

COURT OF APPEALS
STATE OF COLORADO

101 West Colfax Avenue, Suite 800
Denver, CO 80202

Weld County District Court
Honorable James F. Hartmann, Judge
Case No. 08CR1659

THE PEOPLE OF THE STATE OF
COLORADO,

Plaintiff-Appellee,

v.

MATTHEW VINCENT MARTINEZ,

Defendant-Appellant.

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Case No. 09CA1179

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 4236 words.

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.

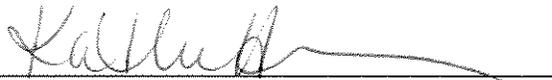


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STATEMENT OF THE CASE AND FACTS

On September 14, 2008, around 8:00 p.m., the police were dispatched to an apartment regarding a loud noise complaint (3/30/09, p176). When Officer Ranous approached the open door, he observed the defendant sitting at a table smoking marijuana (3/30/09, pp177-178). He also observed the haze of smoke in the air and smelled a heavy odor of burning marijuana (3/30/09, p177).

The defendant approached the door and gave the officer a false name and date of birth when asked to identify himself (3/30/09, pp179-180). Another officer arrived, and they attempted to enter the apartment; the defendant resisted the entry (3/30/09, pp182-183,242). The officers were able to force open the door and after they entered, a struggle ensued (3/30/09, pp183-189,242-245). The defendant was eventually subdued and taken into custody (3/30/09, pp189-195,245-246,250). Marijuana and drug paraphernalia were seized from the living room table (3/30/09, pp201-203,268,296-298).

The defendant was charged with attempt to influence a public servant (F4), criminal impersonation (F6), obstructing a peace officer (M2), resisting arrest (M2), possession of one ounce or less of marijuana (PO2), and possession of drug paraphernalia (PO2) (File, pp11-14). The prosecution later added a charge of second degree assault on a peace officer (F4) (File, pp21-23).

Following a jury trial, the defendant was convicted of all charges except for second degree assault on a police officer and attempting to influence a public servant (File, pp123-128; 3/31/09, pp133-134). He was thereafter sentenced to a total of 18 months in the Department of Corrections and given fines for the marijuana and drug paraphernalia charges (File, p137; 4/28/09, p18). This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion to suppress as the officer's warrantless entry was justified under the exigent circumstances exception to the warrant requirement.

The prosecutor did not commit plain error in referencing, either directly or indirectly, the fact that the defendant did not testify, as any reference was not made to infer the defendant's guilt.

ARGUMENT

I. The trial court properly denied the motion to suppress evidence obtained following the officers' warrantless entry into the apartment.

The defendant first claims that the trial court erred in denying his motion to suppress evidence obtained following the officers' entry into the apartment.

A. Factual background.

Prior to trial, the defendant filed a motion to suppress based on an allegedly unlawful search of the apartment (File, pp53-54). At a hearing held on this motion, the following evidence was introduced.

On September 14, 2008, at 8:12 p.m., Officer Daniel Ranous responded to a complaint of loud music coming from an apartment (1/22/09, p6). Upon arriving at the apartment complex, he could hear loud music coming from the subject apartment, and could see that the door was open (1/22/09, p6). As he approached, the the music was

turned down, but when he reached the door, it was still open (1/22/09, p6).

Officer Ranous was able to see into the apartment, and observed the defendant sitting at a table in the living room (1/22/09, pp6-7). He was holding a silver metallic object in his hand “that appeared to be coming away from his mouth” (1/22/09, p7). Based on his training and experience, he believed the object to be a marijuana pipe (1/22/09, p7). Officer Ranous also described a “light smoky haze in the room and a heavy odor of burning marijuana” (1/22/09, pp7,13).

Officer Ranous called for backup (1/22/09, p7). The defendant then stood up from the table and walked to the doorway (1/22/09, p7). Officer Ranous told the defendant he was there because of the noise complaint and asked for his name; the defendant provided a false name (1/22/09, p8).

Although the defendant claimed that he had moved in to the apartment the day before, the person who had leased the apartment indicated that the defendant did not live there nor did he have permission to be there at that time (1/22/09, p9). Although the

defendant had stayed overnight on one previous occasion, he did not have permission to stay there that night (1/22/09, p19).

When Officer McDaniel arrived, Officer Ranous told the defendant they were going to come in, as the officers wanted to “secure” the marijuana (1/22/09, p10). The defendant responded, “you are not coming in,” and attempted to shut the door. Officer Ranous blocked the door with his foot, but the officers were able to enter and, after a scuffle, take the defendant into custody (1/22/09, pp10,15).

