COURT OF APPEALS STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
District Court for Weld County Honorable Marcelo A. Kopcow, Judge Case No. 09CR814	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. VALERIE L. EHRLICK, Defendant-Appellant.	▲**COURT USE ONLY**▲ Case No. 09CA2769
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PEOPLE'S 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).

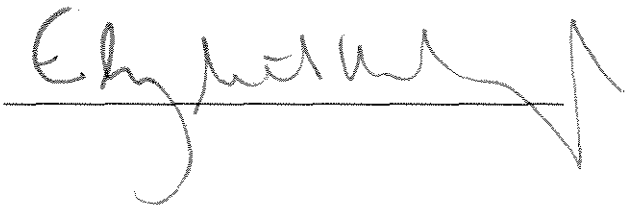
It contains 4029 words.

It does not exceed 30 pages.

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

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.

The brief also contains statements concerning both the standard of review and preservation of the issue for appeal.



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INTRODUCTION

The Defendant, Valerie L. Ehrlick, was convicted of possession of less than a gram of methamphetamine and of possession of drug paraphernalia. She is presently on probation.

On direct appeal of her convictions, the Defendant argues that the trial court erred: 1) by denying a motion to suppress; and 2) by denying a motion for mistrial based upon a juror's misconduct.

STATEMENT OF THE FACTS

On May 6, 2009, the Defendant was contacted by a deputy sheriff after her car was observed in a remote warehouse district late at night (9/21/09, pp. 118-23). The deputy observed a pipe in plain view as he approached the Defendant's car (9/21/09, pp. 124-25). A search of the car uncovered another pipe; testing demonstrated that that pipe contained methamphetamine residue (9/21/09, pp. 130-31, 176-78).

Further facts will be provided as needed.

STATEMENT OF THE CASE

On May 15, 2009, the Defendant was charged with possession of one gram or less of methamphetamine (court file, pp. 13-14). On or about July 16, 2009, the Defendant, through counsel, filed motions to suppress alleging that her contact with the police had been an illegal seizure and that statements she made were inadmissible (court file, pp. 38-39, 40-41). A suppression hearing was set for August 14, 2009, but the Defendant failed to appear for the hearing (8/14/09, p. 2). The suppression motions were heard, and denied by the trial court in an oral ruling, on September 3, 2009 (9/3/09, pp. 39-44). The court's determination that the Defendant's contact with the officer was supported by reasonable suspicion is the subject of Argument I.

After the lunch break of the one-day trial on September 21, 2009, a juror reported that another juror had made a comment over lunch that the case was "cut and dry" in violation of the court's order not to discuss the case before its conclusion (9/21/09, pp. 144-45). After the jurors involved were interviewed individually in chambers (9/21/09, pp.146-162), the trial court denied defense counsel's request for a

mistrial but granted his request to dismiss the juror who had acted inappropriately (9/21/09, pp. 163-67). That ruling is the subject of Argument II.

At the request of the defense, the jury was instructed on the lesser non-included offense of possession of drug paraphernalia in addition to the charged offense of possession of methamphetamine (court file pp. 89, 91; 9/21/09, pp. 189-91). After deliberations, the jury convicted on both counts (court file, pp. 95, 96).

Although the Defendant was initially sentenced to community corrections for 18 months (11/10/09, pp. 11-14), that sentence was modified, and she is presently on probation pursuant to a drug court program.

SUMMARY OF THE ARGUMENT

1. The police officer had reasonable suspicion to initiate contact with the Defendant based upon her presence in a remote warehouse district in the middle of the night and the officer's knowledge that such

circumstances indicate that a burglary or theft might be contemplated or in progress.

2. The trial court appropriately exercised its discretion in denying the request for the drastic remedy of mistrial and instead dismissing a juror who had made inappropriate comments, such as that the case was "cut and dry," to other jurors.

ARGUMENT

I. The police officer had reasonable suspicion to initiate contact with the Defendant based upon her presence in a remote warehouse district in the middle of the night and the officer's knowledge that such circumstances indicate that a burglary or theft might be contemplated or in progress.

The Defendant first argues that her contact with the deputy sheriff constituted an illegal seizure.

