DATE FILED: June 13, 2013 3:21 PM

COURT OF APPEALS STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	
District Court, Jefferson County Honorable Tamara Russell, Judge Case No. 10CR2446	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. STEVE GORDON, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 11CA1890
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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 does not exceed 9,500 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.

/s/Kevin E. McReynolds

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II. Whether the trial court correctly denied Gordon's motion for judgment of acquittal because the record included sufficient evidence for a rational juror to infer he was smuggling more than five pounds of marijuana.

III. Whether the trial court abused its discretion by not expressly addressing the possibility that prospective jurors may have seen a docket sheet that associated Gordon with the related civil forfeiture action against the truck in which he smuggled fifty pounds of marijuana.

STATEMENT OF THE CASE

This case involves Defendant Steve Gordon, who confessed to helping an associate smuggle contraband across the county in exchange for a payment of $10,000. Using his wife and toddler as cover, Gordon drove a truck with a hidden compartment containing 50 pounds of high-grade marijuana until it was discovered by police following a traffic stop on I-70.

After a two-day trial, a Jefferson county jury convicted Gordon of possession with intent to distribute more than 5 pounds and less than 100 pounds of marijuana. The trial court sentenced Gordon to two years of probation and 60 days in jail.

Gordon raises three issues on appeal. All fail.

STATEMENT OF THE FACTS

Gordon took his wife and young daughter on a cross-country road trip, supposedly to look at car trailers and go sightseeing (*see* Vol. 1 pp. 8-9). Gordon claims he was talking about this trip when an acquaintance "Mike" happened to overhear and offered him $10,000 to smuggle large quantities of cash from San Francisco back to Boston (*see*

id. p. 10; CD 6/7/11 pp. 174-75; Supp. CD 4/12/11A pp. 31-32).[1] Gordon agreed and later told police this was the first time he ever smuggled contraband and that Mike made modifications to the truck on the day he left Boston, a week before his arrest (CD 6/7/11 pp. 175-76). Contrary to these claims, the hidden compartment containing the marijuana was rusted and worn, not new (CD 6/8/11 pp. 17-18; Env. V, Exs. 15, 16).

After crossing the country to spend a single day in San Francisco (where Mike appeared and loaded the truck), Gordon took his family to Los Angeles for a day before starting the trip back to Boston (CD 6/7/11 pp. 153-56, 177-79, 228-30; Supp. CD 4/12/11A pp. 32-33). While crossing Colorado, Gordon was pulled over for speeding and for having an unreadable rear license plate (*see* CD 6/7/11 p. 151; Supp. CD 4/12/11A pp. 58-59).

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[1] The Supplemental CD includes two transcripts from the April 12, 2011 suppression hearing. To avoid confusion, the People's citations to the 121 page transcript are to "Supp. CD 4/12/11A", and citations to the separate 17 page transcript are to "Supp. CD 4/12/11B".

After concluding the traffic stop and telling Gordon he was free to go, police asked Gordon if he would mind answering a few more questions and Gordon agreed (*see* Supp. CD 4/12/11A pp. 22, 43, 66-67; CD 5/13/11 p. 5; CD 6/8/11 p. 41-42). Gordon denied having any illegal items in the truck, but reacted differently when asked about marijuana (*see* Vol. p. 10; CD 6/7/11 p. 231). Gordon then voluntarily consented to a search of the truck (*see* Vol. p. 10; CD 5/13/11 p. 5).

Shining a light into the auxiliary fuel tank in the truck's bed showed that a false wall had been added (*see* Vol. p. 10; CD 5/13/11 p. 5; Supp. CD 4/12/11A pp. 24, 70; CD 6/7/11 p. 234). A scope then showed the area behind the false wall contained large green cellophane wrapped bundles that were consistent with marijuana (*see* Vol. p. 10; CD 6/7/11 pp. 234-35). Police arrested Gordon (*see* Vol. p. 10; Supp. CD 4/12/11A p. 26).

A further inspection of the truck revealed 25 large bundles of marijuana in a sophisticated smuggling compartment (*see* Vol. p. 10; CD 6/7/11 pp. 167-68; CD 6/8/11 pp. 5-19, 23-25; Env. V, Ex. 13, 15-16). The auxiliary fuel tank was mounted on rusted hinges with pistons to

control access to the hidden compartment (CD 6/8/11 pp. 5, 14-19, 23-25; Env. V, Ex. 15-16). The pistons were hard-wired into the driver's side window controls (*see id.* pp. 17-18, 23-25).

Gordon waived his *Miranda* rights and gave a statement to police, claiming that he believed he was smuggling only cash, not drugs (*see* CD 5/13/11 pp. 7-8; Supp. CD 4/12/11A pp. 29-33 ; CD 6/7/11 pp. 173-77).

