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

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply 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 reply brief complies with C.A.R. 28(g).

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Signature of attorney or party

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. REVERSAL IS REQUIRED BECAUSE THE STATE CHARGED MR. RIDGEWAY WITH POSSESSING PARTICULAR, SPECIFIED BURGLARY TOOLS, MR. RIDGEWAY RELIED ON THE CHARGING DOCUMENTS IN FORMULATING HIS DEFENSE, WHICH WAS LATER UNDERMINED AT TRIAL WHEN THE STATE PRESENTED EVIDENCE OF ADDITIONAL ALLEGED BURGLARY TOOLS NOT SPECIFIED IN THE CHARGING DOCUMENTS, AND THE JURY WAS INVITED, AND THEN PERMITTED, TO RELY ON THOSE ADDITIONAL ITEMS IN CONVICTING MR. RIDGEWAY.

A. This issue is preserved

This Court should reject the Attorney General's argument that Mr. Ridgeway did not preserve this issue for review. The State charged Mr. Ridgeway with possession of specific burglary tools. However, in addition to presenting evidence of the specified burglary tools, which were found in a vehicle in which Mr. Ridgeway was a passenger, the State presented evidence of other alleged burglary tools found in Mr. Ridgeway's pockets, which it had not charged in the complaint and information.

In order to prevent the jury from impermissibly relying on the evidence of the items found in Mr. Ridgeway's pockets—in other words, to prevent the prejudicial variance—defense counsel tendered an instruction that would have restricted the jury

to consideration of only the items the State charged in the complaint and information. Indeed, had the court given the instruction tendered by defense counsel, there would not have been a prejudicial variance because the jury would have been precluded from considering the evidence that impermissibly expanded the scope of the charged offense. *See People v. McKeel*, 246 P.3d 638, 641 (Colo. 2010) (stating that courts "presume that jurors follow the instructions that they receive"). Hence, the court was on notice of defense counsel's position regarding the need to restrict the jury's consideration to only the offense charged. The issue was therefore preserved. *See, e.g., People v. Pahl*, 169 P.3d 169, 182-83 (Colo. App. 2006) (finding an error preserved where the defendant put the court on notice of its position by tendering his own instructions).

B. The State was bound by its decision to narrow the scope of its possession of burglary tools charge by specifying the factual basis supporting the charge in the complaint and information.

In this case, there was evidence of alleged burglary tools located in the vehicle—specifically, crowbars, masks, gloves, and bandanas—and evidence related to alleged burglary tools found in Mr. Ridgeway's pockets—specifically, a mirror, walkie-

talkie, headlamp, and pocket knife.[1] However, the State made a strategic choice to narrow the scope of the possession of burglary tools to only those items found in the vehicle by specifically charging only those items in the complaint and information. As a consequence, the State placed Mr. Ridgeway on notice of the factual circumstances supporting its possession of burglary tools charge.

In response, Mr. Ridgeway defended against the charge on the basis that he was merely riding in a vehicle that happened to contain items that the driver od the vehicle, Trevor Rich, had used in a burglary of a check cashing establishment. The jury apparently accepted this defense because it acquitted Mr. Ridgeway of the burglary and theft. However, concerning the evidence of the items discovered in his pockets, the State effectively placed Mr. Ridgeway on notice that he would *not* have to defend against a charge of possession of burglary tools in connection with those items, so he had not prepared a defense as to those items. Therefore, he was unfairly prejudiced when the State later decided to present evidence of the items discovered in Mr. Ridgeway's pockets and then invited the jury to rely on that evidence, in addition

[1] The Attorney General states that Mr. Ridgeway conceded that the items discovered in his pockets were burglary tools, yet it is clear from the portion of the Opening Brief to which the Attorney General cites that no such concession occurred. *See* OB, p. 8 ("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 walkie-talkie." (Emphasis added.)

to the evidence it had specified in the charging documents, to convict Mr. Ridgeway of possession of burglary tools.

