. 573, 590 (1980). It is the defendant's burden to show that a search or seizure did not conform to constitutional requirements. *People v. Jansen*, 713 P.2d 907, 911 (Colo. 1986).

A warrantless search pursuant to a voluntary consent does not violate the prohibition on unreasonable search and seizures. *People v. Brazzel*, 18 P.3d 1285, 1289 (Colo. 2001). For consent to be valid, (1) it must be voluntary and (2) cannot have been the product of any prior illegality. *People v. Rodriguez*, 945 P.2d 1351, 1363 (Colo. 1997).

The voluntariness of the consent is a factual determination for the trial court to determine under the totality of the circumstances. *Brazzel*, 18 P.3d at 1289; *People v. Benson*, 124 P.3d 851, 854 (Colo. App. 2005). The trial court determined Shepard-Duncan's consent was voluntary. (V1, p.49.)

Here, Deputy Carnes waited with the intention of requesting consent to search from the owner. He was in the process of tracking down the owner before he noticed the bong. When he saw the bong, he did not seize it. Rather, he continued tracking down the owner, Shepard-Duncan, until he contacted her and she arrived.

Immediately upon her arrival, Deputy Carnes explained why he was there and asked if she would consent to a search. At no time did he raise his voice or threaten her or talk in anything except for a conversational tone. (CD, 6/30/08, pp.11, 24.) Only after she consented did he search her apartment, and even during that search, all items he discovered—the bong on the living room floor, the glass pipe on the bedside dresser, the baggies on the dresser—were in plain view.

In short, Deputy Carnes *did not even search for or seize evidence until after he received Shepard-Duncan's consent.* Shepard-Duncan voluntarily and immediately gave oral *and* written consent to Deputy Carnes (prong one). The initial entry into the house was justified by the stabbing;[3] thus, there was no illegal entry (prong two).

Even should this Court determine that the prior entry into, or Officer's Carnes's presence at, Shepard-Duncan's house was unlawful, her consent still was valid. *See Benson*, 124 P.3d at 854-55.

In *Benson*, a division of this court held that a defendant's consent to the warrantless search of his residence was sufficiently attenuated from an earlier allegedly illegal entry where (1) during the one-hour interval between the entry and consent, the defendant voluntarily drove home even though he was aware that police officers were waiting there

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[3] Neither at the suppression hearing below nor in her Opening Brief does Shepard-Duncan argue that no exigent circumstances existed to justify Deputy Carnes's entry into her apartment. *See* OB, pp.10-27; *see generally* (CD, 6/30/08). Consequently, this claim is waived. *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007) (claims not raised at the suppression hearing are waived); *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (appellate courts do not consider claims not raised in opening brief).

for him; (2) the defendant spoke to one of the officers while driving home and volunteered information about the marijuana on the premises; and (3) once defendant arrived, he *immediately consented* to, and participated in, the search. In short, even though the initial entry was illegal, the division held that his consent was valid because it was, as here, voluntary. *Id.*

Benson is dispositive. As in *Benson*, here (1) the police phoned Shepard-Duncan; (2) Shepard-Duncan voluntarily returned home thirty minutes later knowing the police already were there; (3) Shepard-Duncan *immediately consented* to the search; (4) Shepard-Duncan told Deputy Carnes about her use of methamphetamine; and (5) Shepard-Duncan participated in the search.

Shepard-Duncan's actions are "strong indications that [her] consent to the search was an act of free will untainted by any prior illegal police conduct," *id.*, and these factual findings are entitled to deference. *See Bonilla-Barraza*, 209 P.3d at 1094. The only exception here falls in the People's favor: unlike in *Benson*, where the initial entry was illegal, here it was legal.

The fact that Deputy Carnes noticed the bong in plain view *was not* what triggered his decision to search. Rather, Deputy Carnes needed to conduct a search because of the triggering assault that first brought the officers legitimately to the premises. It only was during his quest for consent that he noticed the bong. In other words, he was not searching when he was attempting to gain consent.

Moreover, Deputy Carnes did not even see the baggies of methamphetamines or the glass pipe with the methamphetamine residue until after he received Shepard-Duncan's consent. Consequently, even if this Court determines suppression *was* required, it only would have applied to the bong. Because the other items, the more incriminating items, were seized *after* Shepard-Duncan consented, they were validly seized and admitted into evidence. Consequently, any error in the bong's admission was utterly harmless.

2. The items were in plain view.

Another exception to the warrant requirement is that officers are "not required to close their eyes to any evidence that they plainly see." *Pitts*, 13 P.3d at 1222. This is the plain view doctrine, and "[i]f an

article is already in plain view, neither its observation nor its seizure would invoke any invasion of privacy." *Horton v. California*, 496 U.S. 128, 133-34 (1990).