The jury did not believe this story and convicted Gordon of possession with intent to distribute marijuana (Env. IV, Verdict).

This appeal followed.

SUMMARY OF THE ARGUMENTS

The trial court correctly denied Gordon's motion to suppress because he was not illegally detained during the traffic stop and police had both Gordon's consent to search and reasonable suspicion for continuing his detention after completing the traffic stop and telling him he was free to leave.

The trial court also correctly denied Gordon's motion for judgment of acquittal because the police testimony and laboratory evidence provided sufficient evidence for a rational juror to conclude the 25 cellophane wrapped packages Gordon was smuggling in a hidden compartment contained at least 5 pounds of marijuana.

Further, because the information was not inherently prejudicial, the trial court did not abuse its discretion or commit plain error by not polling the jurors on whether they had seen a docket sheet outside the courtroom that showed Gordon was also a party in a related civil forfeiture action.

ARGUMENTS

I. The Trial Court Correctly Denied Gordon's Motion to Suppress Evidence of His Drug Smuggling.

Gordon contends the trial court erred because police illegally detained him beyond the time necessary for the traffic stop and Gordon's subsequent consensual encounter and consent to search were tainted by this illegal detention or involved a new illegal detention.

He is wrong because his unpreserved claims of illegal detention are without merit, and the trial court correctly concluded police had a reasonable suspicion to stop Gordon for traffic violations and both his consent and reasonable suspicion supported the questioning and search that took place after police concluded the traffic stop and told Gordon he was free to go.

A. Standards of Review.

The People agree a trial court's suppression determination involves a mixed question of fact and law (Opening Brief p. 2). *See People v. Syrie*, 101 P.3d 218, 221-22 (Colo. 2004). Accordingly, this Court must defer to the factual findings below and analyze the trial court's application of legal standards to those facts *de novo* (*see* Opening Brief p. 2). *People v. Vissarriagas*, 278 P.3d 915, 917 (Colo. 2012); *People v. Garcia*, 251 P.3d 1152, 1158 (Colo. App. 2010).

But the People do not agree that Gordon preserved the claims he makes in this appeal (*see* Opening Brief p. 3). At the conclusion of the suppression hearing, Gordon moved to suppress evidence resulting from his traffic stop by arguing *only*: (1) police lacked a reasonable suspicion

to initiate the traffic stop; (2) his continued discussion with police after being told he was free to go was not consensual; and (3) his consent to search was not voluntary (*see* Supp. CD 4/12/11B pp. 5-10).

Recognizing the difficulty of overcoming the trial court's express findings on these claims, Gordon's appeal is founded primarily on new arguments: (1) that police illegally seized him by prolonging the traffic stop beyond the time necessary to serve its purpose and this detention tainted any consensual encounter or consent to search, or (2) alternatively, that police questioning of Gordon after telling him he was free to go constituted a separate illegal seizure (Opening Brief pp. 16-18, 22-23, 25-26, 27-32). These new claims are reviewed, if at all, for plain error. *See Syrie*, 101 P.3d at 223 (refusing to consider new arguments regarding a suppression determination because they were not raised below and the trial court was not given an opportunity to make factual findings regarding these claims); *People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998) (same);[2] *Hagos v. People*, 2012 CO 63 ¶ 14

[2] The purpose of preservation is to provide the trial court with the opportunity to directly address a defendant's arguments, not to provide

(Nov. 5, 2012) (unpreserved claims are reviewed for plain error). Gordon bears the burden of persuasion under the plain error standard of review. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005).

To the extent Gordon challenges the trial court's findings on his preserved claims that police violated his Fourth Amendment rights, the People agree any such constitutional violations would require reversal if they were not harmless beyond a reasonable doubt (*see* Opening Brief pp. 2-3).

B. Gordon was not Illegally Detained and Voluntarily Consented to the Search of His Brother's Truck.

"The *Fourth Amendment to the United States Constitution* and *article II, section 7 of the Colorado Constitution* protect persons from

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a favorable standard of review to whatever new arguments appellate counsel comes up with. *See Novak v. Craven*, 195 P.3d 1115, 1120 (Colo. App. 2008) ("[t]o preserve a claim for review on appeal, the party claiming error must have supplied the right ground for the request . . . giving the judge the wrong reason for a request is usually equivalent to giving the judge no reason at all"); *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006) (recognizing that giving trial courts the particular grounds for an objection or motion not only gives the prosecution a full and fair opportunity to present relevant evidence and argument with regard to it, but also gives the court an opportunity to correct any alleged error).

unreasonable searches and seizures of their person, home papers and effects." *Garcia*, 251 P.3d at 1157 (italics in original).

