COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Jefferson District Court Honorable Tamara Russell Case Number 10CR2446	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. STEVE GORDON Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender BRITTA KRUSE, #41572 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 11CA1890
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:

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Signature of attorney or party

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STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court erred in denying Mr. Gordon's motion to suppress.

II. Whether there was sufficient evidence to support Mr. Gordon's conviction beyond a reasonable doubt.

III. Whether the trial court reversibly erred by failing to apply the *Harper* test in light of the jury's potential exposure to prejudicial extraneous information.

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Gordon with possession with intent to distribute more than five pounds of marijuana in violation of section 18-18-406(6)(b)(I),(III)(B),C.R.S.(2010), after bundles—at least one of which contained marijuana—were discovered in his truck during a traffic stop.(v1,p.1-2) Mr. Gordon was tried by a jury and convicted as charged.(*Id.* at 61) The court imposed two years of probation.(*Id.*) Additional relevant facts will be presented as necessary in the arguments below.

SUMMARY OF THE ARGUMENT

I. Mr. Gordon was illegally detained without reasonable suspicion after the purpose of the stop had been resolved, and the evidence obtained as a result must be suppressed because its discovery was not sufficiently attenuated. Alternatively, Mr. Gordon was illegally detained after the officers returned his information but then

proceeded to confront and interrogate him on unrelated matters; therefore, evidence obtained as a result of that additional illegal detention requires suppression.

II. Mr. Gordon's conviction must be reversed because there was insufficient evidence to prove that the substance the police discovered amounted to more than five pounds of marijuana.

III. The trial court reversibly erred when it failed to take any action in response to concern that jurors were exposed to prejudicial extraneous information.

ARGUMENT

I. SUPPRESSION IS REQUIRED BECAUSE MR. GORDON'S PROLONGED DETENTION IMPERMISSIBLY EXCEEDED THE SCOPE OF THE TRAFFIC STOP IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Standard of Review and Preservation

A trial court's suppression order involves issues of law and fact. *People v. Arroya*, 988 P.2d 1124,1129(Colo.1999). The court's findings of fact are given deference if supported by the record, and the court's conclusions of law are subject to de novo review. *People v. Adkins*, 113 P.3d 788,791(Colo.2005). A violation of a defendant's Fourth Amendment rights is an error of constitutional dimension, *see People v. Burola*, 848 P.2d 958,964(Colo.1993), and the State bears the burden of proving that such an error was harmless beyond a reasonable doubt, *People v. Larson*, 97 P.3d

246,251(Colo.App.2004). If there is a "reasonable probability that the defendant could have been prejudiced by the error," the error cannot be harmless beyond a reasonable doubt. *Id.*

In his motion to suppress evidence obtained as a result of an illegal warrantless seizure and search, defense counsel argued that Mr. Gordon had been detained "for an excessive amount of time," and that a reasonable person in Mr. Gordon's position "would not feel free to leave the two police officers."(v1,p.40-41) The court denied the motion, finding that the stop was not impermissibly prolonged and Mr. Gordon was "free to leave" when his documents were returned but "voluntarily" agreed to stay and answer more questions.(5.13.11,p.5,11-14).

B. Legal Framework

The Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution guarantee the right of the people to be secure against unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1,9(1968); *People v. Greer*, 860 P.2d 528,530(Colo.1993). These constitutional protections extend to an investigatory traffic stop because such stops constitute "seizures" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648,653(1979); *People v. Rodriguez*, 945 P.2d 1351,1359(Colo.1997). However, pursuant to *Terry*, seizure of a

person during a traffic stop is authorized by a standard of reasonable suspicion rather than probable cause. *Rodriguez*, 935 P.2d at 1359.

According to *Terry*, an officer lacking probable cause to arrest may detain an individual temporarily as long as three conditions are met: (1) the officer has a reasonable suspicion that the individual has committed—or is about to commit—a crime; (2) the purpose of the detention is reasonable; and (3) there exists a reasonable connection between the scope and character of the intrusion and its objective. *See* 392 U.S at 30; *Rodriguez*, 945 P.2d at 1359. To withstand constitutional muster, the traffic stop must be brief in duration, lasting "no longer than necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491,500(1983); *People v. Brandon*, 140 P.3d 15,18-19(Colo.App.2005). Once the purpose of the stop has been satisfied and no other reasonable suspicion exists to support additional investigation, any further detention or questioning of the driver of a vehicle constitutes an unreasonable and, therefore, unlawful detention unless the detention has transformed into a consensual encounter. *United States v. Trestyn*, 646 F.3d 732,742(10thCir.2011); *People v. Redinger*, 906 P.2d 81,84(Colo.1995); *Brandon*, 140 P.3d at 18.

Reasonable suspicion warranting further detention of a stopped motorist cannot be a "subjective and unarticulated hunch of criminal activity;" rather, it must be based on "specific and articulable facts." *People v. Wells*, 676 P.2d

698,701(Colo.1984); *see People v. Haley*, 41 P.3d 666,674(Colo.2001), *abrogated on other grounds by People v. Esparza*, 272 P.3d 367(Colo.2012). In determining whether reasonable suspicion exists, court's look to the totality of the circumstances and apply an objective test that considers only facts and circumstances known to the officer at the time of the encounter. *Haley*, 41 P.3d at 674; *Outlaw v. People*, 17 P.3d 150,157(Colo.2001).

If no reasonable suspicion exists to justify further investigation, then the question becomes whether the initial detention transformed into a consensual encounter. *Brandon*, 140 P.3d at 20. In a consensual encounter, the individual "voluntarily cooperates with the police and is free to leave at any time." *Outlaw*, 17 P.3d at 155. In a traffic stop, an officer must return a driver's documentation before a detention can end and a consensual encounter can begin. *United States v. Elliot*, 107 F.3d 810,814(10thCir.1997). Nevertheless, although the return of the driver's documentation is necessary to end a detention, it is not "sufficient to demonstrate than an encounter has become consensual." *Id.*; *People v. Cervantes-Arredondo*, 17 P.3d 141,148(Colo.2001). If the individual has an "objective reason to believe that he was not free to end this conversation with the law enforcements officer and proceed on this way," then even the return of his documents does not end the detention. *United States v. Werking*, 915 F.2d 1404,1408(10thCir.1990).