Police may seize items without a warrant under the plain view doctrine where (1) the initial police intrusion onto the premises was legitimate, (2) the police had a reasonable belief that the evidence was incriminating, and (3) the police had a right of access to the evidence. *People v. Kluhsman*, 980 P.2d 529, 534 (Colo. 1999); *see also People v. Najjar*, 984 P.2d 592, 596 (Colo. 1999)(plain view doctrine applies when officers observe item as a result of a prior lawful intrusion, and the incriminating character of the item is immediately apparent to the officer who observes it).

The first step, the initial intrusion, is satisfied when probable cause and exigent circumstances justify the officer's presence. *Kluhsman*, 980 P.2d at 535. The second step is satisfied when the evidence is incriminating and its incriminating nature is instantly obvious. *Pitts*, 13 P.3d at 1222.

Here, Deputy Carnes had probable cause to, and exigent circumstances demanded the officers, enter Shepard-Duncan's apartment without a warrant. Once inside, Deputy Carnes saw the bong, which he testified he knew was used for marijuana and drugs. (CD, 6/30/08, p.26.) He had a right to access this evidence because it was in plain view in the living room, where the victim had directed him to retrieve his cellular telephone—an action Deputy Carnes undertook in order to get consent in the first place from the apartment's owner.

Where an officer's presence on the premises is legitimate and the officer notices incriminating evidence of obviously illegal character in plain view, that evidence's warrantless seizure is constitutional. *Gothard*, 185 P.3d at 183-84. In *Gothard*, exigent circumstances supported an officer's entry into the defendant's motel room, and the plain view doctrine authorized the officer's warrantless seizure of methamphetamine the officer observed on the defendant's nightstand. *Id.* The supreme court overturned a trial court's decision to suppress this evidence. *Id.* at 184. Here, by contrast, the trial court determined suppression was not required. Further, in *Gothard*, the officers had

received an anonymous tip that "funny stuff" was occurring at a motel, and did not discover anything until they arrived at the hotel; they had not been called to control a specific situation, as here. *Id.*

Even evidence in plain view discovered inside a defendant's apartment when police were there to *arrest* a defendant, even though they did not have a search warrant, is admissible. *People v. Dotson,* 55 P.3d 175, 180 (Colo. App. 2002). Here, the police were validly on the premises to assist a stabbing victim, and Deputy Carnes noticed the bong in plain sight in the middle of the living room. In other words, police did not even suspect Shepard-Duncan of having done anything illegal and were not there to arrest her; they were there to assist a victim of violence and only once validly on the premises did they discover the obviously illegal drug paraphernalia in plain view.

Relevantly, Deputy Carnes, as discussed above, neither began his search until he received Shepard-Duncan's consent nor used his observation of the bong to trigger his need to search; rather, it was the predicate stabbing that triggered his need to search and once he received the consent, *all* items he seized were in plain view.

3. Under either the independent source doctrine or the inevitable discovery rule, this evidence was admissible.

Assuming, arguendo, this Court determines the evidence was seized in violation of the Shepard-Duncan's constitutional rights, the evidence nonetheless is admissible. Although unconstitutionally-obtained evidence normally must be excluded, the purpose of exclusion is to deter improper police procedure and conduct. *See People v. Burola*, 848 P.2d 958, 960 (Colo. 1993). Courts recognize two doctrines applicable here as exceptions to the exclusionary rule: independent source and inevitable discovery. *People v. Schoondermark*, 759 P.2d 715, 718(Colo. 1988).

First, under the independent source exception, unconstitutionally obtained evidence may be admitted if the prosecution can establish that it was also discovered by means independent of the illegality. *People v. Morley*, 4 P.3d 1078, 1080-81 (Colo. 2000). Here, however no improper police conduct occurred, and exclusion would serve no deterrent effect. Even if, arguendo, Deputy Carnes was not legally on Shepard-Duncan's

premises, he validly received Shepard-Duncan's consent to search, and during this search, he discovered the evidence. Further, he was validly on the premises collecting evidence for the stabbing, and the evidence was in plain sight.

Second, under the inevitable discovery rule, evidence initially discovered in an unconstitutional manner may be received if that same evidence inevitably would have been obtained lawfully. *See Schoondermark*, 759 P.2d at 716-20.

