DATE FILED: April 14, 2015 11:44 AM

COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Mesa County District Court Honorable Valerie J. Robison, Judge Case No. 12CR34	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. LINDA ECCO DALTON, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 12CA2407
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains **5,233** words.

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

For the party responding to the issue:

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

/s/ Carmen Moraleda

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

STATUTES

STATEMENT OF THE CASE

Following a trial, a jury found defendant, Linda Ecco Dalton, guilty of criminal mischief ($1,000-20,000), after she drove her car into the garage door of a used-car business (PR. CF, Vol. I, pp. 1, 89; R. Tr. 9/19/12, p. 161).

The trial court sentenced her to two years' probation (R. Tr. 10/12/12, p. 18).

In this appeal, defendant contends that the evidence was insufficient to support her conviction because the prosecution failed to establish she acted knowingly when she drove into the garage. She also argues, for the first time on appeal, that the prosecution committed misconduct during voir dire and closing argument.

STATEMENT OF THE FACTS

Defendant had a history of depression (*see* R. Tr. 9/18/12, p. 122). Approximately three months before this incident, she stopped taking her medication because Medicaid no longer covered the prescription (*id.*). Her boyfriend, with whom she lived, testified that after she

stopped taking her medication, she started acting strange, her sleep pattern changed, and she seemed confused at times (R. Tr. 9/19/12, pp. 7-9, 21, 33).

In November 2011, defendant got in her boyfriend's car alone, drove away for miles, and drove the car into a used-car lot (R. Tr. 9/18/12, pp. 38, 58-60; PR. (Env.) Vol. IV, People's Ex. 12). She actually went through the lot's garage door and into the lot, causing approximately $17,526 in damage (PR. (Env.) Vol. IV, People's Exs. 8, 9a-c).

The officer who reported to the vicinity of the incident spoke with defendant (R. Tr. 9/18/12, p. 63). Defendant told him that voices in her head told her to drive her car through the "big red door" (*id.*). She also told the officer that she was "the oracle and that she could not die," and that she had to drive through the big red door (*id.* at 65). The "voices" had also told her in the past to "throw herself out of a window or other bad stuff" (*id.* at 65-66). She also said that she directed movies while she was asleep, and that "Kevin Costner and Bruce Willis were looking for her because she was their long-lost child" (*id.* at 95).

After taking defendant to the hospital, the officer returned to the scene to investigate the crash (*id.* at 66). The officer was familiar with a used-car business called "Car Barn," which had a large red garage door, and he surmised that it might be the big red door defendant had referred to (*id.* at 67). When he got there, he saw that an SUV had driven through the garage door, which was broken and scattered on the ground (*id.* at 67-68). The garage was in disarray, several motorcycles were leaning against each other in front of the SUV, and there was clutter all around the SUV (*id.* at 68, 174; PR. (Env.) Vol. IV, People's Exs. 7b-c, 9a-c, 10a-c).

The officer did not see any signs that the SUV had tried to stop before entering the garage, such as skid marks (R. Tr. 9/18/12, pp. 76, 81). He opined that the crash was not a traffic accident, but rather an intentional act (*id.* at 76, 79, 82).

A few weeks later, the officer spoke with defendant on the phone (*id.* at 82-83). She told him that the day of the crash felt "like it was a dream," that she had not been sleeping before that, she had not taken her medication for three months, and that she drove into the red door

because she "was sick of life" (*id.* at 83). She also told the officer that she was "bipolar, maybe borderline schizophreni[c], and gravely disabled," and that the night of the crash she was not under the influence of any drugs (*id.* at 83-84).

