DATE FILED: June 17, 2013

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
El Paso County District Court Honorable Theresa M Cisneros Case Number 2010CR4540	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. DERICK CAMPBELL Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender DAYNA VISE, #36656 1300 Broadway, Suite 300 Denver, Colorado 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 2011CA1279

OPENING BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE

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

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

Choose one:

☑ It contains 6,799 words.

☐ It does not exceed 30 pages.

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

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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.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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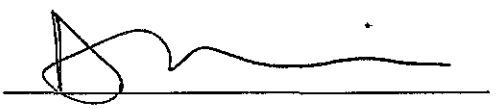

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INTRODUCTION

Defendant-Appellant was the defendant in the trial court and will be referred to by name or as the Defendant. 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.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court erred in failing to suppress evidence obtained pursuant to a search warrant when the affidavit in support of the search warrant was materially misleading and there was no probable cause to support the search?

II. Whether the admission of the highly prejudicial allegation that Mr. Campbell had committed a "home invasion" robbery deprived him of his right to due process, a fair trial, and an impartial jury when the evidence was not necessary for the jury's understanding of the charge of possession of a controlled substance?

III. Whether the prosecutor's burden-shifting arguments deprived Mr. Campbell of his right to due process, a fair trial, and an impartial jury?

STATEMENT OF THE CASE

On December 22, 2010, the State charged Mr. Campbell with one count of possession of a schedule II controlled substance – more than 4 grams, a class four felony pursuant to § 18-18-403.5(1),(2)(a)(II), C.R.S. (Record, pp13-14) Prior to trial, this charge was amended to possession of a schedule II controlled substance – 4 grams or less, a class six felony pursuant to § 18-18-403.5(1),(2)(a)(I), C.R.S. (*Id.*) Mr. Campbell tried his case to a jury May 3 and 5, 2011. (5/3/11; 5/5/11) On May 5,

2011, the jury found Mr. Campbell guilty as charged. (5/5/11, p2) On that same day, the trial court sentenced Mr. Campbell to two years in prison. (5/5/11, p26) Mr. Campbell timely filed a notice of appeal, thereby perfecting this appeal.

STATEMENT OF THE FACTS

On December 14, 2010, Edward Cleveland called 9-1-1 at approximately 11:20 a.m. to report a home invasion robbery at his house in Colorado Springs. (4/18/11, p24) Officers determined a robbery did not occur and Mr. Campbell was never charged with this offense. (4/22/11, pp25-26) As a result of the sequence of events following this report, however, Mr. Campbell was charged with possessing cocaine found in a jacket in the car he was pulled over in. The following facts are pertinent to the issues raised in this appeal.

Officer Jason Reeser was on patrol when dispatch aired the information about a home invasion robbery and a description of the suspects and vehicles involved. (4/18/11, pp24-25) One of the suspect vehicles involved was a Mercedes Benz with two African American men in it. (4/18/11, p25) Reeser saw a Mercedes Benz with two African American men in it, but because he did not have more information, he said he "developed my own PC for a stop" and waited until he saw the driver fail to use his turn signal to justify stopping the car. (4/18/11, p28) Mr. Campbell was the driver and was calm throughout the stop, (4/18/11, p32)

After obtaining Mr. Campbell's information, Reeser went back and requested backup officers to come. (4/18/11, p30) Reeser had also seen an Xbox and a computer in the back of the Mercedes. (4/18/11, p30) These items were alleged to have been stolen in the robbery. (4/18/11, p30) Several other officers arrived and it was reported Mr. Cleveland said one of the people involved in the robbery was Derick Campbell and that a weapon was used. (4/18/11, pp30-31)

Officer Duran, one of the backup officers who arrived, handcuffed Mr. Campbell and took him to his patrol car. (4/18/11, p47) He asked Mr. Campbell to consent to a search, but Mr. Campbell declined. (4/18/11, pp49-50) The officers decided to impound the car while they applied for a search warrant. (4/18/11, pp40,53) Mr. Campbell told the officers that the items in the back of his car were his and that he had reported them stolen the day before. (4/18/11, pp49,76-78) Officer Wrede also responded to the traffic stop. (4/18/11, pp74-75) Wrede was able to confirm that Mr. Campbell had indeed reported an Xbox and computer stolen from his house the day before. (4/18/11, pp77-78)

Duran then transported Mr. Campbell to the station to interview him. (4/18/11, p53) Duran asked why Mr. Campbell would not give consent to search and Mr. Campbell said that he had something called "Mr. Smiley" in the car – a substance similar to marijuana without THC. (4/18/11, p54) Mr. Smiley was legal to have and

Wrede knew it was legal. (4/18/11, pp54-55,84) However, Mr. Campbell believed it may be a violation of his parole to have it. (4/18/11, p55)

Meanwhile, the lead officer in charge of the robbery, Officer Blackburn, had gone to speak with Mr. Cleveland and determined that not only was Mr. Cleveland's story full of inconsistencies, but he also did not want to pursue charges. (4/18/11, pp78-79; 4/22/11, pp22-24) Based on his interview with the complaining witness, Blackburn determined that a robbery had not occurred. (4/22/11, pp25-26)

Later, back at the station, all the officers conferred about the case and Blackburn told Duran and Wrede about his interview with the complaining witness and determination no robbery had occurred. (4/22/11, p25) Blackburn believed that the other officers were still pursuing the search warrant based on the traffic stop Duran had conducted. (4/22/11, p25)

Mr. Campbell was released from custody based on this information after about an hour at the station. (4/18/11, p65) Nevertheless, Wrede applied for a search warrant based on the robbery. (4/18/11, p79) Importantly, by the time the officers obtained the search warrant, Blackburn had already determined that a robbery had not occurred. (4/18/11, p79; 4/22/11, pp25-26) Blackburn told Wrede and Duran about his investigation. (4/18/11, pp65,78-79,83)

Wrede, who signed the affidavit for a search warrant, did not include any information concerning Blackburn's investigation or determination that a robbery had not occurred. (Exhibit A) *See* Attachment A.

