COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Mesa County District Court Honorable Valerie J. Robison, Judge Case Numbers 12CR34	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. LINDA ECCO DALTON Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender AUDREY E. BIANCO, #37930 1300 Broadway, Suite 300 Denver, Colorado 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA2407

OPENING BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE	

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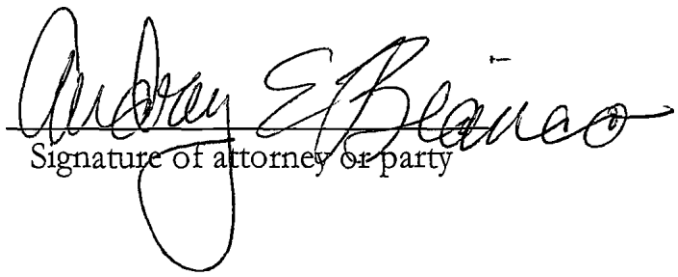

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STATEMENT OF ISSUES PRESENTED

I. Did the prosecution present insufficient evidence to support a conclusion that Dalton committed a knowing and voluntary act when she drove because the evidence supported a conclusion that Dalton acted in a sleep-like state, and the prosecutor did not offer evidence to refute that inference?

II. Did the prosecutor's egregious misconduct, including her improper use of voir dire to ask the jurors to precommit themselves to a particular finding and her use of Dalton's poverty as a basis upon which to urge the jurors to convict, deny Dalton a fair trial?

STATEMENT OF THE CASE

Linda Dalton was charged with one count of criminal mischief resulting in damage one thousand dollars or more but less than twenty thousand dollars.[1] (PR. CF, Vol. I, pp.1-2) The District Attorney later added one count of careless driving, but dismissed that charge on the first day of trial. (Id.pp.15-16) Dalton tried her case to a jury and was convicted as charged. (R.Tr. 9/17/12–9/19/12; R.Tr. 9/19/12, p.161) The trial court sentenced Dalton to two years of probation. (10/12/12, p.18) She filed a timely notice of appeal. (PR. CF, Vol. I, pp.99-100)

[1] § 18-4-501, C.R.S. 2011 (F4). The General Assembly has since amended this provision, and the conduct at issue in this case would now be classified as a level 5 felony. § 18-4-501(4)(e), C.R.S. 2014.

STATEMENT OF THE FACTS

At the time of these events, Dalton lived with her boyfriend, Randall Burris, several miles outside of Fruita, Colorado. (R.Tr. 9/17/12, p.77; R.Tr. 9/19/12, pp.7, 33) The two were unemployed and lived in a trailer off a dirt road without electricity or running water. (9/19/12, pp.7, 19, 21, 33, 37) In order to conserve the propane they had, they frequently used their car to warm up, including for the purpose of smoking cigarettes at night. (Id., p.21) Because they had little money for gas, they spent a lot of time together close to home. (R.Tr. 9/18/12, p.122)

The events leading to the charges in this case began approximately three months before the actual incident for which Dalton was charged. (R.Tr. 9/18/12, p.122) Dalton had a history of depression and had received treatment for the condition in the past. (Id.) Around that time, Medicaid indicated that it would no longer pay for her anti-depressant prescription, Cymbalta. (Id.) Medicaid directed her doctor to use a different medication, which he attempted to do. (Id.) Because Dalton is sensitive to medications, she was unable to tolerate the side effects of the new medicine, so her doctor again attempted to prescribe Cymbalta. (Id.) Medicaid again stated that it wouldn't pay for that prescription. (Id.) Dalton's doctor, therefore, gave her a couple of months' worth of samples. (Id.) Eventually, Dalton used all of the

samples and stopped taking the prescription, since Medicaid wouldn't pay for it. (Id.p.123)

Upon stopping the medication, Dalton testified that she began to feel very energetic and "closer to God." (Id.p.123) Her friends and family also reported that Dalton seemed unusually happy around that time. (Id.p.194; R.Tr. 9/19/12, p.10) Dalton testified that she believed herself to have become more enlightened. (R.Tr. 9/18/12, p.124) She began to talk a lot about God and to discover the meaning of life in elements of nature, such as a pattern on a rock. (Id.pp.197-98; R.Tr. 9/19/12, pp.9-11) While this behavior didn't initially cause her family concern, her behavior became progressively stranger and more confused. (Id.pp.11-19, 59-68; R.Tr. 9/18/12, pp.125, 200-205) Dalton's sleep patterns changed—she wasn't able to sleep through the night. (R.Tr. 9/19/12, p.15) At times she seemed confused about who she was, who Burris was, and where she was. (Id.p.16; R.Tr. 9/18/12, p.125) She began to refer to family members by incorrect names, including the names of characters from movies. (Id.pp.17, 66; R.Tr. 9/18/12, pp.195-96) She also started to talk a lot about movies, although her sister testified that it seemed as though Dalton didn't realize she was talking about movies. (R.Tr. 9/19/12, p.66) She began to refer to Angelina Jolie and Brad Pitt as her parents. (Id.; R.Tr. 9/18/12, p.195)

Burris testified that he increasingly felt the need to supervise Dalton during her day-to-day activities, including eating, dressing herself, and using the bathroom. (R.Tr. 9/19/12, pp.17-19) He also purchased some sleeping pills to help her sleep through the night. (Id.p.20) Despite the fact that he gave Dalton sleeping pills, she would wake up in the middle of the night. (Id.)

On the night of November 1, 2011, Burris gave Dalton a sleeping pill before they went to bed. (Id.p.20) A couple of hours later, Dalton woke up and sat in bed rocking and mumbling about movies and about religious figures. (Id.) In order to get her to return to bed, Burris gave Dalton an additional sleeping pill. (Id.) Nonetheless, Dalton awoke again and was again "chanting" to herself. (Id.) Burris testified that shortly thereafter, Dalton went outside—he presumed so that she could have a cigarette. (Id.) He heard her start the car, but he felt no concern because they often sat in the car to warm up. (Id.p.20) Then he heard Dalton start to drive away. (Id.p.22) He raced out the door to catch her, but she had already driven beyond earshot. (Id.)

Dalton testified that on the night of the incident, she remembered taking some sleeping pills and believed that she was dreaming of flying through the air. (R.Tr. 9/18/12, p.125) She remembered seeing a red door and deciding to fly through it. (Id.) The next thing she remembered was running down the road and stepping on

some thorns, wondering where her shoes were. (Id.pp.125-26) She remembered seeing a sign that said "a white van will pull over and help you," and that a white van did stop to help her. (Id.p.126) Then a police officer arrived. (Id.) The next thing she remembered was being in the Colorado West Psychiatric Hospital. (Id.p.127)

Nicholas Peck, the police officer who responded that night filled in some of the details of what happened. (Id.pp.62-68) He received a call to attend to a traffic accident at about 3:00 a.m. on November 2, 2011. (Id.p.62) When he arrived, he spoke briefly to the woman who had called police, but she hadn't witnessed the accident. (Id.p.63) Peck then noticed that Dalton wasn't wearing any shoes, despite the fact that it was quite cold. (Id.) He asked her why she wasn't wearing shoes, and she informed him that the voices in her head told her that she couldn't wear shoes. (Id.) She told him that she had been involved in a crash—that she had driven her car through a big red door. (Id.) Peck called an ambulance to make sure that Dalton was physically uninjured. (Id.p.64) While they waited for the ambulance, Dalton continued to talk to him. (Id.p.65)

While they were waiting, Dalton told Peck that

> she was the oracle and that she couldn't die. She said she was asleep but she could wake up. She just had to drive through the big red door. She made reference to Amelia Earhart as being the last oracle until her. And she said that it –it didn't really make sense now, but it did make sense at the time.

(Id.p.65) She also told Peck that she had been hearing voices for about a month, and that sometimes the voices told her to throw herself out a window and "other bad stuff." (Id.pp.65-66)

After the paramedics examined her, they concluded that they didn't need to transport her by ambulance, but informed Peck that the doctor with whom they had consulted wanted to examine Dalton. (Id.p.66) Therefore, Peck himself transported Dalton to the hospital. (Id.) While in transit, "[s]he did continue to make some unusual statements," including telling Peck "that Kevin Costner and Bruce Willis were looking for her because she was their long-lost child. And then she also made another statement about directing movies. I believe she said that she—when she dreams, she only sees in black and white unless she's directing movies." (Id.p.95) She also told him that she was "kept asleep I believe for the purpose of directing movies. Once she said it was for about three months. Another time, she said she'd been kept asleep for about 41 years." (Id.p.96) When they arrived at St. Mary's Hospital, Dalton was placed on an "M1" hold—a mental health hold utilized when there is a concern that a patient could be a danger to herself or others. (Id.p.104)

Peck then drove back to Fruita, believing he knew through which "big red door" Dalton drove. (Id.pp.66-67) He identified the accident location as a used car lot called the Car Barn. (Id.p.67; R.Tr. 9/17/12, p.78) The Car Barn was notable for

having a large garage door that was painted bright red. (R.Tr. 9/18/12, p.8) When Peck arrived at the Car Barn, he found an SUV, registered to Burris, parked inside the garage, having driven directly through the door itself. (Id.p.68) The garage interior was in disarray, including among other things several crushed motorcycles, broken ladders and signs, and a broken hydraulic pump, as well as a significant amount of gasoline spilled across the floor. (Id.pp.12-24, 36-37, 68; R.Tr. 9/17/12, pp.83-94, 99-104). The total cost of the damage was $17.526.38, which was paid in its entirety by Burris' insurance company. (R.Tr. 9/18/12, pp.38, 51-52) The insurance company didn't seek restitution, as it was paying a claim for its insured. (R.Tr. 10/12/12, p.5)

Dalton was transferred from St. Mary's Hospital to Colorado West Psychiatric Hospital later on November 2, 2011. (R.Tr. 9/18/12, p.181) She remained in that hospital until November 8. (Id.p.129) On November 7, while she was still hospitalized, Peck again contacted Dalton to discuss what had happened. (Id.pp.83, 129) At that time, Dalton told Peck that the events of that night felt like a dream—she told him that she hadn't been sleeping during the days leading up to the accident. (Id.p.83) She also told him that she had driven through the big red door because she was "sick of life." (Id.) She confirmed that she had been off of her psychiatric medications for approximately three months and informed him that she had taken no

drugs or medications, legal or illegal, on the night of the crash. (Id.p.84) Any additional facts will be discussed as relevant below.

SUMMARY OF ARGUMENT

The key question confronting the jury in this case was whether Dalton possessed the requisite mental state when she drove her car through the garage door of the Car Barn. The attorneys asked the jury to determine whether she could have acted knowingly at that time, given the testimony about her general awareness and perception, or lack thereof, of reality. Each of the errors argued in this appeal goes directly to that question.

The prosecution presented insufficient evidence to support a finding, beyond a reasonable doubt, that Dalton committed a knowing and voluntary act that night. Dalton testified that she was in a dream-like state, that she believed she had flown through the door. The prosecution never refuted this testimony, but rather offered only the inference that, because she made several turns while driving the car, she must have been acting voluntarily and she must have been aware of what she was doing. The only other evidence supporting the prosecution's argument was that Dalton told Peck, while still being held at Colorado West Psychiatric Hospital, that she had driven through the door because she was "sick of life," but during the same conversation, she also told him that she had believed she was dreaming when it happened.

Furthermore, the prosecutor committed repeated and flagrant misconduct, aimed at persuading the jury to decide the case not on the facts properly before them and the law as the court instructed them, but on prejudice and on misrepresentations of the law and facts. The prosecutor improperly asked the jurors to precommit themselves to a particular result during voir dire, asking each how they would vote, based on a hypothetical that misrepresented the law as it applied to this case. The prosecutor then reminded the jurors of their previous commitment to find guilt based on that same misrepresentation of the applicable law, which the prosecutor reiterated for them during closing. In addition, the prosecutor misrepresented the state of the evidence in order to suggest to the jury that she had a stronger case than she did. The prosecutor also offered a lengthy argument to the jury that urged conviction based merely on Dalton's poverty. The prosecutor repeatedly acted improperly and therefore Dalton must receive a new trial.

ARGUMENT

I. Insufficient evidence supported a conclusion that Dalton committed a knowing and voluntary act when she drove because the evidence supported a conclusion that Dalton acted in a sleep-like state, and the prosecutor did not offer evidence to refute that inference.

A. Preservation and Standard of Review

Appellate courts review *de novo* whether the evidence before the jury was sufficient to sustain a defendant's conviction. *People v. Duran,* 272 P.3d 1084, 1090

(Colo.App.2011). The prosecution must prove all elements of a crime beyond a reasonable doubt in order to satisfy the due process requirements of the United States and Colorado constitutions. U.S. Const. amend. XIV, §1; Colo. Const. art. II, §25; *In re Winship*, 397 U.S. 358, 363 (1970); *Montez v. People*, 269 P.3d 1228, 1232 (Colo. 2012). Dalton made a motion for a judgment of acquittal at the conclusion of the prosecution's case. (R.Tr. 9/18/12, p.112)

B. Law

In evaluating the sufficiency of the evidence, the appellate court considers "whether the evidence, viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crime charged beyond a reasonable doubt." *People v. Barrus*, 232 P.3d 264, 271 (Colo.App.2009). Although the court gives the prosecution the benefit of any inference which might be drawn from the evidence, a mere modicum of evidence is not sufficient to sustain a guilty verdict. *Id.*; *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999). As the United States Supreme Court concluded in *Jackson v. Virginia*, "[a]ny evidence that is relevant-that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, could be deemed a 'mere modicum.'" 443 U.S. 307, 320 (1979). However, as the Court noted, "it could not seriously be argued that such a 'modicum' of

evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* A verdict in a criminal case may not be based on guessing, speculation, or conjecture. *Duran*, 272 P.3d at 1090.

Furthermore, the Supreme Court has clearly and repeatedly stated that "any evidence" is not the proper standard for evaluating sufficiency. *See Jackson*, 443 U.S. at 315; *Winship*, 397 U.S. at 364. A record need not be "totally devoid of evidence of guilt" in order to fall short of sufficiency. *Jackson*, 443 U.S. at 315. The "'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt…" *Id.* at 320. While such a rule might suffice in the context of a civil case, in which the preponderance of the evidence standard applies, "proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability." *Id.* at 315; *see also Winship*, 397 U.S. at 363-64. "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Winship*, 397 U.S. at 364. "[T]he standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson*, 443 U.S. at 315.

With regard to the specific question of a defendant's mens rea, courts judge the mental state of "knowingly" under a subjective standard, not an objective one—that is to say, the prosecution must prove that the accused was actually aware, not just that the average person would have been aware, of the circumstances. *See Oram v. People*, 255 P.3d 1032, 1038 (Colo. 2011). The accused must actually be aware of the activity in which he or she is participating, even if unaware that such activity is illegal. *Id.* A knowing act requires more than just an actors' awareness of a risk and disregard of such risk—that meets the definition of reckless, but not knowing. *Mata-Medina v. People*, 71 P.3d 973, 978 (Colo. 2003). One who merely should be aware of a risk, but is not, acts negligently. *Id.* Thus, the burden on the prosecution was to prove more than that Dalton should have known that she might cause damage to the Car Barn garage door and the contents of the garage, or that she knew her conduct might cause such harm, but she chose to act anyway. Rather, the prosecutor was required to show that Dalton subjectively knew that what she was doing was practically certain to cause that feared harm.

"A 'Voluntary act' means an act performed consciously as a result of effort or determination …." § 18-1-501(9), C.R.S. 2014. "[S]uch an act must be the product of conscious mental activity involving effort or determination." *People v. Rostad*, 669 P.2d 126, 129 (Colo. 1983). "Conscious," in turn, is defined as "[a]ware of and responding

to one's surroundings." Oxforddictionaries.com at /us/definition/english/conscious, last accessed Oct. 20, 2014. The Model Penal Code, while not binding, also provides guidance on the meaning of a voluntary act.

> The following are not voluntary acts within the meaning of this Section:
>
> (a) a reflex or convulsion;
>
> (b) a bodily movement during unconsciousness or sleep;
>
> (c) conduct during hypnosis or resulting from hypnotic suggestion;
>
> (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act, Model Penal Code § 2.01 (2013). What is clear, then, is that an individual doesn't act voluntarily if he or she is unaware of his or her surroundings and acts while asleep or otherwise while unconscious.

Therefore, in order to sustain Dalton's conviction, this Court must conclude that the evidence introduced sufficiently proves, beyond a reasonable doubt, that she subjectively knew what she was doing and knew she was practically certain to cause the damage on the night in question, and also that she acted consciously. Of critical importance is that "[p]roof of the commission of the act alone is not sufficient to

prove that the defendant had the requisite culpable mental state." COLJI-Crim. 6:01 (1983).

C. Application

In this case, Dalton testified about the events that took place the night of November 2, 2011. She testified that she remembered having taken sleeping pills that evening, and then having what she believed to be a dream. (R.Tr. 9/18/12, p.125) She testified that she believed that she was flying through the air when she saw the red door, and that at that point she decided to "fly through it." (Id.) She didn't remember how she "got out of the red door." (Id.) The next thing she remembered was running on thorns and wondering where her shoes were. (Id.p.126) She remembered "looking at a door, a business door or something and reading a sign that said there will be a white van that will pull over and help you." (Id.) In response to a question from the jury, Dalton admitted that she largely "remembered" events based on what other people told her she did, after the fact. (Id.p.176)

Dalton's testimony was entirely consistent with Peck's testimony, when he said that Dalton told him, at the time of the accident, that "she was asleep but she could wake up. She just had to drive through the big red door." (Id.p.65) He testified that it seemed to him that Dalton herself was trying to understand the information she was giving to him. (Id.) She also told Peck that she had been kept asleep for 3 months,

and later she said she had been kept asleep for 41 years, in order to direct movies. (Id.p.96) When they next spoke, a few days later while she was still confined to the psychiatric hospital, Dalton again told Peck that the entire incident "felt like a dream." (Id.p.83)

Linda Kahl, who was working at Colorado West Psychiatric Hospital when Dalton was admitted, testified that at that time Dalton was "attending to some internal stimulation," meaning she was hearing voices. (Id.p.181) Dalton told her that she had been ordered to run into a red garage door by the "voices." (Id.p.183) Dalton continued to suffer from "grandiose delusions" and from voices in her head, even after two days of receiving medication in a hospital setting. (Id.pp.181-83)

The evidence, then, overwhelmingly supports the conclusion that Dalton acted in a sleep-like state, and the prosecution offered almost no evidence to refute that conclusion. In fact, the prosecutor conceded that Dalton was "having some problems at [that] time." (Tr. 9/19/12, p.127)

The prosecution's theory of Dalton's mens rea was essentially that her ability to navigate in her car proved that she acted knowingly[2]. (Id.pp.141-42) According to the prosecution, "[y]ou don't drive that far without knowing what you're doing. You

[2] To the extent that the prosecution relied on the theory that Ms. Dalton acted knowingly by failing to take her medications during the weeks before the incident, such a theory relies upon an incorrect interpretation of the law and will be discussed below in section II.

don't arrive at your destination without knowing what you're doing. And you don't accomplish your goal of driving through the red door without knowing what you're doing." (Id.p.142) The prosecution never presented any evidence, however, that Dalton intended to arrive at the Car Barn—in fact, testimony confirmed that Dalton had no connection whatsoever to the Car Barn or its proprietors. (R.Tr. 9/18/12, p.52) The prosecutor also argued, in order to bolster the assertion that Dalton knew what she was doing that night, that Dalton "was still feeding herself. She was still going to the bathroom on her own. She could still dress herself.…[S]he was performing her general daily activities." (R.Tr. 9/19/12, p.130)

The only other piece of evidence that could arguably support the prosecution's position was Peck's testimony that Dalton told him that she was "sick of life." (Id.p.83) Such a statement, standing alone, is nothing more than a "mere modicum"—perhaps enough to satisfy the "any evidence" standard in a civil case, but clearly insufficient to support a conclusion in this case, beyond a reasonable doubt.

Because the prosecution failed to meet its burden to prove that Dalton acted voluntarily and knowingly at the time she drove her car into the Car Barn, her conviction for criminal mischief should be vacated.

II. The prosecutor's egregious misconduct, including improperly using voir dire to ask the jurors to precommit themselves to a particular finding and her use of Dalton's poverty as a basis upon which to urge the jurors to convict, denied Dalton a fair trial.

A. Preservation and Standard of Review

These errors were not preserved. When an allegation of prosecutorial misconduct is not preserved, it is reviewed for plain error. *People v. McBride*, 228 P.3d 216, 221 (Colo.App.2009). A prosecutor's misconduct is plain error when it is "flagrantly, glaringly, or tremendously improper. *Id.* (*quoting Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005)). Notably, "novelty does not provide a safe harbor for flagrantly improper arguments." *Id.* at 222.

In addition, a defendant has a due process right to trial by a fair and impartial jury. *See, e.g.,* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; *Oaks v. People*, 371 P.2d 443 (1962). Prosecutorial misconduct affects a defendant's constitutional right to a fair trial. *See Domingo-Gomez*, 125 P.3d at 1048 (Colo. 2005). The determination of whether due process has been violated in a criminal prosecution is reviewed de novo. *U.S. v. Nickl*, 427 F.3d 1286, 1296 (10th Cir. 2005); *People v. Matheny*, 46 P.3d 453, 461 (Colo. 2002) (noting that mixed questions of law and fact that have constitutional implications have been reviewed de novo). Constitutional error requires reversal unless it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). This means that "before disregarding it as harmless,

a reviewing court must be convinced beyond a reasonable doubt of its lack of prejudicial impact." *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008). A defendant's right to be tried by a fair and impartial jury, as guaranteed by the federal and Colorado constitutions requires that the prosecutor refrain from employing improper methods to obtain a conviction. *Harris v. People*, 888 P.2d 259, 263 (Colo. 1995); *see also* U.S. Const. amend. VI; Colo. Const. art. II, §§ 16, 23; *Berger v. U.S.*, 295 U.S. 78, 88-89 (1935).

The prosecutor's misconduct in this case spanned the length of the trial, from voir dire through closing statements. Each will be addressed in turn.

B. Proceedings Below

1. Voir Dire

During voir dire, the prosecutor asked the jurors to consider a hypothetical defendant with a seizure disorder, for which the defendant took medications. (Supp.R.Tr. 9/17/12, p.137) She then asked them to imagine that the defendant stopped taking the medication and began suffering from seizures and then, knowing that he or she was prone to these seizures, nonetheless drove a car and caused an accident. (Id.) She asked the jurors,"[a]re they responsible for the wreck?" (Id.) She urged the jurors to conclude that the hypothetical defendant was responsible for the ensuing wreck, regardless of the reason for stopping medication. (Id.p.138) She then

obtained the agreement of several jurors that, because that person stopped taking their medication and then drove, he or she was liable for the ensuing accident. (Id.pp.137-38, 156-57)

2. Closing Arguments

During closing arguments, the prosecutor initially focused largely on the elements of the offense and the evidence admitted at trial, which was proper. (R.Tr. 9/19/12, pp.122-40) Towards the conclusion of her initial closing statement, she started to stray from that proper argument, however, telling the jury, "[c]an you get help? Sure. Reach out. Can you take medications? Sure. Take your prescribed meds. Don't decide for three months that you're not going to take your medications. And we'll come back to that later." (Id.p.141) The prosecutor did, indeed, return to that subject during what was an egregiously improper rebuttal closing. The argument began thusly:

> So, what I want to talk to you about is accountability. Where is the accountability in this case? The Defendant wants to say that she was forced to live in the desert. They were living on unemployment. They were out hiking in the desert on a day-to-day basis. I didn't hear anyone talking about going to try and find a job during that case to better their situation, but they were forced, it was put upon them that they had to live in the desert.
>
> She was forced to go off her medications. No one took them away from her. No one refused to give her the prescription.

And she told us that she smoked about ten cigarettes a day. Burris puts that number lower. He made several things lower or higher during his testimony. Dalton told you it was about ten cigarettes a day and that she and Burris would usually smoke together. That's about a pack a day habit between the two of them, right? So, you've got a pack a day habit at say five bucks a pack. 30 days in a month. That's 150 bucks. Weren't the meds like 145 a month? That's a decision.

She never tried to save. She didn't talk to her sister, her brother, her five siblings, her parents about borrowing money to get those medications. She made a decision not to save, not to borrow, and to spend her money on other frivolous things instead of getting her necessary medical medication. That was her decision.

And we talked about that in jury selection. We talked about the person who has the seizure disorder who decides to go off their medications, that person who then has seizures over the next month, gets in their car, drives, and causes a wreck. That person you said was accountable, unanimously. Everyone said that person is accountable for their actions.

That is the same situation as we have here with Dalton. We have a situation where Dalton knows that she's supposed to be on medications. She decides to buy cigarettes instead of taking those medications. She knows she's feeling badly. Her sister told you she knew that something was wrong. And then she chose to get in her car and drive.

She is just as accountable as that person who had the seizure disorder and even more so because the person who had the seizure disorder didn't know it was coming on and Dalton knew there was something wrong with her.

(Id.pp.148-50)

C. Law and Application

1. Voir Dire

"It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968) (*quoting Fay v. New York*, 332 U.S. 261, 294 (1947)). It is for this reason that "[t]he only proper purpose of voir dire is to determine the bias or prejudice of a potential juror. Counsel may not use voir dire for the purpose of instructing or educating the jury." *People v. Shipman*, 747 P.2d 1, 3 (Colo.App.1987); *accord, People v. Lybarger*, 790 P.2d 855, 859 (Colo.App.1989). Therefore, although the trial court maintains discretion over the scope of voir dire examination, *Shipman*, 747 P.2d at 3, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness," *Morgan v. Illinois*, 504 U.S. 719, 730 (1992) (*quoting Aldridge v. United States*, 283 U.S. 308, 310 (1931), *alterations in original*).

While most often seen in the context of capital cases, "stake out" questions are generally impermissible in any context. *See, e.g. United States v. McVeigh*, 153 F.3d 1166, 1208 (10th Cir. 1998) (noting that case law doesn't "allow defendants to pre-determine jurors' views of the appropriate punishment for the particular crime

charged."); *U.S. v. Johnson*, 366 F.Supp.2d 822, 840-44 (N.D. Iowa, 2005) (discussing various methods of voir dire and noting a consensus among courts concluding that "stake out" questions are not permissible); *State v. Manley*, 255 A.2d 193, 202-205 (N.J. 1969) (noting that counsel's questions, which sought to educate the jury on the facts of the case, to indoctrinate the jury, and to induce the jurors to commit themselves to vote in a particular way, subverted the function of voir dire, i.e. to impanel an impartial jury); *State v. Fletcher*, 500 S.E.2d 668, 679 (1998) (noting that stake out questions are impermissible); *Witter v. State*, 921 P.2d 886, 892 (1996), *abrogated on other grounds by Nunnery v. State*, 263 P.3d 235 (Nev. 2011) (same).

"Stake out" questions are generally defined as questions that ask a prospective juror to speculate or to explain how his or her decision will be affected by the specific facts of the case. *Johnson*, 366 F.Supp.2d at 842. "Stake out" questions are also sometimes referred to as "pre-commitment" questions that ask the prospective juror to precommit, or pledge him or herself to how he or she might vote, based upon the facts of the case. *Id.* Attorneys sometimes pose such questions in the form of hypotheticals. *See, e.g., State v. Manley*, 255 A.2d 193, 205 (N.J. 1969) (noting that, in order to restore voir dire to its proper purpose of selecting a fair and impartial jury, the court would prohibit the use of "hypothetical question[s] intended and so framed

as to commit or to pledge jurors to a point of view or a result before they have heard any evidence, argument of counsel or instructions of the court.").

For example, one court concluded that an attorney may not properly ask a prospective juror whether evidence of rape would lead him or her to vote for the death penalty. *U.S. v. Fell*, 372 F.Supp.2d 766, 771 (D.Vt., 2005). Likewise, it was proper for the court to bar counsel from asking jurors whether they had been so influenced by the facts of the case, as revealed during pretrial publicity, that they felt the only appropriate punishment would be death. *McVeigh,* 153 F.3d at 1207. Furthermore, even a seemingly open-ended question that "begs follow-up questions that inevitably lead to stake-out questions" can be improper. *U.S. v. Wilson*, 493 F.Supp.2d 402, 403-05 (E.D.N.Y. 2006). Thus, in *Wilson*, the court concluded that defense counsel could not properly ask jurors questions such as, "[w]hat are your opinions about psychiatrists, psychologists, or other mental health professionals who come to testify in some criminal cases?" or, "[d]o you believe that everyone who commits the same crime should be punished the same way?" *Id.* at 403, 405.

Courts must distinguish such questions from those asking whether a prospective juror could fairly follow the law, regardless of the facts established. *Johnson*, 366 F.Supp.2d at 845. So, for example, the *Johnson* court concluded that it was proper to ask a juror whether he or she "*could fairly consider* either a death or life

sentence, notwithstanding proof of certain facts," because such a question "commits a juror to no other position than fair consideration of the appropriate penalty in light of all the facts and the court's instructions." *Id.* (emphasis in original).

While these issues have generally arisen in the context of capital cases, their logic applies equally to a non-capital case, where the prosecutor seeks to have jurors precommit themselves to a particular determination of the case. For example, in *People v. Lybarger*, this Court noted that "[v]oir dire may not be used to instruct the jury regarding the law or the defendant's theory of the case." 790 P.2d 855, 859 (Colo.App.1989) (*rev'd. on other grounds by Lybarger v. People*, 807 P.2d 570 (Colo. 1991)). In *Lybarger*, the defense wished to inquire of potential jurors whether they possessed any religious beliefs that could have impacted their willingness to consider the defendant's affirmative defense—in that case, that he was spiritually treating his sick baby and therefore was excused from seeking medical care for her. *Id.* at 859. The trial court concluded that the question at issue "went to the defendant's theory of the case," and therefore prohibited the defense from asking it. *Id.* The Court of Appeals affirmed because of a lack of prejudice, but in so doing it approved of the trial court's conclusion that voir dire could not be used to educate the jury about the defendant's theory of the case. *Id.*

In this case, the prosecutor expressly set forth her theory of the case, only lightly disguised as involving someone with a seizure disorder, rather than a mental illness. As in *Lybargar*, she improperly sought not only to educate the jury, but also to request that they agree with her that they would hold a person accountable if presented with those facts. In a case in which the prosecution's theory was that Dalton's failure to taker her medications resulted in the psychotic episode, which then resulted in the damage to the Car Barn, the prosecutor merely changed the nature of the underlying illness. As discussed below, the hypothetical misrepresents the law in this area, and thus not only did it improperly educate the jury, but, in fact, miseducated them. (See Section II(C)(2)(a), below).

Furthermore, the prosecutor sought to cash in on the jurors' precommitments during closing, reminding the jury that

> [W]e talked about that in jury selection. We talked about the person who has the seizure disorder who decides to go off their medications, that person who then has seizures over the next month, gets in their car, drives, and causes a wreck. That person you said was accountable, unanimously. Everyone said that person is accountable for their actions.

(R.Tr. 9/19/12, p.150). Thus, the prosecutor sought to hold the jurors to their prior statements, to remind them that they had already announced their conclusion in open

court when they "unanimously" agreed that these facts, which hypothesized "the same situation as we have here with Dalton," required a finding of guilt.

2. Closing Arguments

The prosecutor's closing remarks were problematic for a couple of different reasons. The prosecutor mischaracterized the law by comparing Dalton's case to that of a person with epilepsy who chooses to drive while unmedicated. She improperly attempted to convince the jury to convict Dalton based on misrepresentations of the evidence. And, most significantly, she attacked Dalton on the basis of her poverty and sought to use her status as a poor person to convince the jury to convict.

In evaluating a claim of prosecutorial misconduct, courts engage in a two-step analysis. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). The court first considers whether the prosecutor's conduct was improper, based on the totality of the circumstances, and then it determines whether the actions warrant reversal. *Id.*

a. Misstatement of the law

"[I]t is improper for counsel to misstate or misinterpret the law during closing argument." *People v. Rodriguez*, 794 P.2d 965, 977 (Colo. 1990). A prosecutor's argument that distorts a key element of the offense can deny a defendant a fair trial. *See McBride*, 228 P.3d at 225. Thus, in *McBride*, the prosecutor misstated the deliberation element of first degree murder. *Id.* The question of deliberation was

central to the trial, and the Court of Appeals concluded that the prosecutor's misconduct was plain where he had "obliterate[ed]" the distinction between intentional and deliberative acts. *Id.*

Here, the prosecutor likewise misstated the law as it applied to the central issue in the case—Dalton's mental state. The prosecutor informed the jury, during argument, that Dalton was guilty because she knew she was supposed to be on medication, yet she was not taking that medication in the months prior to the incident. (R.Tr. 9/19/12, p.150) The prosecutor told the jury that, because Dalton knew she was feeling badly, yet she chose to buy cigarettes instead of her medication, she should be held "accountable." (Id.) The prosecutor then analogized this case to a hypothetical case in which a person with previously diagnosed epilepsy decided not to take medication and chose to drive, despite the risk of a seizure. (Id.) As in *McBride*, "[t]his analogy was inapt." 228 P.3d at 225.

In the prosecutor's analogy, she hypothesized an individual who has a previously diagnosed seizure disorder. (R.Tr. 9/19/12, p.150) That individual, then, decides to stop taking medication and begins to suffer seizures over the course of the month. (Id.) At that point, despite the diagnosed condition and the previous seizures, the prosecutor's hypothetical defendant chooses to drive a car and ultimately causes a crash. (Id.)

In the criminal context, an individual who causes a crash after suffering an epileptic seizure is "criminally responsible in undertaking to drive *knowing* that he or she may become unconscious." *State v. Freeman,* 1995WL66582 at 3 (Tenn. App.1995) (emphasis added); *see also Robertson v. State*, 109 S.W.3d 13, 20-21 (Tex. App.2003) (finding the defendant criminally liable because he misrepresented his condition on his driver's license renewal application and chose to drive); *Commonwealth v. Cheatham*, 615 A.2d 802, 806-07 (Pa. Super. Ct. 1992) (concluding the defendant, who knew he was subject to epileptic seizures, and who had been informed by both his doctor and the state Department of Transportation that he was not entitled to drive, was liable for the resulting crash). Significant to this analysis, however, is the fact that criminal responsibility stems from a defendant's pre-existing, actual knowledge of his or her condition and his or her choice to drive. *Cheatham*, 615 A.2d at 806-07. "The defining difference between the epileptic who drives with the knowledge that he or she is seizure prone and the unsuspecting epileptic who drives is choice. One chooses to take the risk; the other does not know he is taking the risk." *Id.* In this case, the prosecution presented no evidence that Dalton knew she was likely to experience the sort of psychotic episode that she ultimately did suffer. Therefore, the epilepsy hypothetical was inapposite.

Even where a defendant does, in fact, possess such knowledge in advance, the courts treat his or her behavior as reckless, rather than knowing. *See id.* ("Cheatham's disregard for the safety of others was sufficiently reckless and wanton to rise to the level of criminal culpability."); *Robertson*, 109 S.W.3d at 21 (the defendant's decision to drive "was a conscious choice in disregard of the unjustifiable danger his driving posed."); *Freeman*, 1995WL66582 at 3 ("Freeman's disregard of the risk was a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused's point of view."). To the extent, then, that the jury followed the prosecutor's hypothetical, it permitted them to convict Dalton if they concluded that she had behaved recklessly by failing to take her medications—they wouldn't have needed to find she acted knowingly, thus reducing the prosecution's burden.

In any event, in the context of a psychiatric illness the analysis should differ. *See Commonwelath v. Shin*, ___ N.E. 3d ___, ___ 2014WL4745347 (Mass. App.2014). In *Shin*, the Court of Appeals of Massachusetts analyzed the criminal culpability of one who, for whatever reason, has failed to take prescribed psychiatric medication. *Id.* at 5. In that case, the defendant had a significant history of mental illness, including having experienced auditory hallucinations and grandiose thinking. *Id.* at 2. He was diagnosed as schizophrenic, as well as having a separate personality disorder. *Id.* at 2-

4. At the time of the offense, the defendant had not been taking his prescribed medication for a number of reasons. *Id.* at 2-3. At one point, there was evidence that the defendant had trouble paying for his prescriptions. *Id.* at 2. There was also evidence that the defendant had "a significant history of noncompliance with his prescribed medication…." *Id.* at 4.

The trial court in *Shin* had conducted an analysis similar to that involved in those cases where voluntary intoxication intersects with issues of mental illness. *Id.* In such cases, defendants can be found liable if they knew or had reason to know that the consumption of drugs or alcohol would "activate a latent mental illness or intensify an active mental disease," resulting in an inability to conform their conduct to the law. *Id.* (*quoting Commonwealth v. Berry*, 931 N.E.2d 972, n.9 (2010)). The trial court concluded that the defendant knew that if he didn't take his medication, he would be likely to commit additional crimes, yet he stopped taking the medicine anyway. *Id.* at 3. The Massachusetts Court of Appeals reversed.