The Attorney General argues that there was no legal effect of the State's decision to specify the factual circumstances of the charge of possession of burglary tools in the charging documents. This argument must fail. An information must provide an accused "with sufficient notice of the charged offenses and *factual circumstances* to allow adequate trial preparation." *People v. Richardson*, 58 P.3d 1039, 1044 (Colo. App. 2002) (Emphasis added). Indeed, such notice lies at the foundation of due process of law. *People v. Cooke*, 525 P.3d 426, 428 (Colo. 1974).

Thus, far from constituting "mere surplusage," the phrase "namely: crowbars, gloves, masks, and bandanas," which the State chose to include in the charging documents, functioned as the notice of the charges against Mr. Ridgeway required in order to enable him to prepare an adequate defense. *See, e.g., United States v. Chambers*, 408 F.3d 237 (5th Cir. 2005) (rejecting the argument that the specific factual allegations in the indictment were "mere surplusage" and reversing for a "fatal variance between the indictment and the proof" where the Government proved an essential element of the charged offense on the basis of a set of facts different from the particular facts alleged in the indictment); *People v. Rice*, 198 P.3d 1241, 1245-46 (Colo. App. 2008). In good faith reliance on that notice, Mr. Ridgeway did prepare a

defense, a defense that was undermined when the State sought a conviction based on other alleged burglary tools that it did not include in the charging documents and concerning which Mr. Ridgeway had no defense.

In fact, the Attorney General's argument conflates the instant case with a case in which the State has not make the explicit choice of specifying the factual circumstances on which its charge is based. If that were the case here, which it is not, then it would have been incumbent on Mr. Ridgeway to move for a bill of particulars to ascertain whether the State was going to rely on the items found in the vehicle, the items found in his pockets, or both so that he could prepare the necessary defense. Certainly, had the court granted such a motion for a bill of particulars, the State would be bound by its response, and Mr. Ridgeway would have been entitled to rely on the State's response. *See Erickson v. People*, 951 P.2d 919, 921 (Colo. 1998) ("A bill of particulars forecasts 'the facts that the prosecution intends to prove and limits the proof at trial to those areas described in the bill of particulars'...its purpose is to enable the defendant to properly prepare his defense..." (quoting *People v. Dist. Court*, 603 P.2d 127, 129 (Colo. 1979)); *People v. Stratton*, 677 P.2d 373, 375 (Colo. App. 1983) ("[T]he facts expected to be proven by the prosecution must be divulged in the bill of particulars, and proof at trial is thereby limited to those facts.").

Similarly, where there is evidence of multiple acts that could constitute the charged offense, and the State elects the act on which it will rely for a conviction, the State's election functions as an abandonment of its ability to seek a conviction as to the other acts. *See Melina v. People*, 161 P.3d 635, 639 (Colo. 2007) ("Where there is evidence of multiple acts, any one of which would constitute the offense charged, the People may be compelled to elect the acts or series of acts on which they rely for a conviction."); *c.f. People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (observing that an election by the State serves as an abandonment of all other theories of liability).

The same principles apply to this case. Once having decided to narrow the scope of its own charge by specifying the factual circumstances supporting it in the charging documents, Mr. Ridgeway was entitled to rely on that limitation, and the State was bound by it and could not later expand its charge to include other bases for conviction, particularly not without amending the charging documents and particularly not after the trial has begun. *See Stratton*, 677 P.2d at 375 ("It is axiomatic that a defendant should be tried only for the offense with which he has been charged." (citing *Stuff v. People*, 344 P.2d 455 (1959)); *see, e.g.*, *Rice*, 198 P.3d at 1245-46 (reversing because the State's argument and elemental jury instruction constituted a fatal variance from the charging documents because it expanded the scope of the crime as charged, which undermined the defendant's defense); *People v. Simmons*, 973

P.2d 627, 629-30 (Colo. App. 1998) (reversing because the State's argument and elemental jury instruction expanded the crime as charged to include two additional victims and the jury was therefore permitted to convict the defendant without unanimously agreeing as to the particular victim).

