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| <p>COURT OF APPEALS, STATE OF COLORADO</p> <p>101 West Colfax Avenue, Suite 800 Denver, Colorado 80202</p> | |
| <p>Adams District Court Honorable Chris Melonakis Case Number 10CR477</p> | |
| <p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellee</p> <p>v.</p> <p>LEWIS BURTON RIDGEWAY</p> <p>Defendant-Appellant</p> | <p>▲ COURT USE ONLY ▲</p> |
| <p>Douglas K. Wilson, Colorado State Public Defender BRITTA KRUSE, #41572 1290 Broadway, Suite 900 Denver, Colorado 80203</p> <p><u>Appellate.pubdef@coloradodefenders.us</u> (303) 764-1400 (Telephone)</p> | <p>Case Number: 11CA1077</p> |
| <p>OPENING BRIEF OF DEFENDANT-APPELLANT</p> | |

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| <p style="text-align: center;">CERTIFICATE OF COMPLIANCE</p> | |

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

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

Choose one:

It contains 4,243 words.

It does not exceed 30 pages.

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

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R., p.____), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



Signature of attorney or party

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INTRODUCTION

Defendant-Appellant was the defendant in the trial court and will be referred to by his name. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal. Transcripts will be cited by date followed by the page number.

STATEMENT OF THE ISSUES PRESENTED

- I. Whether the evidence and arguments presented by the State at trial, combined with the elemental jury instruction concerning the crime of possession of burglary tools, constituted a prejudicial variance because it impermissibly expanded the crime as charged thereby undermining Mr. Ridgeway's defense and creating a substantial risk that the jury's verdict was not unanimous.

- II. Whether the trial court reversibly erred when it failed to instruct the jury concerning a required element of the crime of possession of burglary tools that the jury had to find Mr. Ridgeway possessed the tools with the intent to use the tools in the commission of a burglary.

STATEMENT OF THE CASE

On February 17, 2010, the State charged Mr. Ridgeway with second degree burglary pursuant to section 18-4-203(1), C.R.S. (2010) (F4), and theft of less than \$500 pursuant to section 18-4-401(1), (2)(b), C.R.S. (2010) (M2). (v1, p. 1-2.) The State later filed motions to add one count of possession of burglary tools pursuant to section 18-4-205(1), C.R.S. (2010) (F5) (*id.* at 5-6), and one count of criminal impersonation pursuant to section 18-5-113(1)(e), C.R.S. (2010) (F6) (*id.* at 8-9), which the trial court granted on January 7, 2011 (*id.* at 6, 9).¹ The State ultimately elected not to proceed on the criminal impersonation charge. (1.11.11, p. 3.)

Mr. Ridgeway was tried before a jury, which acquitted him of burglary and theft but convicted him of possession of burglary tools. (v1, p. 55-57.) On April 7, 2011, the trial court sentenced Mr. Ridgeway to three years in the Department of Corrections. (*Id.* at 62; 4.7.11, p. 15.) Mr. Ridgeway now timely appeals his conviction and resulting sentence.

STATEMENT OF THE FACTS

In the early morning hours of February 17, Denver Police Officer Sloan observed a Jeep weave between lanes and make an abrupt turn without signaling.

¹ Although the trial court granted the State's motions to add charges, an amended complaint was never filed.

Because Sloan suspected that the driver might be intoxicated, he pulled over the Jeep and approached the driver, Trevor Rich, for identification. (1.19.11, p. 178-79.) During the stop, Sloan noticed that the passenger, Mr. Ridgeway, was behaving suspiciously and Sloan suspected him of providing a false name so he called for back-up. (*Id.* at 179-82.) Eventually, Denver Police Officer Reiner arrived. (*Id.* at 182.) The officers approached the Jeep, and Sloan asked Mr. Ridgeway to get out. (*Id.* at 183.) When Mr. Ridgeway got out of the Jeep, Reiner saw a gun on the passenger seat, alerted Sloan, and then the officers took both Rich and Mr. Ridgeway into custody. (*Id.* at 184-85.)