In the context of a traffic stop, prolonging a stop to conduct a drug investigation intrudes upon a reasonable expectation of privacy and, therefore, requires either: (1) reasonable suspicion, or (2) that the further questioning or search is the result of a consensual encounter after the traffic stop is concluded. *Id.* at 1158; *People v. Castaneda*, 187 P.3d 107, 109 (Colo. 2008) (recognizing a consensual encounter does not require a showing of reasonable suspicion because it is not a seizure under the *Fourth Amendment*).

Reasonable suspicion exists when, under the totality of the circumstances, the articulable facts taken together with reasonable inferences from those facts give rise to a reasonable suspicion that a person has been, is, or is about to be engaged in criminal activity. *Garcia*, 251 P.3d at 1158; *People v. Pigford*, 17 P.3d 172, 175-76 (Colo. App. 2000). "Objective evaluations of a person's 'nervous or unduly cautious behavior' may be considered as part of the totality of the circumstances." *Pigford*, 17 P.3d at 176. Importantly, this is an

objective analysis and an officer's subjective motives for an investigation will not affect the propriety of a reasonable search. *Garcia*, 251 P.3d at 1158.

A consensual encounter following a traffic stop cannot begin until an officer has returned the driver's documentation. *Castaneda*, 187 P.3d at 109. But such an encounter will not be considered consensual "if the driver has an objective reason to believe that he was not free to end his conversation with the law enforcement officer and proceed on his way." *Id.* (internal quotation and citation omitted).

1. Suppression proceedings.

At the suppression hearing, the prosecution argued police had a reasonable suspicion to stop Gordon on east I-70 for violating traffic laws because: (1) pacing Gordon's vehicle showed he was speeding; (2) a license plate frame partially obscured his rear plate; and (3) an attempt to run the license plate before pulling him over suggested it had expired in 1989 (Supp. CD 4/12/11B p. 11; *see* Supp. CD 4/12/11A pp. 10-11, 57-58).

After pulling Gordon over, Agent Jacobsen spoke with him through the truck window while Gordon searched for his license, registration and insurance (Supp. CD 4/12/11A pp. 12-13). In this brief conversation, Gordon appeared extremely nervous and hesitated noticeably before answering basic questions (*see id.* pp. 15-16). Gordon claimed he had driven with his wife and toddler daughter from Boston to Chicago and then to San Francisco in the last week to look at small automobile trailers and to show his wife San Francisco before heading back home (*see id.* pp. 13-14). Gordon gave Agent Jacobsen his license and registration and explained that the truck belonged to his brother (*see id.* pp. 13, 66).

Agent Jacobsen took the license and registration back to the patrol car for Agent Collett to check (*see id.* pp. 14-15). Both agents were confused by Gordon's story and choice of route because I-80 runs more directly between San Francisco and Boston (*see id.* p. 15).

While Agent Collett checked the validity of Gordon's license and registration, Jacobsen went back to clarify Gordon's story (*see* Supp. CD 4/12/11A pp. 14-16, 61). Because it was difficult to hear, Jacobsen

asked Gordon to talk with him by the passenger side of the patrol car (*see id.* p. 17). When Agent Jacobsen asked why they had not taken I-80, Gordon explained that they had also eaten in Las Vegas and also gone sightseeing and looked into casting companies for their daughter in Los Angeles (*id.* pp. 18, 20-21).

At that point, Agent Collett got out of the patrol car and asked Gordon about the proof of insurance, which Gordon indicated his wife could find in the truck (*see id.* pp. 19, 62).

Agent Collett spoke to Gordon's wife briefly about their trip while she located the insurance information (*see id.* pp. 62-63). Her version largely matched Gordon's, but rather than stating they had previously stopped in Chicago to look at a trailer, she claimed they were to make this stop on the way back to Boston (*see id.* 63-64).

Noticing this inconsistency, Agent Collett took the insurance information and went back to clarify with Gordon where the family had travelled (Supp. CD 4/12/11A pp. 63-64). After hearing what Gordon had told Agent Jacobsen while Collett was verifying the license and registration information – that they had gone to Los Angeles to visit

casting companies on Sunday and had come through Las Vegas – Collett noticed a new inconsistency because Gordon's wife had not mentioned anything about Los Angeles or Las Vegas when discussing their route (*see id.* 62-64).

Given the noise level on the road, the apparent inconsistencies and Gordon's extremely nervous behavior, Agent Collett went back to quickly clarify with Gordon's wife whether he had correctly understood her (*see id.* pp. 64-65). When he asked her directly, she denied they had visited any cities in California other than in the San Francisco/Santa Rosa area and added she had been disappointed that they had not been able to visit her sister in Long Beach (adjacent to Los Angeles) because it was too far away from where they had been traveling (*see id.* p. 65).

Instead of confronting Gordon with the significant inconsistencies between the stories he and his wife had told, Agent Collett returned Gordon's documents, gave him a warning, shook his hand and told him that he was free to go (*see id.* pp. 66).