Under the inevitable discovery exception, there must be an affirmative showing of reasonable probability that the evidence would inevitably be discovered through lawful means already initiated when the seizure was made; speculation about possible series of events under which the evidence may have been discovered is not enough. *People v. Syrie*, 101 P.3d 219, 222-23 (Colo. 2004).

Here, that affirmative showing occurred when Deputy Carnes requested Shepard-Duncan's consent without coercion and without mention of any illegal items found in her residence, when she consented, and when he subsequently found methamphetamine

baggies, the pipe, and the bong. In other words, the "lawful means already initiated" was Deputy Carnes's ongoing efforts to receive consent from the resident and his inaction in seizing evidence, even evidence in plain view, until he received that consent.

For all these reasons, the trial court properly denied Shepard-Duncan's motion to suppress, and this Court should affirm the trial court's ruling.

II. No prosecutorial misconduct occurred.

Shepard-Duncan complains the prosecution improperly stated she could not be presumed innocent and personally opined on her guilt. These claims fail.

A. Standard of review

The People agree that Shepard-Duncan did not object and, absent a contemporaneous objection during the argument, appellate courts review alleged improper statements during closing argument for plain error. *People v. Kendall*, 174 P.3d 791, 797 (Colo. App. 2007).

Under plain error review, reversal is required only when the error so undermined the fundamental fairness of the proceeding as to cast serious doubt on the reliability of the judgment. *People v. Sepulveda*, 65

P.3d 1002, 1006 (Colo. 2003). Shepard-Duncan bears the burden of persuasion under the plain error standard. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005).

B. Relevant facts

At the beginning of its rebuttal closing argument, the prosecution reminded the jury that:

> It is [the prosecution's] sole obligation to prove everything. The defense counsel and the Defendant have no obligation. In our system of government, you have the right to a trial. You have the right to have the finder of fact be your peers. And you don't have to present any evidence at that trial. *The burden is entirely on the People.*

(CD, 12/30/08, p.82 (emphasis added).) The prosecution told the jury the same, that it had to prove every element beyond a reasonable doubt, in its initial closing argument. (CD, 12/30/08, p.64.)

Later in the rebuttal, the prosecution stated:

> 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.

> The Judge has given you several instructions that you hadn't heard all the evidence and that you were not to talk about the case or discuss the case or do anything else, so you had to sit there like a sponge and suck it all up, suck it all up. And then now, after I sit down, the Judge will give you the final instruction. You'll go to the back. You'll be able to let it all out. You'll be able to talk about it. And when you're done, after you've given a fair and rational consideration, and that's the Judge's instruction, a fair and rational consideration of all the evidence, you're allowed to make a determination. And, ladies and gentlemen, I submit to you that at the end of that, *you're going to find that you have no reasonable doubt* that the Defendant possessed less than a gram of methamphetamine and that she possessed drug paraphernalia.

(CD, 12/30/08, pp.87-88 (emphasis added).)

The jury instructions explicitly told the jurors that Shepard-Duncan was presumed innocent and that the prosecution bore the burden of proof beyond a reasonable doubt to prove her guilt. (V1, p.64.)

C. Law and analysis

Due process requires a fair trial, not a perfect trial. *Medina v. People*, 114 P.3d 845, 856 (Colo. 2005). Appellate courts take a

defendant's failure to object contemporaneously as an indication of the defendant's belief that the argument is not overly damaging. *Kendall*, 174 P.3d at 797. To constitute plain error, prosecutorial misconduct must be flagrant, glaringly obvious, or egregiously improper. *People v. Walters*, 148 P.3d 331, 335 (Colo. App. 2006); *People v. Williams*, 996 P.2d 237, 244 (Colo. App. 1999) (prosecution's remark that drug dealing was immoral and wrong not improper).

Plain error does not occur unless it was obvious, substantial, and undermined the fundamental fairness of the trial such that it cast serious doubt on the very reliability of the judgment of conviction. *Miller*, 113 P.3d at 750.

Prosecutorial misconduct during closing argument rarely constitutes plain error. *People v. Manier*, 197 P.3d 254, 258 (Colo. App. 2008). Claims of improper argument are evaluated in the context of the argument as a whole and in light of the evidence before the jury. *People v. Welsh*, 176 P.3d 781, 788 (Colo. App. 2007). Closing argument must be based on facts in the record and reasonable inferences drawn from those facts. *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984). A

prosecutor has wide latitude in the language he uses in closing argument. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). So long as the prosecution does not induce the jury to determine guilt on the basis of passion, prejudice, or another improper purpose, rhetorical devices and embellishment may be employed. *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003).