Evidence obtained as a direct result of an illegal search or seizure must be suppressed. *Wong Sun v. United States*, 371 U.S. 471,484(1963); *Rodriguez*, 945 P.2d at 1363. However, if the connection between the evidence and the illegality is "so attenuated as to dissipate the taint," then suppression is not required. *Rodriguez*, 945 P.2d at 1364(quoting *Wong Sun*, 371 U.S. at 487). As pertinent here, the test for determining whether to suppress evidence obtained as a result of a purported consent that follows improper conduct by the police is two-fold: courts must determine (1) whether the consent was obtained through exploitation of the prior illegality, and (2) whether the consent was voluntary. *Id.* Thus, even if a defendant voluntarily consents, the evidence is not admissible unless the consent is "an act of free will sufficient to purge the primary taint" of police illegality. *Id.* Factors to be considered include the "temporal proximity" of the illegality and the consent, the presence of "intervening circumstances," and the "purpose and flagrancy" of the official misconduct. *Id.* The State bears the burden of proving both attenuation and voluntariness. *Id.*

C. Relevant Facts

1. Suppression Hearing

According to the testimony at the suppression hearing, Mr. Gordon, a black man, was traveling on Interstate 70 ("I-70") with his wife and three-year-old daughter when he was pulled over.(4.12.11,p.11-12;*see also* Defense Ex.A;v1,p.8) The alleged

bases for stopping him were speeding five to eight miles over the limit, and a decorative placard partially obscuring the license plate, which officers believed might be expired.[1](*Id.*) The officers that stopped Mr. Gordon—Agents Jacobsen and Collett—rode together in a marked patrol car with lights activated, both were wearing uniforms, and both had their standard issue firearms.(*Id.* at 10, 59, 85)

Jacobsen approached Mr. Gordon for his license, registration, and proof of insurance while Collett remained in the car.(*Id.* at 13, 59) Mr. Gordon immediately provided his Massachusetts license and continued to search for the other documents.(*Id.* at 13) During that contact, which lasted around five minutes, Jacobsen began questioning Mr. Gordon about his travel plans.(*Id.* at 13-15) Mr. Gordon explained he was from Boston and was on his way home from a trip to San Francisco.(*Id.*) Mr. Gordon stated he had been searching for car trailers to purchase in Chicago and San Francisco for his brother's auto-body business, and that his family accompanied him on the trip because his wife wanted to do some sightseeing.(*Id.*;*see also* v1,p.9(affidavit for warrantless arrest[2]))

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[1] Although the officers said they could not read the plate before initiating the stop, they claimed they "guessed" it was from Massachusetts, and upon running the plate through the DMV system, they alleged that the plate came up expired.(4.12.11,p.58) However, the officers later apparently determined that the plate was valid.(*See Id.* at 61;5.13.11,p.4;v1,p.9)

[2] Although the parties did not expressly rely on the affidavit during the hearing, it was in the court file and directly relates to this issue.

Once Mr. Gordon provided the registration—which was in the name of Mr. Gordon's brother Michael Gordon—Jacobsen returned to the patrol car and gave Mr. Gordon's documents to Collett to verify.(*Id.* at 14, 59) Jacobsen also told Collett that he thought it was "weird" Mr. Gordon had chosen not to drive east on I-80—which was a more direct route connecting San Francisco and Boston—and instead took I-70.(*Id.* at 15, 60) Jacobsen also told Collett that Mr. Gordon appeared nervous—his mouth looked dry and he was rubbing his head—and he had to pause before answering questions.(*Id.* at 16)

Jacobsen then walked back to Mr. Gordon's truck and asked him to exit the vehicle.(*Id.* at 17) Mr. Gordon got out and walked to where Jacobsen was waiting at the front of the patrol car, which was parked about a "car length" behind Mr. Gordon's truck.(*Id.* at 17-18, 59) Jacobsen continued to question Mr. Gordon about his travels.(*Id.* at 18) Mr. Gordon repeated what he had said before and elaborated that he and his wife had also stopped in Las Vegas for a meal, apparently in response to Jacobsen's question why Mr. Gordon was on I-70 not I-80.(*Id.* at 18)

At that point, Collett approached Jacobsen and Mr. Gordon.(*Id.* at 19) By that time, Collet had already validated all of Mr. Gordon's information(4.12.11,p.61;5.13.11,p.4,v1,p.9) However, Collett did not return Mr. Gordon's documents to him; rather, he asked Mr. Gordon to provide proof of

insurance.(4.12.11,p.19,22,62) Mr. Gordon said the proof of insurance was in the truck, so Collett approached the passenger side of the truck and asked Mr. Gordon's wife to find it.(*Id.* at 19,62) While Mrs. Gordon was looking, Collett questioned her separately about the couple's travel plans.(*Id.* at 62) She said they drove from Boston a week ago to San Francisco and had plans to stop in Chicago on the way back to Boston so Mr. Gordon could look at a car trailer.(*Id.* at 62-63)

After Mrs. Gordon provided Collett with valid proof of insurance in the name of Mr. Gordon's brother, Collett still did not return Mr. Gordon's documents.(*Id.* at 63;v1,p.9) Instead, Collett went back to question Mr. Gordon further about his travels.(4.12.11,p.63) Mr. Gordon again went over the details, this time adding that the family had also stopped in Los Angeles ("L.A.") to do some sightseeing and check with some casting companies for the couple's daughter, and then they drove up through Las Vegas to reach I-70.(*Id.* at 21,64) According to Collett, he believed the Gordons' statements were "inconsistent"; specifically, he thought Mr. Gordon said they went to Chicago on their way to San Francisco, whereas Mrs. Gordon indicated they would stop in Chicago on their way home from San Francisco.(*Id.* at 64) Thus, Collett went back to the truck to question Mrs. Gordon a second time to "clarify some things."(*Id.* at 64-65) In the meantime, Jacobsen remained and continued questioning Mr. Gordon about his travels.(*Id.* at 19-20)

During Collett's second conversation with Mrs. Gordon, he asked her whether they had visited any other cities in California.(*Id.* at 65) Mrs. Gordon said no and mentioned that she wanted to visit her sister in Long Beach but it was too far of a drive.(*Id.*) According to Collet, Mrs. Gordon's statement "stood out to him" because he believed the Gordons could have visited Mrs. Gordon's sister in Long Beach if they had been in L.A.—as Mr. Gordon said—because the two cities were near each other.(*Id.*) He also believed it was inconsistent that Mr. Gordon said they had gone to Los Angeles to visit casting companies on a Sunday because, in Collett's opinion, it was "unlikely" that casting companies would be open.(*Id.*)

Collett then rejoined Jacobsen, who was still questioning Mr. Gordon, and gave Mr. Gordon his documents back.(*Id.* at 22, 66) Collett told Mr. Gordon to have the decorative placard removed and said he was not going to give Mr. Gordon any tickets, shook his hand, and told him he was free to go.(*Id.* at 22, 66) Mr. Gordon started to walk back to his truck, but Collett called out to him when he reached the driver's side door.(*Id.* at 66) According to Collett, he said, "could I ask you a few more questions?"(*Id.*) Collett testified that he could not hear Mr. Gordon's response due to the traffic noise but believed he had responded affirmatively.(*Id.* at 66-67) According to Mr. Gordon, Collett said he wanted Mr. Gordon to come back because Collet