Duran and Wrede went to the impound lot to execute the search warrant even though Blackburn had determined that no robbery occurred. In the car was a jacket with a bottle containing a green leafy substance labeled "Mr. Smiley" in one pocket and suspected crack cocaine in another pocket. (4/18/11, pp82; 5/3/11, pp46-47) The following day the officers obtained an arrest warrant and arrested Mr. Campbell for possession of the crack cocaine found in the jacket. (5/3/11, pp47-48)

SUMMARY OF THE ARGUMENT

I. The Fourth Amendment protects individuals from unreasonable searches and seizures. To this end, no warrant shall issue unless supported by probable cause to believe a crime has been committed. The affidavit in support of the search warrant in this case was materially misleading because it was based upon an alleged robbery, but failed to include the fact that the lead officer in that case had already determined a robbery had not occurred.

At the very least, by the time the search warrant was executed, there was no longer probable cause to believe that the robbery had occurred, as the officers knew no robbery occurred and had released Mr. Campbell from custody by the time of the

search. Thus, the officers' search of Mr. Campbell's car was not supported by probable cause and violated his right to be free from unreasonable searches and seizures. The affidavit similarly failed to establish probable cause to search the car for drugs because Mr. Campbell said he had a substance called "Mr. Smiley" in the car because the officers knew Mr. Smiley was legal to possess. The trial court reversibly erred by concluding that the search of Mr. Campbell's car was supported by probable cause and erred by failing to suppress the evidence obtained therein.

II. The trial court deprived Mr. Campbell of his due process rights to a fair trial and an impartial jury, and reversibly erred by admitting evidence that he had committed a "home invasion" robbery when this case involved a sole charge of possession of a controlled substance. This highly prejudicial evidence was not relevant to a material fact of consequence required to be proven by the prosecution in a possession of a controlled substance, and in fact did not meet any of the threshold requirements for admission under a CRE 404(b) analysis. Moreover, when the evidence was admitted the jury was not instructed as to any limited purpose. Additionally, the evidence was not properly admitted as *res gestae* evidence because it was not necessary to the jury's understanding of the facts of the case and any probative value was outweighed by its prejudicial effect. The improperly admitted

evidence injected prejudice into the minds of the jury and requires reversal of Mr. Campbell's conviction.

III. The State bears the burden of proving every element of the charged offense beyond a reasonable doubt and the defendant has no burden to prove his innocence. The prosecutor's argument that the defense had the same subpoena power as the State and could have called witnesses to testify improperly shifted the burden of proof. The improper comments deprived Mr. Campbell of his right to due process, a fair trial, and an impartial jury and requires reversal of his conviction.

ARGUMENT

I. THE AFFIDAVIT FOR A SEARCH WARRANT TO SEARCH MR. CAMPBELL'S CAR WAS MATERIALLY MISLEADING, THERE WAS NO PROBABLE CAUSE TO SEARCH MR. CAMPBELL'S CAR AT THE TIME IT WAS SEARCHED, AND THE SEARCH THUS VIOLATED MR. CAMPBELL'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. Standard of Review

This issue is preserved. Mr. Campbell filed several motions challenging the constitutionality of the seizure and search of his vehicle, including a motion to suppress evidence based on (1) a false and misleading affidavit upon which the search warrant was issued, (2) an extended vehicle seizure, and (3) based on the absence of probable cause to justify the search by the time the car was searched. (Record, pp56-67) A hearing was held on these motions April 18 and 22, 2011.

Suppression issues are reviewed to "determine whether the trial court's legal conclusions are supported by sufficient evidence and if it applied the correct legal standards." *People v. Russom,* 107 P.3d 986 (Colo. App. 2004). To this end, appellate courts only defer to a trial court's findings of fact if those findings are supported by the record. *Id.* Legal issues are reviewed de novo. *Id.*

B. Relevant Facts

The pertinent facts are set forth, *supra.*

The trial court issued a written order denying Mr. Campbell's motions to suppress based on a misleading affidavit, the extended vehicle seizure, and dissipation of probable cause once it became known to officers that Blackburn had determined no robbery had occurred because "there was still probable cause to believe that contraband would be found in the vehicle based on the chain of events [] and Mr. Campbell's statements that he had something in the vehicle that would violate his parole." (Record, p82) Additionally, the court found that "Officer Blackburn did not determine that a robbery did not occur so there was no material omission." (Record, p81)

C. Law and Analysis

The Fourth Amendment to the U.S. Constitution and Article II, Section 7 of the Colorado Constitution protect individuals against unreasonable searches and

seizures. These constitutional provisions provide that no warrant shall issue unless it is established there is probable cause supported by oath or affirmation to believe that a crime has been committed. U.S. Const. amend. IV; Colo. Const. art. II, § 7; § 16-3-301 and §16-3-303, C.R.S. "The requirement of a warrant based on probable cause is the principal protection against governmental intrusion upon a person's reasonable expectation of privacy in his or her residence, person, and effects." *People v. Grazier,* 992 P.2d 1149, 1153 (Colo. 2000). "Probable cause exists only if the facts and circumstances within the officer's knowledge are sufficient to cause a reasonably prudent person to believe that an offense has been or is being committed." *People v. Henson,* 705 P.2d 996, 999 (Colo. App. 1985); *People v. Randolph,* 4 P.3d 477, 481 (Colo. 2000).

A warrant must establish probable cause to believe that contraband or evidence of criminal activity is located in the place to be searched. *People v. Miller,* 73 P.3d 1108, 1112 (Colo. 2003). Probable cause exists when an affidavit alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. *Id.* Courts look at the totality of the circumstances to determine whether probable cause exists and "involves a practical, common-sense determination whether a fair probability exists that a search

of a particular place will reveal contraband or other evidence of criminal activity." *Id.* at 1113.

"An affidavit for a search warrant establishes probable cause if it alleges sufficient facts for a person of reasonable caution to believe that contraband or material evidence of criminal activity will be found in the place to be searched." *People v. Rayford,* 725 P.2d 1142, 1148 (Colo. 1986); *United States v. Ventresca,* 380 U.S. 102 (1965). Section 16-3-305(6), C.R.S., provides that a search warrant shall be executed within fourteen days, however, "searches executed within a proper statutory period may still violate the Constitution if the information upon which the warrant is based becomes stale." *Russom,* 107 P.3d at 991. "In determining whether probable cause has dissipated over time or the warrant has become stale, a court must evaluate the nature of the criminal activity and the kind of property for which authorization to search is sought." *Id.* In determining whether the subsequent search was constitutional, courts look to whether it remains likely that the items suspected to be illegal or to establish a crime was committed will be found in the place to be searched. *Id.*

> *i. Omission from the arrest warrant affidavit of the material fact that the lead officer in the robbery investigation had determined that no robbery had occurred rendered the warrant materially misleading.*

Here, the affidavit supporting the request for a search warrant set forth the facts of the original dispatch that a robbery had occurred. (Exhibit A). In the request

for a warrant to search the car, the affidavit also stated, "[i]t was determined that the vehicle and the occupants were involved in the robbery[.]" (Exhibit A, Attachment A) However, the affidavit failed to include any information about Officer Blackburn's determination that no robbery had occurred. Blackburn's investigation and determination there was no robbery was left out of the affidavit entirely, even though he was the lead officer investigating the case. (4/22/11, p24; Exhibit A)

When a defendant challenges the statements contained in an affidavit for a warrant, courts examine the statements contained therein to determine the accuracy of the affidavit. *People v. Kazmierski,* 25 P.3d 1207, 1210 (Colo. 2001); *People v. Dailey,* 639 P.2d 1068, 1074-75 (Colo. 1982). If false, the court determines the source of the error. *Id.* If the error is intentional falsehood or reckless disregard for the truth on the part of the officer-affiant, the statements must be stricken and the remaining statements examined to see if there is still probable cause to support the search. *Id.* Similarly, the omission of material facts known to the affiant when executing the affidavit may cause statements within the affidavit to be so misleading that the finding of probable cause cannot stand. *People v. Eirish,* 165 P.3d 848, 856 (Colo. 2007). An omitted fact is material for purposes of vitiating an entire affidavit when its omission rendered the affidavit substantially misleading. *Id.*

The warrant was fatally flawed because the warrant was premised on an allegation of a robbery Blackburn determined was baseless. (4/22/11, p25) The trial court's determination that "Officer Blackburn did not determine that a robbery did not occur" was contrary to Blackburn's testimony, which established he had instead determined no robbery occurred. (Record, p81; 4/22/11, p25) Reviewing courts are only bound by the trial court's findings if supported by credible evidence in the record. *People v. Freeman,* 668 P.2d 1371, 1378 (Colo. 1983). Here, Blackburn determined there was no robbery based on his interview with the complaining witness. (4/22/11, p25) In fact, Blackburn believed the other officers were still pursuing the search warrant based solely on their traffic stop of Mr. Campbell because Blackburn had told the officers about his investigation. (4/22/11, p25) Additionally, Mr. Campbell was released once Blackburn told the other officers no robbery had occurred. (4/18/11, p65) Yet Wrede and Duran nonetheless requested a search warrant based on the robbery without disclosing that the lead officer had determined there was no robbery. This was a material omission in the affidavit. Similarly, the statement in the warrant that the "vehicle and the occupants were involved in the robbery" was materially misleading in light of Blackburn's conclusion no robbery had occurred.

Officer Blackburn assessed the accusation made by the complainant when he arrived at the scene. Blackburn determined that there was no robbery based on a number of factors – including that the complainant's allegations were contradictory on key factors and there was no evidence or corroboration to substantiate what the complainant was saying. (4/22/11, pp22-25) Additionally, the complainant ultimately said he did not want to pursue charges at all. (4/22/11, pp22-25) The officer averred to the fact that the complainant's allegations were fully lacking in credibility. (4/22/11, pp22-25) Although the State elicited testimony from Blackburn that it is the District Attorney's decision whether to file charges or not, charges are not likely to be filed by the District Attorney if presented with information that no criminal offense occurred.

In sum, the lead officer determined no robbery had occurred after speaking to the complainant in that case. The affidavit was materially misleading by omitting this information and misrepresenting that officers determined Mr. Campbell was involved in the robbery. The affidavit for the search warrant was materially misleading without Blackburn's report and conclusion no robbery occurred. It was also misleading because of the misrepresentation that Mr. Campbell was determined to be involved in the robbery. Consequently, without these statements the affidavit fails to establish probable cause to support the search warrant. *Kazmierski,* 25 P.3d at 1210. When a

search is conducted without a valid warrant, the exclusionary rule operates to suppress the fruits of the search. *Miller,* 75 P.3d at 1113. The cocaine found in this case should have been suppressed as a result of the misleading affidavit.

This Court should reverse Mr. Campbell's conviction based on the misleading affidavit upon which the search warrant was based and the resulting unconstitutional search of Mr. Campbell's car. U.S. Const. amend. IV; Colo. Const. art. II, § 7; *Kazmierski,* 25 P.3d at 1210; *Eirish,* 165 P.3d at 856.

ii. Probable cause to believe the robbery occurred had dissipated by the time the search warrant was executed, rendering the search of Mr. Campbell's car unconstitutional.

The evidence should also have been suppressed because there was no probable cause to support the warrant at the time Mr. Campbell's car was searched. At the time his vehicle was searched, Mr. Campbell had been released from custody. (4/18/11, p65) This occurred after Blackburn determined no robbery had occurred and reported this to the officers who were holding Mr. Campbell at the station. (*Id.*) However, Mr. Campbell's car had been impounded after he was arrested. (4/18/11, p40)

When officers decided to release Mr. Campbell because Blackburn had determined no robbery had occurred, the officers should have also halted their request for, and execution of, the search warrant for the car because probable cause had dissipated at that time. Officers "involved in obtaining and executing a search warrant have a continuing duty to exercise reasonable professional judgment." *Miller,*

75 P.3d at 1116. Thus, even though the warrant had been signed, it was incumbent upon the officers to stop efforts to search the car once it was known that the lead officer had determined the robbery allegation was unsubstantiated. *Russom,* 107 P.3d 991. Even though the warrant had been approved, it became stale and unconstitutional because there was no probable cause to support it. *Id.*

Probable cause must be based upon a reasonable belief that "material evidence of criminal activity will be found in the place to be searched." *Rayford,* 725 P.2d at 1148. Here, as discussed *supra,* officers knew the robbery allegation was unsubstantiated because Blackburn had told them about his investigation and interview with the complainant. Thus, at the time of the search there was not a reasonable belief that material evidence of the robbery would be found in the car. When a search is conducted without a valid warrant, the exclusionary rule operates to suppress the fruits of the search. *Miller,* 75 P.3d at 1113. Thus, the cocaine found in the car should have been suppressed.

This Court should reverse Mr. Campbell's conviction because there was no probable cause to search the car based on the robbery allegation by the time the officers searched the car. U.S. Const. amend. IV; Colo. Const. art. II, § 7; *Russom,* 107 P.3d at 991.

iii. There was no independent probable cause to search Mr. Campbell's car because of his statement he had Mr. Smiley, which was a legal substance, in his car but subjectively believed his possession may violate his parole.

There was also no basis to search Mr. Campbell's car for drugs. Wrede's sole basis for asserting probable cause to search Mr. Campbell's car for drugs, which was also contained in the search warrant affidavit, was Mr. Campbell's statement that he had "Mr. Smiley" in the car. (4/18/11, p84)

Mr. Campbell's statement that he had "Mr. Smiley" in the car, which the officers knew to be legal, cannot by itself support a finding of probable cause to search. Indeed, probable cause only exists if there is reason to believe material evidence of criminal or illegal activity is in the place to be searched. *Rayford,* 725 P.2d at 1148; *Ventresca,* 380 U.S. 102. Additionally, "[p]robable cause exists only if the facts and circumstances *within the officer's knowledge* are sufficient to cause a reasonably prudent person to believe that an offense has been or is being committed." *Henson,* 705 P.2d at 999 (emphasis added). The officers knew that Mr. Smiley was legal. (4/18/11, p84) Moreover, Duran did not even believe he was searching for drugs when he searched the car, presumably because he did not believe the officers had probable cause to do so. (4/18/11, p67-68) He "doubt[ed] that drugs were even listed on the attachments of the warrant." (4/18/11, p68) Therefore, the fact that Mr. Campbell told officers he had Mr. Smiley in the car cannot establish probable cause to

believe that there was evidence of illegal or criminal activity in the car because the officers testified they knew Mr. Smiley was legal. (4/18/11, p84) Probable cause must be based on the *officer's* knowledge of facts and, here, the officers knew that Mr. Smiley was legal to possess. *Henson,* 705 P.2d at 999. There was no other reason to believe there would be drugs in the car.

Mr. Campbell's conviction must be reversed because there was no probable cause for to search the car based on his statement he had Mr. Smiley, a legal substance, in the car. U.S. Const. amend. IV; Colo. Const. art. II, § 7; *Randolph,* 4 P.3d at 481-83.

II. ADMISSION OF EVIDENCE THAT MR. CAMPBELL WAS INVOLVED IN A "HOME INVASION" ROBBERY, WHICH WAS IRRELEVANT AND NOT NECESSARY FOR THE JURY'S UNDERSTANDING OF THIS CASE, DEPRIVED MR. CAMPBELL OF HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND AN IMPARTIAL JURY.

A. Standard of Review

This issue is preserved. Mr. Campbell filed a motion requesting notice of any acts, transactions, or *res gestae* the prosecution intended to introduce, the prosecution represented that it would not introduce such evidence, and the defense objected throughout trial to admission of this evidence. (Record, p34; 4/18/11, p10; 5/3/11, pp4,9-10,20,83)

Error in admitting evidence which substantially influences the verdict or affects the fairness of the trial requires reversal. *People v. Welsh,* 80 P.3d 296, 310 (Colo. 2003); *People v. Yusem,* 210 P.2d 458, 469 (Colo. 2009). "If this influence is apparent, 'or if one is left in grave doubt, the conviction cannot stand.'" *Welsh,* 80 P.3d at 310, quoting *People v. Quintana,* 665 P.2d 605, 612 (Colo. 1983) and *Kotteakos v. United States,* 328 U.S. 750, 765 (1946). Error predicated upon an improper ruling on the admission of evidence is harmful if it affects a substantial right of the defendant. *Welsh,* 80 P.3d at 310; *Yusem,* 210 P.2d at 469; C.A.R. 35(e); Crim. P. Rule 52(a); CRE 103(a).

Moreover, a defendant has a constitutional due process right to trial by a fair and impartial jury. *See, e.g.,* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Oaks v. People*, 371 P.2d 443 (Colo. 1962). Improperly admitted evidence affects a defendant's constitutional right to a fair trial. *Domingo-Gomez v. People,* 125 P.3d 1043, 1048 (Colo. 2005). A constitutional error requires reversal unless the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967). The determination of whether a defendant's due process rights have been violated in a criminal prosecution is reviewed *de novo*. *U.S. v. Nickl,* 427 F.3d 1286 (10th Cir. 2005).

B. Relevant Facts

The defense filed a motion for notice of any prior acts, wrongs, transactions, or *res gestae* that the prosecution intended to introduce at trial. (Record, p34) The State

informed the trial court that it had no plans to introduce any other act evidence at trial. (4/18/11, p10) The State argued that no advance notice was required for admission of *res gestae* evidence, but that the prosecutor's general practice was to approach the bench if the prosecutor wanted to admit any. (4/18/11, p11)

The prosecutor began his opening statements by discussing the robbery allegation:

> [PROSECUTOR]: The story of this case starts off on December 14th of 2010, with Colorado Springs Police Department receiving a 911 call regarding a home invasion. The person on the phone is indicating that there is –
>
> [DEFENSE]: Objection. He's talking about hearsay. It's irrelevant.
>
> THE COURT: Objection is overruled. This is opening statement.

(5/3/11, p4) The prosecution continued to discuss the facts surrounding the robbery even though Mr. Campbell was not charged with it. He explained there was a home invasion and Mr. Campbell was pulled over because he matched the description of the suspect aired by the police. (5/3/11, pp4-5) The prosecutor told the jury Mr. Campbell was not charged with the home invasion because Mr. Campbell said that the property found in his car was actually taken from him and there were "other issues regarding the case." (5/3/11, p5)

The State's first witness at trial was Blackburn, who told the jury about Mr. Cleveland's allegation of a home invasion robbery. (5/3/11, pp9-10) The defense again objected to this testimony, citing hearsay as the basis this time. (5/3/11, pp9-10) The trial court overruled the objection. (*Id.*) The State continued to elicit testimony regarding the "home invasion" robbery from its witnesses throughout the trial. (5/3/11, pp17-18,32-33,81-83) The defense continued to object based on relevance, confrontation, and hearsay. (5/3/11, pp20,83) In arguing that the defense could have subpoenaed witnesses to prove the drugs belonged to someone else, the prosecutor argued: "we didn't hear from the person who is alleged to have been robbed by the defendant that day." (5/5/11am, p25) The prosecutor also referred to Mr. Cleveland as a "victim" of a robbery in his closing argument. (5/5/11am, p27)

C. Law and Analysis

The United States and Colorado Constitutions guarantee all individuals the right to due process, a fair trial, and an impartial jury. U.S. Const. amends V, VI, XIV; Colo. Const. art. II §§ 16, 23, 25. Emanating from these constitutional provisions is the well-established principle that evidence offered to prove the character of a person to show that he acted in conformity therewith on a particular occasion is inadmissible. *People v. Rath*, 44 P.3d 1033, 1038 (Colo.2002). Colorado courts have long held that "no person shall be convicted of an offense by proving that he is guilty of another" or

by evidence that "creates a prejudice in the minds of the jury against the accused." *Kostal v. People*, 357 P.2d 70, 73 (Colo.1960). As a result, "evidence is not admissible which shows or tends to show that the accused has committed a crime wholly independent of the offense for which he is on trial." *Id.*

C.R.E. 404(b) effectuates these established principles and sets further limitation to admission of relevant evidence. It provides that evidence of other crimes, wrongs, or acts is not admissible to prove the defendant's character in order to show that he acted in conformity therewith. But such evidence may be admissible for limited other purposes where the prosecution can articulate a relevant evidentiary hypothesis for its use of the evidence. *Yusem*, 210 P.3d at 463-64; C.R.E. 404(b). Other acts evidence is admissible if (1) it relates to a material fact, (2) is logically relevant by tending to make the existence of any material fact more or less probable than without the evidence, (3) the logical relevance does not depend on the prohibited inference that defendant committed the crime because of the likelihood he acted in conformity with his bad character, and (4) its probative value is not outweighed by its prejudicial impact. *Yusem*, 210 P.3d at 463; *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990); *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991). Where evidence properly is admitted for a limited purpose, the jury then must be instructed as to the limited purpose for which it may consider the evidence. *Kaufman v. People*, 202 P.3d 542, 553 (Colo. 2009).

"*Res gestae* evidence is 'matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without knowledge of which the main fact might not be properly understood.'" *People v. Rollins,* 892 P.2d 866, 872-73 (Colo. 1995), citing and quoting *Woertman v. People,* 804 P.2d 188, 190 n. 3 (Colo. 1991) and *Martinez v. People,* 132 P. 64, 65 (1913). "Evidence that is contemporaneous with and serves to illustrate the character of the crime charged is *res gestae* evidence." *Id.* Additionally, to be admissible, *res gestae* evidence must be relevant and its probative value must not be outweighed by unfair prejudice. *Id.*

The evidence was not admitted under a C.R.E. 404(b) theory. (4/18/11, p11) The State represented that it was not seeking to admit any C.R.E. 404(b) evidence, it never advanced a hypothesis of relevancy or argued an exception to the general rule prohibiting admission of other acts evidence. *Yusem*, 210 P.3d at 463-64; C.R.E. 404(b). The trial court ruled no C.R.E. 404(b) evidence would be admitted. (4/18/11, p11)

The evidence appears to have been improperly admitted as *res gestae* evidence. However, the evidence was not necessary to the jury's complete understanding of the case, as is required under long-standing case law and set forth in this Court's decisions in *Rollins, Woertman,* and *Martinez, supra.* Evidence of Mr. Cleveland's allegation of a

home invasion robbery, for which Mr. Campbell was never charged, was irrelevant to the charge that Mr. Campbell possessed cocaine and was highly prejudicial to Mr. Campbell. The State never charged Mr. Campbell for robbery and yet the prosecutor continued to elicit testimony from officers concerning the alleged robbery and continued to refer to Mr. Cleveland as a "victim." Presentation of this evidence had the damning innuendo that Mr. Campbell was a person of bad character who had committed a very serious offense wholly independent from the charge in this case. *Kostal*, 357 P.2d at 73.

The prejudice resulting from the presentation of this evidence far exceeded any probative value the evidence may have had. C.R.E. 403 ("[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). Thus, admission of the evidence also was prohibited under *Rollins, supra,* and C.R.E. 403, because *res gestae* evidence is only admissible if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice. *Rollins,* 892 P.2d at 872-73. As noted above, the evidence of the robbery was not relevant to the charged offense. It did not serve to give a complete understanding of the events relevant to the charge, and was not necessary to the jury's understanding of the facts. *Id.* Additionally, the danger of unfair prejudice to Mr. Campbell was great and its prejudicial impact exacerbated by

the prosecutor's arguments concerning the robbery and that Mr. Cleveland was a victim.

Admission of the highly prejudicial, irrelevant evidence that Mr. Campbell had committed a home invasion robbery deprived Mr. Campbell of his right to due process, a fair trial, and an impartial jury. U.S. Const. amends V, VI, XIV; Colo. Const. art. II §§ 16, 23, 25. This Court should reverse Mr. Campbell's conviction and remand for a new trial.

III. THE PROSECUTOR'S ARGUMENT THAT MR. CAMPBELL HAD THE "SAME SUBPOENA POWER" AS THE STATE AND COULD HAVE CALLED WITNESSES TO TESTIFY IMPROPERLY SHIFTED THE BURDEN OF PROOF.

A. Standard of Review

This issue is preserved. Mr. Campbell objected to the prosecutor's burden-shifting argument. (5/5/11am, pp25-26) When a defendant objects at trial to a prosecutor's improper statements, the error requires reversal if there is a reasonable probability that the misconduct contributed to the defendant's conviction. *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008).

B. Facts, Law, and Analysis

The United States and Colorado Constitutions guarantee all individuals the right to a fair trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const.

art. II, §§ 16, 23, 25. A jury that has been misled by improper argument cannot be considered impartial. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005).

The trial court is responsible for assuring that jurors remain fair and impartial. *People v. Rodriguez*, 914 P.2d 230, 260 (Colo. 1996). While the trial court generally is vested with the discretion to determine whether a prosecutor is engaging in misconduct, appellate courts review counsel's conduct to avoid a miscarriage of justice notwithstanding the trial court's failure or refusal to do so. *Domingo-Gomez*, 125 P.3d at 1049-50. In determining prejudice to a defendant resulting from a prosecutor's improper argument, reviewing courts look to the strength of admissible evidence and also the nature of the error committed and the prejudice associated with it. *Crider*, 186 P.3d at 43.

All defendants in criminal trials are guaranteed the right to due process which protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *Francis v. Franklin*, 471 U.S. 307, 313 (1985). It is axiomatic that the burden of proof rests with the prosecution through trial. *Leonard v. People*, 369 P.2d 54, 61 (Colo. 1962). "It is not incumbent upon the defendant to prove anything to the satisfaction of the jury; rather, it is sufficient if he, by any evidence in the case, succeeds in raising a reasonable doubt in the minds of the jury" regarding any essential element of the charged offense. *Id.* A prosecutor may not

shift to a criminal defendant the burden of proving his or her innocence. *People v. Santana,* 255 P.3d 1126, 1130 (Colo. 2011).

In assessing whether the prosecution's burden-shifting actions constitutes reversible error, reviewing courts consider "the degree to which: (1) the prosecutor specifically argued or intended to establish that the defendant carried the burden of proof; (2) the prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) the jury is informed by counsel and the court about the defendant's presumption of innocence and the prosecution's burden of proof." *Santana,* 255 P.3d at 1131-32.

Here, the prosecutor argued in rebuttal closing:

> When we're talking about speculation, we didn't hear form the person who is alleged to have been robbed by the defendant that day. We didn't hear from Mr. Gilchrist, the passenger in the vehicle. And I'm going to point out defense has the same powers of subpoena that the People do. They can produce –
>
> [DEFENSE COUNSEL]: Objection. Burden shifting.
>
> THE COURT: Objection is overruled.
>
> [PROSECUTOR]: They can produce witnesses just as we can. So we don't have testimony from them. We don't have anything other than speculation to suggest that it's theirs.

(5/5/11am, pp25-26)

The prosecutor also argued, "[n]ow, defense has said, well, we don't know. What if the victim of the robbery snuck the crack cocaine in there? How do we know that that didn't happen? Well, again, we haven't heard from that person." (5/5/11am, p27)

These comments improperly shifted the burden to the defendant by arguing that the defendant was somehow required to prove the drugs belonged to someone else by calling other witnesses at trial and getting them to admit ownership of the drugs. The prosecutor's argument was contrary to established constitutional principles that the prosecution carries the burden of proof throughout trial, that a defendant need not prove anything at trial, and that a defendant need only raise a reasonable doubt in the minds of the jury. *Francis v. Franklin,* 471 at 313; *Leonard,* 369 P.2d at 61.

Although a division of this Court has found that no error results from comments that the defendant had the same subpoena power as the State, *see People v. Esquivel-Alaniz,* 985 P.2d 22, 23 (Colo. App. 1999) (prosecutor's argument that defendant has same subpoena power as the State is not error), this Court is not bound by the decision of another division. *People v. Howe,* 292 P.3d 1186, 1189 (Colo. App. 2012). Here, the error resulting from the prosecutor's arguments were particularly harmful because the cocaine was found in a car in which there were only two occupants. Additionally, Mr. Campbell implied that the jacket and drugs could have

come from Mr. Cleveland's home. However, Mr. Campbell's defense was that he did not know whose cocaine it was and that the prosecution had not proven he knew it was in the jacket found in the car. (5/5/11am, p18)

Arguing that Mr. Campbell was required to call the other occupant of the car or Mr. Cleveland to testify that the drugs were theirs was entirely improper. It is well-established that a defendant cannot call a witness to testify if there is reason to believe the witness would invoke their Fifth Amendment rights. *People v. Dikeman,* 555 P.2d 519, 520 (Colo. 1976) ("the defense may not ask a defense witness questions which it knows the witness will refuse to answer because of a valid claim to a privilege not to testify"). Additionally, the argument misled the jury into believing that Mr. Campbell had the burden to prove his innocence by calling witnesses to testify, contrary to law. In a case such as this, in which drugs were found in a jacket in a car occupied by more than one person and where the critical inquiry is whether the defendant knowingly possessed the drugs, the prosecutor's burden shifting comments were harmful.

Additionally, the prosecutor's burden-shifting remarks were not justified as a fair response to defense counsel's argument. Mr. Campbell argued:

> [w]e don't know whose jacket it was, even if we make the assumption that it was Mr. Campbell's, who else had control over it, who else could have had the jacket? Was it this Mr. Cleveland where they came from in the home, was it the passenger, was it someone else who has been in and out of the car, sometimes people leave jackets in a car,

> sometimes people go in and out of a car. We don't know. It could have been anyone's. We don't even know whose car it is[.]

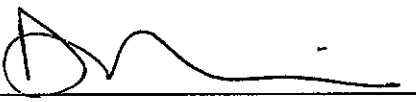
(5/5/11am, p18) This argument was a proper argument based on the evidence at trial and called into question the sufficiency of the State's evidence that Mr. Campbell knew there was cocaine in the jacket. Thus, the burden shifting argument by the prosecutor did not constitute a "fair response" to defense counsel comments. *Santana,* 255 P.3d at 1131.

In the context of this case, the prosecutor's improper remarks deprived Mr. Campbell of his right to due process, a fair trial, and an impartial jury by shifting the burden. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Francis v. Franklin,* 471 at 313; *Leonard,* 369 P.2d at 61; *Santana,* 255 P.3d at 1131-32. This Court should reverse Mr. Campbell's conviction and remand for a new trial.

CONCLUSION

For the foregoing reasons and authorities in Argument I, Mr. Campbell respectfully requests this Court reverse his conviction and remand to the trial court with instruction to suppress the evidence obtained from the search of his car. For the reasons and authorities in Arguments II and III, Mr. Campbell requests this Court reverse his conviction and remand for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender



DAYNA VISE, #36656
Deputy State Public Defender
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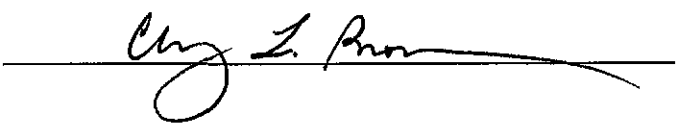
1300 Broadway, Suite 300
Denver, Colorado 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on June 17, 2013, a copy of this Opening Brief of Defendant-Appellant was served on Catherine P. Adkisson of the Attorney General's Office through the AGAppellate@state.co.us account in ICCES.



Case 10-1314

SEARCH WARRANT

RECEIVED
DEC 14 2010
CLERK'S OFFICE

IN THE (DISTRICT) (COUNTY) COURT, EL PASO COUNTY, STATE OF COLORADO
CRIMINAL ACTION NUMBER _____

Whereas **Officer Keith Wrede, 1876P** has made an Application and Affidavit to the Court for the issuance of a Search Warrant, and;

Whereas the application is in proper form and probable cause is found for the issuance of a Search Warrant to search the person(s) and or premises specified in the application.

THEREFORE, the applicant, and any other peace officer into whose hands this Search Warrant shall come, is hereby ordered, with the necessary and proper assistance, to enter and search within the next ten (10) days the person, premises, location and any appurtenances thereto, description of which is: **A 1987 Mercedes Benz gray in color 2 door sedan that has attached Colorado plate - 086VGM VIN#WDBCA45D8HA319020. The vehicle is currently located at the CSPD impound lot located in Colorado Springs, Colorado.**

The following person(s), property or thing(s) will be searched for, and if found seized:
See Attachment "B"

as probable cause has been found to believe that it:

(X) Is stolen or embezzled, or
( ) Is designed or intended for use in committing a criminal offense, or
(X) Is or has been used as a means of committing a criminal offense, or
(X) Is illegal to possess, or
(X) Would be material evidence in a subsequent criminal prosecution, or required, authorized or permitted by a statute of the State of Colorado, or
( ) Is a person, property or thing the seizure of which is expressly required, authorized or permitted by a statute of the State of Colorado, or
( ) Is kept, stored, transported, sold, dispensed, or possessed in violation of a statute of the State of Colorado under circumstances involving a serious threat to the public safety, or order, or to the public health.

(Mark "X" according to fact)

Furthermore, a copy of this warrant is to be left with the person whose premises or person is searched along with a list of any and all items seized at the time of its execution. If said person cannot be located or identified, a copy of the search Warrant and the list of property seized shall be left at the place from which the property was taken.

Further, a return shall be promptly made to this Court upon the execution of this Search Warrant along with an inventory of any property taken. The property seized shall be held in some safe place until the Court shall further order.

Done by the Court this 14th day of DECEMBER, 2010.

