COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Weld County District Court Honorable Marcelo Adrian Kopcow, Judge Case Number 09CR814	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. VALERIE L. EHRLICK Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender MARK EVANS, #40156 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 09CA2769

OPENING BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE

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

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

Choose one:

☒ It contains 4638 words.

☐ It does not exceed 30 pages.

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

☑ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.___), not to an entire document, where the issue was raised and ruled on, 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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II. Whether the district court erred by denying Ms. Ehrlick's motion for a mistrial after one juror expressed his opinion regarding the merits of the case to four other jurors before the close of evidence?

STATEMENT OF THE CASE AND FACTS

Deputy Dustin Tanner stopped Ms. Ehrlick's vehicle in the early morning hours of May 6, 2009. (09/21/09, pp.118-20) He saw a marijuana pipe in the center console and inquired about the presence of other drugs or paraphernalia. (09/03/09, pp.12-14) Ms. Ehrlick admitted that she had a pipe with her and that she had smoked methamphetamine earlier that day. (09/03/09, p.14) Deputy Tanner then arrested her and found another pipe containing a residual amount of methamphetamine. (09/03/09, p.16; 09/21/09, p.130)

The Weld County District Attorney charged Ms. Ehrlick with one count of possession of one gram or less of a schedule II controlled substance, a class six felony under section 18-18-405(1), (2.3)(a)(I), C.R.S. 2009. Before trial Ms. Ehrlick

submitted a motion to suppress all evidence obtained from her vehicle, arguing that the police had no reasonable suspicion of criminal activity when they stopped her. (Ct. File, pp.38-39) The district court held a hearing on the motion but denied suppression. (09/03/09, p.44)

Twelve jurors plus one alternate were selected to hear Ms. Ehrlick's trial. She chose to withhold her opening statement until after the close of the State's evidence. (09/21/09, p.116) Ms. Ehrlick's theory of defense was that although she was in possession of paraphernalia, she did not know that there was any controlled substance in the pipe. (09/21/09, pp.213-17)

Before the close of evidence, Juror 4 shared his opinion on the merits of the case with several other jurors. (09/21/09, pp.144-68) Ms. Ehrlick moved for a mistrial after she discovered what had occurred. (09/21/09, p.163) The district court interviewed five jurors, dismissed Juror 4, and denied the motion for mistrial. (09/21/09, pp.165-68)

The remaining members of the jury found Ms. Ehrlick guilty of both possession of a schedule II controlled substance and the lesser non-included offense of possession of paraphernalia. (Ct. File, pp.95-96) The district court sentenced her to eighteen months of community corrections, and this appeal ensued. (Ct. File, p.104)

SUMMARY OF THE ARGUMENT

The United States and Colorado Constitutions protect citizens from being seized by their government unless they are reasonably suspected of engaging in criminal activity. Deputy Tanner did not have any reasonable basis to suspect that Ms. Ehrlick was engaged in criminal activity when he stopped her vehicle. Consequently, that stop was constitutionally infirm and any resulting evidence should not have been admitted against her.

Once accused of a crime, citizens also have a constitutional right to a fair trial by unbiased jurors. The jury in Ms. Ehrlick's trial was rendered biased by one juror sharing his opinion of the merits of the case prior to the close of evidence. Ms. Ehrlick could not receive a fair trial under those circumstances, and the district court erred by denying her motion for a mistrial.

Because Ms. Ehrlick's arrest and prosecution was conducted in violation of the protections imparted by the United States and Colorado Constitutions, this Court must reverse her convictions.

ARGUMENT

I. The district court erroneously determined that Ms. Ehrlick's presence in a warehouse district late at night, without any other indicia of criminal activity, amounted to "reasonable suspicion" justifying police initiation of an investigatory stop.