While checking the Jeep to ensure that there were no more weapons, the officers observed a number of items, including crowbars, masks, gloves, bandanas, a walkie-talkie, and a cash register drawer. (*Id.* at 187-88.) Sloan also searched Mr. Ridgeway's pockets and found a walkie-talkie, mirror, pocket knife, and a headlamp. (*Id.* at 186.) The officers transported Rich and Mr. Ridgeway to jail, where they were interrogated by Denver Police Detective Miller. (*Id.* at 189, 208, 212.)

During his interrogation, Rich told Miller several different stories. One story was that Mr. Ridgeway called him for a ride and on their way they were stopped by the police. (*Id.* at 162-63.) Rich also told police that when he went to pick up Mr. Ridgeway, Mr. Ridgeway appeared from behind some bushes and put bags in his Jeep,

but Rich did not know what was in the bags. (*Id.* at 163-65, 215.) Another story Rich told Miller was that he had picked up Mr. Ridgeway and then Mr. Ridgeway pulled a gun on him and forced him to drive and commit a burglary. (*Id.* at 219-220.) Finally, Rich told Miller that he and Mr. Ridgeway got together earlier in the evening, burglarized a business called C&A Check Cashing with the tools in the Jeep, parked for several hours, and then the police pulled them over when they were driving home. (*Id.* at 139, 220.)

At trial, evidence was presented concerning a burglary at C&A Check Cashing (*id.* at 134-38), and the items found in Rich's Jeep and Mr. Ridgeway's pockets during the traffic stop (*id.* at 186-88). Rich testified that he and Mr. Ridgeway used the items found in the Jeep in the burglary (*id.* at 140-42, 148-49); however, the jury also heard about the numerous conflicting stories Rich told the police (*id.* at 158-61, 163-65, 167-68, 215-16), as well as the fact that Rich had four previous felony convictions, including one for burglary, and that the State had offered Rich a very favorable plea deal in exchange for his testimony (*id.* at 138, 152, 168).

Detective Miller also testified to the numerous stories Rich told him and admitted that he had used several interrogation tactics on Rich before Rich ever implicated Mr. Ridgeway in the C&A Check Cashing burglary. (*Id.* at 211, 213-220.) In addition, Miller testified to two statements Mr. Ridgeway made during his

interrogation following the traffic stop and arrest. Miller testified that Mr. Ridgeway stated, “It doesn’t matter what I tell you about tonight, there is a car full of burglary tools, there is a goddamn gun, it is not mine. Run the blanking number.” (*Id.* at 213.) Second, Miller testified that Mr. Ridgeway stated that one set of gloves and mask was his, and one set belonged to Rich. (*Id.* at 212.)

The jury ultimately acquitted Mr. Ridgeway of the burglary and theft, but convicted him of possession of burglary tools. (v1, p.55-57.)

Additional facts will be presented as necessary in the arguments below.

SUMMARY OF THE ARGUMENT

Reversal of Mr. Ridgeway’s conviction is required because the evidence and arguments presented by the State at trial, combined with the elemental jury instruction, constituted a prejudicial variance. The State charged Mr. Ridgeway with possession of specific burglary tools, and Mr. Ridgeway based his defense on that charge. However, at trial the State presented evidence of additional burglary tools beside those charged and argued that the additional tools could also serve as the basis for a conviction. Additionally, the trial court refused to tender defense counsel’s instruction containing the specific burglary tools as charged, and instead provided an instruction that failed to specify any burglary tools. This resulted in a variance that prejudiced Mr. Ridgeway’s substantial rights because it expanded the crime as charged

in a manner that undermined Mr. Ridgeway's defense and created a substantial risk that the jury's verdict was not unanimous.

Reversal of Mr. Ridgeway's conviction is likewise required because the trial court failed to properly instruct the jury, as requested by defense counsel, regarding the elements of the crime of possession of burglary tools. It is an element of the offense that the defendant possessed the burglary tools with the specific intent to use those tools in the commission of a burglary—the statute does not criminalize innocent possession of tools which could be used in a burglary. However, under the instruction provided by the trial court, the jury was not required to find that Mr. Ridgeway intended to use the tools in the commission of a burglary. Thus, it is possible that the jury convicted Mr. Ridgeway merely because he possessed tools which could be used in a burglary and intended to use the tools for any purpose, including an innocent purpose. As a result, the error violated Mr. Ridgeway's constitutional right to have the jury find every element of the offense beyond a reasonable doubt, and cannot be deemed harmless beyond a reasonable doubt because the error may have contributed to the verdict.