On the table, Officer Ranous observed a silver marijuana pipe, a glass marijuana pipe, a bag with marijuana in it, and a small bag of methamphetamine (1/22/09, p10).

The defendant also testified at this hearing, and claimed that he had been “sleeping” at that apartment the night before his arrest and had slept there on two prior occasions (1/22/09, p22). He also claimed that he had been invited to stay there any time in the future (1/22/09, p22).

At the conclusion of the evidence, the defendant argued, *inter alia*, that he had standing to object to the entry into the house because he

was a guest in the home (1/22/09, p27). He also argued that the entry was unlawful because there was no evidence as to where the marijuana was “supposedly emanating from” (1/22/09, pp27-28).

The prosecutor responded by arguing that the defendant had not established that he had standing to object to an entry into the apartment as there was no evidence that he lived there and the lessee indicated that the defendant did not have permission to be there (1/22/09, p29). The prosecutor then argued that the entry was lawful as there was probable cause to believe that a crime was occurring and the officers had exigent circumstances justifying the immediate entry, i.e., the marijuana pipe in the defendant’s hand, coming down from his lips, and the smell of burning marijuana coming from the apartment (1/22/09, p30).

The court denied the motion to suppress, first finding that the defendant had standing to object to the entry because he was a guest at the apartment with an “open invitation” to stay there when needed (1/22/09, p34). The court then found that the warrantless entry was lawful under the exigent circumstances doctrine, as the officer observed

the defendant with a marijuana pipe being moved away from his mouth, and smelled the odor and observed the haze of burning marijuana in the apartment (1/22/09, pp35-36). The court further concluded that the officers were entitled to seize the drugs and paraphernalia which were in plain view on the table (1/22/09, pp39-40).

B. Standard of review and preservation of claim.

In reviewing a motion to suppress, the trial court's findings of fact are entitled to deference by a reviewing court, and will not be set aside where they are adequately supported by competent evidence in the record. *People v. Kirk*, 103 P.3d 918, 921 (Colo. 2005); *People v. Jackson*, 39 P.3d 1174, 1180 (Colo. 2002). However, the trial court's ultimate conclusions of law are subject to *de novo* review. *Id.*; *People v. Kazmierski*, 25 P.3d 1207, 1210 (Colo. 2001).

The defendant challenged the entry into the apartment in the trial court, and as such, his claim is preserved.

C. The evidence was properly allowed.

The Fourth Amendment, which protects citizens from unreasonable searches and seizures, generally requires that police officers obtain a warrant before entering and searching a residence. U.S. Const. amend. IV; *United States v. Karo*, 468 U.S. 705, 714-15 (1984). “Because the ultimate touchstone of the 4th Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.” *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). One of those exceptions is exigent circumstances.

The doctrine of exigent circumstances is limited to “those situations where, due to an emergency, the compelling need for immediate police action militates against the strict adherence to the warrant requirement.” *People v. Gomez*, 632 P.2d 586, 592 (Colo. 1981). “The essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an ‘urgent need’ to render aid or take action.” *United States v. MacDonald*, 916 F.2d 766, 769 (2nd Cir. 1990).

Exigent circumstances may justify a warrantless entry into a residence when: 1) police are engaged in a 'hot pursuit' of a fleeing suspect; 2) there is a risk of immediate destruction of evidence; or 3) there is a colorable claim of emergency threatening the life or safety of another. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006); *People v. Kluhsman*, 980 P.2d 529, 534 (Colo. 1999).

To establish the threat of immediate destruction or removal of evidence as an exigent circumstance, there must be an articulable basis on the part of the police to justify a reasonable belief that evidence is about to be removed or destroyed. *People v. Turner*, 660 P.2d 1284, 1287-1288 (Colo. 1983). Whether a defendant has been alerted to police presence is a factor that may be properly considered. *See People v. Bustam*, 641 P.2d 968, 973 (Colo. 1982).

It has been repeatedly recognized in Colorado that when officers smell burning marijuana before entering a residence they have probable cause to believe that contraband or evidence of criminal activity was being destroyed. *See Mendez v. People*, 986 P.2d 275, 280 (Colo. 1999) (smell of burning marijuana may give an officer probable cause to

search or arrest); *People v. Baker*, 813 P.2d 331, 333 (Colo. 1991) (concluding that officers had probable cause to believe a crime was being committed when they smelled burned marijuana emanating from inside defendant's home); *People v. Stephenson*, 529 P.2d 1333 (Colo. 1975).

