COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 3, 2013 1:27 PM
El Paso County District Court Honorable Theresa M. Cisneros, Judge Case No. 10CR4540	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. DERICK CAMPBELL, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 11CA1279
JOHN W. SUTHERS, Attorney General GABRIEL P. OLIVARES, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: (720) 508-6468 E-Mail: Gabriel.olivares@state.co.us Registration Number: 45336 *Counsel of Record	

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains 8,553 words.

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

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

/s/ Gabriel P. Olivares

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STATEMENT OF THE CASE

On December 22, 2010, the People charged the defendant with one count of possession of a controlled substance – schedule II – 4 grams or less. (Vol. 1, pp. 13-14).

On February 28, 2011, the defendant filed nine different suppression motions. (Vol. 1, pp. 36-71). Five were motions to suppress evidence seized in a search of the defendant's car. (Vol. 1, pp. 53-71). Three were motions to suppress statements by the defendant. (Vol. 1, pp. 36-40, 44-52). One was a motion to suppress evidence that the defendant possessed a marijuana substitute, "Mr. Smiley," and the fact that he was on parole. (Vol. 1, pp. 41-43).

An evidentiary hearing was held on April 18, 2011, and April 22, 2011. (Vol. 1, pp. 125-26). Prior to evidence being presented, the trial court ruled on the defendant's ninth motion[1], ordering that any reference to the defendant being on parole was not admissible and taking under advisement references to "Mr. Smiley." (4/18/11, pp. 21-

[1] "Motion to Suppress (9-Comment Asserting Rights)" (Vol. 1, pp. 36-40).

22). On April 29, 2011, the trial court issued a written order regarding the defendant's other eight motions. (Vol. 1, pp. 75-86). In the order, the trial court denied the motions regarding the fruits of the search. (Vol. 1, pp. 77-84). It also denied in part and granted in part the defendant's motions to suppress statements. (Vol. 1, pp. 83-86).

The defendant proceeded to trial on May 3, 2011. (Vol. 1, p. 124). On May 5, 2011, a jury convicted him of the sole count. (Vol. 1, p. 106). The same day, the trial court sentenced him to two years in the Department of Corrections with one year of mandatory parole. (Vol. 1, p. 107).

This appeal followed.

STATEMENT OF THE FACTS

On December 14th, 2010, at approximately 11:18 a.m., Tyrone Cleveland called Colorado Springs 911 reporting that three men with guns ran into his house. (Def.'s Ex. B, p. 1; Def.'s Ex. C, p. 1). Mr. Cleveland reported that "[t]hey took all [his] things." (Def.'s Ex. B, p. 1). When Mr. Cleveland initially called 911, the men were still in his

house, but, after an argument, they left while he was still on the phone with the operator. (Def.'s Ex. B, p. 2). He reported that they were leaving in a gray Mercedes and a white pickup truck heading towards the mountains and "about to hit Academy." (Def.'s Ex. B, pp. 2-3). Mr. Cleveland then claimed that he had been punched by the men. (Def.'s Ex. B, p. 3). He also reported that one of the men was named Derick Campbell. (Def.'s Ex. B, p. 3). He also stated that all three men were black. (Def.'s Ex. B, p. 3). Towards the end of the call, Mr. Cleveland was asked by the operator if the men took anything from his home, and he responded, "No, not that I see." (Def.'s Ex. B, p. 4). Officers from the Colorado Springs Police Department arrived towards the end of the call. (Def.'s Ex. B, pp. 4-5).

As the 911 call was taking place, dispatch relayed to officers that "there was a robbery in progress where . . . someone was assaulted, items were taken, and then the suspects had fled the area." (4/18/11, p. 26). Dispatch also aired descriptions of the suspects and the suspects' vehicles. (4/18/11, p. 25).

At that time, Officer James Reeser was doing traffic enforcement and was at Fountain Blvd. and Academy Blvd., which was approximately "eight to nine city blocks" from the location of the incident. (4/18/11, p. 26). Officer Reeser saw a gray Mercedes with two African-American men. (4/18/11, pp. 25-26). Officer Reeser did not immediately pull the vehicle over; rather, he followed the vehicle waiting for confirmation of the descriptions of the suspects. (4/18/11, p. 27). Because he could not see the faces of the occupants of the vehicle, Officer Reeser developed his own "probable cause for a stop," observing the Mercedes make a left-hand turn without using its turn signal. (4/18/11, p. 28).

Officer Reeser contacted the occupants of the vehicle and informed them that the reason for the stop was the turn signal violation. (4/18/11, p. 30). After he obtained the identification of the defendant, who was driving, Officer Reeser went back to his motorcycle to request cover. (4/18/11, p. 30). On his way back to his bike, he observed an Acer computer and an Xbox in the backseat of the vehicle. (4/18/11, p. 30). At some point, the officers at Mr. Cleveland's house had indicated over

their Nextel radios that those items had been taken. (4/18/11, pp. 48-49). Officers Andy Duran and Keith Wrede appeared on the scene shortly thereafter, and Officer Duran confirmed that the defendant's name was the same name reported by Mr. Cleveland. (4/18/11, p. 31).

Officer Duran asked the defendant to exit the vehicle, conducted a pat-down for weapons, placed him in handcuffs, and led him to his patrol car. (4/18/11, p. 47). The defendant indicated that the items were his and that they were taken in a burglary of his home the night before. (4/18/11, p. 49). Officer Duran asked the defendant for consent to search the vehicle so that they could confirm the items were his, and the defendant indicated that he would give consent only if the officers would allow him to call his mother. (4/18/11, p. 49). The defendant never gave his consent to the officers. (4/18/11, p. 50). The defendant was eventually taken to a police substation, and the vehicle was impounded. (4/18/11, pp. 52-53).