Deputy Tanner was the only suppression hearing witness. He testified that at 2:45 a.m. on May 6, 2009, he was in his patrol car driving westbound on 10th Street in Greeley, Colorado. (09/03/09, p.5) He saw a dark colored vehicle traveling eastbound that turned into a small warehouse district on the south side of the road. (09/03/09, pp.5-6) This "stuck out as being kind of odd[,]" so Deputy Tanner performed a U-turn and entered the same district. (09/03/09, p.6) He was "inquisitive that there might be criminal activity going on, [because] wire thefts and tool thefts are very prevalent, especially in the late hours." (09/03/09, p.6)

Deputy Tanner did not observe any criminal activity prior to approaching Ms. Ehrlick's vehicle. (09/03/09, p.21) He testified: "I mean, there may have been a trespass on the property, because it wasn't an 'open for public' business, that I knew at that time about it." (09/03/09, p.21) He had not, however, seen any signs prohibiting the public from entering the area. (09/03/09, p.29) Deputy Tanner had no knowledge of recent crime in the area, or of any threats to those specific warehouses. (09/03/09, p.25) Instead, he was concerned in a general way about "scouting the place out for a theft, dropping someone off for a theft, may have been

looking to go dump litter, stealing, any number of crimes a person can do in a car." (09/03/09, p.28)

Deputy Tanner observed that after the vehicle entered the area it "made a U-turn like they had forgotten something[,]" and then stopped with its brake lights on. (09/03/09, p.9) The warehouse district was poorly lit and there were no residences nearby. (09/03/09, pp.7-8) The deputy "killed [his] lights to drive in behind" the vehicle, pulled within fifty feet of the vehicle's rear, and then activated all of his overhead lighting and headlights. (09/03/09, pp.10, 19-20) When Deputy Tanner's lights came on he did not see any crimes being committed; just some movement from the driver. (09/03/09, pp.19, 21) Shortly thereafter he approached the car to see if there was a "legitimate reason" for its presence in the area. (09/03/09, p.12) Ms. Ehrlick was the car's only occupant.

After hearing Deputy Tanner's testimony the district court acknowledged that the parties were "in agreement that this was an investigatory stop and not a consensual encounter." (09/03/09, p.39) It then made the following findings:

> The facts of this case, as testified to by Deputy Tanner, are that he is patrolling at 2:45 in the morning and he is by the 6300 block - - between 65th and 71st Avenue, City of Greeley, Weld County, Colorado, where he observes a dark-colored sedan entering into a warehouse district.
>
> And while he doesn't have specific information about this warehouse district being burglarized, that it is routine and

> common for these types of warehouse districts to be the scenes of crimes, including burglaries and thefts.
>
> That he sees this vehicle go into this U-shaped road which could -- which potentially is private property. There's no other vehicles. There's no other people near that area. There's no reason why somebody would be in that area.

(09/03/09, pp.41-42) Based on those facts, the district court found that Deputy Tanner was justified in initiating an investigatory stop. (09/03/09, p.42)

A. Standard of Review

Ms. Ehrlick preserved this issue for appellate review by filing a motion to suppress all evidence obtained through an illegal stop. (Ct. File, pp.38-39) The district court held a hearing on the motion but denied suppression. (09/03/09, pp.39-43)

Whether a trial court correctly ruled on a motion to suppress evidence is a mixed question of fact and law. This Court defers to a trial court's findings of fact if supported by competent evidence in the record. *Outlaw v. People*, 17 P.3d 150, 155 (Colo. 2001). However, this Court reviews a trial court's legal conclusions de novo, and must correct legal conclusions contradicted by the uncontroverted evidence. *See id.*

B. Applicable Law

Citizens have a right to the possession and control of their own persons, free from all restraint and interference by others, unless authorized by law. *See Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *People v. Nelson*, 172 Colo. 456, 459, 474 P.2d 158, 159 (1970) (quoting same). To preserve that right, the prohibitions on unreasonable searches and seizures in both the Fourth Amendment to the United States Constitution and Article II, section seven, of the Colorado Constitution, apply to not only formal arrests but also lesser forms of police intrusion. *See Terry*, 392 U.S. at 16-17; *People v. D.F.*, 933 P.2d 9, 18 (Colo. 1997).

An investigatory stop is an intermediate form of police response short of custodial arrest. *People v. Pacheco*, 182 P.3d 1180, 1183 (Colo. 2008). "Before making an investigatory stop, an officer must have an articulable and specific basis in fact for suspecting that the individual is committing, has committed, or is about to commit a crime." *People v. Padgett*, 932 P.2d 810, 814 (Colo. 1997). Simple "good faith" on the part of the officer is not enough. *Terry*, 392 U.S. at 22. Rather, three conditions must exist for a constitutionally permissible investigatory stop: (1) the officer must have a reasonable suspicion that criminal activity has occurred, is taking place, or is about to take place; (2) the purpose of the intrusion must be reasonable; and (3) the scope and

character of the intrusion must be reasonably related to its purpose. *Padgett*, 932 P.2d at 814-15.