"needed" to ask him more questions, so Mr. Gordon obeyed the officer and returned to where Collett and Jacobsen were still standing.(*Id.* at 97)

When Mr. Gordon returned, Collett immediately confronted Mr. Gordon about the perceived inconsistencies in his version of events and the fact he did not believe Mr. Gordon's "story" "made sense" because he believed Boston was a large enough city in which to locate the car trailer Mr. Gordon was looking for, which would obviate the need to spend the cost of diesel fuel to drive across country.[3](*Id.* at 67-68). He then asked Mr. Gordon a series of questions about whether Mr. Gordon had any cocaine, methamphetamine, marijuana, or heroin in the truck.(*Id.* at 68) The overhead lights of the patrol car remained activated during this conversation.(*Id.* at 85)

Collett also testified that Mr. Gordon told him he had a concealed gun permit, but no guns in the vehicle, and that he had been accepted by the Florida Highway Patrol but could not take the position because his brother became ill and needed help running his auto-body business in Massachusetts.(*Id.* at 68-69) Collett claimed that he then asked Mr. Gordon for consent to search the truck "to make sure" there was nothing illegal in the truck and explained to Mr. Gordon that Mr. Gordon did not have to let him search.(*Id.* at 69, 86) According to Collett, Mr. Gordon said he

[3] At no point during the hearing did either Collett or Jacobsen testify what they believed the significance was of Mr. Gordon's explanation of his activities or of the alleged "inconsistencies" in the husband and wife's answers.

understood and permitted the officers to search.(*Id.* at 69) When asked by defense counsel why he had not asked for consent to search earlier before "releasing" Mr. Gordon, Collett testified, "Because of the case law, I wanted to engage in a consensual encounter with him after the traffic stop business was conducted."(*Id.* at 84)

According to Mr. Gordon, however, Collett told him his answers did not "match" his wife's and that he "needed" to search the truck.(*Id.* at 98, 100) Mr. Gordon also said he told Collett he did not want him to search because, although he did not have any guns in the truck, he believed he may have spent shell casings inside from doing target practice, and he was not sure whether those were illegal to possess.(*Id.* at 99) Collett told Mr. Gordon that was not his "main focus" and continued to reiterate that he needed to search the truck.(*Id.* at 99-100) According to Mr. Gordon, Collett never did anything to indicate to Mr. Gordon that he could refuse the search.(*Id.* at 100) Mr. Gordon said, "whatever," and Collet proceeded to search.(*Id.*) Mr. Gordon also testified that Collett was fidgeting and had placed his hand on top on his gun during their conversation.(*Id.* at 98) Finally, Mr. Gordon said he felt he was not free to leave because he was on the side of the road, he was a black man, and the officers were questioning him so he did not see how he "could just take off and leave."(*Id.* at 101)

When Jacobsen and Collett searched the truck, they noticed a large auxiliary fuel tank in the bed, unscrewed the cap, and looked inside.(*Id.* at 23,46,70) They shined a flashlight into the tank and noticed it was empty of fuel and appeared to have a false bottom built into it.(*Id.* at 24,70) The officers used a miniature specialized magnifying scope to look into the tank through a small, pencil-eraser sized hole.(*Id.* at 24,47-48,71) With the scope the officers were able to see what looked like bundles wrapped in green cellophane, which based on their training and experience might contain drugs or money.(*Id.* at 24-25,72)

Collett placed Mr. Gordon and his wife under arrest and then drove the truck two miles to a substation to conduct a more extensive search.(*Id.* at 26,72,74) At the substation, officers opened the fuel tank and discovered twenty-five packages inside.(*Id.* at 76) Collett opened one of the packages and found two bags each containing approximately one pound of a budding green substance that tested presumptively positive for the presence of THC.(*Id.* at 77) Thereafter, Mr. Gordon was transported to the Lakewood Police Department for questioning.(*Id.* at 27) After waiving his Miranda rights, Mr. Gordon stated that while discussing his pending trip to look for trailers in San Francisco, an acquaintance, Michael Wright, asked to speak to him about his trip and ultimately offered to pay Mr. Gordon $10,000 to transport money from San Francisco to Boston.(*Id.* at 31-32) After Mr. Gordon agreed, Wright

borrowed Mr. Gordon's truck and returned it to him several hours later.(*Id.* at 29-32) Immediately thereafter, Mr. Gordon traveled to San Francisco where he again met up with Wright, who took the truck a second time and returned it with directions for Mr. Gordon to deliver the money to a specified address in Boston several days later.(*Id.* at 29-33) Mr. Gordon stated that this was the first time he had ever been paid to transport anything and maintained that he thought the fuel tank contained money, not marijuana.(*Id.* at 33,54)

2. Trial Court's Ruling

Defense counsel filed a motion to suppress, which was litigated at the aforementioned hearing on April 12, 2011. After taking the matter under advisement, the court orally denied the motion to suppress at a subsequent hearing on May 13, 2011.(5.13.11,p.16-17) The court first explained that it had taken the matter under advisement due to the fact that aspects of the officers' testimony were "odd" and "stood out."(*Id.* at 8) The court found the officers' claims that they were merely conducting traffic enforcement on I-70 "seemed very odd" because the officers did not have a radar or laser gun to detect speed, Collett was "not even trained or certified" in using either of those devices, and Collett "had not bothered to calibrate his speedometer." (*Id.* 8-9) The court also found it "odd" that an officer doing traffic enforcement would "just happen to have a scope in their car that would be capable of

looking inside an auxiliary fuel tank to determine if there was money or drugs in there."(*Id.* at 9)

Ultimately, however, the court concluded that although "obviously these folks aren't out there doing speeding enforcement," the officers' subjective intent had no bearing on the reasonableness of the stop, and the court found there was reasonable suspicion to support a traffic stop on the basis that Mr. Gordon had been speeding and driving with an obstructed plate.(*Id.* at 11) The court then found that the amount of time the officers detained Mr. Gordon was "minimal" and just long enough to verify his registration, insurance, and license to determine that they were valid.(*Id.* at 12) The court also found that Mr. Gordon was free to leave once the officers returned his documents to him.(*Id.* at 5,13) Further, the court apparently disregarded Mr. Gordon's testimony and found that he had voluntarily consented to return to answer more questions.(*Id.* at 5, 13-14) In addition, the court, relying on *People v. Garcia,* 251 P.3d 1152(Colo.App.2010), found that the officers had reasonable suspicion to detain Mr. Gordon after the basis for the traffic stop was resolved due to the alleged inconsistencies in the Gordons' versions of their travel plans.(*Id.* at 13-14) However, the officers never explained, and the court never found, what the relevance or significance was of these "inconsistences," nor did the court explain for what crime it believed there was reasonable suspicion.