The Attorney General also argues that there was no variance in this case because the proof on which the possession of burglary tools conviction would have been based, i.e. proof of the items found in Mr. Ridgeway's pockets, corresponds with "an offense that was clearly set out in the indictment." (AB, p.13) For support, the Attorney General relies on *Pahl, supra.* However, although the Attorney General implies that, in *Pahl,* this Court held there was no variance,[2] in fact, this Court held that the discrepancy between the charging documents and the jury instruction *did* constitute a variance, just not a constructive amendment because, technically, the crime itself had not changed. 169 P.3d at 177-78. This Court ultimately concluded that the variance did not require reversal because the defendant had failed to allege how he was prejudiced. (*Id.* at 178)

To the contrary, here, Mr. Ridgeway argues that the variance prejudiced him because, in reliance on the specificity in the charging documents, he developed a

[2] The Attorney General states that *Pahl* held that the charging documents, which specified a particular security, and the jury instruction, which did not, were "the same." (AB, p. 17)

defense to those specific allegations, which was later undermined by the State's decision to proceed under an additional theory of liability for which he had not prepared a defense. Had he known he would need to defend against a charge based on the alleged burglary tools in his pockets, then he would certainly have developed a defense to those items as well; for instance, by presenting evidence that none of those items were intended to be used in a burglary, i.e. they were intended for an innocent purpose.[3] Moreover, the variance prejudiced Mr. Ridgeway's substantial right to a unanimous verdict because some jurors may have relied on the evidence of the items specified in the charging documents whereas other jurors may have relied on evidence of the items in Mr. Ridgeway's pockets, which were not charged. *See Simmons*, 973 P.2d at 629-30.

Next, the Attorney General argues that there was no variance because Mr. Ridgeway failed to show where in the record the prosecution presented evidence that the items in Mr. Ridgeway's pockets were burglary tools. This argument too must fail. As set forth in the Opening Brief, the State elicited the evidence of the alleged burglary tools in Mr. Ridgeway's pockets through the testimony of two different witnesses and admitted several exhibits of the alleged burglary tools. The first witness

[3] It is important to note that this defense would also have been undermined in this case by the trial court's failure to properly instruct the jury on the critical element of the crime of possession of burglary tools—that the defendant must intend to use the items possessed *in the commission of a burglary.* (*See* OB, p.15-19)

was Trevor Rich, and, contrary to the Attorney General's characterization of the record, Rich did not identify the alleged burglary tools in Mr. Ridgeway's pockets as merely "odds and ends." (*See* AB, p.8, 15) Rich did describe some of the items discovered in Mr. Ridgeway's pockets as "odds and ends," likely in reference to the spare change and wrapper depicted in the exhibit. (*See* 1/19/11, p.156; Ex. #23) However, Rich also specifically identified a knife, mirror, and flashlight (headlamp) as items found in Mr. Ridgeway's pockets. (1/19/11, p.156)

Second, Officer Sloan testified to searching Mr. Ridgeway upon his arrest and specifically described the items he found in Mr. Ridgeway's pockets as a compact radio (walkie-talkie), a mirror, a knife, and a flashlight (headlamp). (*Id.* at 186, 188; Ex. 20, 23) He further testified that he found a walkie-talkie on Mr. Ridgeway that was similar to the walkie-talkie found in the vehicle, which Rich had already identified as a burglary tool used in the burglary of the check cashing store. (1/19/11, p.150-51, 156, 188)

The clear implication of eliciting Rich and Sloan's testimony about the items found in Mr. Ridgeway's pockets and admitting exhibits of the items was that the State intended to rely on these items as additional alleged burglary tools to support its possession of burglary tools charge, even though those items were not named in the charging documents. Indeed, the State made clear its intent to present those items to

the jury as additional burglary tools during closing arguments. During her closing argument, the prosecutor admitted that she had believed that the mirror found in Mr. Ridgeway's pocket was a burglary tool and explained that was the reason why she had questioned Rich about its purpose. (1.20.11, p.23) Furthermore, *immediately* after addressing the evidence concerning the charged burglary tools during her rebuttal closing, the prosecutor stated, "Then let's talk about what was found on Mr. Ridgeway. In his pocket was a knife, a headlamp, flashlight. And, more importantly, on Mr. Ridgeway was the other walkie-talkie." (*Id.* at 36) The prosecutor then concluded by stating, "He committed these crimes and I ask that you find him guilty of all charges." (*Id.* at 37) Hence, the clear import of the prosecutor's argument was to invite the jury to rely on the items found in Mr. Ridgeway's pockets to convict Mr. Ridgeway of the possession of burglary tools charge. Therefore, contrary to the Attorney General's argument, the State did rely on that evidence.