Standard of review. The People agree that an appellate court defers to the trial court's findings of fact, but it reviews conclusions of law *de novo,* within the totality of the circumstances. *People v. Garcia,* 11 P.3d 449, 453 (Colo. 2000). The People also agree that the claim was

preserved by defense counsel's arguments and the trial court's ruling denying them (9/3/09, pp. 30-36, 39-44).

Factual background. The Defendant, through counsel, filed a motion to suppress alleging that her contact with the police had been an illegal seizure (court file, pp. 38-39). One witness testified at the motions hearing held on September 3, 2009 (9/3/09, pp. 5-29). As relevant to this issue, the testimony was as follows:

Deputy Dustin Tanner testified that he was on patrol at 2:45 a.m. on May 6, 2009 when he observed a car turn into a poorly lit warehouse district; he was unaware of any residences in the area (9/3/09, p. 6). He indicated that this aroused suspicion because "wire theft and tool thefts are very prevalent, especially in the late night hours" (9/3/09, pp. 6, 9). Deputy Tanner turned his patrol car around and went into the horseshoe-shaped drive of the warehouse area (9/3/09, p. 6, 18). After driving once through the area, Deputy Tanner saw the car, the only vehicle around, parked but with its lights still on (9/3/09, pp. 9, 19). Deputy Tanner turned off all of the lights on his patrol car, approached the suspicious car, and illuminated all of his lights,

including his overhead red and blue lights (9/3/09, pp. 9, 20). Deputy Tanner saw the female driver, of the car, moving around in the car (9/3/09, pp. 9, 21).

Deputy Tanner called dispatch and reported a suspicious vehicle, described it, and gave the license plate number (9/3/09, pp. 11, 22). He approached the car, and noticed a marijuana pipe on the center console (9/3/09, pp. 12, 23). He introduced himself to the driver and asked what she was doing (9/3/09, pp. 12, 13). She said she was looking for her boyfriend who had a shop in the area, and that she lived nearby (9/3/09, p. 13). Deputy Tanner obtained her driver's license, registration, and proof of insurance and "ran a clearance on her" while waiting for a backup officer to arrive (9/3/09, pp. 13, 23-24).

On cross examination, Deputy Tanner agreed that, before initiating contact with the driver, he had not actually seen any crimes being committed (9/3/09, pp. 19, 21). He also agreed that although he was concerned about possible theft of tools or wire, he had no knowledge concerning the contents of the warehouses (9/3/09, p. 24). On redirect examination, he stated that he was concerned that the activity he

observed might be consistent with "scouting the place out for a theft, dropping someone off for a theft, may have been looking to go dump litter, stealing, any numbers of crimes a person can do in the car" and that such crimes often occur in isolated locations (9/3/09, p. 28). Deputy Tanner indicated that he believed the roadway to be private property, although he admitted on re-cross examination that he did not recall seeing any "no trespassing signs" (9/3/09, pp. 28, 29).

Trial court's ruling. In denying the Defendant's claim that an illegal seizure had occurred, the trial court set forth the applicable law and indicated that it considered *People v. Rushdoony,* 97 P.3d 338 (Colo. App. 2004) to be the case most similar to the present one (9/3/09, pp. 39-40). The court concluded:

> 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.
>
> And so the officer is doing his job. He's suspicious that this activity is unusual, given the totality of the circumstances. And arguably, if something did happen, and he didn't respond to that suspicious activity, I imagine the officer could have easily been criticized by members of the community why he didn't take any action, because the activity was so suspicious.
>
> So he puts his lights on and he sees the driver doing some type of movement inside of the car. Reaching over. And that also piques his curiosity because that's unusual behavior. She's alone in this warehouse district that's dark where nobody is there.
>
> And so it seems to me, based on the facts of this case, that the prosecution, based on the totality of the circumstances, has met their burden that there is a reasonable suspicion that criminal activity could be taking place.

(9/3/09, pp. 41-42).

Legal standards and analysis. The Fourth Amendment to the United States Constitution proscribes all unreasonable searches and seizures. U.S. Const. amend. IV. Colorado has recognized three types

of citizen-police encounters: 1) arrest; 2) investigatory stop; and 3) consensual interview. *People v. Melton*, 910 P.2d 672, 676 (Colo. 1996).