A police officer's unarticulated hunch that criminal activity has occurred does not amount to the reasonable suspicion necessary to support an investigatory stop. *People v. Greer*, 860 P.2d 528, 530-31 (Colo. 1993). Rather, the officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. Those facts must provide a "basis for suspecting that *a particular crime* was being committed by [the suspect] at the time he was detained." *See United States v. Davis*, 94 F.3d 1465, 1470 (10th Cir. 1996) (emphasis added). When courts evaluate whether an investigatory stop was valid, they take into account the facts and circumstances known to the officer at the time of the stop. *See Padgett*, 932 P.2d at 815.

Presence in a high-crime area is not a circumstance amounting to reasonable suspicion that an individual is engaged in crime. For instance, in *People v. Greer* the Colorado Supreme Court found that a police officer surveilling a bar "infamous and well known" for narcotics sales did not have reasonable suspicion to stop an individual observed in its parking lot. 860 P.2d 528, 529 (Colo. 1993). The defendant had exited a car, met with three men in the parking lot, and bent her arm upward during the meeting. *Id.* As the men walked away the officer saw one of them placing

currency into his pocket. *Id.* The officer based his suspicion of criminal activity on his experience as a police officer; the conduct of the defendant, the currency in the hands of the man when he turned around, and the fact that the establishment was infamous for narcotics sales. *Id.* at 530.

The Colorado Supreme Court affirmed the district court's finding that the officer did not have reasonable suspicion to stop the defendant. In doing so, the court emphasized that the officer had no information regarding the individual defendant, such as a history of drug activity. *Id.* at 531. It noted that an area's reputation for drug trafficking can support an officer's decision to initiate a stop. *Id.* The court made clear, however, that "[a] history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality." *Id.* (quotations omitted).

Being outside late at night also does not, by itself, amount to reasonable suspicion of criminal activity. In *People v. Padgett*, police were observing two men walking at 1:50 a.m. when one of them stumbled while crossing an icy street. 932 P.2d at 812. When the men saw the officers approaching, one of them walked away rapidly. *Id.* The Colorado Supreme Court implicitly found that the hour of day, even when combined with other arguably suspicious behavior such as stumbling and walking away from police, did not justify detaining the individuals. *Id.* at 815-16. The

officer's suspicion that "something didn't look right" simply was not enough to justify an investigatory stop. *See id.* at 815.

C. Application

The fact that Ms. Ehrlick was in a warehouse district late at night was not sufficient to justify stopping her. Colorado courts long ago rejected the idea that late-night travels are inherently suspicious. *See, e.g., Padgett*, 932 P.2d at 812, 815-16. Reports of crime in an area can factor into an officer's decision to initiate a stop. *Greer*, 860 P.2d at 531. However, no such reports existed here. Instead, Deputy Tanner testified that he did not have any information indicating that the individual warehouses in this case had ever been a locus of crime. (09/03/09, p.25) The district court effectively ruled that because crimes frequently occur at warehouses in general, Ms. Ehrlick's presence at this particular warehouse was sufficient to create suspicion of criminal activity. The applicable precedent of Colorado courts, however, does not support that conclusion.

Instead, the Colorado Supreme Court has made clear that even a strong nexus between an individual location and criminal activity does not always generate reasonable suspicion. The establishment where the *Greer* defendant was observed was "infamous and well known" for narcotics sales, and the defendant was seen engaged in behavior consistent with a narcotics transaction. *See* 860 P.2d at 529. If

observations of such behavior — taking place in the parking lot of an establishment specifically known as a place of narcotics transactions — are not sufficient to provide reasonable suspicion, then observations of an individual's mere presence in the vicinity of a warehouse not known for any type of crime cannot be sufficient. *See id.* at 529, 531.

The *Greer* court also emphasized the importance of an officer's knowledge about the individual being observed prior to initiation of an investigatory stop. *Id.* at 531. As in *Greer*, here Deputy Tanner never testified that he knew anything about Ms. Ehrlick or her vehicle prior to initiating the investigatory stop. He had no reason — other than her location and the time of day — to suspect that she was engaged in any criminal activity.