At the substation, Officer Duran asked the defendant, who had waived his *Miranda* rights, why he refused to consent to a search of his vehicle. (4/18/11, p. 54). The defendant, who was on parole at the time,

indicated that he had "Mr. Smiley" in his vehicle and "he would get in trouble if he had possession of that." (4/18/11, p. 54). The defendant was released from custody that day. (4/18/11, p. 64).

At Mr. Cleveland's house, Officer Randall Blackburn arrived quickly after the initial dispatch was made.[2] (4/22/11, p. 22). Mr. Cleveland said that he had been assaulted and some of his personal items had been taken out of his house. (4/22/11, p. 22). Officer Blackburn noted some discrepancies between Mr. Cleveland's 911 call and the report he gave to the officers on the scene.[3] (4/22/11, p. 22). Specifically, Mr. Cleveland had told the 911 operator that there were guns involved, and he had told the officers that guns were not involved. (4/22/11, p. 23; Vol. 1, p. 63). Mr. Cleveland told the 911 operator at one point that he didn't see anything missing and told the officers that the

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[2] Officer Blackburn, who testified during the evidentiary hearing, documented his observations in a written police report which was not part of the record. However, the defendant's trial counsel, Mr. Michael Harris, included portions of the report in a signed affidavit in support of the motions to suppress. (Vol. 1, p. 63).

[3] At some point during Officer Blackburn's investigation, he requested that Sergeant Mark Devorss pull the 911 tape so that he could compare Mr. Cleveland's statements. (4/22/11, p. 19).

defendant took his laptop and Xbox. (4/22/11, p. 23; Vol. 1, p. 63). Mr. Cleveland also reported that he had been "assaulted and struck approximately ten times" in his face and neck area, however Officer Blackburn did not see any injuries and Mr. Cleveland declined any medical attention. (4/22/11, p. 23). Mr. Cleveland also initially claimed to have known the suspects for around two years, but declined to give their information because "he claimed he was afraid of them." (Vol. 1, p. 63). However, as the interview progressed, he identified the suspects. (4/22/11, p. 23). Towards the end of the interview, Mr. Cleveland signed "no prosecution forms," and Officer Blackburn concluded his investigation. (4/22/11, p. 24).

Officer Blackburn contacted Officers Duran and Wrede, who were in the process of obtaining a search warrant for the defendant's vehicle. (4/22/11, p. 25). He told the officers "everything that [he] was aware of about the robbery and no prosecution forms." (4/22/11, p. 25). When asked during the evidentiary hearing if he told them about the inconsistencies in Mr. Cleveland's testimony, Officer Blackburn testified that he did not recall "going that far in depth," and that he only

mentioned "about they didn't want to pursue any charges." (4/22/11, p. 25). However, Officer Blackburn also testified that from his part of the investigation, he believed "there was not a robbery that was committed," and he thought he indicated this to Officers Duran and Wrede. (4/22/11, p. 26).

Officer Wrede began the paperwork for the search warrant on the vehicle in order to verify the owner of the items and because he was not certain whether weapons were used in the home invasion. (4/18/11, p. 79). Officer Wrede applied for the search warrant and attached an affidavit in support of his warrant. (Def.'s Ex. A). A magistrate signed the warrant at approximately 3:18 p.m., and the search was conducted that same afternoon.[4] (Def.'s Ex. A, p. 4; 4/18/11, p. 80). The officers located a black laptop computer, a black Xbox, and a digital scale. (4/18/11, p. 82). In a black jacket that was located in the back seat of the vehicle, the officers discovered "Mr. Smiley" and a substance that later

[4] Officer Wrede testified that the search probably occurred at "3:00 or 4:00ish." (4/18/11, p. 80).

tested positive for cocaine. (4/18/11, p. 82). No weapons were recovered. (4/18/11, p. 82).

SUMMARY OF THE ARGUMENT

The trial court properly denied the defendant's motions to suppress because the search of his vehicle was based on a valid search warrant, no material facts were omitted from the warrant affidavit, and the officers did not make misrepresentations in the affidavit. Additionally, the search was valid under other exceptions to the warrant requirement, including the automobile exception, the inventory search exception, and as a search of a parolee.

No error was committed in allowing evidence of the defendant's involvement in the home invasion and robbery of Mr. Cleveland since it was admitted as res gestae, it was relevant to put the crime in context and to respond to the defendant's theory of defense, and there was no danger of unfair prejudice.

Finally, the district attorney did not commit prosecutorial misconduct because his statements were not intended to shift the

burden of proof, the statements were in response to the defendant's theory of defense, and the jury was properly instructed. Also, Colorado courts have routinely held that these types of statements have do not impermissibly shift the burden of proof.

ARGUMENT

I. The trial court properly denied the defendant's motions to suppress evidence because the search of his vehicle was based on a valid search warrant.

A. Preservation and Standard of Review

The People agree that this issue was preserved when the defendant filed multiple motions to suppress the evidence seized in the search of the vehicle and those motions were ruled upon by the trial court. (Vol. 1, pp. 53-64, 75-86).

An appellate court's review of a suppression order presents mixed questions of law and fact. *People v. Martin*, 222 P.3d 331, 334 (Colo. 2010). The appellate court defers to the trial court's factual findings if they are supported by the record but reviews its legal conclusions de novo. *Id.*

Additionally, of the nine motions to suppress presented to the trial court, the defendant's appeal only challenges the trial court's ruling in the third,[5] fourth,[6] and fifth[7] motions. As the defendant has not challenged the other rulings on appeal, those claims are abandoned. *People v. Gomez*, 211 P.3d 53, 57 (Colo. App. 2008) (declining to address an argument raised in the trial court but not renewed on appeal).