Arrests and investigatory stops are seizures and implicate constitutional protections; therefore, they must be justified, respectively, by probable cause and reasonable articulable suspicion of criminal activity. *People v. Paynter*, 955 P.2d 68, 72 (Colo. 1998). A defendant has the burden of going forward with evidence of an impermissible seizure; specifically, the defendant must show: 1) the point at which he was seized within the meaning of the Fourth Amendment; and 2) that the seizure was unconstitutional. *Outlaw v. People,* 17 P.3d 150, 155 (Colo. 2001).

As a preliminary matter, the People note that this Court could determine, on *de novo* review, that the Defendant's initial contact with the deputy was a consensual interview. Although the deputy had turned on the red and blue lights on his patrol car in addition to the spotlight prior to approaching the Defendant's car, the Defendant's car was already parked when he did so. *See People v. Paynter,* 955 P.2d at 70 (no seizure occurred where an officer parked his patrol car behind a

vehicle, turned on his spotlight, walked up to the vehicle and asked the occupants for identification); *cf. Outlaw v. People,* 17 P.3d at 156 (where officers in a patrol car followed a pedestrian down a sidewalk at extremely close range and then summoned him to the patrol car, defendant was seized at the moment the officers summoned him to the patrol car).

Alternatively, a police officer may stop a person for investigatory purposes and conduct a limited search of the person for weapons with less than probable cause to arrest. *People v. Sutherland*, 886 P.2d 681, 686 (Colo. 1994). The determination of whether reasonable suspicion exists to justify an investigatory stop focuses on whether, based on the totality of the circumstances, there are specific, articulable facts known to the officer which, taken together with reasonable inferences from those facts, create a reasonable suspicion of criminal activity justifying an intrusion into a defendant's personal security. *People v. Salazar*, 964 P.2d 502, 505 (Colo. 1998).

"Reasonable suspicion is both a qualitatively and quantitatively lower standard than probable cause. That is, it can be supported both

by less information and by less reliable information than is necessary to establish probable cause." *People v. King*, 16 P.3d 807, 813 (Colo. 2001). In other words, reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

In arguing that the deputy had no reasonable suspicion to justify an investigatory stop, the Defendant relies principally on *People v. Greer,* 860 P.2d 528 (Colo. 1993). That case stands for the proposition that mere presence in a high crime area is insufficient to justify an investigatory stop. *Id.* at 531-32. However, it has been distinguished in subsequent cases such as *People v. Canton*, 951 P.2d 907 (Colo. 1998) and *People v. Rushdoony,* 97 P.3d 338 (Colo. App. 2004).

In *People v. Rushdoony,* 97 P.3d 338, 343 (Colo. App. 2004), a panel of this Court concluded that the facts and circumstances supported a "minimal level of objective suspicion" that a defendant was committing, had committed, or was about to commit a criminal act. In that case, at 3:30 a.m., in a dark area behind a store in a shopping center where there had been recent burglaries, Rushdoony was digging

in a dumpster, and, upon seeing the police car, pulled away from the dumpster and toward a parked car. *Id.* As the trial court noted in the present case, while the facts here are not identical, the *Rushdoony* case supports a conclusion that there was reasonable suspicion for the contact here. Not only did the deputy know that that there were on-going reports of thefts of wire and tools from such locations, but the Defendant was present in the middle of the night "in a dark area not usually frequented by the public." *See id.* Thus, under the facts and circumstances presented here, the deputy's contact with the Defendant would constitute a permissible investigatory stop because he had reasonable suspicion that she might be engaged in criminal activity, despite the fact he had not observed any actual criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 28 (1968) (officers' observations of three men repeatedly passing by a store window constituted reasonable suspicion that the men were contemplating a robbery).

II. The trial court appropriately exercised its discretion in denying the request for the drastic remedy of mistrial and instead dismissing a juror who had made inappropriate comments, specifically that the case was "cut and dry," to other jurors.

The Defendant also argues that the trial court should have granted her motion for mistrial.

Standard of review/preservation of claim. The People generally agree that the standard of review is abuse of discretion. A mistrial is a drastic remedy, and a trial court's ruling on a motion for mistrial will not be disturbed on appeal absent a gross abuse of discretion. *People v. Lehmkuhl,* 117 P.3d 98, 104 (Colo. App. 2004). The People also agree that the claim was preserved by defense counsel's motion for mistrial and the trial court's ruling denying it (9/21/09, pp. 163-67).