3. Trial

At trial, the State admitted the bundles discovered in the auxiliary fuel tank into evidence as well as a report indicating that the material discovered in one of the bundles tested positive for marijuana.(People's Ex.1-2,14) The State also admitted the statements Mr. Gordon made to the officers on the side of the road and during his interrogation at the police station.(6.7.11,p.173-78) The jury convicted Mr. Gordon of possession with the intent to distribute more than five pounds of marijuana.(Env.V,Verdict)

D. Analysis

1. Suppression is required because evidence was obtained as a result of Mr. Gordon being illegally detained by officers who persisted in questioning both he and his wife about unrelated matters after the purpose for which the traffic stop was instituted had already been accomplished and where no reasonable suspicion for further investigation existed.

a. Mr. Gordon was illegally detained.

In this case, the officers stopped Mr. Gordon for two reasons: speeding a few miles over the limit and driving with an obstructed plate (which might be expired). At that point, it is undisputed that Mr. Gordon was seized. *See Whren v. United States*, 517 U.S. 806,809-10(1996)("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]").

The traffic investigation concluded, however, once Collett obtained Mr. Gordon's proof of insurance because Collett had already previously determined that Mr. Gordon had a valid license, no warrants, and the truck was properly registered and licensed. However, Collett kept Mr. Gordon's documents, *see Elliot*, 107 F.3d at 814 (observing bright-line rule that an officer must return a driver's documents before a detention can end), and subjected him to further questioning about his travel plans, and these questions were unrelated and irrelevant to any purported investigation into whether Mr. Gordon was speeding or had obstructed plates, *see* 4 WAYNE R. LAFAVE, *Search and Seizure: A Treatise on the Fourth Amendment*, §9.3(d), at 392-95(4th ed. 2004)(observing that questions about travel plans often exceed the scope of a traffic stop because "[t]he objective is not to gain some insight into the traffic infraction providing the legal basis for the stop, but to uncover inconsistent, evasive or false assertions that can contribute to reasonable suspicion or probable cause regarding drugs"). In addition, not only did Collett subject Mr. Gordon to further questioning after he had concluded the traffic investigation, but he also questioned Mrs. Gordon a second time about the couple's travel plans in an alleged effort to "clarify things," thereby further prolonging the detention.

Moreover, there was no reasonable suspicion to justify the Gordons' further detention after the investigation into the alleged traffic infractions was accomplished.

At the time the traffic stop was concluded, i.e. the point when Collett obtained proof of insurance—the final piece of evidence he needed to conclude his investigation—the officers, collectively, were aware of the following:

- The Gordons traveled from Boston to San Francisco to look at car trailers for Mr. Gordon's brother's auto-body business and to go sight-seeing.
- The Gordons were returning by I-70 rather than I-80.
- Mr. Gordon said they stopped in Chicago on their way to San Francisco, whereas Mrs. Gordon said they might stop in Chicago on their way home to Boston.
- Mr. Gordon appeared nervous.

These facts do not amount to reasonable suspicion. First, there is nothing unusual about the Gordons' travel plans or route. Both Mr. and Mrs. Gordon indicated that the primary purpose of the trip was to search for car trailers for his brother's auto-body business. Consistent with that fact, Mr. Gordon was driving a large truck capable of hauling such a trailer if indeed he located one, and the truck was registered and insured in Mr. Gordon's brother's name. Likewise, there is nothing inherently suspicious about choosing to drive on I-70 rather than I-80. There was no testimony or evidence that I-70, rather than I-80, is somehow indicative of some type of criminal activity, nor was there any testimony or evidence specifically linking Boston or San Francisco to some type of criminal activity. Indeed, the officers never explained why they felt the Gordons' explanation or route was suspicious. They

merely testified that it "stood out" or seemed "weird." Such unarticulated "hunches" cannot support a finding of reasonable suspicion. *Haley*, 41 P.3d at 674; *see also United States v. Santos*, 403 F.3d 1120,1132(10thCir.2005)("If travel between two of this county's largest population centers is a ground on which reasonable suspicion may be predicted, it is difficult to imagine an activity incapable of justifying police suspicion and an accompanying investigative detention.").

In *Haley*, the Colorado Supreme Court considered whether allegedly unusual travel arrangements—the fact that the defendants had flown to Sacramento and then rented a car to drive back to Kansas City—supported a finding of reasonable suspicion. 41 P.3d at 675. The court held that it did not. *Id.* According to the court, people can choose to travel in a particular manner for any given number of reasons, and therefore the "choice of means of travel at any time on the journey does not lend support to reasonable suspicion." *Id.*; *see also United States v. Wood*, 106 F.3d 942,947(10thCir.1994)(holding that defendant's travel plans—flying one way to California and renting a car to drive back to Kansas—were not the sort of unusual plans that give rise to reasonable suspicion of criminal activity). Here, there could be any number of reasons why the Gordons choose to take I-70 home instead of I-80, and therefore the fact that they did so is not inherently suspicious. *See United States v. Simpson*, 609 F.3d 1140,1152(10thCir.2010)("[S]uspiciousness cannot be based simply

on the fact that a person is making unusual travel plans, or plans that an officer would not have chosen to make."); *Haley*, 41 P.3d at 675("We cannot assume as a basis for reasonable suspicion that cars traveling from California on I-70 in Colorado contain illegal drugs).

Second, contrary to Collett's characterization, the Gordons' accounts of their travels were not inconsistent vis-à-vis a stop in Chicago to look at a car trailer. Mr. Gordon said they stopped in Chicago on the way to San Francisco, but Mrs. Gordon never said that they did not stop in Chicago on the way. Rather, she said they might stop in Chicago on the way back. However, that they may stop in Chicago on the way back does not foreclose the possibility that they had already stopped there on the way out, and Mr. Gordon had never said they would not stop in Chicago on the way back. Furthermore, the couple's descriptions of their travel plans were otherwise entirely consistent. Both said they left Boston the week earlier to travel to San Francisco. Both said that the purpose of the trip was to look at car trailers and go sight-seeing. Both said they were on their way back home when they were stopped by the police. Thus, there were no inconsistencies giving rise to reasonable suspicion.