B. Ruling Below

In denying the defendant's third motion, "Motion to Suppress and Request for Veracity Hearing (3-False Warrant Affidavit)," the trial court found that Officer Wrede had not omitted material facts from the affidavit in support of the search warrant. (Vol. 1, p. 81). Specifically, the trial court stated:

> The testimony at the hearing established that after [the defendant] was taken to the Sand Creek substation, he admitted to possessing a substance that would violate his parole. That information is contained within the four corners

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[5] "Motion to Suppress and Request for Veracity Hearing (3-False Warrant Affidavit)" (Vol. 1, pp. 59-64).

[6] "Motion to Suppress (4-Stale Warrant)" (Vol. 1, pp. 56-58).

[7] "Motion to Suppress (5-No Basis for Warrant)" (Vol. 1, pp. 53-55).

> of the warrant affidavit. That information, in and of itself, was sufficient to allow the officers to apply for the search warrant because that information would cause a person of reasonable caution to believe that contraband was located within the vehicle. Additionally, Officer Blackburn did not determine that a robbery did not occur so there was no material omission. He only determined that the complaining witness did not wish to prosecute and that eth complaining witness made inconsistent statements. Had this information been placed in the warrant, it would not have affected the magistrate's determination of probable cause for the search of the vehicle.

(Vol. 1, p. 81) (citations omitted).

In denying the defendant's fourth motion, "Motion to Suppress (4-Stale Warrant," the trial court found that probable cause to believe contraband or evidence of criminal activity in the vehicle still existed at the time of the execution of the warrant. (Vol. 1, p. 82). The court found that the search was carried out on the same afternoon that the warrant was issued.[8] Regardless, the court found that probable cause still existed based on the chain of events and the defendant's statements.

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[8] Officer Duran mistakenly put the date of the search as December 15, 2011 in his report, but the trial court found his testimony credible that the search occurred on December 14. (4/18/11, pp. 64-65; Vol. 1, p. 82).

In denying the defendant's fifth motion, "Motion to Suppress (5-No Basis for Warrant)," the court found that even though "Mr. Smiley" was legal because it had no THC, the defendant's statement that he could be returned to prison if he was in possession of the substance was sufficient to establish probable cause that contraband or evidence of criminal activity would be located in the vehicle. (Vol. 1, pp. 82-83).

C. Applicable Law

The United States Constitution and the Colorado Constitution provide that a search warrant may only be issued upon a showing of probable cause, supported by oath or affirmation, particularly describing the place to be searched and the things to be seized. U.S. Const. amend. IV; Colo. Const. art. II, § 7. "A warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause so as to allow the magistrate to make an independent evaluation. There is a presumption of validity afforded to the affidavit submitted in support of the search warrant." *People v. Kerst*, 181 P.3d 1167, 1171 (Colo. 2008) (citing *Franks v. Delaware*, 438 U.S. 154, 165, 171 (1978)).

On its face, "[a]n affidavit establishes probable cause if it contains 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." *Kerst*, 181 P.3d at 1172. A magistrate examines the totality of the circumstances and "make[s] a practical, common-sense decision whether a fair probability exists that a search of a particular place will reveal contraband or evidence of a crime." *People v. Altman*, 960 P.2d 1164, 1167 (Colo. 1998).

Claims of material omissions in a warrant affidavit are analyzed differently than claims that the warrant affidavit contained false statements. *Kerst*, 181 P.3d at 1171 n.4.

The omission of material facts known to the affiant when executing the affidavit may cause statements within the affidavit to be so misleading that a finding of probable cause may be deemed erroneous. *People v. Eirish*, 165 P.3d 848, 856 (Colo. App. 2007). However, "[t]here is no requirement that a warrant affidavit fully describe all steps taken, all information obtained, and all statements made by witnesses during the course of an investigation."

Kerst, 181 P.3d at 1171. Rather, the affiant has only a duty to disclose material or relevant adverse facts. *Id.* "A fact is material for the purposes of vitiating an entire affidavit only if its omission rendered the affidavit 'substantially misleading' as to the existence of probable cause to the magistrate who issued the warrant." *Id.* (quoting *People v. Winden*, 689 P.2d 578. 583 (Colo. 1984)). "In sum, although information omitted from the affidavit may be adverse and relevant, its omission does not rise to the level of misrepresentation if it does not cast doubt on the existence of probable cause." *Id.*

The test for determining whether false statements resulted in a mistaken finding of probable cause was set forth in *People v. Dailey*, 639 P.2d 1068, 1074-75 (Colo. 1982). At a veracity hearing, a court must address: "(1) whether the warrant affidavit contains false statements; (2) whether the false statements must be excised; (3) if the statements are excised, whether the remaining statements establish probable cause to authorize the search." *People v. Reed*, 56 P.3d 96, 99 (Colo. 2002) (citing *Dailey*, 639 P.2d at 1075). Under the Fourth Amendment, false statements must be stricken if the source of error is the affiant's

intentional falsehood or reckless disregard for the truth. *Reed*, 56 P.3d at 99. A court may consider facts outside the four corners of the warrant affidavit in determining the falsity of a statement or the source of the error. *Id.*

D. The search warrant did not omit material facts or contain material misrepresentations.

The defendant argues that the search warrant was invalid because it was based on an affidavit which omitted material facts. He contends that omitting the fact that Officer Blackburn had determined that no robbery had occurred rendered the warrant materially misleading. He further argues that the statement in the warrant that the vehicle and its occupants were involved in the robbery was materially misleading since Officer Blackburn had concluded no robbery occurred.