Gordon then walked from the patrol car back to his driver's side door when Agent Collett called to him and asked if he could ask Gordon

a few more questions (*see id.* pp. 66, 22-23). Gordon agreed and walked back to where Agent Collett was standing by the patrol car (*see id.*).

Agent Collett asked Gordon why his wife did not remember going to Los Angeles and suggested the trip did not make sense – he was making two cross-country trips with a toddler on a tight schedule in search of automobile trailers, which could probably be found nearer Boston (Supp. CD 4/12/11A pp. 67-68). Agent Collett then asked Gordon if he had any illegal items in the truck including drugs or large sums of money (*see id.* p. 68). Gordon denied having each item, but reacted differently before answering when asked about marijuana (*see id.*). Gordon then gave his verbal consent for police to search his truck (*see id.* p. 69).

After reaffirming Gordon's voluntary consent, Agent Collett began to search the truck (*see id.* pp. 69-70, 23). He immediately noticed the auxiliary fuel tank in the bed of the truck seemed odd – it had a hole in the side that would keep it from holding fuel and shining a light through the gas cap revealed a false wall that substantially limited its capacity (*see* Supp. CD 4/12/11A pp. 70-71, 24-25). When Agent

Jacobsen joined the search, he agreed that the fuel tank appeared to have been altered and then retrieved a scope from the patrol car (*see id.*). Placing the scope in the hole on the outside of the fuel tank, Agent Jacobsen saw the hidden compartment contained cellophane wrapped bundles that were consistent with illegal drugs (*see id.* pp. 25-26, 71-72). Police then arrested Gordon and Agent Collett told him they had found the "dope" (*see id.* pp. 72-73).

At the police station, Gordon signed a *Miranda* waiver before admitting he knew about the hidden compartment and had agreed to smuggle contraband cross-country in exchange for $10,000 (*see id.* pp. 29-32).

Gordon also testified at the suppression hearing and contradicted the police testimony in several ways. First, Gordon claimed that Agent Collett did not ask Gordon to return to answer more questions, but instead demanded it (*see* Supp. CD 4/12/11A p. 97). Second, Gordon claimed Agent Collett kept touching his gun while asking questions about contraband and that he felt threatened by this behavior (*see id.* pp. 98, 119). Third, Gordon claimed he initially denied Agent Collett's

request to search the vehicle and repeatedly said he did not want to consent until, after five minutes of Collett insisting he "needed" to search the truck, Gordon responded "whatever" (*see id.* pp. 99-101, 116-17).

After hearing arguments from each side, the trial court took the matter under advisement (*see* 4/12/11B pp.4-15).

2. Trial court ruling.

In a separate hearing, the trial court made its findings of fact and conclusions of law denying Gordon's motion to suppress (*see* 5/13/11 pp. 3-17). Specifically, the trial court held:

(1) the traffic stop was supported by reasonable suspicion because pacing is a valid method of assessing speeding and there was uncontroverted evidence that Gordon was speeding and that the license plate on the truck was partially obscured (*see id.* pp.10-11);

(2) the investigatory stop that followed was of minimal duration and Agent Collett's discussions with Gordon and his wife

during this stop were valid discussions, not interrogations (*see id.* pp. 12-13);

(3) the contradictory stories told by Gordon and his wife created a reasonable suspicion to detain the truck and seek consent to search because these facts, innocent by themselves isolation, when considered together justified an investigatory stop and were very similar to the circumstances in *Garcia*[3] (*see id.* pp. 12-14);

(4) at the moment the traffic stop concluded, Gordon was free to leave and he voluntarily returned and consented to further questioning and the search – to the extent Gordon claimed he was intimidated by Agent Collett and did not feel free to leave, this testimony was not credible (*see id.* pp. 5, 8, 14); and

(5) Agent Collett obtained Gordon's voluntary consent to search the truck by stating he did not have to allow the search and the scope of the search was appropriate (*see id.* pp.5, 14-16).

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[3] *Garcia*, 251 P.3d 1152.

3. Analysis.

Though he did so below, Gordon does not contest the validity of the initial traffic stop on appeal. Instead, Gordon contends this investigative stop became an illegal seizure the instant his wife handed Agent Collett proof of insurance or, alternatively, the alleged consensual encounter with police after the traffic stop ended became an illegal seizure when Agent Collett confronted Gordon about discrepancies in their statements and asked about whether illegal items were in the truck (*see* Opening Brief pp. 16-32). These arguments fail for three reasons.