The trial court relied primarily on *Garcia*, 251 P.3d at 1152, in concluding that the officers had reasonable suspicion based on alleged inconsistencies in the Gordons' versions of events. However, as argued above, the officers were not aware of any

actual inconsistencies before the illegal detention began. Furthermore, even assuming arguendo that the couple's explanation of the stop in Chicago was inconsistent, such inconsistency was not of quality or character of the inconsistencies that gave rise to reasonable suspicion in *Garcia*. In *Garcia*, the defendants claimed that they were returning a truck to its owner, yet neither knew the owner's name, address, or phone number, and neither could identity their destination other than "Iowa," they had no plan for connecting with the owner other than to call a third-party, and the driver did not know the passenger's last name. 251 P.3d at 1156-57. Furthermore—unlike in Mr. Gordon's case—it appears that one of the officers trained in drug investigations testified about how "lack of knowledge about ownership of the truck" was relevant to such a drug investigation. *See id.* at 1156.

Finally, the fact Mr. Gordon appeared nervous during his contact with the officers cannot constitute reasonable suspicion to detain him and his family. As courts have repeatedly warned, "it is 'not uncommon for most citizens—whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer.'" *Haley*, 41 P.3d at 675(quoting *Wood*, 106 F.3d at 948); *see also United States v. Fernandez*, 18 F.3d 874,879-80(10thCir.1994)(stating that "nervousness is of limited significance in determining reasonable suspicion" and observing that reliance on nervousness as a basis for reasonable session must be treated with caution).

Moreover, neither officer testified to having previously met Mr. Gordon, and presumably they would not have given that he was from Boston; thus, the officers had "no measure by which to gauge" Mr. Gordon's behavior during the traffic stop as compared to his usual demeanor. *United States v. Beck*, 140 F.3d 1129,1132(8thCir.1998).

In conclusion, at the moment the officers concluded their investigation into the traffic infractions, that is—after Collett received the Gordons' proof of insurance after having already determined Mr. Gordon had a valid license and was entitled to operate the truck, the Gordons ought to have been allowed to proceed on their way without being subject to further delay. *See Haley*, 41 P.3d at 674-77; *Redinger*, 906 P.2d at 84; *Brandon*, 140 P.3d at 18.

However, the officers continued to detain the Gordons by retaining their documents and continuing to question them after their traffic investigation was complete without reasonable suspicion to justify further investigation. Thus, Mr. Gordon was deprived of his constitutional rights to be free from unreasonable searches and seizures. *See id.*

b. Suppression is required.

After illegally detaining the Gordons for further questioning after the purpose for the stop had already been accomplished, Collett ultimately returned Mr. Gordon's documents, did not write him any tickets, and told him he was free to leave. Mr.

Gordon then began to walk the couple feet back to his truck. However, as soon as he reached for the door, Collett called him back for more questions and subsequently Mr. Gordon's truck was searched. During the search, the officers discovered a number of bundles, at least one of which contained two pounds of marijuana. Nevertheless, neither of these events—the additional questioning nor search—were sufficient to purge the taint of the illegal detention. *See Rodriguez*, 945 P.2d at 1364-65(suppressing evidence obtained as a result of a consensual search because the consent was not sufficiently attenuated from a prior illegal detention).

(1) THE ENCOUNTER THAT OCCURRED AFTER OFFICERS RETURNED MR. GORDON'S DOCUMENTS WAS NOT CONSENSUAL NOR SUFFICIENTLY ATTENUATED FROM HIS ILLEGAL DETENTION.

In this case, even assuming that the subsequent contact between Mr. Gordon and the two officers began as a consensual encounter, it immediately escalated into an illegal detention. Within seconds of being told he was free to go, Collet asked Mr. Gordon if he would answer more questions. When Mr. Gordon did so, Collett immediately confronted him about perceived inconsistencies in his version of events and the fact Collett did not believe Mr. Gordon's "story" "made sense." Collett then launched into a number of questions about whether Mr. Gordon had anything illegal in his truck, including specifically whether he had any heroin, cocaine, methamphetamine, marijuana, guns, or money in the truck. In the face of such

"[a]ccusatory, persistent, and intrusive questioning," no reasonable person would have felt free to disregard Collett's questions and leave. *United States v. Little*, 60 F.3d 708,712(10thCir.1995)(observing that the manner of questioning can turn an otherwise voluntary encounter into detention); *Outlaw*, 17 P.3d at 150(a consensual encounter occurs when an individual "voluntarily cooperates with the police and is free to leave at any time"). Moreover, at the time Mr. Gordon, a black man from out-of-state, was being questioned, he was separated from his family and was standing next to the patrol car, which had its flashing lights activated, and there were two officers present, both in police uniforms, both wearing firearms. Under these circumstances, a reasonable person would not have felt free to leave. Indeed, Mr. Gordon testified that did not feel that he "could just take off and leave."

In *Brandon*, the officer returned the driver's documents and told her that she was free to leave, but a few seconds later the officer resumed asking the driver a series of questions unrelated to the traffic offense for which she was stopped. 140 P.3d at 20. The court held that what may have begun as a consensual encounter between the officer and driver "escalated into an unlawful detention or seizure as the result of [the officer]'s continued questioning of [the driver]. *Id.* The same is true here. Even if Mr. Gordon had voluntarily returned to speak to the officers, he would not have felt free to leave once Collett began interrogating him about his "story" and asking him a

barrage of persistent and incriminating questions about whether he had anything illegal in his truck.

Moreover, even setting aside whether the encounter was consensual, it was not sufficiently attenuated from the prior illegal detention to purge the taint of that illegality.[4] Thus, any evidence obtained as a result must be suppressed. First, in terms of the "temporal proximity," the so-called "consensual encounter" occurred within seconds of the illegal detention. *See, e.g.*, *Brandon*, 140 P.3d 23(finding no attenuation where the illegal detention occurred immediately before the driver consented to a search). After having illegally detained the Gordons for further questioning, Collett returned Mr. Gordon's documents and told him he was free to go. Mr. Gordon then walked a car-length or less back to his own truck—which could not take more than a few seconds—at which time Collett stopped him to see if he would answer more questions. Thus, the subsequent encounter occurred almost immediately after the illegal detention. Similarly, due to the extremely short temporal proximity between the illegal detention and subsequent encounter, there were insufficient intervening circumstances to dissipate the taint. *C.f. Wong Sun*, 371 U.S. at 487(holding that the

[4] Although the trial court did not conduct an attenuation analysis due to its finding that Mr. Gordon was not illegally detained, there is "a record of amply sufficient detail from which the determination may be made." *Brandon*, 140 P.3d at 22-23.

defendant's illegal arrest did not taint the statement defendant made when he voluntarily came to the police station several days later).