At trial, during her direct examination, defendant testified that she had stopped taking her depression medication three months before the incident because Medicaid no longer covered it, and that a month before the incident, she started to feel "closer to God" (R. Tr. 9/18/12, pp. 120-23). She also talked about some of the side effects of stopping her medication (*id.* at 124). On the night of the crash, she had taken a couple of sleeping pills that her boyfriend had given her, and it felt like she was having a dream (*id.* at 125-26). She thought she was "flying through the air, and then [she] saw a red door and . . . decided to fly through it" (*id.*). She could not remember how she got out of the red door, but remembered running down the road (*id.* at 125-26). She was taken to Colorado West Mental health, where she remained for six days (*id.* at 127). She had some memories of her stay at the hospital, but she did not know what she was doing (*id.* at 128). Nor did she remember

her conversation with the officer a few weeks after the incident (*id.* at 129).

During her cross-examination, defendant testified she did not remember hearing voices, what the voices told her, or that she said that she heard voices (*id.* at 162-63). All she remembered was taking the pills, her boyfriend being worried, and then waking up in the mental hospital and finding out that she had run into the Car Barn (*id.* at 163).

Defendant did not raise a defense of insanity or impaired mental condition at trial (*see* PR. Vol. I, pp. 46, 63-65).

SUMMARY OF THE ARGUMENT

Under the substantial-evidence test, the evidence was sufficient for the jury to conclude that defendant knowingly and voluntarily crashed her car into the used-car business, and contrary to what defendant contends, the prosecution did not have to refute that she acted in a "sleep-like" state. In any event, the prosecution presented ample competent evidence demonstrating that defendant had the required mental state, and it was for the jury to assess defendant's

credibility and the plausibility of her defense, in light of all the evidence.

The prosecution did not commit misconduct during voir dire or closing argument. Its questions and arguments were aptly based on the evidence and the applicable law. But even assuming that they were improper, none rose to the level of tremendously egregious conduct required to constitute plain error, nor were they so seriously prejudicial to warrant reversal under that standard.

ARGUMENT

I. The evidence was substantial and sufficient for the jury to find that defendant acted knowingly when she drove her car through the garage door.

Defendant contends that the evidence was insufficient to support her conviction for criminal mischief because the evidence supported that she acted in a "sleep-like state and the prosecutor did not offer evidence to refute that inference" (OB, pp. 9-16).

A. Standard of Review

The People agree that defendant preserved this claim by moving for a judgment of acquittal at the conclusion of the prosecution's case-in-

chief (R. Tr. 9/18/12, pp. 112-13). The People also agree that this Court reviews de novo claims challenging the sufficiency of the evidence. *Oram v. People*, 255 P.3d 1032, 1038 (Colo. 2011). The standard of review for assessing the sufficiency of the evidence supporting a guilty verdict is the same as that which pertains to review of the denial of a motion for judgment of acquittal. *People v. Martinez*, 165 P.3d 907, 914 (Colo. App. 2007).

B. Law

Substantial-Evidence Test. In undertaking a sufficiency analysis, a reviewing court must determine "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and 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 beyond a reasonable doubt." *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973). The substantial evidence test affords the same status to both direct and circumstantial evidence. *Id.*

Under this analysis, a reviewing court must give the prosecution the benefit of every reasonable inference that can be drawn from the

evidence. *People v. San Emerterio*, 839 P.2d 1161, 1164 (Colo. 1992). And it must defer to the jury's determinations of the credibility of witnesses, the weight of the evidence, and its resolutions of conflicting evidence. *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983). "It is the jury which should decide the difficult questions of witness credibility and the weight to be given to conflicting items of evidence." *People v. Gibson*, 203 P.3d 571, 575 (Colo. App. 2008). Even where reasonable minds could reach different conclusions from the evidence, the evidence is sufficient to sustain a conviction. *People v. Fuller*, 791 P.2d 702, 706 (Colo. 1990).

Criminal Mischief. A person commits criminal mischief when "he or she *knowingly* damages the real or personal property of one or more other persons . . . in the course of a single criminal episode." § 18-4-501(1), C.R.S. (2014) (emphasis added).

"Knowingly"—Statutory Definition.

> A person acts "knowingly" . . . with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

§ 18-1-501(6), C.R.S. (2014).

> A person acts "knowingly" . . . with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

Id.

A "voluntary act" means "an act performed consciously as a result of effort or determination." § 18-1-501(9), C.R.S. (2014).

C. Analysis

The record contains substantial evidence that defendant acted knowingly and committed a voluntary act when she drove her car into the garage door. While a person's "state of mind is normally not subject to direct proof," it can be inferred from "her actions and the circumstances surrounding the occurrence." *People v. Phillips*, 219 P.3d 798, 800 (Colo. App. 2009); *see also People v. Thompson*, 121 P.3d 273, 278 (Colo. App. 2005) ("in pulling the trigger of a loaded gun held at close range to the head of a police officer, defendant evidenced an intent to kill or seriously injured him"). Not surprisingly, evidence of a defendant's intent "can rarely be proven other than by circumstantial or indirect evidence," and the jury may properly infer the intent to commit a crime from the defendant's conduct and the circumstances of the

crime. *People v. Mandez*, 997 P.2d 1254, 1264 (Colo. App. 1999); *see also People v. Chastain*, 733 P.2d 1206, 1212 (Colo. 1987) ("[D]irect proof of the defendant's state of mind is rarely available, and consequently, resort must necessarily be had to circumstantial evidence on this element."); *People v. Frayer*, 661 P.2d 1189, 1191 (Colo. App. 1982) (because direct evidence will rarely be available to establish a defendant's mental state, circumstantial evidence and permissible inferences drawn therefrom generally constitute the basis for establishing the requisite state of mind).

While defendant told the officer on the day of the incident that it had felt like a dream and that "voices" told her to go through the red door, she later told him that she drove through the door because she was "sick of life" (R. Tr. 9/18/12, pp. 63, 83-84). This testimony alone supported that defendant was aware of what she was doing and intentionally drove her car through the garage. *See White v. Muniz*, 999 P.2d 814, 817 (Colo. 2000) ("Juries may find it difficult to determine the mental state of an actor, but they may rely on circumstantial evidence in reaching their conclusion. No person can pinpoint the thoughts in

the mind of another, but a jury can examine the facts to conclude what another must have been thinking."); *Aguero v. Colorado Communs. Corp.*, 946 P.2d 519, 523 (Colo. App. 1997) ("circumstantial evidence is . . . admissible in criminal trials and may be used to prove the mens rea of 'knowingly.'"). Moreover, defendant was aware of the side effects of discontinuing her medication, yet she decided to drive (R. Tr. 9/18/12, pp. 124).

Further, as noted above, defendant did not raise a defense of insanity or impaired mental condition, and thus she did not assert that her mental-health problems prevented her from forming the required culpable mental state or that they grossly impaired her perception or understanding of reality. *See People v. Vanrees*, 125 P.3d 403, 407-08 (Colo. 2005) ("A defendant seeking to introduce evidence raising the affirmative defense of impaired mental condition must comply with the statutory pleading requirements of the affirmative defense of 'not guilty by reason of insanity.'").

But defendant was allowed to testify extensively about her mental issues, depression, sleeping problems, the antidepressants she had been

taken, the side effects of discontinuing her medication, and how she felt around the time of the incident (R. Tr. 9/18/12, pp. 120-42). Defendant's boyfriend also extensively testified at trial regarding defendant's behavioral problems after she stopped taking her medication, and then leading to the incident (R. Tr. 9/12/12, pp. 92-95, 99-101). Thus, the issue of defendant's mental health was placed before the jury. But, as stated above, because defendant did not plead the defense of insanity or impaired mental condition, the prosecution was not required to disprove it. *See Vanrees*, 125 P.3d at 408 (once a defendant raises a "not guilty by reason of insanity," the burden of proof is on the prosecution to prove the defendant "not mentally impaired beyond a reasonable doubt").

It was for the jury to determine whether defendant acted with the required mental state, and whether her acts were voluntary, when she drove through the door based on her actions, her conduct, and the surrounding circumstances. *See Maraggos v. People*, 486 P.2d 1, 3 (Colo. 1971) (the mind of an offender "may be read from his acts, his conduct, and the reasonable inferences which may be drawn from the circumstances of the case."). It was also for the jury to assess

defendant's credibility and the weight to be given her testimony, as well as the testimony of the others witnesses. *See People v. Robb*, 215 P.3d 1253, 1257 (Colo. App. 2009) ("the determination of the credibility of witnesses is solely within the province of the jury"); *People v. Ramirez*, 30 P.3d 807, 809 (Colo. App. 2001) (a reviewing court does not sit as a thirteen juror and makes its own credibility determination); *see also, e.g., Martinez*, 165 P.3d at 915 ("Although we acknowledge the absence of any direct evidence establishing that defendant obtained or viewed the child pornography, we cannot say the circumstantial evidence was insufficient to prove that defendant *knowingly* possessed the images of child pornography contained on the computer.").

Defendant argues that the evidence was insufficient to support her conviction because the prosecution did not refute that she was acting in a "sleep-like" state when she crashed her car. By so arguing, defendant appears to rely on the pre-substantial evidence test, known as the "reasonable hypothesis of innocence" test, long ago overruled by the Colorado Supreme Court. *See Gonzales*, 666 P.2d at 127 (noting that the "reasonable hypothesis of innocence" test was abandoned in

Bennett in favor of the substantial evidence test).[1] In *Bennett*, the supreme court specifically "cast aside as outmoded and as confusing the requirement that the prosecution's evidence, when circumstantial, must exclude every reasonable hypothesis other than that of guilt and no longer require such an instruction or such a test to be applied." 515 P.2d at 469; *see also People v. LaRosa*, 2013 CO 2, ¶ 35 ("The sufficiency of the evidence test is an elemental test. Its focus is on the 'substantive elements of the criminal offense.'").

Therefore, contrary to defendant's contention, the prosecution did not *need* to refute that she acted in a sleep-like state, because substantial evidence proved that she acted knowingly and committed a voluntary act. *Bennett*, 515 P.2d at 469. Regardless of the merits of defendant's "sleep-like" theory, the prosecution amply established by circumstantial evidence that defendant was aware of her conduct and

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[1] *See People v. Naranjo*, 509 P.2d 1235 (Colo. 1973) (describing the "reasonable hypothesis of innocence" test as follows: where the guilt of a defendant is proven by circumstantial evidence, the test for denial of a motion for judgment of acquittal is whether there is evidence in the record from which a jury can find beyond a reasonable doubt that the circumstances are such as to exclude every reasonable hypothesis of innocence).

voluntarily drove her car through the garage door. Indeed, defendant drove for miles before getting to Car Barn, which additionally shows she was sufficiently conscious and alert to be able to drive (*see* PR (Env.) Vol. IV, People's Ex. 12; R. Tr. 9/19/12, pp. 141-42). The record supports that the jury simply rejected defendant's theory, as it was the jury's prerogative.

Also, contrary to defendant's contention, the prosecution did not need to show that she "intended to arrive at the Car Barn," or that she had any connection with the business owners (*see* OB, p. 16). The prosecution only needed to prove that defendant knowingly and voluntarily drove her car into someone else's property, causing damage. *See* § 18-1-501(6), (9).

To the extent defendant argues that her mental condition rose to the level of statutory impaired mental condition (*see* OB, p. 13), this Court should reject that claim because she did not plead insanity or impaired mental condition, and thus she is precluded from so doing on appeal. *See Vanrees*, 125 P.3d at 409; *cf. People v. Requejo*, 919 P.2d 874, 878 (Colo. App. 1996) (the defendant did not claim that he was

unable to understand the reality and thus "perception of reality" was not an issue).

In sum, the evidence was substantial and sufficient to support that defendant acted knowingly and committed a voluntary act when she drove her car into Car Barn's property. As such, this Court should reject her claim and affirm her conviction.

II. The prosecution did not commit misconduct during voir dire or closing argument, much less misconduct that warrants reversal under plain error.

Defendant contends that the prosecution committed misconduct during voir dire and later during closing argument that requires reversal under plain error. As to the former, she argues that the prosecution improperly asked the jurors to precommit or pledge to a result in the case. As to the latter, she argues that the prosecution (1) misstated the law, (2) misrepresented the evidence, and (3) urged the jury to convict on improper bases (OB, pp. 17-40).