The evidence presented at the suppression hearing did not support a finding that Ms. Ehrlick was trespassing on private property. Deputy Tanner never saw a "no trespassing" sign, never testified that the warehouse district was closed to the public at any time of day, and never accused Ms. Ehrlick of trespassing. (09/03/09, p.29) Indeed, the district court was not certain whether the warehouse was even on private property. (09/03/09, p.42) Such unverified hunches cannot support a finding of reasonable suspicion.

The district court incorrectly analogized the facts in this case to those in *People v. Rushdoony*. (09/03/09, pp.40-41) The defendant in *Rushdoony* was found "dumpster diving" behind a shopping mall at 3:30 a.m. 97 P.3d 338, 341 (Colo. App. 2004). A division of this Court found that the arresting officer had reasonable suspicion to stop him. In doing so, it relied on the fact that: (1) several burglaries had occurred at businesses in the immediate vicinity in the past two weeks, and (2) the defendant immediately backed away from the dumpster upon seeing the officer. *Id.* at 343. Here, Deputy Tanner had no such specific information regarding the warehouse district where Ms. Ehrlick was found, and Ms. Ehrlick did not attempt to flee upon seeing him. Thus, the district court erred by relying on *Rushdoony* to justify its denial of Ms. Ehrlick's suppression motion.

Deputy Tanner's testimony indicated that he did not suspect that Ms. Ehrlick was engaged in any particular crime. During the brief suppression hearing he stated he was concerned about: (1) wire thefts, (2) tool thefts, (3) trespass, (4) "scouting the place out for a theft," (5) "dropping someone off for a theft," (6) littering, (7) stealing, (8) "any number of crimes a person can do in a car[,]" and (9) "[a]ny number of things." (09/03/09, pp.6, 21, 24, 28) His "Warrantless Affidavit" mentioned only: "Due to the location being remote, the late hours, and the slow driving of the car, Tanner suspected that criminal activity was going to happen."

(Ct. File, pp.1-2) Such an extensive list of concerns illustrates that Deputy Tanner was not concerned about anything in particular. Such generalized hunches do not amount to reasonable suspicion necessary to justify an investigatory stop. *See Terry*, 392 U.S. at 27; *Davis*, 94 F.3d at 1470.

In sum, the court's recitation of its findings indicated that it based its denial of Ms. Ehrlick's motion to suppress on the fact that Deputy Tanner observed her: (1) at 2:45 a.m., (2) in a warehouse district, and (3) without any other vehicles or people around. (09/03/09, pp.41-42) Ms. Ehrlick does not dispute those facts. Those facts, however, did not amount to a reasonable suspicion of criminal activity, and did not justify Deputy Tanner detaining her. Because the district court erroneously denied Mr. Ehrlick's motion to suppress evidence found as a result of that detention, this Court must reverse her convictions.

II. The district court erred by denying Ms. Ehrlick's motion for a mistrial after one juror expressed his opinion regarding the merits of the case to four other jurors before the close of evidence.

After lunch on the only day of trial, the court clerk reported that she overheard one of the jurors reference Ms. Ehrlick's case while dining with three others. (09/21/09, pp.144-45) Specifically, she heard one male juror tell three females: "This is a clear-cut and dry case." (09/21/09, p.145) At the time the comment was made

the jury had heard the prosecution's opening statement and testimony from Deputy Tanner, the State's primary witness.

This district court brought in Juror 4 — the one overheard at lunch — and asked whether he had commented about the case to any other jurors. (09/21/09, p.147) Juror 4 responded by discussing a different instance in which he had done so. (09/21/09, pp.146-47) He reported that during a morning restroom break he asked Juror 5: "Why is there a jury trial for something of this nature?" (09/21/09, pp.147-48)

The court clarified that it was asking whether there were "some other women that you spoke to regarding the strength of the case." (09/21/09, p.148) Juror 4 replied: "I made the statement, I said I thought it was a cut and dry case." (09/21/09, p.148) He explained that what he meant by saying that was: "I'm assuming on the information that I have heard, as to this particular point, that the police officer caught this young lady with something she wasn't supposed to have." (09/21/09, p.148)