Officer Blackburn's assessment that the complainant was not credible was based on several factors, including the following:

(1) Mr. Cleveland reported that he didn't see that anything was taken from his home to the 911 operator, but also reported

that a computer and Xbox were stolen. (Def.'s Ex. B, p. 4; 4/18/11, p. 30).

(2) Mr. Cleveland initially reported that guns were involved but then told the officers that guns were not involved. (4/22/11, p. 23).

(3) Mr. Cleveland reported that he was punched approximately ten times, but no injuries were apparent and he declined medical attention. (4/22/11, p. 23).

(4) Mr. Cleveland initially identified the defendant to the 911 operator but then was hesitant to identify the suspects to the officers on the scene, and eventually divulged their information. (Def.'s Ex. B, p. 3, 4/22/11, p. 23).

(5) Mr. Cleveland signed a "No Prosecution" form. (4/22/11, p. 24).

While these facts and Officer Blackburn's opinion that Mr. Cleveland's allegations were baseless were not included in the affidavit, there omission did not render the affidavit substantially misleading. The other officers had additional information not known to Officer Blackburn that led them to believe that the defendant had gone to Mr.

Cleveland's house and taken some items. The information known to the officers at the time they prepared the affidavit indicated that some sort of altercation took place between Mr. Cleveland and the defendant. He was positively identified by Mr. Cleveland and the items in his back seat were reported stolen prior to Officer Reeser observing them in plain view. The possibility that Mr. Cleveland was mistaken about the details of the encounter, embellished the story in the heat of the moment, or was hesitant to identify the suspects or pursue prosecution for fear of retribution does not diminish the existence of probable cause.

Even if Officer Blackburn's opinion had been included in the affidavit there would still have been probable cause to search the vehicle. The existing facts within the warrant affidavit established probable cause that a search of the vehicle would reveal evidence of either a home invasion or a robbery. Mr. Cleveland reported to 911 that three men were involved in a robbery of his house. All three men were identified as black males. Mr. Cleveland identified the two vehicles which the men were leaving in, as well as their direction of travel. (Def.'s Ex. A, p. 3).

Within minutes, Officer Reeser pulled over a vehicle matching the description of one of the vehicles involved in the incident, and the driver and passenger were both black males. Officer Reeser observed in plain view a black laptop and an Xbox in the rear seat of the vehicle, and Mr. Cleveland had reported that an Acer computer and an Xbox had been taken from his home. (Def.'s Ex. A, p. 3). Thus, there was probable cause to believe that the vehicle contained evidence of the home invasion or robbery.

The fact that the items found in the vehicle were possibly the defendant's or that Mr. Cleveland did not have rightful possession of the items does not mean that the defendant did not commit a criminal offense by going to Mr. Cleveland's home and taking his property back. Whereas theft involves the taking of "anything of value of another," § 18-4-401(1), C.R.S. (2013), robbery involves the taking of "anything of value from the person or presence of another." § 18-4-301(1), C.R.S. (2013). Thus, "the gravamen of the offense of robbery is the violent nature of the taking," and "[p]roof of ownership of the property taken is immaterial so long as the victim had sufficient control over it at the

time of the taking." *People v. Borghesi*, 66 P.3d 93, 100-01 (Colo. 2003); *see also People v. Scearce*, 87 P.3d 228, 231 (Colo. App. 2003) (concluding that the robbery statutes endorse the basic public policy that even rightful owners should not be permitted to use force to regain their property, once it has been taken).

Accordingly, the statement in the warrant that the defendant was involved in a robbery was not a misrepresentation. The statement does not indicate who made the determination or when the determination was made. However, it is evident from the testimonies of the officers involved in the traffic stop, that at some point they made a determination that the vehicle and the occupants were involved in the incident with Mr. Cleveland. The defendant, the defendant's vehicle, and the items in the vehicle were identified by Mr. Cleveland. Additionally, there was evidence that the items were taken by force, threat, or intimidation, thus constituting a robbery regardless of true ownership. The fact that Officer Blackburn might have had a contrary opinion does not make the statement false.

Nor did the defendant establish that this statement was based on an intentional falsehood or reckless disregard for the truth. Rather, the officers were still investigating what happened. A determination that a robbery did not occur was premature because, based on the 911 transcript and the evidence seized from the search of the car, it was likely that the defendant took the items by force, threat, or intimidation, thus committing the act of robbery. (Def.'s Ex. B, p. 2). Contrary to the defendant's assertion, probable cause had not dissipated by the time they performed the search because there was still probable cause to believe that the defendant was involved in the robbery.

The trial court rested its ruling in part on its conclusion that "Officer Blackburn did not determine that a robbery did not occur." (Vol. 1, p. 81). During Officer Blackburn's testimony, the following exchange took place:

> Q. Would it be fair to say that when you finished the interview at 1:18 p.m., there was no determination that there was any sort of robbery?
>
> A. That's fair to say, yes.

> Q. Would that have been known to Officers Wrede and Duran that there was no determination there was a robbery?
>
> A. It's hard to say what their understanding was. But from my part, I do believe there was not a robbery that was committed.
>
> Q. You indicated that to them?
>
> A. During the conversation I think, yes.

(4/22/11, pp. 25-26). Thus, Officer Blackburn's testified both that he did not determine that a robbery took place and that he determined that no robbery took place. More importantly, he was not certain what the conveyed to the other officers, and Officer Wrede never testified that Officer Blackburn indicated he had determined that no robbery took place, and stated that he did not recall Officer Blackburn telling him that Mr. Cleveland reported that nothing was taken from the property. (4/18/11, p. 83).[9] Consequently, the record supported the trial court's finding.

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[9] Additionally, an affidavit provided by the defendant's trial counsel in support of the written motion referenced a report by Officer Blackburn. This report was not part of the record. The affidavit asserted that Officer Blackburn's report indicated there were discrepancies in Mr. Cleveland's account. However, it did not state that he had made a determination that no robbery took place. (Vol. 1, p. 64).