First, as the trial court found, Agent Collett's discussions with Gordon and his wife during the traffic stop were not interrogations and did not constitute an unreasonable seizure because: (1) the stop was of minimal duration; (2) the discussion was conversational and polite, not confrontational (*see* 5/13/11 p. 12; *see also* 4/12/11A pp. 119-20 (Gordon admitting police were polite and did not threaten him or his wife)); and (3) the discrepancies in the statements of Gordon and his wife combined with Gordon's extremely nervous behavior gave rise to a reasonable

suspicion justifying detention and further questioning – though police chose instead to end the traffic stop before initiating a consensual encounter (*see* 5/13/11 pp. 13-14, 4-5).

Second, recent on-point decisions by this Court and the Colorado Supreme Court directly support the trial court's findings of both the officers' reasonable suspicion and that Gordon voluntarily engaged in a consensual encounter after the end of the traffic stop.

In *Garcia*, this Court upheld the non-consensual search of a vehicle after the conclusion of a traffic stop because it was supported by reasonable suspicion and the length of the detention (14-20 minutes to wait for a K-9 unit after the traffic stop ended) was appropriately brief. *See* 251 P.3d at 1160. During a traffic stop, the police officer noticed several discrepancies in the stories told by the driver and passenger including that they could not accurately relate their planned route on a multi-state journey and the vehicle was not registered to the driver or the passenger, though the passenger claimed he knew the owner's uncle. *See id.* at 1157, 1158. The officer also noticed that the driver was hesitant in answering direct questions. *See id.* at 1156. The officer

concluded the traffic stop and told the driver he was free to go. *Id.* at 1157. After the driver took two or three steps back towards his vehicle, the officer asked if they could talk further and the driver agreed and returned. *Id.* The officer then confronted the driver that their story did not make sense and asked whether there were drugs in the vehicle, which the driver denied. *Id.* The driver and passenger refused to consent to a search, but the officer detained the vehicle and requested a K-9 unit to do a narcotic dog search. 251 P.3d at 1157. After the dog alerted, police found marijuana in the vehicle. *Id.*

The trial court denied the defendant's motion to suppress and this Court affirmed, holding the aggregate inconsistencies in the suspects' stories allowed the officer to continue "to investigate, first through consensual questioning and subsequently through the dog sniff, because the totality of the circumstances viewed objectively supported the reasonableness of the officer's suspicions." *Id.* at 1159; *see id.* at 1160.

In *Castaneda*, the Colorado Supreme Court reversed a trial court's suppression order because search of vehicle after the conclusion of a traffic stop resulted from a consensual encounter. 187 P.3d at 108-10.

During a traffic stop, a driver told the police officer that he was traveling from out-of-state to meet a friend to buy cars at auction. *Id.* at 108. Although the driver had a previous drug trafficking arrest, he had no outstanding warrants. *Id.* The officer returned the driver's documents and gave him a warning ticket and told him he was free to leave. *Id.* After the driver had turned and begun walking back to his vehicle, the officer asked if he would answer more questions and the driver agreed and returned. *Id.* When asked, the driver denied having drugs or weapons in the vehicle and gave his consent for police to search the vehicle. *Id.* "The search revealed packages of marijuana concealed in the SUV's spare tire." 187 P.3d at 108.

The trial court granted the driver's motion to suppress because it found he was illegally detained during the additional questioning because no reasonable person under the circumstances would have felt free to leave, particularly because he was not advised he did not have to consent to the continued questioning and the continued questioning was not supported by reasonable suspicion. *Id.*

The Colorado Supreme Court reversed because it found the continued questioning and subsequent search consensual because: (1) after returning the driver's documents, the officer said he was free to leave; (2) the officer asked the driver's permission to ask him further questions; (3) the questions and search consent confirmed the driver's consent was to allow a search of the vehicle for drugs and weapons; and (4) as the trial court acknowledged, police did not use any show of force or coercive tactics. *Id.* 109-10. Additionally, the Supreme Court rejected the trial court's view that failing to specifically inform the driver he did not have to consent could transform a consensual encounter into an investigatory stop. *Id.* at 110.

Here, the facts are markedly similar to those in *Garcia* and *Castaneda*.

As in *Garcia*, Gordon's noticeable hesitancy in answering direct questions and the conflicting and confusing accounts Gordon and his wife gave regarding the multi-state trip they were taking in a vehicle not registered to them created, in the aggregate, a reasonable suspicion to continue the investigation through consensual questioning and a

search of their vehicle (*see* 5/13/11 pp. 4, 13-14; Supp. CD 4/12/11A pp. 15-16, 62-65, 66; *see* Vol. p. 9). Gordon's additional reaction when asked whether there was marijuana in the truck provided additional support for this reasonable suspicion (*see* Supp. CD 4/12/11A p. 68; Vol. 10).

Additionally, as in both *Garcia* and *Castaneda*, the continued questioning of Gordon after returning his documents was a consensual encounter because: (1) Gordon was told he was free to go and returned towards his vehicle (*see* 5/13/11 p. 5; Supp. CD 4/12/11A pp. 66, 22-23);[4] (2) Agent Collett asked Gordon's permission to ask him additional questions and Gordon agreed and returned (*see* 5/13/11 p. 5; Supp. CD 4/12/11A pp. 66, 22-23); and (3) as the trial court found, police did not use a show of force or coercive tactics (*see* 5/13/11 p. 8).[5] Moreover, as in

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[4] The fact police told Gordon he was free to go clearly distinguishes this case from the recent Colorado Supreme Court decision affirming the suppression of drug evidence uncovered after a 30 minute extension of a traffic stop that was not supported by reasonable suspicion. *People v. Mason*, 2013 CO 32 ¶¶ 5-6 (June 3, 2013) (noting that, after police completed the traffic stop paperwork, the detaining deputy retained the defendant's documents and informed him he was not free to leave).

[5] The trial court found Gordon's claims of police coercion not credible (5/13/11 p. 8).

Castaneda, the contents of the limited questioning and Gordon's consent confirmed he agreed to allow police to search the truck for drugs (*see id.* p. 5; Supp. CD 4/12/11A pp. 66-69).[6]

Third and finally, as in *Garcia*, the trial court found the investigatory stop here was appropriately brief and that Gordon voluntarily consented to the search after being told he did not have to allow it (*see* 5/13/11 pp. 5, 14-15; Supp. CD 4/12/11A pp. 69, 86).[7]

Given the above, this Court should affirm the trial court's suppression order because its factual findings are supported by the record and its legal conclusions accurately apply analogous case law.[8]

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[6] By contrast, the facts here are distinguishable from the case Gordon primarily relies upon, *People v. Brandon*, 140 P.3d 15 (Colo. App. 2005) (*see* Opening Brief pp. 4, 5, 22, 24-26, 28-30, 32). There the police officer did not let the offender go back to her vehicle and instead immediately began asking additional questions and ignored the crying offender's objections asking why the officer wanted to search her vehicle. *See Brandon*, 140 P.3d at 20.

[7] In so holding, the trial court rejected Gordon's claims that he was coerced into allowing the search were not credible (*see* 5/13/11 pp. 8, 5, 14-15).

[8] Even assuming *arguendo* that the trial court erred, this Court should still affirm the suppression order because Gordon failed to show

II. There was Sufficient Evidence for a Rational Juror to Convict Gordon.

Gordon contends this Court should vacate his conviction because there was insufficient evidence to show that the 25 packages police found in the smuggling compartment contained more than five pounds of marijuana (*see* Opening Brief pp. 32-35). He is wrong.

A. Standards of Review.

The People do not fully agree that this claim is subject to *de novo* review (*see* Opening Brief p. 32). Instead, because jury verdicts deserve deference and a presumption of validity, courts apply a "daunting standard" to these types of challenges: "constru[ing] the record in the light most favorable to the prosecution to determine whether any rational juror could have found guilt proven beyond a reasonable doubt." *People v. McBride*, 228 P.3d 216, 226 (Colo. App. 2009); *see Mata-Medina v. People*, 71 P.3d 973, 983 (Colo. 2003).

In fact, "[t]his standard is so high, and the consequences to the rare defendant able to satisfy it so severe, that [reviewing courts] apply

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his unpreserved arguments that he was illegally seized demonstrate the trial court committed "plain error".

it even where . . . a defendant failed to preserve the challenge by raising it in the trial court." *McBride*, 228 P.3d at 226 (citations omitted).[9]

Gordon cannot meet this standard.

B. There was Sufficient Evidence for a Rational Juror to Infer Gordon Possessed More than Five Pounds of Marijuana.

A conviction for possession of a controlled substance may be based on circumstantial evidence. *People v. Stark*, 691 P.2d 334, 339 (Colo. 1984). This does not require that the substance be found on defendant's person, so long as it is found in a place under his or her dominion and control. *People v. Warner*, 251 P.3d 556, 564 (Colo. App. 2010) (internal quotation omitted).

Section 18-18-406(6)(b) prohibits the knowing possession of marijuana with intent to distribute and assigns different felony levels of offenses based on the amount of marijuana possessed. *See* § 18-18-

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[9] Though Gordon fails to address preservation in his Opening Brief, the record shows that he did not raise his current sufficiency claim below (*see* 6/8/11 p. 73 (motion for judgment of acquittal arguing only that Gordon did not knowingly possess marijuana); *see* Opening Brief pp. 32-33).