Factual background. The record reflects that after the jurors was selected and sworn, the trial court specifically instructed them

> ...you're not to discuss this case among yourselves while the evidence is being presented to you. The first time that you'll be allowed to discuss this case among yourselves is after you

> have heard all of the evidence, the instructions of the Court, the closing arguments of counsel, and you have retired to the jury room and selected a jury foreperson.

(9/21/09, p. 109). They were also instructed, "Should any juror or anyone else attempt to discuss the case with you, please notify Ms. Elkins or Ms. Duran [the judge's judicial assistants] or myself immediately" (9/21/09, p. 110). After the lunch break, Ms. Duran reported to the court and counsel that a female juror had reported that a male juror had said to her and two other female jurors over lunch that the case was "cut and dry" (9/21/09, pp. 144-45). The jurors involved were interviewed individually in chambers (9/21/09, pp.146-162).

Juror No. 4, when asked if he had made any statements regarding the case to other jurors, stated that, during the first break, he had said to a man, Juror No. 5, "Why is there a jury trial for something of this nature?" (9/21/09, pp. 148-49). When asked if he had made comments to women jurors over the lunch hour, Juror No. 4 remembered that he had stated, "I thought it was a cut and dry case" (9/21/09, p. 149). He denied that he had already made up his mind about the guilt or innocence of the Defendant (9/21/09, pp. 149-50).

Juror No. 4 observed, "Again, I don't know that for a fact, so I have a tendency to open mouth and insert foot" (9/21/09, p. 150). He affirmed that he thought he could fairly listen to the rest of the evidence and evaluate the case (9/21/09, pp. 150-51).

Juror No. 9 reported that, during lunch, Juror No. 4 had said to her and two other jurors that the case was "cut and dry" and that she and the others had not responded to that comment (9/21/09, p. 152). She indicated that the statement was not going to affect her and that she felt "he was totally out of order" (9/21/09, p. 153). After Juror No. 9 said, "I'm going to hear both sides of the story," she assured the court and counsel that she would hold the prosecution to its burden of proof (9/21/09, pp. 153-54). The court thanked her for coming forward with the matter, and Juror No. 9 responded, "It was the right thing to do" (9/21/09, p. 154).

Juror No. 3 stated that she did not remember any comments made by Juror No. 4 and offered that perhaps she had not been paying attention (9/21/09, pp. 155-56). Juror No. 3 assured the court that she

would not evaluate the case until she had heard all of the evidence (9/21/09, pp. 156-57).

Juror No. 13 indicated that she had not been paying attention; she recalled hearing another juror say, "Should we report him," and had thought that the reference was to a waiter but she remembered that she heard "it was like a slam dunk deal" (9/21/09, p. 158). Juror No. 13 assured the court that the statement would not affect her ability to be fair and impartial, and that she would not evaluate the case until she had heard all of the evidence (9/21/09, pp. 158-59).

Based on Juror No. 4's statements, Juror No. 5 was also questioned.

Juror No. 5 stated that he remembered speaking to Juror No. 4 during a break in a hallway but that "it wasn't really that much about the case" and he didn't remember what was said (9/21/09, pp. 160-61). Juror No. 5 affirmed that he would follow the court's orders and not make any decisions about the case until final deliberations (9/21/09, pp. 161-62).

After the jurors had been questioned, defense counsel moved for a mistrial; alternatively, he requested that Juror No. 4 be excused (9/21/09, pp. 163-65). The trial court ruled:

> First, the Court is going to deny the motion for a mistrial, finding there's not a manifest necessity for it. The three jurors -- female jurors who had lunch with the defendant indicated that they can be fair, they can be impartial, that what Juror No. 4 told them is not going to be considered by them, that they can make up their own independent minds once all the evidence and closing arguments are concluded.
>
> And so I don't believe that there's good cause to grant the mistrial. I believe that the defendant can still have a fair and impartial trial and fair and impartial jury.
>
> The Court is going to grant the request to excuse Juror No. 4 based on the comments that I have heard from him and from the three ladies he had lunch with -- the three jurors he had lunch with. He's not only violated a court order, he has already made up his mind, notwithstanding some of the comments he made when I was questioning him as to the strength of the case and the defendant's guilt.
>
> So I think it's an appropriate remedy to excuse him, and we'll use the alternate in place of him. Okay?