Judge: _____

DEFENDANT'S EXHIBIT A

(DISTRICT) (COUNTY) COURT, EL PASO COUNTY, STATE OF COLORADO
CRIMINAL ACTION NUMBER _____

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

The undersigned, a peace officer as defined in 18-1-901 (3) (1), C.R.S. 1973 as amended, being first duly sworn on oath moves the Court to issue a Warrant to search those person(s) and/or premises known as:

A 1987 Mercedes Benz gray in color 2 door sedan that has attached Colorado plate - 086VGM VIN#WDBCA45D8HA319020. The vehicle is currently located at the CSPD impound lot located in Colorado Springs, Colorado.

The undersigned states that there exists probable cause to believe that the following person, property or thing(s) to be searched for, and if found, seized will be found on the aforementioned person(s) and or premises and are described as follows:

See Attachment "B"

The grounds for the seizure of said person(s), property or thing(s) are that probable cause exists to believe that it: (X) Is stolen or embezzled, or ( ) Is designed or intended for use as a means of committing a criminal offense, or (XX) Is or has been used as a means of committing a criminal offense, or (X) Is illegal to possess, or (X) would be material evidence in a subsequent criminal prosecution, or ( ) Is a person, property or thing the seizure of which is expressly required, authorized, or permitted by a statute of the State of Colorado, or ( ) Is kept, stored, transported, sold, dispensed, or possessed in violation of the statute of the State of Colorado under circumstances involving a serious threat to the public safety, or order, or to the public health, (mark X according to the fact);

The facts submitted in support of this application are set for in the accompanying attachment designated as Attachment "A" which is attached hereto and made a part hereof.

Applicant: [signature] 1875

Law enforcement agency: Colorado Springs Police Department

Position: Officer

Sworn and subscribed before me this 14th day of DECEMBER 2010.

Judge: [signature]

ATTACHMENT "A"

The following affidavit is made in support of the request for the issuance of a search warrant to search A 1987 Mercedes Benz gray in color 2 door sedan that has attached Colorado plate - 086VGM VIN#WDBCA45D8HA319020. The vehicle is currently located at the CSPD impound lot located in Colorado Springs, Colorado.

Your affiant is Officer Keith Wrede #1876P, a sworn police officer for the City of Colorado Springs, currently assigned to the Sand Creek Patrol Division. The facts contained in this affidavit can be found in official CSPD case report #10-41062, entitled First Degree Burglary.

On 12/14/2010 (Tuesday) at approximately 11:18 hours, Officers with the Colorado Springs Police Department were dispatched to a home invasion / robbery at 3430 Foxridge Dr. Your affiant was one of the officers who responded.

The 911 dispatcher indicated that three suspects were involved in the robbery. All suspects were reported to be black males. The victim also told 911 dispatchers that the suspects had guns when they came into his house. The victim advised that the suspects were leaving his house with some of his property to include an Xbox and a computer. He advised dispatch that two black males left in a gold colored Mercedes Benz and the other black male left in a white pickup truck. The vehicles left west on Drennan Rd towards Academy Bl. per the victim.

At approximately 11:25 hours, while En route to 3430 Foxridge Dr. Officer J. Reeser #2646 contacted gold in color Mercedes Benz at Academy Bl. and Fountain Bl. Occupied by two black males. The vehicle was turning east onto Fountain from Academy Bl. Officer Reeser initiated a traffic stop on the vehicle near Fire Fly and Murray Bl. Your affiant assisted Officer J. Reeser with the traffic stop. When Officer J. Reeser approached the vehicle he observed in plain view a black laptop and an Xbox in the back seat of the Mercedes Benz. The driver of the vehicle was identified as Campbell, Derick (01-27-1986) via Colorado Driver License. The passenger was identified as Gilchrist, Julis (11-20-1983). Both parties were detained and the vehicle was taken to the Colorado Springs Police Department Impound Lot.

It was determined that the vehicle and the occupants were involved in the robbery at 3430 Foxridge Dr. During a mirandized interview with Campbell, Derick, he stated that the Xbox and computer were his and they there stolen from his house on 12/13/2010 in the City of Fountain. The details of Campbell's stolen property are documented under Fountain Police Department's case number 10-028593 titled Burglary. Campbell also said he had "Mr. Smiley" in his car which he referred to it as being similar to that of marijuana but containing no THC. He said he could be returned to prison if he was in possession of the substance he referred to as "Mr. Smiley".

Based on the above mentioned facts, your affiant respectfully requests that a search warrant be issued to search A 1987 Mercedes Benz gray in color 2 door sedan that has attached Colorado plate - 086VGM VIN#WDBCA45D8HA319020 . The vehicle is currently located at 2725 E. Las Vegas the CSPD impound lot located in Colorado Springs, Colorado .

Items to be searched for are listed in Attachment "B".

AFFIANT: Wrede 1876

Officer Keith Wrede 1876P

POSITION: Detective, Colorado Springs Police Department

JUDGE

12/14/10 @ 3:18 pm

DATE/TIME

ATTACHMENT "B"

The following items listed Attachment "B" are for a A 1987 Mercedes Benz gray in color 2 door sedan that has attached Colorado plate - 086VGM VIN#WDBCA45D8HA319020. The vehicle is currently located at the CSPD impound lot located in Colorado Springs, Colorado.

- Any identification identify any of the occupants of the vehicle
- Any and all firearms
- Any and all ammunition
- Any documentation showing the ownership of a firearm
- Any item commonly used to carry & transport a firearm i.e.: holsters, gun cases or magazines
- Any letters, notes, tapes, pictures or other documentation depicting the association between all the individuals involved in this investigation
- Any and all illegal controlled substance meaning a drug, substance, or an immediate precursor included in schedules I through V, including cocaine, marihuana and marijuana concentrate.
- Any and all drug paraphernalia
- Any material showing why this crime may have occurred
- Any computer and game system
- Any indicia of ownership of vehicle