The Massachusetts Court of Appeals noted that "it is not at all clear that the situations are analogous; mentally ill people fail to take prescribed medication for a myriad of reasons, including, for example, side effects that may be otherwise dangerous to their health." *Id.* at 5. That Court also noted that some individuals cannot afford their medications or lack access to proper medical care. *Id.* The Court

pointed out that, unlike those cases where an individual consumes a substance that renders him or her incapacitated, in the case before it, "[the defendant's] mental illness is not *caused* by his failure to take medication, even though the medication might alleviate it somewhat or even entirely." *Id.* The Court concluded that in such a case, the question was limited to only whether the defendant had capacity at the time of the offense, and nothing more. *Id.* A different outcome, it noted, "could be used to argue that every mentally ill defendant who had ever taken helpful medication in the past, but discontinued it, was criminally responsible." *Id.*

As in *Shin*, the record in this case is clear that Dalton was suffering from an illness that was not self-induced. Furthermore, and perhaps more importantly, the prosecution presented absolutely no evidence that Dalton had ever suffered from a similar sort of problem or that she had any reason to know that she was likely to have such a break from reality if she stopped taking her medication. To the extent that her previous medication may have alleviated her symptoms (another argument without any support in the record), the evidence was that Dalton stopped taking her medication because: 1) Medicaid would no longer pay for the medication prescribed by her doctor, and she could not afford to fill the $190 prescription; and 2) the alternative medicines, prescribed at the request of Medicaid, caused adverse side effects that she could not tolerate. (9/18/12, pp.122, 164)

Thus, to summarize this case, Dalton had never suffered a previous incident of this kind. She had no reason to know that she needed to take medication to prevent such an incident (if, indeed, such medication would have prevented the incident at all). She could not afford the prescribed medication, and Medicaid, her medical safety net, wouldn't pay for the medication prescribed by her doctor. This is a factual scenario akin to that in *Shin*, not those presented in the cases of drivers suffering from previously diagnosed epilepsy. By suggesting otherwise, the prosecutor blatantly misrepresented the law to the jury.

b. Misrepresenting the state of the evidence

During closing argument, counsel must limit his or her arguments to evidence admitted during trial, reasonable inferences drawn therefrom, and instructions of law. *People v. Gladney*, 250 P.3d 762, 769 (Colo.App.2010). "A prosecutor may not, however, misstate the evidence…." *Id.* Such misstatement is improper. *People v. Eckert*, 919 P.2d 962, 967 (Colo.App.1996). In fact, the American Bar Association Standards for Criminal Justice clearly note that "[i]n closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." ABA, *Standards for Criminal Justice*, Standard 3-5.8 (3rd ed. 1993). This is particularly important in the case of a prosecutor's argument "because

of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." *Id.*

In this case, however, the prosecutor misstated both the evidence that had been presented and the inferences that could properly be drawn from that evidence. During cross-examination, in response to a question from the prosecutor, Dalton noted that her prescribed medication, Cymbalta, cost $190 per month, and she noted that she couldn't afford to pay for it. (R.Tr. 9/18/12, p.164) Yet during closing arguments, the prosecutor attempted to argue that Dalton could, in fact, afford her prescription by hypothesizing that she spent $150 per month on cigarettes and then telling the jury that the medication cost only $145 per month. (R.Tr. 9/19/12, p.149)

The prosecutor also asked Dalton, on cross-examination, whether she had ever asked to borrow money from her family. (R.Tr. 9/18/12, pp.167-69) Dalton attempted to respond that she had not, on account of the fact that her siblings didn't have money they could lend to her. (Id.p.169) The prosecutor cut off the response, however. (Id.) During closing, the prosecutor then asserted that Dalton had "made a decision" not to borrow money. (R.Tr. 9/19/12, p.149) She also argued that Dalton "made a decision not to save…." (Id.) However, at no point was Dalton asked about

whether she had attempted to save up the money in order to pay for her prescription medications. In fact, what Dalton testified was that

> We were already living at the end of 16 Road in the desert. We still—most of our money went to the gas tank. I had no money to afford this [the medication]. I was getting unemployment. I was only getting half my unemployment because it was being garnished. So, you know, I mean, I had barely—hardly any money to live on. I didn't even get $190 at the time.

(R.Tr. 9/18/12, p.165)

In some cases, perhaps, these misstatements would be insignificant. However, in this case the prosecutor urged conviction of Dalton based on precisely these facts. She argued that these "decisions" required that the jury hold Dalton accountable for what happened later—i.e. her mental break with reality and the resulting damage. (R.Tr. 9/19/12, pp.149-50) Thus, the prosecutor's misrepresentations of the facts and resulting inferences went right to the heart of its theory of guilt, and therefore significantly prejudiced Dalton.

c. Urging conviction on improper bases

Most troubling of all the misconduct was the prosecutor's attempt to inflame the passions of the jury by appealing to prejudices against poor people. "A prosecuting attorney represents all the people, including the defendant who was being tried. It is his duty to see that the State's case is presented with earnestness and vigor,

but it is equally his duty to see that justice be done by giving the defendant a fair and impartial trial." *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979). It is for that reason that when a prosecutor exploits a jury's "predisposition against some particular segment of society," in order to "stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence." ABA, *Standards for Criminal Justice*, Standard 3-5.8, commentary (3rd ed. 1993). That is why it was decidedly improper for the prosecutor to argue that the jury should convict Dalton because she is poor and belongs to a lower socioeconomic class.

It is, as a general matter, improper for a prosecutor to inject irrelevant issues into trial, either by eliciting such evidence during trial or by making such an argument in closing. *See People v. Lee*, 630 P.2d 583, 591-92 (Colo. 1981); *People v. Munoz-Casteneda*, 300 P.3d 944, 950 (Colo.App.2012); *People v. Adams*, 708 P.2d 813, 815-16 (Colo.App.1985). Furthermore, a prosecutor's intentional injection of such irrelevant and prejudicial evidence constitutes misconduct. *Lee*, 630 P.2d at 591-92. A prosecutor must limit his or her closing argument to appropriate advocacy in order to safeguard a defendant's right to a fair trial. *People v. Walters*, 148 P.3d 331, 334 (Colo.App.2006); *Berger*, 295 U.S. at 88-89; U.S. Const. amend. VI; Colo. Const. art. II, §§ 16, 23. "For example, it is not proper for a prosecutor to refer to facts not in

evidence or to make statements reflecting his or her personal opinion or personal knowledge. Nor may a prosecutor inflame and appeal to the jury's passions or prejudices." *Walters*, 148 P.3d at 334.