Finally, the Attorney General argues that any variance was harmless because (1) Mr. Ridgeway was aware that the additional evidence existed (2) he did not assert what he would have done differently, (3) the evidence was not "integral" to the State's case, and (4) there was overwhelming evidence. None of these arguments is persuasive. First, in arguing that Mr. Ridgeway was not prejudiced because he knew of the existence of the evidence concerning the items found in his pockets and yet did not

request a bill of particulars, the Attorney General is again mistaken about the posture of this case. This is not a case where Mr. Ridgeway would be expected to anticipate that the State would use the items discovered in his pockets as evidence to establish the crime of possession of burglary tools. That is because, as was true in both *Rice* and *Simmons*, *supra*, here, the State *explicitly* placed Mr. Ridgeway on notice that he would not be expected to do so by charging a particular subset of alleged burglary tools—those items found in the vehicle—and, even though it could have done so, not charging the other subset of alleged burglary tools—those items found in Mr. Ridgway's pockets.

Furthermore, defense counsel had no reason to believe that the jury would be permitted to rely on the additional evidence to support the burglary tools charge because the State had already limited the scope of the charge in the complaint and information, and presumably the jury would be instructed to only rely on those items, in which case there would be no prejudice. In fact, defense counsel tendered an elemental instruction that would have limited the jury to consideration of only the evidence alleged in the complaint and information. (v1, p.31) Thus, the lack of contemporaneous objection to the admission of this evidence can be explained by the fact that defense counsel had a good faith basis, based on the State's charging

decision, to believe the jury would not be invited or permitted to rely on that evidence.

Second, the Attorney General assumes that any error would be harmless because Mr. Ridgeway failed to establish any prejudice by not identifying the evidence and arguments he would have made had he been given proper notice. To the contrary, Mr. Ridgeway has made an appropriate and sufficient showing of prejudice. As set forth above and in the Opening Brief, the defense Mr. Ridgeway prepared based on the specificity of the charging documents was undermined because it only accounted for the items discovered in the vehicle and did not account for the items discovered in his pockets.

In *Rice*, this Court reversed a defendant's conviction on plain error review because the variance between the charging documents and the evidence at trial prejudiced the defendant because it undermined the defendant's defense, which was directed only at the allegations contained in the charging documents. *See* 198 P.3d at 1146-47. This Court did not fault the defendant for not specifying exactly what the defendant's defense would have been, or what evidence the defendant would have presented if she had been on notice of the need to defend against the expanded charge, and likely did not do so because such reasoning is counterfactual, and any answer would depend on a number of circumstances and strategic decisions to be

made by trial counsel who would be in possession of all of the discovery and aware of all of the nuances of the case.

In addition, Mr. Ridgeway has established prejudice insofar as the variance created a legitimate danger that that the jury's guilty verdict was not unanimous. Here, because the State invited the jury to rely on the evidence of the items found in Mr. Ridgeway's pockets in addition to the items it charged in the complaint and information, and because the court erred in failing to instruct the jury, as requested by defense counsel, that it could only rely on the evidence alleged in the complaint and information, it is entirely possible that some members of the jury may have relied on the evidence of the items discovered in the vehicle whereas other jurors may have relied on the evidence of the items discovered in Mr. Ridgeway's pockets. *See, e.g.*, *Simmons*, 937 P.2d at 630. Indeed, it is likely that at least some of the jurors relied on the evidence discovered in Mr. Ridgeway's pockets because the jury had already unanimously agreed to acquit Mr. Ridgeway of the burglary and theft for which the burglary tools discovered in the vehicle were alleged to have been used. As a result, Mr. Ridgeway's substantial right to a unanimous verdict was violated because there is a significant danger that the jury did not unanimously agree as to the basis for its possession of burglary tools verdict. *See id.*