A. Standard of Review

The People agree that defendant did not preserve these claims for appellate review. The People also agree that in the absence of a contemporaneous objection to the prosecution's voir dire or closing argument, this Court reviews only for plain error. *See Liggett v. People,* 135 P.3d 725, 735 (Colo. 2006); *People v. Gallegos*, 260 P.3d 15, 27-28 (Colo. App. 2010) ("Prosecutorial misconduct constitutes plain error only when there is a substantial likelihood that it affected the verdict or that it deprived the defendant of a fair and impartial trial.").

The People disagree that defendant preserved a due process violation, that prosecutorial misconduct necessarily affects a defendant's constitutional right to a fair trial, or that constitutional-harmless error review applies to defendant's unpreserved claims of prosecutorial misconduct. *See People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005) ("even constitutional errors are subject to a plain error standard of review" if not properly preserved, and "constitutional harmless error analysis is reserved for those cases in which the defendant preserved his claim for review by raising a contemporaneous

objection"); *People v. Carter*, 2015 COA 24, ¶ 64 (rejecting the defendant's contention that this Court should review prosecutorial misconduct for constitutional harmless error); *see also Martinez v. People*, 244 P.3d 135, 139 (Colo. 2010) (appellate courts "should not reach Colorado Constitutional arguments raised for the first time on appeal").

B. Law and Analysis: Prosecutorial Misconduct Legal Standards

In reviewing prosecutorial misconduct claims, this Court determines first whether the prosecution's arguments were improper, and, if so, whether the misconduct warrants reversal under the proper standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). Under plain error, the challenged misconduct must be flagrantly, glaringly, or tremendously improper, *People v. Arzabala*, 2012 COA 99, ¶ 63, and "so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction," *People v. Cevallos-Acosta*, 140 P.3d 116, 122 (Colo. App. 2005). Prosecutorial

misconduct in closing argument rarely is so egregious as to constitute plain error. *See People v. Constant*, 645 P.2d 843, 846-47 (Colo. 1982).

The prosecution may use every legitimate means to bring about a just conviction, but it has a duty to avoid using improper methods designed to obtain an unjust result. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). In this regard, the prosecution "may comment on the evidence admitted at trial [and] the reasonable inferences that can be drawn from the evidence," and "may . . . point to circumstances that raise questions about, or cast doubt on, a witness's testimony, and may draw reasonable inferences from the evidence as to the credibility of witnesses." *People v. Welsh*, 176 P.3d 781, 788 (Colo. App. 2007).

1. The prosecution's hypothetical during voir dire was proper, but even if it was not, it did not constitute plain error.

During voir dire, the prosecution posed a hypothetical to the potential jurors. It asked whether someone with a seizure disorder should be responsible for causing a wreck when that person had stopped

taking his or her medication knowing that the seizures recurred after being off the medication and nonetheless the person decided to drive a car (Supp. R. Tr. 9/17/12, pp. 137, 157). By posing this hypothetical, defendant asserts that the prosecution improperly urged the jurors to precommit to a result in her case.

First, the hypothetical was proper because it enabled the prosecution to ascertain the potential jurors' biases or preconceived notions regarding personal responsibility of someone under medication for a health condition who decides to stop taking the medication aware of the potential side effects. *See People v. Pena-Rodriguez*, 2012 COA 193, ¶ 50 ("The purpose of voir dire is to determine whether a juror is biased or prejudiced in any way."); *cf. People v. Krueger*, 2012 COA 80, ¶ 50 ("A prosecutor engages in prosecutorial misconduct during voir dire when she misstates the law or intentionally uses the voir dire to present factual matter which the prosecutor knows will not be admissible at trial or to argue the prosecution's case to the jury.") (internal citation and alterations omitted).