ARGUMENT

I. THE EVIDENCE AND ARGUMENTS PRESENTED BY THE STATE AT TRIAL, COMBINED WITH THE ELEMENTAL JURY INSTRUCTION CONCERNING THE CRIME OF POSSESSION OF BURGLARY TOOLS, CONSTITUTED A PREJUDICIAL VARIANCE BY IMPERMISSIBLY EXPANDING THE CRIME AS CHARGED, THUS UNDERMINING MR. RIDGEWAY'S DEFENSE AND CREATING A SUBSTANTIAL RISK THAT THE JURY VERDICT WAS NOT UNANIMOUS.

A. Standard of Review and Preservation

Defense counsel tendered an elemental jury instruction for the crime of possession of burglary tools which mirrored the crime as charged by specifically naming the burglary tools the State alleged Mr. Ridgeway possessed. (v1, p. 31; *see id.* at 5; 1.19.11, p. 14.) The trial court rejected the instruction and instead tendered an instruction that omitted any reference to particular burglary tools. (v1, p. 50; *see* 1.19.11, p. 228, 234.) Accordingly, this issue is preserved.

A variance requires reversal if it prejudices the defendant's substantial rights. *People v. Rice*, 198 P.3d 1241, 1245 (Colo. App. 2008).

B. Relevant Facts

The State charged Mr. Ridgeway with the crime of possession of burglary tools as follows:

Lewis Burton Ridgeway unlawfully and feloniously possessed an explosive, tool, instrument, or other article, *namely: crowbars, gloves, masks and bandanas*, adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into

premises or theft by physical taking, and the defendant intended or knew another intended to use the thing possessed in the commission of such an offense.

(v1, p. 5; *see also* 1.19.11, p. 14.) (Emphasis added.) The State never sought to amend the charge to include other alleged burglary tools.

Mr. Ridgeway's defense at trial was that he had called a friend, Mr. Rich, for a ride home, Rich picked Mr. Ridgeway up in his Jeep, and on their way to Mr. Ridgeway's home the police pulled the Jeep over and discovered burglary tools inside. (1.19.11, p. 123; 1.20.11, p. 30-31.) According to Mr. Ridgeway's defense, he was not involved in the burglary Rich committed, but was merely in the wrong place at the wrong time when the police pulled over Rich's Jeep, which contained the burglary tools. (*Id.*)

However, the State did not limit the evidence at trial to the burglary tools it charged Mr. Ridgeway with possessing; it also presented evidence of additional alleged burglary tools found in Mr. Ridgeway's pockets, such as a knife, headlamp, mirror, and a walkie-talkie. (*See* Ex. 19, 20, 23; 1.19.11, p. 186.) Moreover, during closing arguments, the State highlighted both the charged tools and those found in Mr. Ridgeway's pockets as possible bases for a possession of burglary tools conviction. (1.20.11, p. 34-36.)

When it came time to instruct the jury, defense counsel tendered the following elemental instruction, which mirrored the crime as it was charged by the State:

The elements of the crime of possession of burglary tools are:

1. That the defendant
2. in the State of Colorado, at or about the date and place charged,
3. possessed
4. any explosive, tool, instrument, or other article, *namely: crowbars, gloves, masks, and bandanas*, which were
5. adapted, designed, or commonly used for committing or facilitating the commission of
6. an offense involving forcible entry into premises or theft by a physical taking,
7. with intent to use the thing possessed or with knowledge that another intended to use the thing possessed in the commission of such an offense.

(v1, p. 31.) (Emphasis added.)