Third, the Attorney General argues that the variance was harmless because the evidence of the items located in Mr. Ridgeway's pockets was not "integral" to the State's case. (AB, p.18) It does not necessarily follow that, simply because the prosecutor did not focus solely on the items located in Mr. Ridgeway's pockets, no prejudicial variance occurred. Clearly, the State's main focus in this case was on the lead burglary charge. However, it is also clear that the State chose to hedge its bets by also charging Mr. Ridgeway with possession of burglary tools, and again by relying on evidence beyond what it had charged in the complaint and information to ensure a conviction on the possession of burglary tools charge. As stated above, the additional evidence of alleged burglary tools came out through two separate witnesses, was the subject of at least two exhibits, and the State highlighted the evidence during its rebuttal closing.

In fact, the last thing that the jury heard before going into deliberations was the prosecutor's reference to the items discovered in Mr. Ridgeway's pockets, followed almost immediately by the prosecutor's request that the jury find Mr. Ridgeway guilty of all charges. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1052 (Colo. 2005) (noting the increase in prejudice when improper arguments occur during rebuttal closing, because "[r]ebuttal closing is the last thing a juror hears from counsel before deliberating, and it is therefore foremost in their thoughts"). Thus, regardless of

whether this evidence was the main focus of the State's case, the fact of the matter is that the jury was presented with the evidence during trial, the prosecutor encouraged the jury to rely on the evidence during her closing arguments, and the jury was effectively instructed that it could rely on the evidence in reaching its verdict.

Finally, the Attorney General argues that the variance was not harmless because there was overwhelming evidence of guilt. As an initial matter, the Attorney General's argument mischaracterizes the harmless error test. The harmless error test is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *People v. Welsh*, 58 P.3d 1065, 1072 (Colo. App. 2002) (citing *Bernal v. People*, 44 P.3d 184 (Colo. 2002)). Here, it cannot be said that the verdict was surely unattributable to the error because the jury acquitted Mr. Ridgeway of burglary and it was the State's theory that the burglary tools in the vehicle were used in the commission of that burglary. Therefore, there is reason to believe that at least some members of the jury believed Mr. Ridgeway's defense that the items in the vehicle were not his, notwithstanding his admission indicating he knew the items could be used in a burglary, and his admission that one set of gloves and a mask found in the vehicle belonged to him.

Furthermore, the jury's guilty verdict may also have been a result of the court's error in failing to properly instruct the jury on all of the essential elements of the crime of possession of burglary tools. According to the court's instruction, the jury did not even have to find that Mr. Ridgeway intended to use the items in the vehicle, let alone the items in his pockets, in the commission of a burglary. (*See* Part II, *infra*) Rather, under the court's instruction, it was sufficient if the jury merely believed that any of the items *could* be used in a burglary.

Moreover, the guilty verdict may have been based on the items discovered in Mr. Ridgeway's pockets, concerning which Mr. Ridgeway had not prepared a defense because the State had failed to place him on notice of his need to so do as required by the state and federal constitutions. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Cooke*, 525 P.3d at 428; *see also* Crim. P. 7. Under these circumstances, there is a substantial probability that the jury's verdict was a result of an impermissible variance and may not have been unanimous. Therefore, given the fact that the variance in this case burdened Mr. Ridgeway's substantial rights to notice, due process, and a unanimous verdict, and because there is a strong possibility that the variance contributed to the jury's verdict, reversal is required whether this Court applies harmless error or plain error review. *See, e.g.*, *Rice*, 198 P.3d at 1247 (holding

that a variance between the information and the elemental jury instruction constituted plain and reversible error).

Mr. Ridgeway rests on the arguments and authorities set forth in the Opening Brief concerning any remaining arguments on this issue.