Second, contrary to what defendant asserts, the prosecution did not ask the jurors to precommit or pledge to a particular result in light of the hypothetical; it simply asked their views or opinions on the subject to assess their standpoint and determine any bias (*see* Supp. R. Tr. 9/17/12, pp. 137, 156-57). In any event, the capital cases upon which defendant relies to argue that so-called "stake out" or "pre-commitment" questions are impermissible are inapposite because those cases generally address the propriety of inquiring about jurors' views on the death penalty. *See, e.g., United States v. McVeigh*, 153 F.3d 1166, 1205-07 (10th Cir. 1998) (defining "stake-out" questions as those that ask a juror to speculate or precommit to how that juror might vote based on any particular facts, where the defendant sought to ask questions regarding jurors' predisposition to the death penalty); *United States v. Johnson*, 366 F. Supp. 2d 822, 842 (N.D. Iowa, 2005) (discussing definition of "stake-out" questions); *United States v. Fell*, 372 F. Supp. 2d 766, 769-71 (D. Vt., 2005) (addressing the meaning of stake-out question in capital case).

Because the record refutes that the prosecution did anything improper at all, much less egregiously so, this Court should reject defendant's claim.

2. The prosecution's arguments during its closing were properly based on the evidence and the law, but even if they were not, reversal is not warranted under plain error.

Next, defendant contends that the prosecution committed misconduct by misstating the law, misrepresenting the evidence, and urging the jury to convict on improper bases. The record refutes each of those contentions.

The prosecution may comment on the evidence admitted at trial and the reasonable inferences that can be drawn therefrom. *People v. Samson*, 2012 COA 167, ¶ 31; *see also People v. Gladney*, 250 P.3d 762, 769 (Colo. App. 2010) (prosecution may urge the jury to take a certain view of the evidence). It may also employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance. *Samson,* ¶ 31; *People v. Petschow*, 119 P.3d 495, 508 (Colo. App. 2004) (same). It may

not misstate the law or refer to facts not in evidence. *People v. McMinn*, 2013 COA 94, ¶ 62.

This Court evaluates claims of improper argument in the context of the argument as a whole and in light of the evidence before the jury. *Samson,* ¶ 30. In doing so, it recognizes that prosecutors have wide latitude in the language and style they choose to employ, as well as in replying to an argument by opposing counsel. *Id.* In addition, because arguments delivered in the heat of trial are not perfectly scripted, reviewing courts accord prosecutors the benefit of the doubt when their remarks are ambiguous or simply inartful. *Id.*

Misstating the Law. Defendant alleges that the prosecution misstated the law by arguing that defendant was supposed to be on medication, yet she chose to buy cigarettes instead of her medication, and then by analogizing this case to a hypothetical case of an epileptic who decided not to take medication and chose to drive, despite the risk of having a seizure (R. Tr. 9/19/12, p. 150) (OB, p. 27). Defendant argues that the analogy misrepresented the law because, unlike the epileptic hypothetical, she had never suffered a previous similar

incident before, had no reason to know she needed to take medication to prevent such an incident, and she could not afford the medication.

Contrary to defendant's contention, the prosecution did not argue that defendant should be *criminally* responsible because the decisions she made regarding her medication and driving her car. That was not the point of the analogy. The prosecution simply used the epileptic analogy to exemplify personal responsibility for the decisions one makes. This argument was proper rebuttal argument in response to the defense's theory that the prosecution had not proved the mens rea of the crime, because the heart of the case indeed was defendant's mental state, her awareness or lack thereof, and the decisions she made leading to the incident. *See Samson,* ¶ 30 (prosecutors have wide latitude in the language and style they choose to employ, as well as in replying to an argument by opposing counsel).

Also, contrary to her contention, the prosecution's argument was proper in light of defendant's testimony, including that she had been "forced off" her medication and did not have money to pay for it (R. Tr. 9/18/12, p. 122). So the prosecution could properly argue that defendant

made the decision to buy cigarettes instead of her medication. Moreover, while defendant argues that she had no reason to know she was likely to have "such a break from reality if she stopped taking her medication," (OB, p. 31), she was aware that stopping the medication had side effects because she had "felt them before" (R. Tr. 9/18/12, pp. 124, 165-66). Besides, as noted above, the point of the prosecution's argument was not that defendant was guilty because she failed to take her medication, but rather because she acted knowingly and voluntarily.