Therefore, there was no omission of material fact or material misrepresentation which invalidated the search warrant.

E. The search was valid on alternative grounds.

Even assuming arguendo that the warrant was invalid because of omission or misrepresentation, the officers still had alternate grounds to perform a warrantless search on the vehicle. "[A] party may defend a trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court." *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006). The reviewing court has discretion to affirm the trial court's denial of a defendant's motion to suppress on different grounds than those relied upon by the lower court. *Id.*

First, as discussed above, the officers still had probable cause to believe that the car contained contraband or evidence of criminality. Specifically, there was probable cause to believe that the defendant was involved in the robbery and that there was evidence of a parole violation. Therefore, under the "automobile exception," the officers could have performed a warrantless search of the vehicle either at the

roadside[10] or, as they did here, at the impound lot. *Texas v. White*, 423 U.S. 67, 68 (1975) ("[P]olice officers with probable cause to search an automobile on the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant."); *but see People v. Lorio*, 546 P.2d 1254, 1257 (Colo. 1976).

Second, the vehicle was impounded lawfully, thus an inventory search could have been performed on the vehicle. *Pineda v. People*, 230 P.3d 1181, 1182 (Colo. 2010).

Third, the search of the vehicle was valid as a warrantless search of a parolee. The defendant's own statements established probable cause that a search of the vehicle would reveal either contraband or evidence of a parole violation. The defendant stated that he possessed "Mr. Smiley" which, as he described, was similar to marijuana but contained no THC. The defendant also stated that he could be returned to prison for possessing the substance. (Def.'s Ex. B, p. 3). Thus, there

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[10] The officers could have also searched the vehicle at the roadside under *Arizona v. Gant*, 556 U.S. 332 (2009), because the officers had reasonable suspicion that the vehicle had evidence of the crime for which the defendant was being arrested, robbery.

was probable cause to believe that a search would reveal evidence of a violation of the defendant's parole conditions. Even though "Mr. Smiley" might be legal, as testified during the evidentiary hearing, the possession of a legal substance could still be a violation of the defendant's parole conditions. *See People v. Watkins*, 2012 COA 15, ¶ 39 (holding that the legal possession of medical marijuana is still a violation of the conditions of probation). Alternatively, the defendant's statement that he had a substance that could send him back to prison, could warrant a person of reasonable caution to believe that there was evidence of some other substance that would violate the conditions of the defendant's probation. However, the officers knew the defendant was on parole, therefore they did not need any individualized suspicion to perform a search, even though they had probable cause here. *Samson v. California*, 547 U.S. 843, 857 (2006) ("[T]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.").

Therefore, the search of the vehicle was valid, and the trial court properly denied the defendant's motions to suppress.

II. The testimony regarding the defendant's involvement in a home invasion was admissible as res gestae.

A. Preservation and Standard of Review

The People disagree with the defendant's contention that this issue was preserved for review. The defendant argues that the error was preserved by the filing of a motion requesting notice of any acts, transactions, or res gestae the prosecution intended to introduce, the representation by the prosecution that it would introduce such evidence, and the defendant's objections throughout trial to admission of this evidence. (Def.'s Opening Br., p. 17).

However, during the motions hearing, the district attorney stated:

> Your, honor we do not plan to introduce any [404(b) evidence]. Obviously we're well past the 404(b) deadline at this point on the case. I have no plans to introduce any similar. Res gestae does not require any advance notice, according to case law, so certainly something could come up [where] we would argue res gestae.

The district attorney correctly stated the law, *see People v. Agado*, 964 P.2d 565, 567 (Colo. App. 1998) ("Res gestae evidence need not meet the procedural requirements of evidence introduced pursuant to 404(b)."), and the defendant did not object during the hearing to the fact that res gestae evidence might still be introduced at trial.

Further, while the district attorney made sixteen separate references to the alleged robbery and home invasion, (5/3/11, pp. 4, 9-11, 14-15, 17-19, 20, 32-33, 50, 59, 81-86; 5/5/11, pp. 15, 25), the defendant only objected to the references on eight occasions. Most importantly, none of the objections were on grounds that this was improper 404(b) or res gestae evidence. Three of the objections were solely for hearsay. (5/3/11, pp. 4, 9, 84). Two objections were for hearsay, the Confrontation Clause, and relevance. (5/3/11, pp. 20, 83). One objection was for speculation and hearsay. (5/3/11, p. 33). One objection was for speculation, hearsay, and the Confrontation Clause. (5/3/11, p. 50). The final objection was for burden shifting. (5/5/11, p. 25).

Reviewing courts do not address an evidentiary issue raised on appeal where a different issue was raised below. *Gomez*, 211 P.3d at 57.

If this court does review the defendant's claim, it should be for plain error only. *People v. Hyunh*, 98 P.3d 907, 913 (Colo. App. 2004). "Plain error occurs when, upon review of the entire record, a reviewing court can say with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *People v. Gross*, 2012 CO 60, ¶ 17 (citations and internal quotation marks omitted).

Additionally, the People disagree with the defendant's suggestion that the admission of similar transaction evidence is reviewed as a denial of a defendant's constitutional right to a fair trial. Instead even if the claim had been preserved, trial courts have substantial discretion in determining the admissibility of CRE 404(b) evidence, and a reviewing court will not overturn that ruling absent a showing of an abuse of discretion. *See People v. Cooper*, 104 P.3d 307, 309 (Colo. App. 2004); *People v. Warren*, 55 P.3d 809, 814 (Colo. App. 2002).

B. Relevant Facts

On February 28, 2011, the defendant filed a "Motion for Notice and Discovery of Other Acts or Statements." (Vol. 1, p. 34). The

defendant requested notice of evidence of "other crimes, wrongs, or acts; similar transactions; res gestae; rebuttal; or any other theory of evidence." (Vol. 1, p. 34). During the motions hearing on April 18, 2011, the district attorney indicated that he did not have any plan to introduce CRE 404(b) evidence but the situation might arise where he introduced res gestae evidence, and any issues could be argued at the bench before admitted. (4/18/11, pp. 10-11). The defendant did not object.

At the end of the motions hearing on April 22, 2011, the following conversation took place:

> [DISTRICT ATTORNEY]: Your Honor, I would acknowledge receipt of the defense witness list. I had one quick issue to address with that. At least three of the witnesses: Mr. Edward Cleveland, Craig Walker, and then Officers Blackburn and Devorss who we heard from today are all associated with the robbery. I don't believe that's relevant testimony to the allegations of possession. It's not something the People were going to dive into. I don't think it's something that defense can bring up as anything relevant to the current allegations.
>
> THE COURT: Mr. Harris, why do we need to hear from the officers that investigated the robbery?

> [DEFENSE COUNSEL]: Well, I am not sure if I recall all the officers. Part of the issue would be on the merits, knowledge of the drugs and where they came from, and the jacket may have – I don't want to give them everything. I guess I kind of did. It may have come from the same home of Mr. Cleveland.

(4/22/11, pp. 43-44).

At the beginning of the People's opening statement, the prosecutor told the jury that there was a 911 call reporting a home invasion. (5/3/11, p. 4). The defendant objected on hearsay grounds, and the trial court overruled the objection. (5/3/11, p. 4). The prosecutor went on to say that the defendant was identified as leaving the scene of the home invasion but explained that the People were not pursuing charges of burglary or "anything along those lines." (5/3/11, pp. 4-5).

During the defendant's opening argument, defense counsel said to the jury:

> You're also going to hear that, yes, there was a problem regarding an allegation of a break-in. In fact, my client, Mr. Campbell, the day before he was pulled over in the vehicle, called the police himself because his home was broken into. Police took a report. You're going to hear about several items of his that were taken. And [the defendant] heard about someone who may have had his

> items and went back to get those items. The jacket was found with a computer and a video game, an Xbox system, all taken from this other man's home. [The defendant] didn't know what was in the pockets of this thing.

(5/3/11, pp. 6-7).

The home invasion and robbery were referred to multiple times during trial by both the prosecutor and defense counsel. Significantly, after Officer Blackburn testified, a juror submitted the question, "Why was [the defendant] not charged for the stolen items or for stolen items?" (5/3/11, p. 13). Defense counsel stated, "In my opinion it's a fair question," and the question was asked to Officer Blackburn. (5/3/11, p. 12).[11] While defense counsel was cross-examining Officer Duran, testimony was elicited that established that the jacket was found in the back seat along with the Xbox and laptop, and that after the search the officer verified that the electronics did in fact belong to the defendant. (5/3/11, p. 49).

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[11] Officer Blackburn responded, "Because Mr. Cleveland did not want to pursue any charges. I received two no-prosecution forms I got his signature on and submitted those. He did not want to pursue any charges." (5/3/11, p. 13).

During closing arguments, the prosecutor briefly mentioned the robbery. (5/5/11, p. 15). During the defendant's closing argument, defense counsel stated, "We 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 . . . ." (5/5/11, p. 18). In the People's rebuttal, the prosecutor argued that this suggestion was speculation because the defendant did not call Mr. Cleveland to testify. (5/5/11, p. 25). The defendant objected on the grounds of burden shifting. (5/5/11, p. 25).

C. Applicable Law and Analysis

The defendant argues that evidence of his involvement in the home invasion and robbery of Mr. Cleveland constituted CRE 404(b) evidence, which was inadmissible since the prosecutor did not follow the requirement for bringing such evidence. The defendant further argues that the evidence was improperly admitted as res gestae evidence, since it was irrelevant and unfairly prejudicial. The evidence was correctly admitted as res gestae since it was relevant to place the charged offense

in context, it was related to the defendant's theory of the case, and there was no danger of unfair prejudice.

Res gestae "includes evidence of another offense, which is related to the charge on trial, that helps to provide the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred." *People v. Skufca*, 176 P.3d 83, 86 (Colo. 2008). "[W]hen events leading up to the charged crime help to explain the setting in which it occurred, 'no error is committed by permitting the jury to view the criminal episode in the context in which it happened.'" *Gomez*, 211 P.3d at 58 (quoting *People v. Lobato*, 530 P.2d 493, 496 (Colo. 1975)). To be admissible, such evidence needs to be relevant, and its relevance must not be outweighed by the danger of unfair prejudice. *People v. Thomeczek*, 284 P.3d 110, 114 (Colo. App. 2011).

Evidence that the defendant was involved in the home invasion and robbery of Mr. Cleveland was admissible as res gestae because it explained the setting in which the stop of the defendant occurred. *Cf. Gomez*, 211 P.3d at 58 (holding that a detective's testimony explaining

why police had set up a drug buy with the defendant was properly admitted as res gestae).

Here, the evidence was particularly relevant given the defendant's theory of the case. During the motions hearing, the People stated that it had no intention of bringing in evidence regarding the robbery. (4/22/11, p. 43). However, defense counsel made clear that he intended to admit evidence of the robbery because one of the theories of defense was that the drugs came from Mr. Cleveland. (4/22/11, pp. 43-44). In his opening statement, the prosecutor briefly discussed the robbery and stressed that the defendant was not charged with burglary or anything along those lines. (5/3/11, pp. 4-5). Defense counsel delved further into the facts of the home invasion in his opening statement and implied that the contraband may have come from Mr. Cleveland. (5/3/11, pp. 6-7). During the cross-examination of Officer Duran, defense counsel elicited testimony that the jacket was found with the Xbox and the laptop, suggesting it was among the items recovered from Mr. Cleveland. (5/3/11, p. 49). In closing argument, defense counsel asserted that the

prosecution had not proven that the drugs belonged to the defendant and hypothesized that they came from Mr. Cleveland. (5/5/11, p. 18).

Any possibility of prejudice to the defendant was negated by the prosecutor's numerous assertions that the defendant was not charged with any crimes related to the robbery and that the items were in fact the defendant's. The prosecutor made it clear that the defendant was not charged with any related crimes. (5/3/11, pp. 4-5). Officer Duran testified that he verified, through serial numbers, that the items belonged to the defendant. (5/3/11, p. 49). When one of the jurors asked why the defendant was not charged with robbery, defense counsel stated that he thought it was a fair question, and Officer Blackburn answered that Mr. Cleveland did not want to pursue charges. (5/3/11, pp. 12-13). In following up with Officer Blackburn's answer, defense counsel asked, "Is kind of the short answer to why there is no charge of stealing items is that they were not stolen?" (5/3/11, p. 14). Officer Blackburn eventually admitted that there was no proof that the defendant stole anything. (5/3/11, p. 15). Additionally, the defendant could have mitigated any potential prejudice by requesting a limiting

instruction. *Thomeczek*, 284 P.3d at 114. However, he did not and none was required. *People v. Rudnick*, 878 P.2d 16, 19-20 (Colo. App. 1993) (holding that admitting testimony, without a limiting instruction, to demonstrate chain of events was not an abuse of discretion).

The evidence of the home invasion and robbery helped the jurors understand the context in which the charged crime occurred, it was relevant to the defendant's theory of the case, and there was no danger of unfair prejudice. Thus, the trial court did not commit error, let alone plain error, in allowing its admission. Moreover, even assuming the trial court erred, under the circumstances of this case, any error was harmless. *See People v. Medrano-Bustamante*, 2013 COA 139, ¶¶ 66-69.

III. The prosecutor did not improperly shift the burden of proof in closing argument.

A. Preservation and Standard of Review

The People agree that the defendant preserved this issue when he objected during closing arguments to the prosecutor's statements. (5/5/11, p. 25).

"Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion," as it "is best positioned to evaluate whether any statements made by counsel affected the jury's verdict." *Domingo-Gomez v. People,* 125 P.3d 1043, 1049 (Colo. 2005). "The scope of final argument rests in the discretion of the trial court. Its rulings concerning such will not be disturbed on review absent an abuse of discretion resulting in prejudice and a denial of justice." *People v. Esquivel-Alaniz*, 985 P.2d 22, 23 (Colo. App. 1999).

B. Applicable Facts

During the People's rebuttal closing argument, the prosecutor said:

> When we're talking about speculation, we didn't hear from the person who is alleged to have been robbed by the defendant that day. We didn't here [sic] 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 –

(5/5/11, p. 25). At which point, the defendant objected for burden shifting. (5/5/11, p. 25). The trial court overruled the objection. (5/5/11, p. 26). The district attorney then said:

> 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.

(5/5/11, p. 26).

C. Applicable Law

The burden lies with the prosecution to establish "a prima facie case of guilt through introduction of sufficient evidence." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). "This burden of proof never shifts: '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 . . . .'" *People v. Santana*, 255 P.3d 1126, 1130 (Colo. 2011) (alteration in original) (quoting *Leonard v. People*, 369 P.2d 54, 61 (Colo. 1962)).

"But even though a prosecutor's comments and questions may imply a defendant has the burden of proof, such comments do not necessarily shift the burden of proof, constituting error. Instead courts must evaluate the strength of the prosecution's burden-shifting evidence or comment in light of the entire record to assess whether the

burden was actually shifted." *Santana*, 255 P.3d at 1131 (citations omitted).

Under *Santana*, courts primarily consider three factors when assessing whether the prosecution shifted the burden of proof: (1) the degree to which "the prosecutor specifically argued or intended to establish that the defendant carried the burden of proof"; (2) the degree to which "the prosecutor's actions constituted a fair response to the questioning and comments of defense counsel"; and (3) the degree to which "the jury is informed by counsel and the court about the defendant's presumption of innocence and the prosecution's burden of proof." *Id.* at 1131-32. "[T]he first factor exploring the prosecutor's intent is often related to the second, which considers whether the prosecutor was in some way responding to defense counsel: the more a prosecutor is legitimately responding to questions and arguments raised by defense counsel, the less likely it is the prosecutor intended to shift the burden of proof." *Id.* at 1132.

D. Analysis

The defendant argues that the statement by the prosecutor, "And I'm going to point out defense has the same powers of subpoena that the People do," was improper because it constituted impermissible burden shifting. Applying the *Santana* test, the prosecutor's comment did not in any way shift the burden of proof to the defendant.

The comments were not intended to establish that the defendant carried the burden of proof, rather they were a response to the defendant's theory of defense that the drugs were not his, he did not know they were in the jacket, and they could have possible been put there by Mr. Cleveland. (5/5/11, p. 18; Def.'s Opening Br., pp. 27-28). This defense was prevalent throughout the trial, and was raised in the defendant's opening statement, cross-examination of witnesses, and closing argument. (5/3/11, pp. 6-7, 14-15, 48-49; 5/5/11, p. 18).

Any comments made during the prosecutor's rebuttal closing argument must be reviewed in context, taking into account defense counsel's "opening salvo." *People v. Williams*, 996 P.2d 237, 244 (Colo. App. 1999). Here, the challenged remark was made in the People's

rebuttal argument, after defense counsel argued that the drugs, jacket, and even the car could have "been anyone's." (5/5/11, p. 18). Further, defense counsel stated that testimony regarding what the defendant was wearing was "pure speculation." (5/5/11, p. 19). The prosecutor responded that it was speculation that the drugs belonged to someone else, since the jury had not heard from either Mr. Cleveland or the passenger in the car, Julian Gilchrist. (5/5/11, p. 25). Thus, the prosecutor's remark was simply a comment on the lack of evidence confirming the defendant's theory of the case, rather than a suggestion that the defendant "was required to call the other occupant of the car or Mr. Cleveland to testify that the drugs were theirs." (Def.'s Opening Br., p. 28).

Additionally, the jury was properly informed by counsel and the court about the defendant's presumption of innocence and the prosecution's burden of proof. In the absence of jury bias, it is presumed that juries follow the instructions they receive from trial courts. *Santana*, 255 P.3d at 1132-33. The prosecutor and defense counsel both properly reminder the jury that the prosecutor had burden of proof

during their respective closing arguments. (5/5/11, pp. 13, 21-22). The jury also was properly instructed in Jury Instruction #4 regarding the presumption of innocence, the burden of proof, and reasonable doubt. (Vol. 1, p. 93). Finally, the jury was instructed in Jury Instruction #7 that "[t]he defendant is never compelled to testify, and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." (Vol. 1, p. 96).

Significantly, in *Esquivel-Alaniz*, a division of this Court held that a comment by the prosecutor, which was almost exactly the same as the comment here, did not impermissibly shift the burden of proof. 985 P.2d at 23-25 (the prosecutor stated that "defendant has the same subpoena power as the People do"). As is the case here, the prosecutor in *Esquivel-Alaniz* was commenting on the fact that the defendant had not produced witnesses in support of his theory of defense. *Id.* at 23.

As the defendant states, a division of this Court is certainly not bound by decisions of other divisions. *People v. Howe*, 2012 COA 177, ¶ 19. However, the decision in *Esquivel-Alaniz* is based on Colorado Supreme Court precedent that a prosecutor's comment on the lack of

evidence confirming a defendant's theory of the case is permissible and does not shift the burden of proof, so long as it does not intentionally comment on the defendant's failure to testify. *People v. Medina*, 545 P.2d 702, 703 (Colo. 1976). This rule was reinforced by the three-part test set forth in *Santana*, 255 P.3d at 1132 ("[W]e protect a prosecutor's ability to 'comment on the lack of evidence confirming defendant's theory of the case." (quoting *Medina*, 545 P.2d at 703)). *See also People v. Todd*, 538 P.2d 433, 436 (Colo. 1975) ("In protecting the accused against unfair comment, we are not compelled to limit advocacy or to gag the prosecution in legitimate oral argument covering the evidence and inferences which can be drawn from the evidence.").

The defendant suggest that the prosecutor's remark was impermissible because the defense could not call Mr. Cleveland or Mr. Gilchrist, since they might invoke their Fifth Amendment rights. (Def.'s Opening Br., p. 28). *People v. Dikeman*, 555 P.2d 519, 521 (Colo. 1976), holds that "the defense shall not call a witness, when it is known that the witness will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege." However,

there is nothing in the record that suggests that either witness intended to claim privilege. In fact, the defendant indicated his intention to call both Mr. Cleveland and Mr. Gilchrist prior to trial, and, prior to closing arguments, the trial court indicated that Mr. Gilchrist was prepared to testify from the Department of Corrections, however, the defendant "made an independent decision based on the evidence presented at trial that . . . [he] did not want to call Mr. Gilcrest [sic]." (Vol. 1, p. 73; 4/22/11, p. 43; 10CR540 campbell 050511.pdf, pp. 7-8). Thus, the circumstances here are starkly different from those in *People v. Fletcher*, 566 P.2d 345, 347 (Colo. 1977), where the defense attempted to call a witness and during an *in camera* hearing it was determined that she would not testify but rather would rely on her Fifth Amendment privilege.

Finally, even if the trial court did err in denying the defendant's objection, any error was harmless, given the strength of the evidence of the defendant's guilt. The illegal substance was found in a jacket in the car which the defendant was driving. (5/3/11, p. 38). The jacket was a Polo jacket, and the defendant was wearing Polo underwear and a Polo

belt. (5/3/11, p. 37). Additionally, the stop happened in December and the defendant was not wearing a jacket and Mr. Gilchrist was. (5/3/11, p. 82). The defendant admitted to possessing "Mr. Smiley," and both the "Mr. Smiley" and the cocaine were found in the same jacket. (5/3/11, pp. 36, 38). In the vehicle's glove compartment, officers found a digital scale that was disguised to look like an iPod, suggesting that it was drug paraphernalia. (5/3/11, p. 38). Additionally, any suggestion that the jacket was among the items recovered from Mr. Cleveland was rebutted by the fact that Mr. Cleveland did not report a jacket taken but did report the laptop and Xbox. (5/3/11, pp. 82-83). Further, any possibility of prejudice was greatly diminished by the nature of the comments and the numerous admonitions to the jury regarding the burden of proof and presumption of innocence.

Under the circumstances of this case, reversal is not warranted.

CONCLUSION

For the foregoing reasons and authorities, the defendant's convictions should be affirmed.

JOHN W. SUTHERS
Attorney General

/s/ Gabriel P. Olivares
GABRIEL P. OLIVARES, 45336*
Assistant Attorney General
Appellate Division
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **People's Answer Brief** upon **Dayna Vise**, Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on December 3, 2013.

/s/ C. D. Moretti

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