The court interviewed the three female jurors who lunched with Juror 4. The first, Juror 9, confirmed that Juror 4 had offered his opinion that: "it's a cut and dry case." (09/21/09, p.152) The second, Juror 3, did not hear Juror 4 say anything. (09/21/09, pp.155-56) The third, Juror 13, overhead someone say that the case "was

like a slam dunk deal." (09/21/09, p.158) All three women, when asked by the court whether Juror 4's words would affect their ability to serve as jurors, replied that they would not. (09/21/09, pp.153, 156-59)

Juror 5, to whom Juror 4 spoke during the morning break, was then called by the district court. He appeared to be nervous, and elicited an assurance from the court that he was "not in trouble." (09/21/09, pp.161, 166-67) He could not remember what was said, but when asked whether it pertained to the strength of the case, replied that it did not. (09/21/09, p.160) The court then prompted him: "I assume you're going to follow the Court's orders, including that you cannot make any decisions about the case until final deliberations . . . ?" (09/21/09, p.161) Juror 5 said: "I will." (09/21/09, p.161)

The court did not inquire whether the other jurors had been affected. It dismissed Juror 4 and proceeded to conduct the trial with the remaining twelve. (09/21/09, pp.165-66)

A. Standard of Review

Ms. Ehrlick preserved this issue for appellate review by moving for a mistrial based on jurors' discussion of the case before the close of evidence. (09/21/09, p.163) The district court denied the motion. (09/21/09, p.165)

Trial courts generally have broad discretion when deciding to grant or deny a motion for mistrial. *People v. Abbott*, 690 P.2d 1263, 1269 (Colo. 1984).

Where a trial court denies a motion for mistrial after an error of constitutional dimension, this Court applies the constitutional harmless error standard of review. *People v. Santana*, 240 P.3d 302, 309 (Colo. App. 2009) (*cert. granted* July 19, 2010). Under that standard, a defendant is entitled to a new trial where the underlying error cannot be deemed harmless beyond a reasonable doubt and a subsequent motion for mistrial was denied. *See id.*

In the absence of a constitutional violation, a trial court's exercise of its discretion must be overturned upon a clear showing that it abused that discretion and the defendant was prejudiced. *Bloom v. People*, 185 P.3d 797, 807 (Colo. 2008).

B. Applicable Law

Juror deliberation prior to the close of evidence impinges upon criminal defendants' right to a fair trial, as guaranteed by the United States and Colorado Constitutions. *See* U.S. Const. amends VI, XIV; Colo. Const. art. II, §§ 16, 25; *People v. Preciado-Flores*, 66 P.3d 155, 166 (Colo. App. 2002). Consequently, juror predeliberation amounts to constitutional error. *See People v. Flockhart*, __ P.3d __, __, 2009 WL 4981910, *3 (Colo. App. No. 07CA312, Dec. 24, 2009) (regarding jury

instructions allowing predeliberation); *Huff v. State*, 519 S.E.2d 263, 268 (Ga. Ct. App. 1999) (applying the constitutional harmless error standard to actual predeliberation).

Courts have recognized a number of reasons for the prohibition on premature deliberations in criminal cases, several of which are directly applicable here. First, since the prosecution's evidence is presented first, initial impressions formed by the jurors are likely to be unfavorable to the defendant, and there is a tendency for jurors to pay greater attention to evidence that confirms their initial opinions. *Commonwealth v. Kerpan*, 498 A.2d 829, 831 (Pa. 1985). Second, the defendant is entitled to have his case considered by the jury as a whole, not by separate groups or cliques that might be formed among jurors prior to the conclusion of the case. *Id.* Third, jurors might form premature conclusions without having the benefit of the court's instructions concerning what law they are to apply to the facts of the case. *Id.* at 831-32. Fourth, jurors might form premature conclusions without having heard the final arguments of counsel on both sides. *Id.* at 832. Finally, because a juror's prematurely formed opinion can only be removed, if at all, by evidence from the defendant, premature deliberations can shift the burden of proof and place upon the defendant the burden of changing by evidence the opinion thus formed. *Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir. 1945).

A division of this Court has held that merely instructing a jury that it can deliberate before the close of evidence is constitutional error. *Flockhart*, 2009 WL 4981910 at *3. Such instructions create a presumption of prejudice to the defendant that can only be rebutted by proof from the State that premature deliberations did not occur. *Id.* at *6.