II. THE JURY WAS ERRONEOUSLY PERMITTED TO CONVICT MR. RIDGEWAY OF POSSESSION OF BURGLARY TOOLS WITHOUT HAVING TO FIND PROOF BEYOND A REASONABLE DOUBT OF AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE—THAT MR. RIDGEWAY SPECIFICALLY INTENDED TO USE THE ALLEGED BURGLARY TOOLS *IN THE COMMISSION OF A BURGLARY*—IN VIOLATION OF MR. RIDGEWAY'S CONSTITUTIONAL RIGHTS.

A. This issue is preserved.

The State's argument that Mr. Ridgeway failed to preserve this issue is incorrect and contrary to well-established Colorado precedent, which holds that, when a party tenders a correct instruction, and the court rejects that instruction, the instructional error is preserved for review. *See, e.g., Pahl*, 169 P.3d at 182-83 (finding the instructional error preserved where the defendant put the court on notice of its position by tendering his own instructions); *see also Brown v. People*, 239 P.3d 764, 767 (Colo. 2010) ("A trial court's failure to provide a jury instruction after a defendant requests such instruction will be reviewed under the harmless error standard); *Mata-Medina v. People*, 71 P.3d 973, 980 (Colo. 2003) (reviewing for harmless error when a trial court fails to give a jury instruction that the defendant requested).

Here, defense counsel put the court on notice of its position concerning how the jury ought to be instructed on the crime of possession of burglary tools by tendering its own elemental instruction that properly included all of the elements of the offense. *See Pahl*, 169 P.3d at 183. However, the court rejected that instruction and substituted its own improper instruction, which failed to instruct the jury on all of the essential elements of the offense, thereby preserving the issue for harmless error review. *See id.*; *see also Brown*, 239 P.3d at 767; *Mata-Medina*, 71 P.3d at 980. Indeed, it defies reason to suggest that somehow the court would not have been on notice of defense counsel's position where it only had to briefly compare the two instructions to see that that defense counsel's tendered instruction contained an element that its own instruction did not.

Furthermore, even assuming defense counsel had not preserved this issue by tendering a proper instruction, the court's error in failing to instruct the jury on all of the essential elements of the crime would still require reversal because it is firmly established that a defendant has a constitutional right to proof beyond a reasonable doubt of every element of the crime, and that the court's failure to satisfy its duty to properly instruct the jury on every element of the crime constitutes plain error. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; *In re Winship*, 397 U.S. 358 (1970); *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001); *People v. Rodriguez*, 914 P.2d 230, 271

(Colo. 1996); *Chambers v. People*, 682 P.2d 1173, 1175 (Colo. 1984); *see, e.g.*, *People v. Stitt*, 575 P.2d 446, 456 (Colo. App. 1978) (holding that failure to instruct on the necessary element of specific intent for second degree murder constituted plain error).

B. Even read as a whole, the jury instructions failed to inform the jury that, in order to convict Mr. Ridgeway of possession of burglary tools, it must *find that Mr. Ridgeway specifically intended to use the items possessed* in the commission of a burglary, *an essential element of the crime.*

The Attorney General argues that, even though the jury was never instructed on the critical mens rea that distinguishes innocent conduct from criminal conduct, that is—that the defendant must specifically intend to use the items possessed in a burglary, *see People v. Chastian*, 733 P.2d 1206, 1210-11 (Colo. 1987) (concluding that intent to use the item possessed to commit a forcible entry or theft by physical taking is the critical element of the offense of possession of burglary tools that separates innocent possession from criminal conduct), that somehow the jury would have known it had to find the State had proved beyond a reasonable doubt that Mr. Ridgeway specifically intended to use the items in the commission of a burglary before it could convict Mr. Ridgeway of possession of burglary tools. For support, the

Attorney General relies on the fact that the elemental instruction was labeled "possession of *burglary* tools." (*See* AB, p.26) (Emphasis in original.)