Finally, a consideration of the "purpose and flagrancy of the official misconduct" indicates the purported consensual encounter was tainted by the illegal detention. In *Rodriguez*, the Colorado Supreme Court conducted an attenuation analysis to determine whether an illegal detention that proceeded consent required suppression. 945 P.2d at 1363-65. The court held that the consent was tainted due in part to the "purpose of the prolonged detention." *Id.* at 1365. In so holding, the court relied on the fact that the officers separated the defendant—who did not speak English well—from his interpreter, told the defendant he was free to go but at the same time asked if he "would mind" if they searched his van, requested a drug detection dog well before the request for consent to search was given, and characterized the defendant's detention as an "interdiction stop." *Id.* at 1365. The court summed up the officers' conduct as follows: the officers simply detained the defendant and his family so that they could "ascertain whether any drugs would turn up." *Id.*; *see also Brandon*, 140 P.3d at 21-22(calling into question the purpose the prolonged detention due in part to the fact officers had set out to find a drug detection dog "well before the car was stopped and the request for the consent to search was given").

Similarly, in this case, the court specifically found the officers' testimony that they were merely engaged in traffic enforcement to be incredible, concluding that "obviously these folks aren't out there doing speeding enforcement."(5.13.11,p.8-9,11) The court noted that the officers were not properly certified in traffic enforcement and just so happened to have with them a very specialized device used to conduct searches. Within that discussion, the court also characterized the traffic offenses for which the officers pulled over Mr. Gordon to be "minor."(5.13.11,p.11-12) Indeed, Collett practically admitted as much during cross-examination when he said that the reason why he returned Mr. Gordon's documents and told him he was free to go was "[b]ecause of case law, I wanted to engage in a consensual encounter with him after the traffic stop business was conducted." Thus, the officers were not simply conducting a traffic stop; their focus was on drug interdiction from the start and they merely proceeded with the hope that something might "turn up." *See Rodriguez*, 945 P.2d at 1364-65.

(2) MR. GORDON'S PURPORTED CONSENT TO SEARCH WAS TAINTED BY THE ILLEGAL DETENTION.

Although Mr. Gordon testified that he was pressured into consenting to the search of his truck, the trial court ultimately concluded that his consent was voluntary. However, even assuming his consent was voluntary, it, too, was not sufficiently attenuated to purge the taint of Mr. Gordon's illegal detention. First, like the

subsequent encounter discussed above, the temporal proximity between Mr. Gordon's illegal detention and the request to search was very short. The officers detained Mr. Gordon illegally to subject both he and his wife to further questioning, returned his documents and told him he was free to go, called him back for further questioning within a few seconds, and then during that questioning requested consent to search.

Likewise, the taint was not purged by sufficient intervening circumstances. The only thing that happened between the illegal detention and the request to search was the officers' request for Mr. Gordon to return to answer more questions, at which time Collett immediately confronted Mr. Gordon about the fact he did not believe Mr. Gordon's "story" and interrogated him about whether he had anything illegal in his truck. Under those circumstances, Mr. Gordon's consent was not "an act of free will" sufficient to "purge the primary taint" of his illegal detention. *Rodriguez*, 945 P.2d at 1364; *see, e.g.*, *Brandon*, 140 P.3d at 22-23(holding "there was nothing to purge the prior illegality" where there were "no intervening events and virtually no time lapsed" between the illegal detention and the consent to search).

Finally, as set forth above, the record demonstrates, and the trial court found, that the officers were not conducting routine traffic enforcement as they had suggested, but rather the officers had pulled over Mr. Gordon in the hopes that drugs

"would turn up." *Rodriguez*, 945 P.2d at 1365; *see also Brandon*, 140 P.3d at 21. Thus, analysis of the third factor—the purpose of the prolonged detention—supports suppression.

In conclusion, the traffic stop in this case transformed into an illegal detention when Collett did not return Mr. Gordon's documents after having already concluded his traffic investigation and instead persisted in questioning both Mr. Gordon and his wife about matters unrelated to the original purpose of the stop without reasonable suspicion to justify the further investigation. *See Redinger*, 906 P.2d at 84; *Brandon*, 140 P.3d at 18. Additionally, because the evidence obtained thereafter was a direct result of the prior illegal detention, suppression is required. *Wong Sun*, 371 U.S. at 484; *Brandon*, 140 P.3d at 21-22.

2. Even if Mr. Gordon was not illegally detained by further questioning before his documents were returned, the subsequent encounter after the officers returned his documents immediately escalated into an illegal detention requiring suppression.

Even if this Court finds that Collett's questioning of Mr. Gordon and his wife after the purpose for which the stop was initially conducted had been accomplished did not transform the traffic stop into an illegal detention, the evidence must still be suppressed because it was obtained as a result of an illegal detention which, as

described above,[5] occurred when Collett called Mr. Gordon back for further questioning and then immediately began interrogating him about alleged inconsistencies in his account of his travels and whether he had anything illegal in his truck.

As argued above, even if Mr. Gordon had voluntarily agreed to come back to answer more questions, any subsequent "consensual" encounter immediately escalated into an illegal detention. *See, e.g.*, *Brandon*, 140 P.3d at 20-21(holding that a consensual encounter following a traffic stop escalated into an unlawful detention as a result of the officer's questioning of the driver). A reasonable person in Mr. Gordon's position surely would not have felt free to leave when being interrogated on the side of the road, away from his family, next to a patrol car with its lights activated, by two uniformed officers about whether he was lying about his travel plans and whether he had anything illegal.

Furthermore—just as there was no reasonable suspicion to justify prolonging Mr. Gordon's detention before returning his documents—there was no reasonable suspicion justifying the detention after the documents were returned. The only additional information Collet obtained as a result of re-questioning the Gordons after having already concluded the traffic investigation was (1) Mr. Gordon said the family

[5] *See* Part I.D.1.b(1).

went to L.A. to visit casting companies, whereas Mrs. Gordon did not recall visiting any other California cities, and there was some suggestion that had she been in the L.A. area she would have visited her sister in nearby Long Beach; and (2) Collett did not believe casting companies would be open on a Sunday, the day that Mr. Gordon said they were in L.A.

However, even if the Gordons' statements about visiting L.A were inconsistent, there is nothing to indicate that such an inconsistency was indicative of any crime. *See Wood*, 106 F.3d at 947(observing that discrepancy regarding city where defendant said he rented car is "not the sort of inconsistency" that gives rise to reasonable suspicion in absence of further evidence linking the inconsistency to the drug trade). Furthermore, while Collett may personally believe it is "unlikely" that casting companies would be open on a Sunday, there was no evidence to support he subjective belief, and thus it is just as plausible that casting companies in L.A. *would* be open.

Finally, suppression is required because evidence was obtained as a direct result of Mr. Gordon's additional illegal detention. Indeed, the subsequent request to search Mr. Gordon's truck occurred in the midst of an illegal detention. Collett asked Mr. Gordon a series of questions about whether he had anything illegal in his truck and then immediately asked to search the truck. As a result, there was neither temporal

proximity nor intervening circumstances to purge the taint of the illegal detention because the purported consent to search actually occurred *during* the illegal detention. *See Rodriguez*, 945 P.2d at 1364(finding that the proximity of the illegal detention and the consent was "immediate"); *Brandon*, 140 P.3d at 23(finding "no intervening events and virtually no time lapsed" between the illegal detention and consent to search). Furthermore, the purpose of Mr. Gordon's prolonged detention was not—as the officers suggested—to investigate traffic, but rather to hold him as long as it took until the officers could discover evidence of drugs based on their unarticulated hunch that such drugs existed. *See Rodriguez*, 945 P.2d at 1365; *see also Brandon*, 140 P.3d at 21.

Accordingly, even if this court does not find that suppression is required as a result of Mr. Gordon's illegal detention before his documents were returned, suppression is nonetheless required because the evidence—later admitted at trial—was also obtained as a direct result of Mr. Gordon's additional illegal detention.

II. MR. GORDON'S CONVICTION MUST BE VACATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE SUBSTANCE DISCOVERED AMOUNTED TO MORE THAN FIVE POUNDS OF MARIJUANA.

A. Standard of Review and Preservation

Whether there was sufficient evidence to support a conviction beyond a reasonable doubt is subject to de novo review. *See People v. Robb*, 215 P.3d

1253,1257(Colo.App.2009). A reviewing court may consider a claim of insufficient evidence regardless of whether the defendant raised the claim to the trial court. *See People v. Duncan*, 109 P.3d 1044,1045(Colo.App.2004).

B. Law and Analysis

The Due Process Clauses of the United States and Colorado Constitutions protect an accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358,364(1970); *see* U.S.CONST.AMENDS.V,XIV;COLO.CONST.art.II,§25. These same constitutional provisions apply equally to sentence enhancers. *Mullany v. Wilbur,* 421 U.S. 684,698-99(1975); *Armintrout v. People*, 864 P.2d 576,580(Colo.1993).

In determining the sufficiency of the evidence, the appellate court "must determine whether that evidence, viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crimes charged beyond a reasonable doubt." *People v. Miralda*, 981 P.2d 676,678(Colo.App.1999). Such evidence must be "both substantial and sufficient" in order to support the determination of guilt beyond a reasonable doubt. *Id.* Furthermore, a jury may not base its verdicts on "guessing, speculation, or conjecture." *Id.*

Mr. Gordon was charged with—and convicted of—possession with the intent to distribute more than five but less than one hundred pounds of marijuana, a class four felony, pursuant to section 18-18-406(6)(b)(I),(III)(B).(v1,p.1-2;Env.V,Verdict). To justify that conviction, the State was therefore required to present sufficient evidence to prove beyond a reasonable doubt that the substance discovered amounted to at least five pounds or more of marijuana. However, the State failed to do so.

The following evidence was presented at trial:

- Officers discovered twenty-five bundles wrapped in green cellophane packaging concealed in the auxiliary fuel tank of Mr. Gordon's truck.(6.7.11,p.167)

- Jacobsen testified that, in his experience, he has seen either drugs or currency packaged in this manner (6.7.11,p.192-93), but due to the type and amount of packaging, the officers could not determine if the bundles even contained contraband without opening them.(6.7.11,p.193,195; 6.8.11,p.46;People's Ex.11)

- In order to discover what they contained, Collett opened one of the bundles.(6.7.11,p.167;6.8.11,p.10-11) Inside, he discovered two individual packages, each containing around one pound of a budding green substance suspected to be marijuana.(6.7.11,p.168;6.8.11,p.10-12;People's Ex.13)

- Without opening any of the other bundles to verify the contents, Collett "estimated" that—between all twenty-five bundles—there was fifty pounds of marijuana.(6.8.11,p.12) He arrived at this number by multiplying the two, one pound packages discovered in the bundle he opened by the total number of bundles.(*Id.*)

- The crime lab tested "two items" and determined that each "item" weighed around a pound and each contained marijuana.(People's Ex.14;6.8.11,p.12-13)

Accordingly, in the light most favorable to the State, there was only sufficient evidence to prove the existence of—at most—four pounds of marijuana because neither the officers nor the crime lab bothered to open any additional bundles to verify that, in fact, they too contained marijuana.[6] In order to find the State had proved beyond a reasonable doubt that the marijuana amounted to more than five pounds, the jury therefore must have relied entirely on speculation as to what the remaining unopened bundles contained because, due to the packaging, it was impossible to tell what was inside the bundles without opening them. The bundles could have contained marijuana, but they also could have contained money or some other type of contraband. Indeed, Jacobsen testified that, in his training and experience, he has seen money or drugs packaged in the same manner, and Mr. Gordon's defense was that he believed the packages contained money. Thus, Mr. Gordon's conviction must be vacated because there was insufficient evidence to support a conclusion by a reasonable person that Mr. Gordon was guilty of possession with intent to distribute more than five pounds of marijuana beyond a reasonable doubt. *See Miralda*, 981 P.2d at 678.

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[6] If the "two items" tested by the crime lab were not the same two one-pound packages Collett discovered, then the jury only had the officers' word for it that the substance in the those packages was actually marijuana. Regardless, between the officers' testimony and the crime lab ,testing, at most the State proved beyond a reasonable doubt the existence of four pounds of marijuana.(6.8.11,p.117-18(describing the physical exhibits)).

III. THE TRIAL COURT REVERSIBLY ERRED WHEN IT FAILED TO TAKE ANY ACTION IN RESPONSE TO DEFENSE COUNSEL'S CONCERNS THAT JURORS MAY HAVE BEEN EXPOSED TO PREJUDICIAL EXTRANEOUS INFORMATION AFTER HE OBSERVED MEMBERS OF THE JURY LOOKING AT A DOCKET SHEET LISTING MR. GORDON AS A DEFENDANT IN AN ADDITIONAL CASE.

A. Standard of Review and Preservation

A trial court's decision not to take any action in response to the jury's exposure to prejudicial extraneous information is reviewed for an abuse of discretion. *See Dunlap v. People*, 173 P.3d 1054,1091(Colo.2007). Here, defense counsel informed the trial court that he observed members of the jury looking at a docket sheet that listed Mr. Gordon as a defendant in an additional case and requested that the court address the issue with the jurors and give a curative instruction.(6.7.11,p.131-32) The court declined to do so.(*Id.* at 132-33) Mr. Gordon has a state and federal due process right to a fair trial by an impartial jury, U.S.CONST.AMENDS.V,XIV;COLO.CONST.art.II, §§16,25; thus, reversal of Mr. Gordon's conviction is required unless this Court determines that the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18,21-22(1967); *Dunlap*, 173 P.3d at 1091.

B. Legal Framework

The Due Process Clauses of the Colorado and United States Constitutions guarantee every criminal defendant the right to a fair trial. U.S.CONST.AMENDS.V, XIV;COLO.CONST.art.II,§§16,25. The right to a fair trial includes the right to an

impartial jury. *Dunlap*, 173 P.3d at 1081. These rights entitle a defendant to a verdict "based solely on the evidence presented in the courtroom." *Id.* at 1091. A defendant's constitutional right to a fair trial "is therefore implicated when a jury is exposed to extraneous information." *Id.*

Where, as here, the jury was potentially exposed to extraneous information mid-trial, courts apply a three-step process set forth by the Colorado Supreme Court in *Harper v. People*, 817 P.2d 77,83(Colo.1991); *see also* ABA Standards for Criminal Justice, Fair Trial & Free Press §8-3.6(3)(3d. 1992). First, the court must determine whether the extraneous information has a "potential for unfair prejudice." *Harper*, 817 P.2d at 83. Second, if the information has a potential for unfair prejudice, or if there is any doubt that the information has that potential, then the court must canvass the jurors to determine whether they were, in fact, exposed to extraneous information. *Id.* at 83-84. Third, if the court determines that any of the jurors were exposed to the information, the court must examine those jurors separately to determine how much they know concerning the extraneous information and what effect, if any, that information will have on their ability to decide the case fairly. *Id.* at 83. Failure to address the jury's potential exposure to prejudicial extraneous information can be grounds for reversal. *See People v. Wadle*, 97 P.3d 932,935(Colo.2004); *Dunlap*, 173 P.3d at 1091.

C. Relevant Facts

According to the record made by the court, the caption indicated that the additional case—like the present criminal case—was being prosecuted by the "People of the State of Colorado," and it listed Mr. Gordon, his brother, and the blue pick-up truck as defendants.(6.7.11,p.133) The present case was listed immediately below the forfeiture case.(*Id.*) Defense counsel expressed concern that the jurors who saw it might believe that Mr. Gordon had more than one criminal case.(*Id.* at 132) He asked the court to address the issue with the jurors.(*Id.*) The prosecutor stated that he had "no problem" if the Court addressed the jury as defense counsel suggested.(*Id.*)

However, the court refused, finding "it would draw attention to something that doesn't necessarily need to be highlighted."(*Id.* at 133) Additionally, notwithstanding that Mr. Gordon's name was specifically listed as a defendant in two different case numbers, the court found that no one would know the additional case had to do with Mr. Gordon because his name was "tucked in there," and even if they did, they would just think it was the same case.(*Id.* at 133) The court ultimately suggested that the docket sheet should be taken down, but defense counsel had already done so.(*Id.*)

D. Analysis

1. The extraneous information was prejudicial.

To jurors who are presumably unfamiliar with the nuances of the law regarding civil forfeiture vis-à-vis a criminal case, is it very probable that the fact there are two separate cases—each with its own case number, each prosecuted by the State, each listing Mr. Gordon as a defendant—could cause an average juror to believe that Mr. Gordon had more than one very similar criminal case pending against him; in other words, it might appear that Mr. Gordon has a propensity to commit crimes. Thus, the extraneous information was in the nature of CRE 404(b) "other acts" evidence, which is "generally inadmissible because of its highly prejudicial effect." *Harper*, 817 P.2d 85; *see also People v. Rath*, 44 P.3d 1033,1039(Colo.2002). Furthermore, it appears the court recognized that the extraneous information had a potential for unfair prejudice because its rationale for not taking any steps to ensure that jurors were not misled was that it would simply "draw attention to" or "highlight" the additional case.(6.7.11,p.132-33)

2. The court failed to canvass the jury.

Harper makes clear that if there is even doubt about whether the extraneous information may be prejudicial, the court must canvass the jury. 817 P.2d at 83. Here, the information was inherently prejudicial, which the court apparently recognized.

Moreover, defense counsel said he had seen members of the jury looking at the docket sheet. Consequently, it is likely some jurors were exposed to extraneous information, and it was therefore incumbent upon the court to determine who those jurors were. *Harper*, 817 P.2d at 83. Nevertheless, because the court refused, it is unknown which jurors were exposed and how that exposure would affect their ability to decide Mr. Gordon's case fairly. *Id.* at 83; *see, e.g.*, *People v. Harrison*, 58 P.3d 1103,1109-10(Colo.App.2002)(holding court properly applied *Harper* test by canvassing jury and dismissing juror who was prejudiced), *abrogated on other grounds by People v. Johnson*, 121 P.3d 285,288(Colo.App.2005).

3. The court's error was not harmless beyond a reasonable doubt.

First, the evidence was far from overwhelming. *Dunlap*, 173 P.3d at 1091(observing where evidence is not overwhelming, trial court abuses its discretion in failing to canvass jury regarding potential exposure to extraneous information). There was no direct evidence that Mr. Gordon knowingly possessed more than five pounds of marijuana.(6.8.11,p.96-97,108-117) To the contrary, Mr. Gordon said he was hired to transport money—not drugs—and the person who hired him was the one who modified the tank and placed the bundles inside. In addition, although the police recovered twenty-five bundles, they only opened one or two, thus it is unknown whether the other bundles even contained marijuana. *See* Part II, *supra.*

Second, part of Mr. Gordon's defense was that he had never been paid to transport anything before.(6.8.11,p.203). Therefore, if members of the jury had been led to believe—wrongly—that Mr. Gordon had been caught smuggling drugs in the same truck on another occasion, his defense would be severely undermined.

CONCLUSION

Mr. Gordon respectfully requests this Court to vacate his convictions and remand his case with directions to the trial court to order suppression of the evidence obtained as a result of Mr. Gordon's illegal detentions. Alternatively, Mr. Gordon requests this Court to reverse his conviction because the trial court reversibly erred in failing to take any action pursuant to *Harper*. Finally, Mr. Gordon would ask this Court to vacate his conviction for lack of proof beyond a reasonable doubt.

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CERTIFICATE OF SERVICE

I certify that, on January 18, 2013, 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.

K. Root