(9/21/09, pp. 165-66).

Defense counsel then renewed his request for mistrial regarding the contact with Juror No. 5, arguing that that juror had seemed extremely nervous (9/21/09, pp. 166-67). With regard to that request, the trial court ruled:

> Based on my review of everything, it seems to me Juror No. 5, the male did appear to be nervous, but there's no evidence that I can conclude, implicit or express, that he cannot be a fair and impartial juror.
>
> He indicated that he doesn't remember what the defendant (sic) said, and he's going to wait until final deliberations until he makes a decision. And I understand he's nervous, because he's talking to a judge in chambers. But I don't have any credible evidence that he's not being truthful to the Court.
>
> So the Court is going to deny the motion for a mistrial and grant the motion to excuse Juror No. 4.

(9/21/09, p. 167). The court then excused Juror No. 4 (9/21/09, p. 168).

Legal standards and analysis. Mistrial is a drastic remedy that is warranted only where the prejudice to the defendant is so substantial that its effect on the jury cannot be remedied by any less extreme measure. *People v. Raglin*, 21 P.3d 419, 422 (Colo. App. 2000). Whether to declare a mistrial is committed to the sound discretion of

the trial court, and its ruling cannot be disturbed on appeal absent an abuse of that discretion and prejudice to the defendant. *Id.*

"[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Smith v. Phillips,* 455 U.S. 209, 217 (1982) (presence on jury of juror who during trial submitted employment application to prosecutor's office for investigator position did not violate due process). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*

Accordingly, juror misconduct will serve as grounds for a new trial where it materially affects the substantial rights of a party so as to prevent a fair and impartial trial. *People v. King,* 121 P.3d 234, 241 (Colo. App. 2005). In evaluating a claim of juror misconduct, a reviewing court cannot reverse the trial court's determination absent an abuse of discretion and a showing by the defendant that he was prejudiced by the alleged misconduct. *Id.* "The prejudicial effect of the

alleged misconduct is a question of fact to be determined in light of all of the circumstances of the trial." *Id.* Findings of fact cannot be set aside unless they are clearly erroneous or not supported by the record. *People v. Vazquez*, 106 P.3d 1039, 1040 (Colo. 2005).

Citing *People v. Flockhart,* 07CA312 (Colo. App. Dec. 24, 2009), *cert. granted,* Feb. 22, 2011, the Defendant argues that Juror No. 4's comments were acts of premature deliberation amounting to constitutional error (opening brief at 18). However, the court in that case concluded that "instructing the jury that it may engage in predeliberation discussion of the case is constitutional error, requiring application of the harmless beyond a reasonable doubt standard." *People v. Flockhart,* 2009 WL 4981910 at 3. No such error occurred here; on the contrary, the trial court appropriately instructed the jurors that they were not to engage in predeliberation discussion. Thus, the Defendant's reliance on *Flockhart* is misplaced.

In this case, the trial court appropriately exercised its discretion in dismissing Juror No. 4, the juror who had made the offending comments. However, it properly assessed the responses and demeanors

of the jurors to whom the comments had been made, and determined, as a factual matter, that the other jurors had not been affected by the comments. The only juror who really paid attention to the offending juror appears to have been the individual who reported the matter, and she indicated that she would not consider what she had heard from him, as did the other jurors. Thus, under the circumstances, the trial court acted appropriately in concluding that the Defendant's right to a fair and impartial jury had not been prejudiced and a mistrial was not warranted. *See People v. Manzanares,* 942 P.2d 1235, 1238-39 (Colo. App. 1996) (trial court did not abuse its discretion in denying motion for mistrial based on alleged juror misconduct where juror who was subsequently discharged had expressed to other jurors that he knew the defendant's father and a prosecution witness had accompanied his son home, because asserted prejudice was not "real and substantial").

CONCLUSION

For the above reasons, the judgment of conviction should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **MARK EVANS**, Deputy State Public Defender, by emailing copy of same to pdapp.service@coloradodefenders.us in the Public Defender's Office this 29th day of June 2011.

AG ALPHA: DA SS QJCO
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