However, such improper argument is particularly troubling when it focuses on a defendant's status as a member of a particular group or segment of society. *See, e.g. U.S. ex rel. Haynes v. McKendrick,* 481 F.2d 152, 159 (2d Cir. 1973) (noting that the prosecutor shouldn't attempt to inject issues of race into a trial); *see also Harris*, 888 P.2d at 265 (citing ABA Standards for the proposition that a prosecutor shouldn't make comments calculated to exploit a jury's predisposition against a certain segment of society).

The supreme court has noted that economic class, like race or religion, may form the basis of systematic discrimination. *Cerrone v. People*, 900 P.2d 45, 54 (Colo. 1995) (discussing economic class in the context of a *Batson* challenge). Furthermore, disparate treatment on the basis of class is an affront to equal protection, just as is disparate treatment on the basis of race, gender, or religion. *See, e.g. U.S. ex rel. Mertz v. State*, 423 F.2d 537, 541 (3d Cir. 1970); *Allen v. State*, 970 A.2d 203, 217 (Del. 2009); *People v. Andrews*, 276 N.W.2d 867, 868 (Mich. App.1979). As the Third Circuit Court of Appeals so aptly stated:

> It is fundamental to our conception of a fair trial that equality of treatment must be afforded to all without regard

> to differences in social status or economic condition. In a society which cherishes the ideal of equal justice for all and seeks to accord the equal protection of the laws to all those who are accused of crime, it would be difficult to accept any other view.

Mertz, 423 F.2d at 541. Thus, even in cases where the question of a defendant's financial condition might arguably relate to his or her motive to commit the crime at issue, courts have been very reluctant to admit evidence of a defendant's status as unemployed or impoverished. *See, e.g. U.S. v. Mitchell*, 172 F.3d 1104, 1107-10 (9th Cir. 1999) (*quoting* II Wigmore, Evidence §392 for the proposition that permitting the admission of evidence of a defendant's poverty would "put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly those of violence."); *Vitek v. State*, 453 A.2d 514, 516 (Md. 1982) (noting that the evidence of the defendant's poverty was both irrelevant and significantly more prejudicial than probative); *Andrews*, 276 N.W. 2d at 868-69 (same).

In this case, then, the prosecutor's comments regarding Dalton's unemployment and poverty, being entirely irrelevant, were highly improper and prejudicial. The prosecutor sought to inflame the prejudices of jurors against poor people, playing on the culture-war stereotype of the lazy person living off government funds.

The prosecutor urged the jury to consider the fact that Dalton and Burris were living on unemployment. (R.Tr. 9/19/12, p.149) Although she hadn't asked Dalton about any attempts she had made to find employment, the prosecutor nonetheless made the sarcastic and unsubstantiated insinuation to the jury that she "didn't hear anyone talking about going to try and find a job during that case [sic.] to better their situation, but they were forced, it was put upon them that they had to live in the desert." (Id.) This argument was plainly calculated to stir the jury's disapproval towards two individuals who were living off their unemployment checks from the government while, according to the prosecutor, they were "out hiking in the desert on a day-to-day basis." (Id.) Thus, the prosecutor invoked the image of the so-called welfare queen, irresponsibly living off the state's handouts without attempting to support herself.

The prosecutor attacked Dalton for failing to save her money, although the evidence presented strongly supports an inference that Dalton had no money to be saved. (Id., R.Tr. 9/18/12, p.165) She told the jury that Dalton should have borrowed money from her family, which Dalton testified she could not do, as her family too lacked the resources. (Id.p.169; R.Tr. 9/19/12, p.149) Again, the prosecutor attempted to paint a picture of Dalton as irresponsible and to suggest to

the jury that, as an irresponsible person, she should be found guilty, regardless of her mental state at the time of the actual incident.

The prosecutor also sought to provoke the jury's scorn towards Dalton by suggesting that she spent her limited money on cigarettes instead of on her anti-depressant medication. (R.Tr. 9/19/12, p.149) The fact that the prosecutor was injecting the issue of Dalton's poverty into her argument is demonstrated through the following hypothetical. A person of means, suffering from the same set of issues as Dalton, would be able to purchase both cigarettes and medication. Therefore, in a wealthy person's case, where she, like Dalton, chose to cease taking medication, the prosecutor couldn't similarly assert that the defendant had made an irresponsible choice to spend her money on cigarettes instead of getting her necessary medication. (Id.pp.149-50) Only in the case of an impoverished defendant would such an argument carry persuasive value.

The fact that the prosecutor waited until rebuttal argument to "hit the poverty evidence hard," "when the judge's instructions were long past and defense counsel could not respond," supports a conclusion that this misconduct was very prejudicial to Dalton. *Mitchell*, 172 F.3d at 1107, 1111. These arguments were the very last ones heard by the jurors before they retired to deliberate.

As noted above, the prosecutor's use of Dalton's alleged decisions that, if ever, were made months before this incident, in order to argue her guilt, improperly represented the law to the jury. It likewise sought to influence the jury to make a decision on an improper basis, based on prejudices they might have harbored against the poor and unemployed. It is anathema to our system of justice to permit a conviction to stand that rests on such appeals to biases. The outrageous argument in this case, therefore, denied Dalton a fair trial and entitles her to a new one.

CONCLUSION

For the reasons discussed in section I of this Opening Brief, this Court should vacate Dalton's conviction. In the alternative, for the reasons discussed in section II, this Court should reverse Dalton's convictions and remand her case for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender

AUDREY E. BLANCO, #37930
Deputy State Public Defender
Attorneys for
Linda Ecco Dalton
1300 Broadway, Suite 300
Denver, Colorado 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on January 15, 2015, a copy of this Opening Brief of Defendant-Appellant was served on Catherine P. Adkisson of the Attorney General's Office via Integrated Colorado Courts E-filing System (ICCES).

K. Root