The trial court rejected the tendered instruction because it determined the instruction “contained surplusage.” (1.19.11, p. 234.) Instead, the court provided the following instruction to the jury, which did not reference particular burglary tools:

The elements of the crime of Possession of Burglary Tools are:

1. That the defendant
2. in the State of Colorado, at or about the date and place charged,
3. possessed,
4. any explosive, tool, instrument, or other article which was,
5. adapted, designed, or commonly used for committing
6. an offense involving forcible entry into premises
7. with intent to use the thing possessed.²

(v1, p. 50.) The verdict form likewise did not specify any particular burglary tools. (*See id.* at 57.)

Ultimately, the jury acquitted Mr. Ridgeway of burglary and theft, but convicted him of possession of burglary tools. (*See id.* at 55-57.)

C. Law and Analysis

The Sixth Amendment provides that, “In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI; *see also* Colo. Const. art. II, § 16; Crim. P. 7. Furthermore, “[t]he right of an accused to notice of the charges which have been made against him

² The fact that the instruction omitted from this element the critical phrase “in the commission of such an offense” is the subject of the second issue raised on appeal. *See* argument *supra* at II.B.

constitutes a fundamental constitutional guarantee and lies at the foundation of due process of law.” *People v. Cooke*, 525 P.3d 426, 428 (Colo. 1974). In light of these constitutional guarantees, it is essential that an information sufficiently advise a defendant of the charges so that he can prepare an adequate defense. *See Cervantes v. People*, 715 P.2d 783, 785 (Colo. 1986). Moreover, such notice is essential to ensuring that the defendant “is not taken by surprise by the evidence offered at trial.” *Id.*

A variance occurs “when the charged elements are unchanged, but the evidence proves facts materially different from those alleged in the charging instrument.” *Rice*, 198 P.3d at 1245. A variance requires reversal when the evidence and arguments at trial, combined with the elemental jury instruction, impermissibly expand the crime as charged and this expansion affects the defendant’s substantial rights. *See id.* at 1245-47.

In *Rice*, a division of this Court held that a variance between the information, arguments at trial, and the elemental jury instruction constituted reversible error. *Id.* at 1245. There, the State charged the defendant with knowingly using a computer to fraudulently obtain money belonging to the Colorado Department of Labor and Employment. *Id.* The defendant’s defense at trial was that, although she lied to obtain the money, she had mistakenly believed the money belonged to her, rather than the Department. *Id.* However, the State argued, and the jury was instructed, that the

defendant could be convicted if she accessed a computer for the purpose of fraudulently obtaining money, regardless of who she believed the money belonged to. *Id.* at 1246. This Court determined that the State's argument and the elemental instruction on computer crime constituted a variance from the charge alleged in the information by expanding the scope of the crime as charged. *Id.* at 1146. *Id.* Therefore, because the variance undermined the defendant's defense and created a risk that the jury could return a verdict that was not unanimous, this Court held that reversal was required. *Id.* at 1247.

Similarly, in this case, Mr. Ridgeway received notice from the State that he was charged with possession of burglary tools, "namely: crowbars, masks, gloves and bandanas." (v1, p. 5.) Based on this notice, Mr. Ridgeway's defense at trial was that he was not guilty of possessing those burglary tools because they were merely located in a vehicle in which he happened to be traveling as a passenger. However, the State then presented evidence of additional tools discovered in Mr. Ridgeway's pockets, and argued that Mr. Ridgeway was guilty of possession of burglary tools as a result of those items in addition to the items found in the Jeep. Further, the elemental jury instruction did not specify which burglary tools served as the basis of the offense.

Thus, as was true in *Rice*, the State's arguments and evidence, coupled with the elemental instruction, undermined Mr. Ridgeway's defense to the crime as charged

because he had no notice that he would have to defend against evidence of other alleged burglary tools found on his person rather than in the vehicle, and therefore he had no defense to the new, expanded crime. As a result, the variance in the evidence as charged compared with the evidence as presented at trial affected Mr. Ridgeway's substantial rights because it violated his rights to due process and to present a defense. U.S. Const. amends V, VI, XIV; Colo. Const. art. II, §§ 16, 18, 23, 25; *Cervantes*, 715 P.2d at 785; *Cooke*, 525 P.3d at 428; *see also Rice*, 198 P.3d at 1245.

Furthermore, due to the fact that neither the elemental instruction nor the verdict form limited the jury's consideration to only those burglary tools the State charged Mr. Ridgeway with possessing, there was a substantial risk that the jury returned a verdict that was not unanimous. *See Rice*, 198 P.3d at 1247; *see also People v. Simmons*, 973 P.2d 627, 629-30 (Colo. App. 1998) (reversing a defendant's conviction because the State charged the defendant with menacing a particular victim, presented evidence and arguments at trial concerning two other potential victims, and the elemental instruction did not identify specific victim, which therefore permitted the jury to convict the defendant without unanimously agreeing as to the particular victim).

It is possible that some jurors convicted Mr. Ridgeway for the crime as charged—i.e. possessing the crowbars, gloves, masks and bandanas—whereas other

jurors convicted Mr. Ridgeway of the new, expanded offense—i.e. possessing the items found in his pocket. In fact, the latter is particularly possible since it appears the jury believed Mr. Ridgeway’s defense regarding the charged items which were found in the Jeep because it acquitted him of the burglary and theft. However, because there is no way to know whether the jury unanimously agreed on the basis for the conviction, the variance in this case also violated Mr. Ridgeway’s substantial right to a unanimous verdict. *See id.*; *Rice*, 198 P.3d at 1247; *see also People v. Juarez*, 2011 WL 1586471, *8 (Colo. App. Apr. 28, 2011) (“It is well established that the right to a unanimous jury verdict is substantial.”); *People v. Rivera*, 56 P.3d 1155, 1160-61 (Colo. App. 2002) (stating the jury must be properly instructed to ensure that the conviction on any count is the result of a unanimous verdict); § 16-10-108, C.R.S. (requiring a unanimous verdict).

Accordingly, the State’s arguments and evidence at trial, combined with the possession of burglary tools instruction, resulted in a variance that impermissibly expanded the charged offense in a manner which undermined Mr. Ridgeway’s defense and created a substantial risk that the jury’s verdict was not unanimous. Therefore, reversal is required because the variance prejudiced Mr. Ridgeway’s substantial rights. *Rice*, 198 P.3d at 1247; *Simmons*, 973 P.3d at 630.

II. THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO INSTRUCT THE JURY, AS REQUIRED, THAT, IN ORDER TO CONVICT MR. RIDGEWAY OF POSSESSION OF BURGLARY TOOLS, IT WAS REQUIRED TO FIND MR. RIDGEWAY INTENDED TO USE THE TOOLS HE POSSESSED IN THE COMMISSION OF A BURGLARY.

A. Standard of Review and Preservation

Defense counsel tendered an elemental jury instruction for the crime of possession of burglary tools which properly contained all of the elements of the crime, including that the defendant must intend to use the tools “in the commission of such an offense.” (v1, p. 31.) The trial court rejected the instruction and instead tendered an instruction that omitted the part of the element requiring the jury to find that the defendant intended to use the tools “in the commission of such an offense.” (v1, p. 50; *see* 1.19.11, p. 228, 234.) Accordingly, this issue is preserved.

A criminal conviction “may only ensue upon proof beyond a reasonable doubt of every element constituting the crime charged.” *Chambers v. People*, 682 P.2d 1173, 1175 (Colo. 1984); *In re Winship*, 397 U.S. 358 (1970). It is the duty of the trial court to properly instruct the jury on every element of a crime. *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001); *Chambers*, 682 P.2d at 1176; *People v. Davis*, 935 P.2d 79, 83 (Colo. App. 1996). A trial court’s failure to instruct the jury concerning an element of the offense is an error of constitutional magnitude. *See Griego*, 19 P.3d at 7. Where, as here, the error is preserved, reversal is required unless the reviewing court is “confident beyond a reasonable doubt that the error did not contribute to the verdict.” *Id.* at 8-9.

B. Law and Analysis

The crime of possession of burglary tools is defined as follows:

A person commits possession of burglary tools if he possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into a premises or theft by a physical taking, and intends to use the things possessed, or knows that some person intends to use the thing possessed, *in the commission of such an offense*.