However, although it is true that the jury was informed that the crime with which Mr. Ridgeway had been charged was indeed possession of "burglary" tools, the jury had also been instructed that the items possessed must be items which are "adapted, designed, or commonly used for committing or facilitating the commission of" a burglary. (v1, p.50) Meanwhile, nothing about the elemental instruction or the instructions as a whole conveyed to the jury that, not only must these be items that *could be used* in a burglary, the jury must also find that Mr. Ridgeway *specifically intended* the items that could be used in a burglary to *in fact be used* in a burglary. Thus, contrary to the Attorney General's suggestion, the fact that the elemental instruction referenced "burglary" tools would, at most, merely have informed the jury that it was sufficient to find Mr. Ridgeway guilty if it found that he knowingly possessed items could be used in a burglary.

Moreover, the erroneous instruction is particularly prejudicial in light of the fact that, due to a prejudicial variance, the jury was permitted to rely on the items found in Mr. Ridgeway's pockets, and it may generally be presumed that one intends to use the items in one's pockets for *some* purpose. Therefore, in not having to find that Mr. Ridgeway intended use the items in his pockets to commit a burglary, the jury

may have convicted Mr. Ridgeway for conduct that does not constitute a crime. *See Chastian*, 733 P.2d at 1210-11 (concluding that the crime of possession of burglary tools does not criminalize innocent possession of items that could be used in a burglary or theft by physical taking).

The Attorney General also relies on the fact that Rich testified that a small mirror found in Mr. Ridgeway's pockets had not been used in the burglary, therefore, the Attorney General argues, the jury must have been aware that it had to find that Mr. Ridgeway intended to use the items in a burglary. However, the jury may simply have believed that this testimony precluded its finding that the mirror was an article that was "adapted, designed, or commonly used" for committing a burglary, because that was the only element it was required to find concerning the use of the item. There is no basis in the record for assuming that the jury would have instead used that testimony as proof that an element—concerning which it had never been instructed—had not been satisfied. In addition, although the prosecutor apparently abandoned her argument as to the mirror constituting a burglary tool in closing arguments, the prosecutor continued to highlight the other items discovered in Mr. Ridgeway's pockets, thereby indicating to the jury that the other items were still fair game to satisfy a possession of burglary tools conviction.

Finally, the Attorney General argues that any error was harmless due to overwhelming evidence of Mr. Ridgeway's guilt. First, this argument is again based on a misapprehension of the harmless error standard—the question is not whether a guilty verdict surely would have been rendered, but instead whether the guilty verdict was absolutely not attributable to the error, and in this case that showing cannot be made. *See Welsh*, 58 P.3d at 1072 (citing *Bernal*, 44 P.3d at 184).

Second, the jury's verdict refutes this argument. The State's theory was that Mr. Ridgeway and Rich used burglary tools to break into a check cashing business. Nevertheless, despite the fact that Mr. Ridgeway admitted that the police had caught him traveling in a car that contained burglary tools, and that one set of gloves and a mask belonged to him, the jury *acquitted* Mr. Ridgeway of the burglary.

Further, due to the instructional error, the not guilty verdict for burglary and guilty verdict for possession of burglary tools make sense if the jury believed that, although Mr. Ridgeway was not involved in committing burglaries, he was in possession of items that could potentially be used in committing a burglary. Indeed, it would require little imagination for a juror to conclude that a knife, headlamp, mirror, or walkie-talkie *could* be used in a burglary or theft by physical taking. However, the jury was not required to make the critical finding that Mr. Ridgeway intended to use items that could be used in a burglary in the commission of an actual burglary. Thus,

it is entirely possible that the jury could both believe Mr. Ridgeway's defense and believe that being in the wrong place at the wrong time with items that could be used in a burglary nevertheless constituted a crime.

As a result, the court's error in failing to properly instruct the jury likely contributed to the guilty verdict and violated Mr. Ridgeway's constitutional right to have the jury find every element of the offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. at 358; *Griego*, 19 P.3d at 7; *Chambers*, 682 P.2d at 1175. Reversal is therefore required whether this Court applies harmless error or plain error review.

Mr. Ridgeway rests on the arguments and authorities set forth in the Opening Brief concerning any remaining arguments on this issue.

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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303-764-1400

CERTIFICATE OF SERVICE

I certify that, on October 12, 2012, a copy of this Reply Brief of Defendant-Appellant was served on Michael D. McMaster of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us: