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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Adams County District Court Honorable Jill-Ellyn Straus Case Number 10CR52	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Jesus Jimenez-Ayala Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender JOSEPH P. HOUGH, #34384 1300 Broadway, Suite 300 Denver, Colorado 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA120

AMENDED OPENING BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE	

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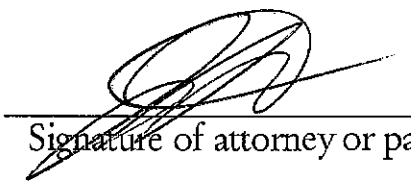

Signature of attorney or party

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court erred in failing to grant the defendant's motion to suppress his incriminating statements and DNA evidence.

II. Whether the prosecution failed to prove, beyond a reasonable doubt, that the defendant committed all of the counts of which he was convicted.

III. Whether the trial court erred in failing to instruct the jury on the affirmative defense of abandonment or renunciation.

STATEMENT of the CASE and APPLICABLE FACTS

Jesus Jimenez-Ayala, the defendant, was charged with numerous counts related to a home invasion including: burglary, attempted aggravated robbery, second degree kidnapping and second degree assault.(v.1,p1-11) After pleading not guilty and trying his case to a jury, Jimenez was convicted of most of the charged counts and thereafter, sentenced to a total term of eighty-six years in the Colorado Department of Corrections.(11/30/11,p16-19)

At trial, AR (who was 19 years old at the time of trial but 17 on the evening at issue) testified that she was at home with three of her younger siblings (CR, JR and VR) as well as the children's step-father (Salvador Contreras) when there was a knock at the door.(9/6/11,p173-78) After CR answered the door, he quickly

"came back crying and screaming saying that there [were] guys with guns."(9/6/11,p179) According to AR, upon hearing "guys screaming in Spanish," she, CR and VR, retreated to a bedroom downstairs (where JR already was), locked the door and called the police.(9/6/11,p179-80)

After the men "came and they started banging on the door," AR opened the downstairs door and three armed men (dressed in all black and wearing ski masks) "barged in there" and held the group of children at gun point.(9/6/11,p180-82,196-99,9/7/11,p33-34) Soon thereafter, one of the men ordered and "push[ed]" AR ("with the gun" at her back) upstairs while the other two (including a shorter male with the silver pistol, presumably Jose Lopez-Gutierrez) stayed behind in the bedroom with the other children.(9/6/11,p182-83)

Once upstairs, AR observed Salvador Contreras also being held at gunpoint by another man also dressed in all black and wearing a ski mask.(9/6/11,p183-85,196-97) The two men then led AR and Salvador to the home's garage[1] where they stated, "Call him. Should we take him in? Call him." Salvador replied, "Call who? Where were you talking about? I don't know nothing."(9/6/11,p184-87)

Shortly thereafter, the police arrived at the home, entered the house and, according to AR, one of the masked men "just ran out and started shooting at the

[1] Upon subsequent investigation, articles consistent with marijuana smuggling were discovered in the garage.(9/8/11,p121)

cops" while the other "ran out through the back door."(9/6/11,p189-92) Then, according to AR: "I was telling the cops to stop shooting because I was the one that called the cops. And I banged on the door and I think that was a mistake because that's when they started shooting at the door and that's when I got hit."(9/6/11,p192-93) As a result of being struck in the leg, by a police officer's bullet, AR suffered only minor injury.(9/6/11,p192-93)

During trial, JR[2], CR and VR also testified as witnesses (Salvador Contreras was not called as a witness) and each relayed a similar version of what had occurred that evening. Unlike AR, however, those witnesses described seeing only three, not four, masked men in all black in their home that evening.(9/7/11,p47,58,84,110)

Next, Deputy Luis Hernandez testified that he, along with two other officers, simultaneously arrived at the scene and immediately ventured to the back of the home.(9/7/11,p131-36) Once there, Hernandez observed one of the suspects "wearing all black" and unarmed running from the home and escaping into the night.(9/7/11,p136-38) Hernandez then saw another suspect, also dressed in all black with his face covered, and the two exchanged gunfire.(9/7/11,p138-40) Finally, a third suspect (again wearing all black and armed) was also seen by

[2] Like AR, JR was also shot in the leg (ankle) by the police and she too suffered no serious injury.(9/7/11,p62)

Hernandez leaving the house and the deputy shot at him as well—though he could not say whether that particular man shot back or not.(9/7/11,p140-41) All three suspects managed to flee the scene and during the altercation, Hernandez was struck in the leg with shotgun or buckshot pellets.(9/7/11,p141-42,151)

After Deputy Hernandez's testimony was concluded, the prosecution called Jimenez's co-defendant, Jose Lopez-Gutierrez, who was apprehended by officers hiding under a vehicle near the scene and time of the crime.(9/8/11,p91) According to Lopez, earlier that same day, after he left work, a man he knew only as "Jorge" picked him up then stopped at a gas station to buy beer and pick up Jesus and Michael Jimenez, the defendant and his brother.(9/8/11,p230-33)

Thereafter, Jorge drove the group (with Michael in the front passenger side and Jose and Jesus in the back) near the location of the home in question, retrieved and passed around various firearms and black outerwear, from his trunk, and informed Lopez that they were going to break into the residence to "do a job."(9/8/11,p233-42) Jorge then approached and knocked on the front door of the home and when it was opened, by CR, Jorge pushed his way in and the group of four (all wearing ski masks) followed.(9/8/11,p240-43) According to Lopez, once inside, Jorge, the defendant and his brother (Michael Jimenez) encountered and pointed their weapons at Salvador Contreras.(9/8/11,p245-46)

As the defendant was upstairs, Lopez, Jorge and Michael went downstairs and after Jorge threatened to shoot, AR opened the door and the three men entered the room with the other children—CR, VR and JR.(9/8/11,p248-49) After Jorge threatened AR, she indicated that the marijuana the men were looking for was in the garage. According to Lopez, Michael Jimenez then forced AR back up the stairs, at gunpoint, while Jorge and Lopez remained downstairs.(9/8/11,p251-53)

Shortly thereafter, the police arrived on the scene, gunfire was heard and in response, Jorge and Lopez ran upstairs and out of the home.(9/8/11,p254-55) Lopez left the pistol and his mask at the scene, hid under a nearby vehicle and was later apprehended by the police.(9/8/11,p258-60)

However, on cross-examination, Lopez admitted that, contrary to his testimony, he had previously conceded the he, not Michael Jimenez, was in the front seat with Jorge on the way to commit the crime, and that he did not even know the defendant or his brother.(9/9/11,p13-15,18) Furthermore, despite being charged exactly as the defendant was (and likewise facing many decades in prison), Lopez received a twenty-year sentence as well as an opportunity for a

further reduced sentence[3] in exchange for his testimony implicating Jimenez.(9/9/11,p8-12)

Finally, though the defendant did not testify at trial, he was subjected to a very lengthy and detailed interrogation that was transcribed (from Spanish) and entered into evidence.(9/9/11,p96; *See* People's Exhibit 70) Aside from a brief initial denial, throughout the remainder of his interview with the police, Jimenez repeatedly confessed his involvement in the planning and execution of the home invasion—where the group, led by Gerardo and Jose Lopez-Gutierrez (according to the defendant), intended to steal previously smuggled marijuana.(People's Exhibit 70,p39-115)

However, Jimenez maintained that before entering the home, he was extremely hesitant and reluctant to follow through on the burglary: "They were knocking, yes and I saw everything there and I said, no. I would tell my brother [Michael Jimenez], let's go, let's go man. For real, let's go, no… Well I regretted it when I saw the lady. … I told him, I'm not liking this. I also have a family and I would not want the same to happen to them. … Let's go man; this really isn't good because I have a bad feeling."(p52-53) Once inside the home, the group

[3] At the defendant's sentencing hearing, defense counsel noted that Lopez had, in fact, received a sentence reduction and was currently serving a mere fourteen years in prison.(11/30/11,p13)

confronted Salvador Contreras, about the location of the marijuana, and he replied that he was only paid to "load tires" and that "they [presumably drug smugglers] already took" the marijuana.(p54-57)

According to Jimenez, after AR went to the garage but before the police arrived, he decided to leave the scene: "That's was when I told my brother [Michael Jimenez], no ah brother, let's get out of here. This isn't right. Then the lady [AR] went out to the garage, I don't know who went out, and when he went out I grabbed him and told him, hey lets go. Well then, I left out the back."(p56) After Jimenez dropped his gun (having never fired it[4]) and then jumped the backyard fence, he heard gunshots and for a while, hid under a nearby truck before he again fled on foot and was later arrested over a mile away.(p57-60)

SUMMARY OF THE ARGUMENT

First, the trial court erred in failing to suppress the defendant's statements and evidence because the arresting officer had neither reasonable suspicion to "stop and frisk" Jimenez nor probable cause to arrest him. Indeed, though the court ultimately and erroneously denied the suppression motion, it even specifically determined the Jimenez was nothing more than a mere "suspicious

[4] Though tests were conducted, gunshot residue (GSR-the requisite mixture of lead, barium and antimony) was not discovered anywhere on Jimenez's person but was, however, found on his co-defendant, Jose Lopez-Gutierrez.(9/9/11,p168-88)

individual in the general vicinity" of the crime, and that before arresting him, the officer simply "suspected he might be involved in a home invasion."

Second, the prosecution failed to prove, beyond a reasonable doubt, that Jimenez, acting either as a principal or complicitor, kidnapped AR, attempted or conspired to commit aggravated robbery against anyone, or was responsible for the second degree assault of Deputy Luis Hernandez.

Finally, because there was ample evidence supporting the affirmative defense of abandonment or renunciation, primarily through statements made by the defendant during his interrogation, and introduced by the prosecution at trial, the court erred in failing to instruct the jury on the prosecution's duty to disprove that affirmative defense beyond a reasonable doubt.

ARGUMENT

I. The trial court erred in failing to grant the defendant's motion to suppress his incriminating statements and evidence.

A. Standard of Review and Applicable Facts

The denial of a motion to suppress presents a mixed question of law and fact—meaning, appellate courts will defer to the trial court's findings of fact, if supported by the record, but a trial court's conclusions of law are reviewed *de novo*. *People v. Adkins*, 113 P.3d 788, 790 (Colo. 2005). Furthermore, where the error is one of constitutional dimension, reversal is required unless the court is

convinced that the error was harmless beyond a reasonable doubt. *See Bartley v. People*, 817 P.2d 1029, 1034 (Colo. 1991).

The constitutional harmless error test is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *People v. Welsh*, 58 P.3d 1065, 1072 (Colo. App. 2002) (citing *Bernal v. People*, 44 P.3d 184 (Colo. 2002)). Put another way, if the record shows that the defendant could have been prejudiced, the error cannot be considered harmless beyond a reasonable doubt. *People v. Perry*, 68 P.3d 472, 476 (Colo. App. 2002).

Here, prior to trial, the defense filed a motion to suppress the defendant's statements and evidence because the officers "lacked reasonable suspicion to contact Mr. Jimenez-Ayala and did not have probable cause at the time of his arrest."(v.1,p35) Specifically, contended the defense, under *Terry v. Ohio*, 392 U.S. 1 (1968) as well as *Stone v. People*, 485 P.2d 495 (Colo. 1971), Jimenez was initially and unlawfully stopped, detained and frisked (pat down) without any reasonable suspicion that he was "committing, ha[d] committed or [was] about to commit a crime."(v.1,p35) Furthermore, pursuant to *Beck v. Ohio*, 379 U.S. 471 (1963) and *People v. Schreyer*, 640 P.2d 1147 (Colo. 1982), there was no probable cause to arrest the defendant, at any point during his unlawful detention, and as

such, his statements and evidence obtained as a result of that unlawful arrest (such as his DNA match to evidence left at the crime scene) should be suppressed.(v.1,p36)

At a subsequent hearing on the matter, the prosecution called Adams County Sheriff's Deputy Scott Larson who testified that at approximately 9:30 in the evening, he was dispatched to the scene of the home invasion and shooting for the purpose of a "transport."(3/18/11,p37-38) Once Larson arrived, the "transport had been taken care of," but a "couple of calls...came in for suspicious parties in the area"—"Hispanic males...all wearing black," speaking Spanish and "running from the scene."(3/18/11,p38,43) Thereafter, according to Larson: "I fielded the calls and was unable to locate somebody at the residence. ... Nobody was in that general area. Figuring they were on foot, I just kind of started cruising streets in the general area."(3/18/11,p39)

Approximately ten to fifteen minutes later and approximately a mile and a quarter away from the crime scene, Larson observed Jimenez outside in a t-shirt with "like grease or road debris on the right shoulder of him and his pants were wet from the bottom of the pants to probably the lower shin."(3/18/11,p39,43) Given that it was "very cold," Larson "thought that was weird" and upon contacting the defendant, he questioned him about why he was in that particular area and without

a jacket.(3/18/11,p39-40) In response, Jimenez explained that he was staying nearby at his sister's home and went out for a walk to smoke a cigarette.(3/18/11,p40-41)

Thereafter, and without further discussion, conversation or investigation, Larson was ordered to "detain him" by someone back at the police station.(3/18/11,p41) Larson then patted Jimenez down (finding no cigarettes or a lighter) and "waited around for further instruction" before he was then "advised by incident command to transport the individual to our substation where he could be placed in by detectives."(3/18/11,p42)

On cross-examination, Larson admitted that when he first saw Jimenez, he was merely walking, not running, down the street.(3/18/11,p44) In response, Larson parked his patrol car "in the middle of the road" and, in full uniform (including his revolver at his side) approached Jimenez on the sidewalk, radioed back to the "incident command" and then "pat[ted] him down because of the nature of the call and make sure somebody's not going to pull a gun."(3/18/11,p45) After continuing to detain the defendant long enough so that two additional backup officers arrived, Jimenez was then arrested and transported by Larson to the police substation.(3/18/11,p46)

At the station, and after advising him of his *Miranda* rights, Detectives Mark Michieli and Fabian Rodriquez proceeded to question the defendant as well as gather DNA samples from him.(3/18/11,p48-50) As a result of that arrest and interrogation, Jimenez not only gave a lengthy, specific and highly incriminating confession concerning his involvement in the home invasion but his DNA was also eventually linked to clothing found at the scene of the crime.(3/18/11,p51;*See* People's Exhibit 70)

At the conclusion of the testimony, the defense argued, just as it had in its motion to suppress, that Deputy Larson lacked both reasonable suspicion to detain Jimenez as well as probable cause to arrest him.(3/18/11,p67-68) Inexplicably, however, the trial court indicated, at least initially, that it could not "consider" "the testimony the Court heard today for probable cause" because the defense had only disputed the "probable cause contained in the warrant and not the probable cause or the testimony brought up on the stand."(3/18/11,p67) In response, the defense correctly noted that in addition to filing a motion specifically addressing the validity of Jimenez's post-*Miranda* confession, it had also filed a motion to suppress specifically concerning the defendant's initial detention and arrest.(3/18/11,p67)

Thereafter, denying the defendant's motion to suppress for lack of reasonable suspicion and probable cause, the court found as follows:

> With respect to statements made by the defendant, the initial contact was on January 4th at the approximate location of Durango – I think it's 7755 Durango. It was about 21:45 hours which was in the evening within about 10 or 15 minutes of an incident that had occurred on Mona Street about a mile away. That was a home invasion case involving four youthful Hispanic individuals dressed in black.
>
> Officer Larson was patrolling in the general vicinity of the area and saw the defendant. He appeared to have some debris on him. His pant legs were wet. His shoes were wet. He wasn't wearing clothing appropriate to the weather conditions which were extremely cold that evening. He was wearing a T-shirt and looked like it had grease on it or some debris on it. *He was in effect a suspicious individual in the general vicinity.*
>
> I should point out that this was 10 to 15 minutes after the incident that he was a mile away. The initial report was that the Hispanic suspects were running from the scene and would easily have given him an opportunity to be in that location. Officer Larson made contact with that individual. He did not detain him in the classic sense.
>
> *There was a brief detention for purposes of investigating his circumstances.* He was told roughly that the defendant identified in court was just having a cigarette. *When he radioed back that he had an individual that he came into contact with, he was ordered to detain that individual because the individual to some extent fit the description of the individuals that left the scene of the officer involved shooting.*

Because there was a weapon involved in the – because there were gunshots involved in the incident, *the officer was compelled to pat the individual down for weapons for his own safety. I'll find no violation there.* Whenever there's an investigative contact, the scope and purpose of that investigative contact is an amorphous thing. It develops or diminishes based on information by the officer.

When he patted him down, he found no lighters or cigarettes which would have helped to explain why this defendant may have been walking out smoking a cigarette. There has been no evidence of that. *The officer's curiosity was heightened even more.*

At that point, he was ordered to detain the individual because the individual fit the description or comported with the description of the individuals seen fleeing the location of the home invasion. He was asked some brief questions during that initial detention. Where are you coming from? Why are you there? He was asked about his clothes and why he was only wearing a T-shirt.

Those are questions that do not invoke the Fifth Amendment protections of Miranda because they're investigatory questions under the Viduya case where an officer detains an individual for purposes of investigation. He's not required to provide Miranda warnings.

The questions are general questions that are calculated to explain or give the defendant an opportunity to explain why he's at that location and what he's doing there by exculpating him from my [sic] involvement. The information that he was obtaining did not comport with any explanation received by or given by the defendant.

> *At that time, he suspected the individual might be involved in a home invasion and took him into custody and transported him to the Adams County Sheriff's Department.* At the police department, he was advised of his rights pursuant to Miranda by a Spanish speaking officer.

(3/18/11,p79-82) (emphasis added)

After making those findings and upon the court questioning the parties, "Are there any other motions I missed," the defense specifically and again requested that the court "rule on the motion to suppress evidence based on probable cause to arrest," as to the "DNA and statements."(3/18/11,p83) In response, and after another series of findings (unrelated to the issue at hand), the court determined that the "evidence seized from the defendant was not in violation of any constitutional right under the Fourth Amendment."(3/18/11,p84)

Subsequently, at trial, and through Detective Fabian Rodriquez, the prosecution introduced the transcript (over 100 pages in length) of Jimenez's entire incriminating confession as well as evidence that the defendant's DNA was matched to clothing used in the home invasion.(9/9/11,p92-123;9/12/11,p32-58; *See* People's Exhibit 70) Furthermore, in its opening statement and throughout its closing and rebuttal closing arguments, the prosecution repeatedly invoked the defendant's own statements and confession (as well as his DNA match) to demonstrate his guilt on all charges and also to dispute his defense that he either

did not participate in or abandoned the commission of most of the crimes charged.(9/6/11,p160-65;9/13/11,p7,9-17,40-43)

B. Analysis and Conclusion

The Fourth Amendment to the United States Constitution guarantees the right to be secure against unreasonable searches and seizures. U.S. Const. amends. IV, XIV; *See* Colo. Const. art. II, § 7. To effectuate these protections, "specific, articulable, and objective facts" or "reasonable suspicion" must exist before police may detain or initiate a "seizure of a particular individual." *People v. Schreyer*, 640 P.2d 1147, 1149 (Colo. 1982); *People v. Johnson*, 865 P.2d 836 (Colo. 1994) (A police officer, lacking probable cause to arrest, may stop a person whom the officer reasonably suspects is committing, has committed, or is about to commit a crime.). Furthermore, an officer has a "narrowly drawn authority" to "frisk" or "pat-down" an otherwise reasonably detained person "for the protection of the investigating police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *See also Stone v. People*, 485 P.2d 495 (Colo. 1971) (*Terry* "stop and frisk" valid under Colorado constitution); *People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989) (If an officer has a reasonable suspicion to believe that the detained person may be armed, the officer may conduct a protective pat-down search for weapons.).

Concerning an officer's authority to arrest an individual, our Supreme Court has held that a "warrantless arrest must be supported by probable cause, i.e., a 'court must determine whether the facts available to a reasonable cautious officer at the moment of arrest would warrant his belief that an offense has been or is being committed' by the person to be arrested." *Schreyer* at 1150 (quoting *People v. Navran*, 483 P.2d 228 (Colo. 1971)); *See also People v. McCoy*, 870 P.2d 1231, 1235 (Colo. 1994) ("[P]robable cause to arrest requires that at the time an arrest is made the police have probable cause to believe a crime has been or is being committed and probable cause to believe the person to be arrested has committed or is committing the crime."); *People v. Castaneda*, 249 P.3d 1119, 1122 (Colo. 2011) (same). Moreover, when a person is arrested without a warrant, the burden of proof is on the State to prove that the officers possessed sufficient probable cause to arrest, and if that "arrest is not supported by probable cause, then evidence obtained incident to that arrest must be suppressed." *People v. King*, 16 P.3d 807, 813-4 (Colo. 2001).

Here, as the defense argued below, Deputy Larson not only lacked the requisite reasonable suspicion to "stop and frisk" Jimenez but also effectuated the defendant's arrest on far less than probable cause. Again, according to Larson, he was advised that the suspects were described (somewhat vaguely) as being young

Hispanic males, wearing all black and "running from the scene." However, contrary to that description, when Larson spotted the defendant, it was over a mile away from the crime, Jimenez was alone (not in a group or with other males), wearing a t-shirt (that was apparently not black, as Larson observed "grease" on it) and was simply walking (not running) on the sidewalk.

Indeed, aside from wearing a dirty t-shirt in cold weather, Jimenez exhibited no other unusual or suspicious behavior (such as being hostile or uncooperative, attempting to flee, brandishing a weapon, using furtive or nervous gestures or body language), and he even offered Larson a plausible explanation for his presence in that particular area—that he was visiting his sister and had stepped out to smoke a cigarette. *See People v. Davis*, 903 P.2d 1, 6 (Colo. 1995) ("[N]o valuable conclusion may be drawn as to what a person's activity is simply by the way he or she is dressed." "Neither the defendant's physical characteristics nor his attire contributes to a conclusion that a crime had been or was being committed."); *McCoy* at 1238. However, instead of employing less intrusive means, such as further questioning Jimenez, investigating or attempting to verify his story, or even obtaining more information from any other officers, Larson not only immediately "detain[ed] him" (not at the direction of his own conscience and judgment but on the orders of someone back at the police station) but also "frisk[ed]" or patted him

down—even though Larson himself had no particular "reason to believe that he [was] dealing with an armed and dangerous individual." *Terry* at 27.

Furthermore, even if Larson had sufficient reasonable suspicion to stop and frisk Jimenez, he most certainly lacked probable cause (based on the information he had at the time of the arrest) to believe the defendant (who was, at best, a "suspicious individual in the general vicinity" and "to some extent fit the description" of a suspect, as the court here found) was responsible for the home invasion and officer shooting. *See McCoy* at 1236 ("Suspicion alone does not amount to probable cause.") (citing *People v. Quintero*, 657 P.2d 948, 950 (Colo. 1983)). Indeed, the court here even determined as much when it made the factual determination (that must be deferred[5] to) that Deputy Larson merely "*suspected* the individual *might be* involved in a home invasion and took him into custody and transported him to the Adams County Sheriff's Department." (emphasis added); *See United States v. Ventresca*, 380 U.S. 102, 109 (1965) (where probable cause is "marginal" or "doubtful," the issue should be resolved in favor of obtaining a warrant). Certainly then, the trial court here erred in failing to suppress Jimenez's incriminating confession and DNA evidence obtained from his unlawful stop and frisk and subsequent arrest. *See Wong Sun v. United States*, 371 U.S. 471, 481

[5] *Adkins* at 790 (unless clearly erroneous, appellate courts must defer to the trial court's findings of fact).

(1963) (The "fruit of the poisonous tree" doctrine excludes evidence discovered as a result of a violation of a defendant's constitutional rights and "extends as well to the indirect as the direct products of such invasion."); *People v. Rodriquez*, 945 P.2d 1351, 1363 (Colo. 1997) ("Evidence obtained as a direct result of an illegal search or seizure is inadmissible.").

Turning now to the harm engendered by the court's error, as previously noted, constitutional errors mandate reversal unless the State can prove the error was "harmless beyond a reasonable doubt." *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008). In this case, it is well beyond dispute that Jimenez's lengthy and detailed confession, as well as his DNA match to evidence left at the crime scene, was extraordinarily incriminating. Indeed, without such evidence, the prosecution would have had, at most, the testimony of a single co-defendant, who not only gave some inconsistent testimony and tested positive for GSR on his person (suggesting he may have been responsible for firing upon the police) but also received a favorable plea bargain and an even further reduced sentence in exchange for his cooperation against the defendant. Additionally, it is also quite possible that without Jimenez's confession and DNA evidence, he never would have been arrested or prosecuted in connection with the crime in the first place.

In any event, not only was a 100-page transcript of the defendant's confession admitted into evidence for the jury's consideration but as discussed, throughout its closing and rebuttal closing arguments, the prosecution repeatedly utilized the defendant's unsuppressed statements and DNA evidence to prove his guilt as to all of the crimes charged. Thus, the court's error clearly cannot be considered harmless, beyond a reasonable doubt or otherwise, and accordingly, requires reversal. *See Bartley, supra*; *Bernal, supra*.

II. The prosecution failed to prove, beyond a reasonable doubt, that the defendant committed all the charged crimes.

A. Standard of Review

Appellate courts review the record *de novo* to determine whether the evidence before the jury was sufficient in quality and quantity to sustain the conviction. *Dempsey v. People*, 117 P.3d 800 (Colo. 2005). In so doing, courts consider "whether the relevant evidence, both direct and circumstantial, when viewed as a whole in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010) (quoting *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973)).

Here, at the close of the prosecution's case-in-chief, the defense moved for a judgment of acquittal on all counts but specifically contended that the prosecution

had failed to prove that Jimenez had committed any of the charged attempted robberies because no one had possession or control over money and marijuana that was not present in the home.(9/12/11,p77-79) Furthermore, no evidence was introduced showing that the defendant, either as a principal or complicitor kidnapped AR or assaulted Deputy Luis Hernandez.(9/12/11,p80-87)

B. Applicable Facts, Analysis and Conclusion

As previously noted, Jimenez was charged with and convicted of numerous counts of burglary, attempted aggravated robbery, conspiracy, kidnapping and second degree assault.(v.1,p1-11;11/30/11,p16-19) However, as the defense argued below, the evidence was simply insufficient, under a theory of complicity or otherwise, to prove, beyond a reasonable doubt, that Jimenez had committed all of the crimes he was ultimately convicted of.(9/12/11,p77-87)

For instance, concerning the defendant's charge and conviction for the second degree kidnapping of AR (Verdict Count #3), that crime, as applicable here, is committed when a person "knowingly seizes and carries any person from one place to another, without [her] consent and without lawful justification" and the "kidnapping is accomplished by the use of a deadly weapon." §18-3-302(1),(4)(a)(II),(III), C.R.S. (2010);(v.1,p4,160). Furthermore, to be liable for such a crime, as a complicitor, the complicitor must have the "intent to promote or

facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense." §18-1-603, C.R.S. (emphasis added); *See also People v. Duran*, 272 P.3d 1084, 1090-91 (Colo. App. 2011) ("To be a complicitor, the person must have knowledge that the principal intends to commit the crime, must intend to promote or facilitate the commission of the offense, and must aid abet, advise or encourage the principal in the commission or planning of the crime.").

Here, as previously discussed, neither AR nor Jose Lopez-Gutierrez ever testified that Jesus Jimenez himself "seize[d] or "carrie[d]" AR "from one place to another" by the "use of a deadly weapon." Indeed, deferring entirely to the prosecution's evidence on the matter, there was no showing whatsoever that the defendant ventured downstairs in the home, at any point during the crime, and consequently, could not have been the man who forced AR back up the stairs at gunpoint. Indeed, considering all the evidence presented and reasonable inferences derived from it, clearly, it was either Jorge or Jose Lopez-Gutierrez or Michael Jimenez that committed that particular crime.

Furthermore, there was no testimony or any other evidence presented, for that matter, demonstrating (beyond a reasonable doubt or otherwise) that the defendant even knew what was occurring downstairs, much less that he both had

the "intent to promote or facilitate" AR's kidnapping and also "aid[ed], abet[ed], advise[d], or encourage[d]" the planning or commission of that offense. Thus, even in the "light most favorable" to the prosecution, the evidence was far from "substantial and sufficient" (*Clark* at 1291) to prove that Jesus Jimenez was guilty of the kidnapping, either as a principal or a complicitor. *See Grissom v. People*, 115 P.3d 1280, 1286 (2005) (An alleged complicitor simply cannot be held liable for the principal's act "unless [the two] were engaged in a common enterprise and the complicitor knew the principal was enlisting the complicitor's help in order to engage in criminal conduct.").

Second, concerning the defendant's convictions for the attempted aggravated robberies of JR, AR, CR, VR, and Salvador Contreras (Verdict Counts #5 through #14 and #16), robbery is committed when a "person knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation." §18-4-301(1);(v.1,p164-78) A robbery becomes "aggravated" when "during the act or robbery or immediate flight therefrom," the robber "by the use of force, threats, or intimidation with a deadly weapon knowingly put the person robbed or any other person in reasonable fear of death or bodily injury" or "[h]e has present a confederate, aiding or abetting the perpetration of the robbery, armed with a deadly weapon with the intent, either on the part of the defendant or

confederate, if resistance is offered, to kill, maim, or wound the person robbed or any other person." §18-4-302(1)(b),(c). Furthermore, "A person commits criminal attempt if, acting with the kind of culpability otherwise required for the commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." §18-2-101(1).

Finally, the crime of "conspiracy" is committed when "with the intent to promote or facilitate its commission, [a suspect] agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime." However, "[n]o person may be convicted of conspiracy to commit a crime, unless an over act in pursuance of that conspiracy is proved to have been done by him or by a person with who he conspired." §18-2-201(1),(2).

Here, and as an initial matter, it is beyond dispute that none of the men committed a theft of any kind in the home and more importantly, there was absolutely no "cash and Marijuana" (as was charged in the information and instructed to the jury) that even could have been stolen or constitute the object of

the robbery.(v.1,p5-9,125) Thus, under a plain and logical reading of both the robbery and attempt statutes, in order to be lawfully convicted of an attempted aggravated robbery, the defendant (either as principal or a complicitor) must have engaged in a "substantial step" toward the theft of "anything of value" (specifically, "cash and Marijuana"), but because there was simply nothing (being the antithesis of "anything") to be taken in the first place, neither Jimenez nor any of his co-defendants could have committed any attempted aggravated robberies of anyone.

But even assuming, *arguendo*, that the defendant or any of his co-defendants could have attempted to take "cash and Marijuana" that did not exist, in *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983), our Supreme Court determined that the term "knowingly takes anything of value from the person or presence of another" requires the object, article or thing taken (such as "cash and Marijuana") to be "within the victim's reach, inspection or observation that he or she would be able to retain control over the property but for the force, threats, or intimidation directed by the perpetrator against the victim." Here, however, no one in the home had or could have possibly had "cash and Marijuana" "within [their] reach, inspection or observation" or "retain[ed] control over" such non-existent things and therefore, the prosecution simply could not have proven the contrary and

thereby satisfy all the elements of attempted aggravated robbery or that there was some sort of conspiracy to commit such a crime—as again, there was no proof that Jimenez had the intent to "promote or facilitate" an attempted robbery, no evidence of any agreement between the defendant or co-defendants to commit those crimes and finally, none of the defendants did or could have performed an "overt act in pursuance of" a conspiracy because of the absence of "cash and Marijuana." *See* §18-2-201(1),(2).

Finally, even if someone in the home (such as AR or Salvador Contreras) could have somehow "retain[ed] control over" the non-existent "cash and Marijuana" (perhaps because AR and Salvador were led to the garage where the cash and Marijuana *may have* formerly been—though there was no testimony that any "cash and Marijuana" was ever there in the first place), clearly, CR, JR, and VR (who were all downstairs during almost the entire home invasion and had no control over or claim to any such contraband) could not conceivably have been victims of any robbery, attempted or otherwise. *See People v. Benton*, 829 P.2d 451, 453 (Colo. App. 1991) ("[I]n order to commit the crime of robbery against an individual who does not have physical possession of the article taken, i.e., in order to take the property from such an individual's 'presence,' that individual must be

exercising, or have the right to exercise, control over the article taken."); *People v. Williams*, 297 P.3d 1011, 1019 (Colo. App. 2012) (evidence of aggravated robbery insufficient where the taking took place in front of customer who had no "control" or "claim to the stolen money"); *People v. Ridenour*, 878 P.2d 23, 27 (Colo. App. 1994) (insufficient evidence of aggravated robbery where the "ticket taker did not have physical possession of the money taken" or even "had the right to exercise control over that money").

In sum then, even in the light most favorable to the prosecution, the evidence presented here was undeniably insufficient to establish that the defendant or any of his co-defendants committed any attempted aggravated robberies, much less six, because: (1) under the terms and elements of robbery and attempt statutes, it is plainly and logically impossible to engage in a "substantial step towards" the taking of "anything of value" when that thing does not exist as charged ("cash and Marijuana"); (2) and even if it were legally and logically possible to do so, no evidence was presented that any "cash and Marijuana" was "within [anyone's] reach, inspection or observation" or that anyone "retain[ed] control over" such non-existent things; (3) finally, even if someone in the home had "retain[ed] control over" "cash and Marijuana" that did not exist, it most certainly was not CR, JR, or VR—who were all well away from where such things might have been if

they had been at all. *C.f. People v. Foster*, 971 P.2d 1082, 1085 (Colo. App. 1998) (evidence of robbery sufficient where a "security guard, pursuant to his employment, was the custodian of the property and had a right to exercise control over it"); *People v. Fox*, 928 P.2d 820 (Colo. App. 1996) (robbery conviction sufficient where defendant "was utilizing force against a person who had a right to exercise control over an item of property that was still within his sight and which would have been in his control if not for defendant's use of force").

Turning now to the defendant's conviction for the second degree assault of Deputy Luis Hernandez (Verdict Count #17), as charged here, that crime is committed when "[w]ith intent to cause bodily injury to another person, [the perpetrator] causes serious bodily injury to that person or another" and "the person who is assaulted...suffered serious bodily injury during the commission or attempted commission of or flight from the commission or attempted commission of...burglary." §18-3-203(1)(g),(2)(b.5);(v.1,p11)

As previously discussed, according to Deputy Hernandez, shortly after arriving on the scene of the home invasion, he ventured to the back of the home and observed one unarmed suspect "wearing all black" running from the home. Almost immediately after, Hernandez saw two other armed suspects (also both dressed in all black), but while he was certain that one of the men shot back,

striking him in the leg with buck-shot, he was unsure whether both had fired upon him.(9/7/11,p138-41) Additionally, while only two of the men were eventually captured (the defendant and Jose Lopez-Gutierrez), only Lopez tested positive for the presence of GSR.(9/9/11,p168-88)

Without a doubt, one of the four men (Jorge, Jose Lopez-Gutierrez, Michael Jimenez, or the defendant) shot and wounded Deputy Hernandez and thereby, committed second degree assault. However, from the evidence presented, it is impossible to know, beyond mere speculation or conjecture, which one of those individuals actually perpetrated that particular crime. *See People v. Saavedra-Rodriguez*, 971 P.2d 223, 225 (Colo. 1998) (prosecution must prove, beyond a reasonable doubt, defendant's actions were the direct and proximate cause of the victim's injuries); *People v. Ayala,* 770 P.2d 1265, 1268 (Colo. 1989) ("[p]resumption and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference, and this rule is doubly applicable in criminal cases"); *People v. Stark*, 691 P.2d 334,339 (Colo. 1984) (guilty verdicts "may not be based on guessing, speculation, or conjecture").

Furthermore, the prosecution presented no evidence, much less proof beyond a reasonable doubt, that the defendant even knew who shot at Hernandez much less that he had both the "intent to promote or facilitate" the assault and somehow also "aid[ed], abet[ed], advise[d], or encourage[d]" the planning or commission of that offense—as would be required of a complicitor. *See Grissom v. People*, 115 P.3d 1280, 1286 (2005) (An alleged complicitor simply cannot be held liable for the principal's act "unless [the two] were engaged in a common enterprise and the complicitor knew the principal was enlisting the complicitor's help in order to engage in criminal conduct."). Indeed, the court here even found that the identity of Hernandez's shooter was never proven: "Whether you shot the officer or your brother shot the officer or one of the other two did makes no difference."(11/30/11,p15) Thus, the evidence of the defendant's guilt for the second degree assault of Deputy Hernandez was, as the court noted, far from proven, beyond a reasonable doubt or otherwise—particularly considering that Jimenez did not even test positive for the presence of GSR. *See also Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979) ("a subjective state of near certitude of guilt" must be reached before a defendant may be convicted).

Finally, it is axiomatic that a conviction based on a record lacking sufficient evidence of the crucial elements of a charged offense constitutes a denial of due

process and is, therefore, constitutionally infirm. *People v. Sprouse,* 962 P.2d 300, 304 (Colo. App. 1997). Because the prosecution here failed to prove that Jimenez kidnapped AR, committed any of the charged attempted robberies, or assaulted Deputy Hernandez, either as a principal or complicitor, his convictions (Verdict Counts #3, #5 through #14, #16 and #17) should be reversed, vacated and dismissed with prejudice. *See* U.S. Const. amend. XIV; Colo. Const. art. II, §25; *People v. Miralda*, 981 P.2d 676, 680 (Colo. App. 1999) (if the State fails to prove every element of a particular offense beyond a reasonable doubt, state and federal double jeopardy principles prohibit the defendant from being retried).

III. The trial court reversibly erred by failing to instruct the jury on the affirmative defense of abandonment or renunciation.

A. Standard of Review

"[T]o present an affirmative defense for jury consideration, the defendant must present some credible evidence on the issue involving the claimed defense. Whether the defendant meets this burden of going forward is a question of law for the trial court, and we therefore review the sufficiency of the defendant's evidence de novo." *People v. Garcia*, 113 P.3d 775, 783-83 (Colo. 2005) (citations omitted). "This inquiry considers the evidence in the light most favorable to the defendant." *People v. Houser*, -- P.3d --, 2013WL363313 *2 (Colo. App.).

Here, during the instructional conference, just prior to jury deliberations, the defense moved for the court to instruct the jury on the affirmative defense of abandonment.(9/12/11,p145) Specifically, argued the defense, primarily based on the defendant's confession (entered into evidence as People's Exhibit 70) there was at least a "scintilla of evidence" showing that during the course of the home invasion, the defendant abandoned any criminal intentions that he may have had and by doing so, did not commit the attempted robberies that he was charged with and ultimately convicted of.(9/12/11,p145-47)

In denying the defendant's requested affirmative defense instruction, the court found: "There is no abandonment. [The defendant] enters the home; he uses the weapon; he takes the victims into the garage. There has to be some scintilla of evidence that he walked away from these crimes. And in this particular case, there is zero evidence that he walked away from these offenses."(9/12/11,p147-48)

B. Law and Analysis

As previously discussed, in connection with the preceding sufficiency argument, a person commits criminal attempt if "he engages in conduct constituting a substantial step toward the commission of the offense." A substantial step is conduct that is "strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." §18-2-101(1), C.R.S.

However, a defendant may assert the affirmative defense of abandonment when he "abandon[s] his effort to commit the crime or otherwise prevent[s] its commission...under circumstances manifesting the complete and voluntary renunciation of his criminal intent." §18-2-101(3).

Recently, in *People v. O'Shaughnessy*, 269 P.3d 1233, 1235 (Colo. 2012), our Supreme Court explained, "[t]hough the abandonment defense may apply at various stages, early and late, in the commission of attempted crimes, it is not unlimited. Once the attempt has been completed by putting into motion forces the actor can no longer stop, it cannot be abandoned." (internal quotations and citations omitted). Furthermore, to be entitled to a jury instruction on abandonment, the defense need only claim "some credible evidence" supporting that affirmative defense. *Id.* at 1236; *People v. DeWitt*, 275 P.3d 728, 733 (Colo. App. 2011) (applying the "scintilla of evidence standard" to the defendant's burden of proof in obtaining an affirmative defense instruction).

Here, as defense counsel argued below, defendant's statements to police amply supported the giving of such an affirmative defense instruction. Again, throughout the defendant's confession, he repeatedly maintained that he was extremely hesitant and reluctant to follow through with any crime: "They were knocking, yes and I saw everything there and I said, no. I would tell my brother

[Michael Jimenez], let's go, let's go man. For real, let's go, no... Well I regretted it when I saw the lady. ... I told him, I'm not liking this. I also have a family and I would not want the same to happen to them. ... Let's go man; this really isn't good because I have a bad feeling."(People's Exhibit 70,p52-53)

And most importantly, according to Jimenez, shortly after entering the home, he decided to leave the scene and abandon any further criminal activity that may have been committed afterward: "That's was when I told my brother [Michael Jimenez], no ah brother, let's get out of here. This isn't right. Then the lady [AR] went out to the garage, I don't know who went out, and when he went out I grabbed him and told him, hey lets go. Well then, I left out the back."(p56) Further supporting Jimenez's claim that he left the scene before the other suspects and thereby, abandoned the commission of some or all of the attempted crimes, was the testimony of JR, CR, VR and Deputy Hernandez who all indicated seeing only three, not four, masked men that evening.(9/7/11,p47,58,84,110)

Evidence supporting an affirmative defense, such as abandonment, "may come from any source even from the prosecution." *People v. Whatley*, 10 P.3d 668, 670 (Colo. App. 2000). Furthermore, the burden to produce sufficient evidence is "exceedingly low," and justifies the exclusion of an affirmative defense for the jury's consideration only where there is "simply no evidence...in th[e] record."

People v. Platt, 170 P.3d 802, 806 (Colo. App. 2007). Thus, because Jimenez's statement, in addition to witness accounts of there being three men in and around the home, provided sufficient evidence (far more than a "scintilla") that the defendant abandoned ("left out the back") the attempted commission of any crimes occurring sometime shortly after the group entered the home, the court here erred in failing to instruct the jury on the affirmative defense of abandonment and accordingly, the defendant's convictions for the attempted aggravated robberies should be reversed. *See People v. Johnson*, 585 P.2d 306, 307-308 (Colo. App. 1978) (reversal of convictions for attempted crimes required where trial court erred in failing to instruct the jury on the defense of abandonment).

CONCLUSION

For the reasons and authorities discussed in Argument I, Jimenez respectfully requests that this Court reverse his convictions and remand his case for further proceedings below. For the reasons and authorities discussed in Argument II, Jimenez respectfully requests that this Court reverse, vacate and remand his convictions (Verdict Counts #3, #5 through #14, #16 and #17) for dismissal. For the reasons and authorities in Argument III, Jimenez respectfully requests that this Court reverse his convictions for all attempted robbery crimes and remand for a new trial on those counts.

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CERTIFICATE OF SERVICE

I certify that, on 7/9/14, a copy of this Opening Brief of Defendant-Appellant was electronically served through ICCES on KATHERINE A. HANSEN of the Attorney General's office.

K. Root