As the Court explained in *Mendez*, “[t]his odor indicated that evidence of a crime, that is, possession of marijuana, was in the process of being burned and thereby destroyed. As such, . . . there was a very real and substantial likelihood that contraband would continue to be destroyed before a warrant could be obtained to search the [] room.” *Mendez, supra* at 282; *see also People v. Mendoza-Balderama*, 981 P.2d 150, 160 (Colo. 1999) (“If officers believe that someone on the premises knows of the drugs, is aware of imminent police intervention, and is in a position to easily dispose of the narcotics, then police might have reason to believe that the evidence was in danger of imminent destruction.”).

The defendant attempts to sidestep these cases by suggesting that exigent circumstances to enter a residence may not be found when the suspected offense is a minor one, or involves a non-jailable offense; e.g.,

when the amount of marijuana involved is less than that required for a misdemeanor. He also suggests that this Court should consider the possibility that the marijuana was being used for medicinal purposes, and therefore legally possessed. However, the Supreme Court in *Mendez* has already rejected these arguments, *Mendez, supra* at 281 n4, 282-283, and the defendant has provided no persuasive reason why this Court should vary from this reasoning. The trial court's order denying the motion to suppress should be upheld.

II. The prosecutor's comments during closing argument did not improperly infringe on the defendant's right against self-incrimination.

The defendant next contends that the prosecutor committed reversible misconduct during closing by referencing his failure to testify.

A. Factual background.

During opening statements, the defendant made it clear that his defense was self-defense; i.e., that the officers were using excessive force against him and he only responded with resistance in self-defense (3/30/09, pp23-24,161-163; *see also* 3/31/09, pp65-73). However, the

defendant did not testify at trial (3/31/09, p41). Because there was no evidence that the defendant's assault on the police officers was in response to excessive or unreasonable force, the court refused to instruct the jury on self-defense (3/31/09, pp74-75).

After the conclusion of the evidence, the prosecutor began his closing argument with the following comments:

Ladies and gentlemen, three people know what happened that day, three people know what happened inside that apartment, and you've heard from two of them. The defendant doesn't have to testify, it's his right. So what you have before you today is what you've heard from Officer Ranous and Officer McDaniel. That's the evidence you have before you today. So what this boils down to are the elements of the crimes.

(3/31/09, p85). The defendant did not object to these comments.

Later, when discussing the elements of attempt to influence a peace officer, the prosecutor stated:

Now, whether he was attempting -- whether it was his intent to alter or affect the public servant's decision or action. And clearly we believe that as well. Now obviously we don't know his specific intent because he never testified, and he doesn't have to, but you can gather his intent by all the circumstantial evidence.

(3/31/09, p93). The defendant did not object to these comments either.

During the defense argument, counsel faulted the police for not interviewing any of the people who had gathered outside the apartment during or after the scuffle, or an individual who had been in the apartment immediately prior to the police arrival (3/31/09, p100).

Defense counsel also stated:

By pleading not guilty, he is sitting there screaming at the top of his lungs, I did nothing wrong. I am just going to address this briefly because the District Attorney brought it up a minute ago. You are not permitted to consider the fact that Mr. Martinez did or did not testify. That can't prejudice him at all. And you are required to follow that instruction just like the -- all the other instructions. The burden is always on the prosecutor. If you have questions in this case, it is the prosecutor's job to answer those questions.

(3/31/09, p110).

In rebuttal, the prosecutor stated:

The defense mentioned that the police never interviewed anyone. Well, they could interview everyone for blocks and no one's going to know anything. There's three people that knew what happened. Three people.

(3/31/09, p112). Again, no objection.

In addition to the above cited comments by the parties, the jury was reminded by the court numerous times during trial that the defendant does not have to testify in this case and if he does not, it cannot be used as an inference of guilt and cannot prejudice him in any way (3/30/09, p54 [voir dire]; 3/30/09, p145 [following jury selection]; File, p101 [written jury instructions]).

B. Standard of review and preservation of claim.

The defendant concedes that all of the challenged comments made by the prosecutor during closing argument were not challenged below. Where a defendant does not object to comments made by the prosecutor, review is only for plain error. *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005); Crim. P. 52(b). Plain error occurs when an error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Domingo-Gomez, supra*; *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005).