Thus, the analogy was proper in light of the evidence and defendant's theory of defense.

Misrepresenting the Evidence. Defendant also alleges the prosecution misrepresented the evidence by arguing that her depression medication cost only $145 per month, when she testified that it cost $190 per month (R. Tr. 9/18/12, p. 164; 9/19/12, p. 149). Contrary to defendant contention, it seems apparent that the reference to $145 as opposed to $190 was a lapsus of memory, not an intentional misrepresentation (R. Tr. 9/19/12, p. 149 (the prosecution simply

rhetorically asked, "Weren't the meds like 145 a month?)). *See, e.g., Samson*, ¶ 31 (because arguments delivered in the heat of trial are not perfectly scripted, reviewing courts accord prosecutors the benefit of the doubt when their remarks are ambiguous or simply inartful).

Defendant also alleges that the prosecution misrepresented the evidence by arguing that she had "made the decision" not to borrow or save money. But defendant testified that she "didn't ask [her] siblings to borrow money," and therefore the prosecution could properly infer that she made the decision not to borrow money from them (R. Tr. 9/18/12, p. 167). Similarly, defendant testified that she was a smoker and used to smoke about ten cigarettes per day, and thus the prosecution could properly infer that defendant made the decision not to save because she could have used the cigarette money to buy her medicine. *See McMinn*, ¶ 61 ("Prosecutors may comment on the evidence admitted at trial and the reasonable inferences that can be drawn therefrom.").

Therefore, the comments were proper in light of the evidence.

Urging Jury to Convict on Improper Bases. Lastly, defendant contends that the prosecution, during rebuttal, improperly appealed to the prejudices of the jury by urging the jury to convict her on the basis of her socioeconomic status. She specifically complains that the prosecution urged the jury to consider that she and her boyfriend were living on unemployment, blamed her for not trying to get a job, and attacked her for failing to save or borrow money to improve her situation (*see* R. Tr. 9/19/12, pp. 149-50).

Defendant's claim takes the prosecution's comments out of context, failing to acknowledge that defendant herself injected the issue of her socioeconomic status in the case, and thus the prosecution could properly comment on it. In fact, during her direct examination, defendant testified that she was "forced off of" her medication, Medicaid would not pay for it, and she was "stuck out in 16 Road a lot because we didn't have a lot of gas money or money" (R. Tr. 9/18/12, p. 122). During her redirect, she testified that she and her boyfriend "were forced out into the desert" (*id.* at 174). The defense also elicited testimony from defendant's boyfriend that he was unemployed, that he and defendant

drove around and picked up scrap metals but never went off for the day, and that they lived in a trailer (R. Tr. 9/19/12, pp. 7-8, 20-21).

Any commentary on that evidence and any reasonable inferences to be drawn therefrom, including those tending to rebut the theory of defense, were appropriate. And the prosecution was entitled to urge the jury to take a certain view of the evidence that defendant strategically chose to introduce in her defense. *People v. Sheffer,* 224 P.3d 279, 291 (Colo. App. 2006) (prosecution has wide latitude to comment on the strength and significance of the evidence, and the reasonable inferences that may be drawn from the evidence).

Because the prosecution's comments and remarks were within the bounds of proper advocacy, defendant's claim fails. But even if, for the sake of argument, any of the comments were improper, none rose to the level of tremendously improper conduct necessary to qualify as plain error. *See Arzabala*, ¶ 63 ("unless the prosecution's conduct is fragrant or glaringly or tremendously improper, it is not plain error") (internal quotations omitted).

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request that this Court affirm defendant's conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **AUDREY E. BIANCO**, Deputy State Public Defender, and all parties herein via Integrated Colorado Courts E-filing System (ICCES) on April 14, 2015.

/s/ Tiffiny Kallina