Where predeliberation has occurred, reversal is required unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. *See id.* at *6-*8. The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original); *Griego v. People*, 19 P.3d 1, 9 (Colo. 2001).

C. Application

Juror 4 shared his opinion regarding Ms. Ehrlick's case with at least four other jurors prior to the close of evidence. These acts were premature deliberation, and were constitutional error. *See Flockhart*, 2009 WL 4981910 at *3-*4. Thus, the only question for this Court is whether that error was harmless beyond a reasonable doubt.

Juror 4's comments keenly illustrate the dangers associated with premature deliberation. He spoke with his fellow jurors after hearing only the prosecution's

opening statement and the testimony of Deputy Tanner, its star witness against Ms. Ehrlick. Juror 4's impression at that point, as he implicitly acknowledged to the district court, was unfavorable to Ms. Ehrlick. *See Kerpan*, 498 A.2d at 831. (09/21/09, p.149) His insistence on talking about the case with only small groups of other jurors — once with another man and once with three women — subjected Ms. Ehrlick to the possibility of decision making by clique rather than by the jury as a whole. *See id.* Juror 4's comments came before he heard the closing arguments of counsel, and with them Ms. Ehrlick's theory of the case. *See id.* at 831-32. Finally, by sharing his impressions with other jurors, he created a situation where their opinions could not be swayed except upon presentation of evidence by Ms. Ehrlick, thus impermissibly shifting the burden of proof. *See Winebrenner*, 147 F.2d at 328.

It is unrealistic to believe that Juror 4's words did not impact the verdict reached by the remaining jurors. Although Juror 5 did not remember exactly what was said, Juror 4 indicated that he called on Juror 5 to question why a jury was even necessary in this type of case. (09/21/09, pp.147-48, 160-61) Juror 5's nervous assurances — prompted by the district court's leading questions — did little to illustrate that he could approach Ms. Ehrlick's case with an open mind. (09/21/09, pp.161-62) Additionally, at least two of the female jurors heard that the case was either "cut and dry" or "a slam dunk deal." (09/21/09, pp.152, 158)

Juror 4's premature deliberations were the first opinions circulated among the jurors. Because Ms. Ehrlick chose to deliver her opening statement after the close of the State's case, the jury knew nothing of her theory of defense prior to Juror 4's acts. The district court inadvertently emphasized the importance of Juror 4's opinion by calling jurors individually from the jury room, questioning them about Juror 4, and then discharging Juror 4. (09/21/09, pp.151-62, 168) Under such circumstances, Juror 4's words could not have been set aside by the affected jurors.

Juror 4 may have predeliberated with more than the four jurors interviewed by the district court. Although the court stated that it had no evidence that "any other jurors heard Juror No. 4 say anything inappropriate[,]" it had equally little evidence that they did not. (09/21/09, p.165) The fact that Juror 4 managed to talk to four other jurors about the case raises the possibility that he talked to more.

Contrary to Juror 4's opinion, this case was not "cut and dry." (09/21/09, p.148) Although Ms. Ehrlick admitted in argument that she was in possession of paraphernalia, she vehemently disputed that she was in knowing possession of a controlled substance. (09/21/09, pp.211-12) The miniscule amount of residue found in the pipe led credence to her claim that she did not know that she had any methamphetamine in the car. (09/21/09, pp.180-81, 215-16) In order to fairly

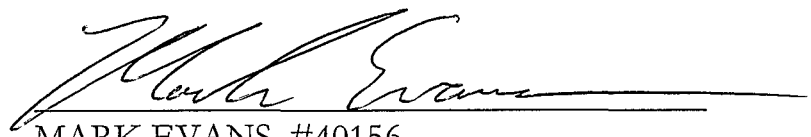
evaluate that theory of defense, however, the jury had to be able to look beyond the "cut and dry" facts — precisely what Juror 4 asked at least four of them not to do.

In sum, the record does not allow this Court to find that the verdict in this case was not attributable to Juror 4's acts of predeliberation. Consequently, this Court must reverse Ms. Ehrlick's convictions and remand this case for a new trial.

CONCLUSION

Based on the arguments and authorities above, Ms. Ehrlick respectfully requests this Court vacate her convictions for both possession of a controlled substance and possession of paraphernalia, and remand this case for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on January 4, 2011, 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.