Only prosecutorial misconduct that is “flagrant or glaringly or tremendously improper” constitutes plain error. *Liggett v. People*, 135

P.3d 725, 735 (Colo. 2006); *People v. Constant*, 645 P.2d 843, 847 (Colo. 1982); *People v. Washington*, 179 P.3d 153 (Colo. App. 2007). In reviewing for plain error, this Court must look at “the severity and frequency of the misconduct, any curative measures taken to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to defendant’s conviction.” *Washington, supra*. Even if the prosecutor’s statements are improper, prosecutorial misconduct is rarely so egregious as to constitute plain error. *Liggett, supra; Constant, supra*.

C. The prosecutor did not commit error, much less plain error.

“[A] prosecutor, while free to strike hard blows, is not at liberty to strike foul ones.” *Domingo-Gomez, supra* at 1048; *Harris v. People*, 888 P.2d 259, 263 (Colo. 1995); *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987); *see also United States v. Young*, 470 U.S. 1, 7 (1985). A prosecutor has the responsibility to refrain from improper methods calculated to produce a wrong conviction as well as to use every

legitimate means to bring about a just one. *Harris, supra; Wilson, supra.*

Final argument must be confined to the evidence admitted at trial, the inferences that can reasonably and fairly be drawn therefrom, and the instructions of law submitted to the jury. *Domingo-Gomez, supra* at 1048; *People v. DeHerrera*, 697 P.2d 734, 743 (Colo. 1985). Contentions of improper comment by the prosecution in closing argument must be evaluated in the context of the argument as a whole and in light of the evidence before the jury. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

When considering whether a prosecutor's comments are proper, the reviewing court must also consider whether those comments were made in response to defendant's argument. *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990). Lack of an objection is also a factor to be considered in examining the impact of a prosecutor's closing argument; the lack of an objection may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not

overly damaging. *Domingo-Gomez, supra* at 1054; *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990).

Counsel may employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance, so long as he or she does not thereby induce the jury to determine guilt on the basis of passion or prejudice, inject irrelevant issues into the case, or accomplish some other improper purpose. *People v. Allee*, 77 P.3d 831 (Colo. App. 2003); *People v. Lucas*, 232 P.3d 155 (Colo. App. 2009) (“Prosecutors have wide latitude in the language and presentation style they employ in closing argument.”).

Factors to be considered when determining the propriety of the prosecutor’s statements include the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction. *Domingo-Gomez, supra* at 1050. The context in which the challenged remarks were made is significant, and includes the nature of the alleged offenses and asserted defenses, the issues to be determined, the evidence in the case, and the point in the proceedings at which the remarks were made. *Harris, supra* at 266. If the

prosecutor's remarks are found to be improper, these same factors are weighed to determine whether the cumulative effect of the prosecutor's statements so prejudiced the jury's verdict as to affect the fundamental fairness of the trial. *Domingo-Gomez, supra* at 1053.

Here, the defendant claims that the prosecutor referred to his election not to testify, and then used that decision to create an inference of guilt "by suggesting that [he] never contradicted the testimony of the officers present that day" and suggesting that this "was convincing circumstantial evidence of an implied admission of his guilt." OB, pp25-26. The defendant is simply wrong.

Although the prosecutor should generally not refer to a defendant's exercise of the Fifth Amendment right to remain silent, not every reference to silence mandates reversal. *People v. Key*, 522 P.2d 719, 720 (Colo. 1974); *People v. Hall*, 107 P.3d 1073, 1077 (Colo. App. 2004); *People v. Cornelison*, 616 P.2d 173, 176 (Colo. App. 1980). The relevant inquiry is whether the defendant's silence was used to create an inference of guilt. *Key, supra*; *Cornelison, supra*; *Hall, supra*; *People v. Abeyta*, 728 P.2d 327, 332 (Colo. App. 1986); *see also United States v.*

Robinson, 485 U.S. 25, 32 (1988), citing *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (“*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant’s silence as substantive evidence of guilt.”).

To determine whether a prosecutor’s comment on the defendant’s silence constitutes reversible error, the court should consider: (1) whether the improper remarks were used as a means of creating an inference of guilt; and (2) whether the prosecution argued that the defendant’s silence constituted an implied admission of guilt. *People v. Rodgers*, 756 P.2d 980, 984 (Colo. 1988); *Key, supra*; *Cornelison, supra*; *Hall, supra*.

The defendant has not identified anywhere in the record where the prosecutor’s comments were used to imply the defendant’s guilt. The prosecutor’s first comments (3/31/09, p85), referenced the fact that the evidence of what occurred in the apartment consisted only of testimony from two of the three parties involved in the incident. This was a comment designed to highlight the evidence that the jury was allowed to consider.

Nothing in this comment, even if it by implication referred to the fact that the defendant did not testify, urged the jury to infer the defendant's guilt based on his decision not to do so. *Cf. Key, supra* (references to silence were not intentionally designed to provoke adverse inferences of guilt in the minds of the jury); *People v. Nave*, 689 P.2d 645, 648-649 (Colo. App. 1984) (comments did not warrant reversal where prosecutor stated: "the defendants had this stereo equipment with them from the burglary. As we know they didn't take the stand, *they don't have to take the stand. We've gone through that in voir dire, the court instructed you a few minutes ago on that*"; prosecutor did not create an inference of guilt, nor did he argue that defendant's silence constituted an implied admission of guilt, his remarks merely reemphasized the law); *compare Griffin v. California*, 380 U.S. 609, 610 (1965) (reversal warranted where court instructed jury that, with regard to evidence or facts which the defendant can reasonably be expected to deny or explain, if he does not testify the jury may take that failure into consideration as tending to indicate the truth of such

evidence, and prosecutor reiterated that concept during closing argument).

Furthermore, this comment was likely a response to the defendant's claims in opening statement that he was only acting in self-defense, and to the fact that no evidence was ultimately presented to support that defense. Because no evidence was presented to support that defense, the prosecutor was simply making clear what evidence could properly be considered. *See People v. Stevenson*, 228 P.3d 161, 171 (Colo. App. 2009) (reference to a defendant's failure to testify is not necessarily unconstitutional if it does not ask the jury to infer guilt from the failure to testify but instead fairly responds to a defense contention), citing *Robinson, supra* at 34 ("where [] the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege"); *Dunlap v. People*, 173 P.3d 1054, 1080 (Colo. 2007) (a prosecutor is allowed to respond to arguments put forth by the defendant or defendant's counsel during opening statement).

The prosecutor's second comment (3/31/09, p93), was made in reference to the proof of the defendant's intent, and he simply noted that there was no direct evidence of intent, but such proof of intent could be obtained from circumstantial evidence. This was not a comment intended to infer guilt from the failure to testify, but an explanation of how proof of an element can be obtained, either through direct evidence, or if no such evidence exists, through circumstantial evidence. *Compare Montoya v. People*, 457 P.2d 397, 398 (Colo. 1969) (prosecutor's comments on defendant's failure to testify improper where prosecutor stated: "But when we are talking about what goes on in somebody's mind, only that person can actually tell you. Now, here we are in the case. You are asked to decide what went on in his mind without hearing it from the very person, the only person who readily knows. Is this a serious-does this create a serious substantial doubt in your mind, or is it only a possibility of a doubt? I think under these circumstances it would have to be only a possibility of a doubt and not a serious substantial doubt because (from) the person who really knows, we heard nothing.").

The prosecutor's third comment (3/31/09, p110), was a direct response to the defendant's argument faulting the police for not interviewing the other people outside the apartment. Defense counsel was apparently attempting to suggest there might have been other people present who could provide testimony contrary to that of the two officers involved in the incident, and the prosecutor's response was simply to note that there was no sense in interviewing anyone else because "there's three people that knew what happened." This was simply a comment about the fact that there were no other eyewitnesses, not a reference to the fact that one of the three eyewitnesses did not testify. Simply put, this was not a reference to the defendant's election not to testify.

None of the comments here improperly infringed on the defendant's right against self-incrimination. To the extent they directly or indirectly refer to his decision not to testify, no attempt was made to equate that with a consciousness of guilt. Indeed, the jury was instructed numerous times, and reminded several times by the prosecutor and defense counsel, that his decision not to testify could not

be used against him. This Court must presume that the jury heeded these instructions. *See People v. Ray*, 109 P.3d 996, 1003 (Colo. App. 2004) (a curative instruction is generally sufficient to overcome any prejudice created by an improper argument; absent a clear showing to the contrary, it is presumed that the jury understood and heeded the trial court's instruction). Under these circumstances, no error, much less plain error warranting reversal, occurred.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request that this Court affirm the defendant's judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon ANNE T. AMICARELLA, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 26 day of August 2011.