§ 18-4-205(1) (emphasis added).³

In *People v. Chastian*, the Colorado Supreme Court considered whether the possession of burglary tools statute required that the person possessing the tools intended to use them to commit a burglary. *See* 733 P.2d 1206, 1210-11 (Colo. 1987). Specifically, the court considered whether the statute criminalized “innocent possession” of articles that may be used as burglary tools, and was therefore

³ The model jury instruction for possession of burglary tools likewise provides:

1. that the defendant,
2. in the state of Colorado, at or about the date and place charged,
3. possessed
4. any [explosive] [tool] [instrument] [article] which was
5. adapted, designed, or commonly used for [committing] [facilitating the commission of]
6. an offense involving [forcible entry into premises] [theft by a physical taking]
7. [with intent to use the thing possessed] [with knowledge that some person intends to use the thing possessed] *in the commission of such an offense*. CJI-Crim. 4-2:08 (2008) (emphasis added).

unconstitutionally overbroad. *Id.* The court held that intent to use the tool to commit forcible entry or theft by physical taking was an element of the offense. *Id.* at 1211. Therefore, according to the court, the statute did not criminalize innocent possession of a tool that could constitute a burglary tool because, in order to be convicted under the statute, the person possessing the tool must also intend to use it in a burglary or theft by physical taking. *Id.* at 1210-11.

In this case, the jury was not instructed it had to find that Mr. Ridgeway possessed burglary tools *with the intent to commit a burglary*. Rather, it was simply instructed that it had to find whether Mr. Ridgeway possessed tools, which could be used in a burglary with the intent to use them for any purpose whatsoever, because it did not specify, as required, the purpose for which the tools must be intended to be used. (v1, p. 50.) Thus, the jury could have convicted Mr. Ridgeway simply because he possessed tools that could be used in a burglary, even if it did not believe that he intended to use them in a burglary; in other words, they could convict him of innocent possession. However, such a result is contrary to the Colorado Supreme Court holding in *Chastian*, which recognizes that the culpable mental state of intent to use the items possessed in a burglary is what separates the crime of possession of burglary tools from innocent conduct, which is why the jury must find beyond a

reasonable doubt that a defendant possessed the tools with the specific intent to use those tools in a burglary. *See* 733 P.2d at 1210-11.

This omission is particularly problematic in light of the prejudicial variance, *see supra* part I.C, and the fact the jury acquitted Mr. Ridgeway of burglary and theft (*see* v1, p. 55-56). Because it is entirely possible that—although the jury did not believe Mr. Ridgeway was involved in a burglary—based on the elemental instruction and the State’s arguments that the items found in Mr. Ridgeway’s pockets constituted burglary tools, they convicted him simply because (1) he had items in his pockets that could be used in a burglary, and (2) it is reasonable to assume that a person intends to use the items he carries in his own pocket for *some purpose*, even if that purpose is entirely innocent. Thus, the jury’s conviction may have been based on innocent possession of burglary tools, which is not a crime under the statute. *See Chastian*, 733 P.2d at 1210-11.

Consequently, the error affected Mr. Ridgeway’s constitutional right to have the jury find every element of the offense beyond a reasonable doubt. *See Chambers*, 682 P.2d at 1175; *see also In re Winship*, 397 U.S. at 358. Additionally, it is more than possible that the jury convicted Mr. Ridgeway for possession of tools that could be used in a burglary without finding, as required, that he also intended to use those items in a burglary. Thus, the error may have contributed to the verdict and, as a

result, cannot be deemed harmless beyond a reasonable doubt. *See Griego*, 19 P.3d at 8-9.

CONCLUSION

Mr. Ridgeway respectfully requests this Court to reverse his conviction because the variance between the evidence and arguments at trial and the crime as charged impermissibly expanded the charged offense, thus undermining Mr. Ridgeway's defense and creating a substantial risk that the jury's verdict was not unanimous. Mr. Ridgeway also respectfully requests this Court to reverse his conviction because the court's failure to properly instruct the jury regarding a critical element of the offense affected his constitutional right to have the jury find every element of the offense beyond a reasonable doubt and may have contributed to the guilty verdict.

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CERTIFICATE OF SERVICE

I certify that, on February 8, 2012, 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.

A handwritten signature, appearing to be 'mjc', is written in black ink over a solid horizontal line that spans the width of the signature.