Overall, comments few in number and momentary in length do not require reversal under plain error review. *Domingo-Gomez*, 125 P.3d at 1053. Where statements made by the prosecutor are questionable or even improper, if they occur infrequently or in isolation and are unlikely to constitute a material factor leading to the defendant's conviction, no mistrial is required. *People v. Hogan*, 114 P.3d 42, 55-56 (Colo. App. 2004).

Because courts should not reverse convictions to punish prosecutors, *see Crider v. People*, 186 P.3d 39, 44 (Colo. 2008), the defendant must show the complained-of statements so undermined the trial's fundamental fairness as to cast doubt on the judgment's reliability. *See also Liggett v. People*, 135 P.3d 725, 735 (Colo. 2006)

(prosecutorial misconduct in closing argument rarely constitutes plain error).

The court's judgment will only be disturbed if "it is clear that the court could not have reached the result but for the incompetent evidence." *Id.* at 733 (internal quotation omitted).

Here, it is clear from the context of the prosecution's argument that it is arguing the evidence leaves no room for any reasonable doubt as to Shepard-Duncan's guilt. The argument in no way proposes that the prosecution does not have to prove this burden, or that the burden somehow is less, or that it was Shepard-Duncan's burden to prove her innocence. Rather, the prosecution explicitly argues that "at the end of [your deliberations], you're going to find that you have no reasonable doubt that the Defendant possessed less than a gram of methamphetamine and that she possessed drug paraphernalia." (CD, 12/30/08, p.88.)

This is the definition of rhetorical device and commenting on evidence admitted. The prosecution argued that all the evidence pointed to one inescapable conclusion: that Shepard-Duncan was

guilty. This is precisely the prosecution's job, and informing the jury that the evidence it had worked hard to admit supported Shepard-Duncan's guilty is nothing more than saying it had done its job in proving her guilt and it was up to the jury to convict her.

The prosecution stating that by law, the jury could have no reasonable doubt of Shepard-Duncan's guilt, was, however inartful, a rhetorical device indicating that until the jury went into the jury room and began deliberating, Shepard-Duncan must be presumed innocent. She was presumed innocent because, until deliberations began, the jury could not weigh the evidence, and thus her presumption of innocence continued to apply uninhibited. It specifically was commenting on the instruction from the trial court that the jury could *not* discuss the evidence until all evidence was submitted. It was not telling the jury that the burden had shifted; it was telling the jury just the opposite: that Shepard-Duncan still enjoyed the full presumption of innocence.

Finally, the prosecution not once injected its personal belief as to Shepard-Duncan's guilt. Shepard-Duncan argues that the prosecution's statement that, "I don't believe that I'm seeing those things here," and

that "it would be hard to imagine a person doing that, *but you [the jury] are the ultimate finder of fact*" somehow amounted to an expression of the prosecution's personal belief. (CD, 12/30/08, p.65 (emphasis added).) A fair reading of this statement clearly indicates that the prosecution is doing two things: (1) it is permissibly commenting on the facts in evidence and (2) it is reminding the jury that it is *the jury's* job to act as fact finder, not anyone else's. Quite the opposite of injecting its own beliefs, here the prosecution is reinforcing to the jury that it is *not* the prosecution's job to do anything besides put the evidence in front of the jury for the jury to make a decision.

Not only was there strong evidence supporting the jury's verdicts, but also the likelihood the jury was improperly affected by the prosecution's choice of language or actions, under the circumstances of this case, was negligible. *Cf. Golob v. People*, 180 P.3d 1006, 1013-14 (Colo. 2008).

In short, the prosecution never once misstated the law or injected its opinion; quite the opposite, it vigorously defended Shepard-Duncan's right to be presumed innocent and reminded the jury of its fact-finding

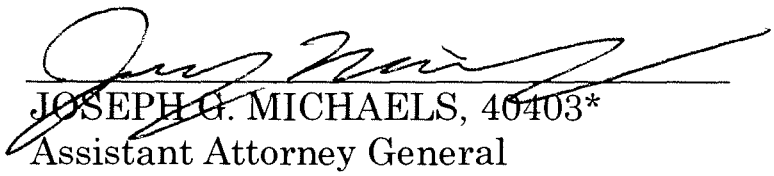
responsibilities. Shepard-Duncan's claims amount to nothing more than an accusation that the prosecution's comments were inflammatory and, consequently, deprived her of his constitutional right to a fair trial. The prosecution did not comment on any of her constitutional rights or misstate the law or its burden or inject its opinion. Consequently, there was no prosecutorial misconduct.

CONCLUSION

For the above reasons, this Court should affirm Shepard-Duncan's convictions.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **MARY BULLARD**, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 31st day of August, 2010.