406(6)(b), C.R.S. (2010). As the Colorado Supreme Court found in interpreting a similar drug possession statute, the quantity provisions of this statute are sentence enhancement provisions, not essential elements of the offense. *See Whitaker v. People*, 48 P.3d 555, 558-59 (Colo. 2002); *see also People v. Scheffer*, 224 P.3d 279, 288 (Colo. App. 2009) (applying *Whitaker* to a more recent possession statute). Accordingly, the requirement that an offender act "knowingly" relates only to an offender's conduct and no *mens rea* requirement applies to the amount of the marijuana possessed. *See Scheffer*, 224 P.3d at 289-90 (reaching this conclusion regarding a similar drug possession statute). As a sentencing factor, the quantity of marijuana possessed is a question for the jury that must be proven beyond a reasonable doubt. *Whitaker*, 48 P.3d at 559.

Here, Gordon was convicted of possession with intent to distribute at least five pounds of marijuana, but not more than one hundred pounds (*see* CD 6/8/11 pp.133; Env. IV, Verdict). § 18-18-406(6)(b)(III)(B), C.R.S. (2010).

Gordon contends there was insufficient evidence to convict him of this offense because the prosecution only provided direct evidence of "at most – four pounds of marijuana [and] 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" (Opening Brief p. 35).

But Gordon's entire argument is based on a false premise – that it was not possible for a rational juror to reasonably infer the bundles contained marijuana without opening and testing them. To the contrary:

- Agent Collett, who testified as an expert on drug distribution and sales, testified that when he looked at the green cellophane bundles through the scope (*i.e.* while still in the hidden compartment), he recognized the packaging of the bundles was consistent with marijuana as opposed to other types of illegal drugs and that their size was not consistent

with the amount of currency Gordon claimed to be smuggling (CD 6/7/11 pp. 221, 234-35; *see also* Supp. CD 4/12/11A pp. 73, 89 (suppression hearing testimony showing Agent Collett told Gordon they had found the marijuana at the time of Gordon's arrest – before the bundles had been opened); Vol. p. 10 (arrest warrant identifying bundles as pot based on the packaging));

- Agent Collett also testified that looking at the bundles from the outside "you can see, you know, into a few other ones, you can see the outline of suspected marijuana, but I only opened one" and that all of 25 bundles appeared similar in content and size (CD 6/8/11 p. 11);
- As Gordon concedes, Agent Collett opened one of the 25 bundles and found it contained two bags which each held one pound of a green budding substance (*i.e.* 2 pounds per bundle) that was consistent with high-grade marijuana (CD 6/8/11 pp. 11-12; *see also* Supp. CD 4/12/11A pp. 76-77 (field test positive for marijuana); Opening Brief pp. 34-35);

- Gordon stipulated to the admission of a police laboratory report showing another randomly selected bundle was opened and confirmed to contain more than two pounds of marijuana (CD 6/7/11 p. 135; CD 6/8/11 pp. 12-14; Env. V, Ex. 14 (stating additional bundles were not analyzed "due to random sampling and tested amount exceeding 8 ounces"); Env. IV, Court Ex. A (stipulation)); and
- At closing argument Gordon made the same claim that underlies this appeal – that there was only evidence that 2 of the 25 identical bundles contained a total of 4 pounds of marijuana (2 pound each) – but the prosecutor then opened a third bundle on rebuttal to show it also contained the same budding green substance that Agent Collett had identified as high grade marijuana (*see* CD 6/8/11 pp. 127-28, 119-21).

Thus, while there was direct and absolute proof that 2 of the 25 bundles contained more than four pounds of marijuana, there was significant evidence from which a rational juror could conclude the 23

identical bundles also contained, at least, one additional pound of marijuana. The Court should therefore affirm the jury's verdict.[10]

III. The Trial Court Did Not Abuse its Discretion by Not Expressly Addressing Whether Prospective Jurors May Have Seen Gordon's Name on a Docket Sheet Regarding a Civil Case.

Gordon contends the trial court committed reversible error by not expressly addressing the jury about whether they had been exposed to extraneous information because Gordon's name was listed on a docket sheet outside the courtroom for both this criminal action and a separate civil forfeiture action (*see* Opening Brief pp. 36-41; *see also* Env. IV, Court Ex. B). He is wrong because the circumstances show this information was not inherently prejudicial.

A. Standard of Review.

The People agree that issues regarding potential "irregularity in the jury's proceedings" are within the broad discretion of trial courts (*see* Opening Brief p. 36). *See People v. Mollaun*, 194 P.3d 411, 416

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[10] If this Court finds the jury erred in rejecting Gordon's quantity argument, it should enter judgment of conviction for Gordon's possession of the lesser undisputed amount of marijuana. *See* 18-18-406(6)(b)(III)(A).

(Colo. App. 2008). Thus, a court only errs in this context where "its decision or action is manifestly arbitrary, unreasonable, or unfair . . ." *Mollaun*, 194 P.3d at 416.

But the People do not agree that Gordon preserved any claim of juror misconduct or prejudice (*c.f.* Opening Brief p. 36 (stating Gordon raised the issue below, but not addressing preservation)).

Here, after the jury had been selected and sworn, Defense counsel informed the judge that he believed some prospective jurors may have seen a docket sheet outside the courtroom during jury selection (*see* CD 6/7/11 pp. 131-32, 127).[11] Notably, Defense counsel stated he was not seeking a mistrial and did not suggest that the jurors actually selected for trial had seen the docket sheet (*see id.* at 131-32).

The trial court reviewed the docket sheet and determined that there was no need to highlight this non-issue with the jury, but that

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[11] To the extent Gordon claims he saw actual jurors viewing the docket sheet, this is inaccurate because Defense counsel expressly stated he noticed the issue during a break before jury selection was complete and there was only one such break that took place immediately before Defense counsel conducted *voir dire* (*compare* Opening Brief p. 36 *with* CD 6/7/11 pp. 132, 127, 131, 92-93).

Defense counsel could take down the docket outside the courtroom to eliminate the issue (*see id.* p. 133). Defense counsel stated he had already taken down the docket (*see id.*).

Because Gordon did not object to the trial court's solution for resolving this matter or raise any claim of prejudice, Gordon did not preserve his current claim of error. Accordingly, if the trial court abused its discretion by not expressly addressing the jury about the docket sheet, this issue is reviewed for plain error.[12]

B. The Trial Court's Decision to Not Highlight Gordon's Separate Civil Forfeiture Case was Not Manifestly Arbitrary, Unreasonable or Unfair.

In cases involving jurors potential exposure to prejudicial information, a court *may* poll the jurors "to determine whether extraneous prejudicial information was improperly brought to the jurors' attention and to assess the likely impact (applying an objective

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[12] If the Court finds Gordon's mere mention of this issue preserved a constitutional claim of irregularity in the jury's proceedings, the People agree that any abuse of discretion by the trial court in handling this issue requires reversal if the error was not harmless beyond a reasonable doubt (*see* Opening Brief p. 36).

standard) of that information." *Mollaun*, 194 P.3d at 418; *see People v. Boundurant*, 2012 COA 50 ¶¶81-83 (Mar. 29, 2012). But such an inquiry is not required "where the court is able to determine from the nature of the allegedly prejudicial extraneous information and the surrounding circumstances that the information is not inherently prejudicial" *Mollaun*, 194 P.3d at 418; *see Boundurant*, 2012 COA 50 ¶¶ 84-85 (holding the trial court did not abuse its discretion by refusing to poll the jury about potential exposure to a media story during the course of trial).

Gordon contends the trial court reversibly erred by failing to expressly instruct or poll the jury about their potential exposure to the docket sheet because jurors could have seen the docket sheet and believed he had another criminal case and a propensity to commit crimes like the one here and that the error was not harmless given the lack of overwhelming evidence against him (*see id.* p. 39, 40-41). He is incorrect.

Critically, however, the trial court correctly found the nature and circumstances relating to the docket sheet demonstrated the

information was not inherently prejudicial (*see* CD 6/7/11 pp. 132-33). Specifically, the trial court found no reason to poll the jury and thereby highlight the nonissue created by the docket sheet because: (1) there was no reason to believe any of the selected jurors saw the docket sheet; (2) there is no reason to think jurors would think the civil forfeiture case involved Gordon because it separately lists the criminal and civil forfeiture cases and lists the pickup truck as the primary party – Gordon's name is buried several lines later; and (4) if a juror saw both listings they would likely conclude they both related to this case (*see id.*; Env. IV, Court Ex. B). *See Mollaun*, 194 P.3d at 418 (where the alleged extraneous information is not inherently prejudicial, the court does not abuse its discretion in failing to question the jurors). While Gordon now disagrees with this conclusion on appeal, he cannot show this conclusion is manifestly arbitrary, unreasonable or unfair.

Moreover, even assuming *arguendo* that Gordon could show the trial court abused its discretion in handling jurors' potential exposure to the docket sheet, he cannot show "plain error" or prejudice because: (1) prospective jurors allegedly saw the docket sheet before they were

selected, sworn and instructed (*see* CD 6/7/11 pp. 131-32, 127); (2) this issue was raised before either party had presented any arguments or evidence (*see id.* pp. 131-34, 142); and (3) the trial court immediately and consistently instructed the jurors that they could only consider evidence in rendering their decision, what constituted evidence, and that jurors cannot conduct any outside research or consider outside sources (*see id.* pp. 136-38, 236-37). *See Domingo-Gomez v. People*, 125 P.3d 1043, 1045 (Colo. 2005) (appellate courts presume the jury understood and followed the instructions).

CONCLUSION

For these reasons, this Court should affirm the jury's conviction below.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon BRITTA KRUSE, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on June 13, 2013.

/s/ C. D. Minor