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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 Number 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, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12CA2407

REPLY BRIEF OF DEFENDANT-APPELLANT

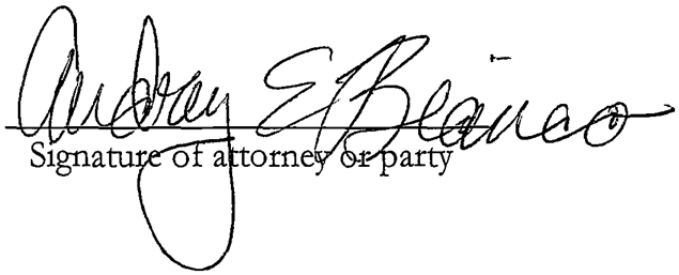
CERTIFICATE OF COMPLIANCE

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:

This brief complies with C.A.R. 28(g) because:

It contains 2,629 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



Signature of attorney or party

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. The prosecution presented insufficient evidence that Ms. Dalton knowingly and voluntarily drove into the Car Barn.

The Attorney General argues that the prosecution had no obligation to refute the defense evidence that she was acting in a "sleep-like state" or that she was mentally impaired at the time of these events. (Ans. Br. pp.11-12) Ms. Dalton agrees, and asserts that this was not the argument she intended to make in the Opening Brief. Rather, Ms. Dalton's argument is that the reviewing court, in considering a challenge to the sufficiency of the evidence, must consider the totality of evidence presented at trial and consider all of it in the light most favorable to the prosecution—in other words, it cannot limit its review to evidence presented by the prosecution. *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999); *People v. Robb*, 215 P.3d 1253, 1257 (Colo. App. 2009). Furthermore, while the reviewing court should not attempt to "determine what specific weight should be accorded to various pieces of evidence," or to resolve conflicts in the evidence, it is the duty of the reviewing court to determine whether there is more than a mere modicum of evidence to support the verdict. *Sprouse*, 983 P.2d at 778. "[V]erdicts in criminal cases may not be based on

guessing, speculation, or conjecture." *Id.* Contrary to the Attorney General's assertion, this is not an argument requiring the application of the "reasonable hypothesis of innocence" doctrine. (Ans. Br. p.13) This is, in fact, simply the "substantial evidence test" as it is properly applied in this case.

Thus, the record reveals that Mr. Burris administered two sleeping pills to Ms. Dalton on the night of these events. (R. Tr. 9/19.12, p.20) Ms. Dalton believed she was asleep and dreaming while she was, in fact, driving. (R. Tr. 9/18/12, pp.65, 125) Ms. Dalton drove several miles and crashed her car into the Car Barn. (R. Tr. 9/19/12, pp. 141-42) Ms. Dalton was not connected to the Car Barn in any way, and thus there was no evidence she had a motive to harm them.[1] (R. Tr. 9/18/12, p.52) When the police found Ms. Dalton, she was disoriented and saying a variety of things that didn't make sense. (Id. pp.95-96). After Ms. Dalton was hospitalized she continued to remain disoriented and delusional. (Id. pp.181-83) During that period, Ms. Dalton told Officer Peck that she had driven through the door because she was "sick of life." (Id. p.83) The Attorney General asks this Court to consider only the fact that Ms. Dalton drove for a distance and that she made a statement that she was sick of life. (Ans. Br. pp.10, 15) Looking at this evidence as a whole,

[1] The Attorney General is correct that the prosecution did not need to prove Ms. Dalton had targeted the Car Barn. (See Ans. Br. p.15) Rather, this evidence that supports the absence of a motive is another relevant piece of circumstantial evidence to support the conclusion that Ms. Dalton did not act knowingly.

even in the light most favorable to the prosecution, it is clear that only a mere modicum supports a conclusion that Ms. Dalton knew what she was doing on the night of the crash.

The Attorney General also champions the same fallacy as that maintained by the prosecution at trial—that Ms. Dalton "was aware of the side effects of discontinuing her medication, yet she decided the drive." (Ans. Br. p.11) First of all, this argument assumes the conclusion by suggesting that Ms. Dalton "decided" to drive, regardless of her awareness that night. Therefore, the reasoning is circular and does not support the Attorney General's conclusion. Second, and more importantly, the Attorney General's position, like that of the prosecution at trial, is simply not a correct statement of the law or the evidence. (See Op. Br. pp.27-32)

Ms. Dalton's relevant mens rea in this case was that at the time she drove the car through the door of the Car Barn. It was not her state of mind three months earlier, when she stopped taking her medications. In part this is because there is absolutely *no* evidence that Ms. Dalton knew, or even had reason to know, that she would suffer this sort of psychotic break when she stopped taking her medications. The Attorney General is correct; Ms. Dalton did testify that she was aware of the side effects of stopping the medication. (Ans. Br. p.11) However, the Attorney General fails to mention how Ms. Dalton described those side effects. Ms. Dalton testified that she had

experienced the effects of withdrawing her medication in the past, and that they lasted about two weeks. (R. Tr. 9/18/12, p.124) She also described the sensation of that withdrawal as "walking around and all of a sudden it just felt like there was no sound and that kind of thing. It was kinda [sic.] weird." (Id.) There was no evidence presented that Ms. Dalton had previously suffered more severe reactions merely from stopping her medication. Even the reaction she did report had passed many weeks before this incident. (Id.) To the extent that the prosecution chose to rely on her mens rea when she "chose" to stop taking her medication, and assuming without conceding that it could properly do so, the prosecution nevertheless retained the burden of proving that Ms. Dalton knew what was practically certain to happen as a result. This, they did not do. For these reasons and those discussed in the Opening Brief, the evidence of Ms. Dalton's mental state was insufficient and as a result her conviction for criminal mischief should be vacated.

II. The prosecutor committed repeated, flagrant, glaring, tremendously improper conduct that requires that Ms. Dalton receive a new trial.

A. Voir Dire

The Attorney General apparently asserts that a prosecutor only commits misconduct during voir dire if he or she misstates the law or intentionally uses it to present inadmissible evidence. (Ans. Br. p.20) While those are two of the ways of committing misconduct during voir dire, they are not the only two

ways to do so. Where parties are prohibited from using voir dire as an opportunity to educate the jurors on their theory of the case, and where an attorney nonetheless uses it for that purpose, he or she is acting improperly. *See People v. Shipman,* 747 P.2d 1, 3 (Colo. App. 1987) (prosecutor acted improperly by asking a series of questions designed to educate the jurors to give greater credence to police officers' testimony); *cf. also People v. Lybarger*, 790 P.2d 855, 859 (Colo. App. 1989) (*rev'd. on other grounds by Lybarger v. People*, 807 P.2e 570 (Colo. 1991)).

The Attorney General also argues that the prosecution never asked the jurors to commit themselves to any particular result. (Ans. Br. p.21) However, as noted in the Opening Brief, that contention is belied by reviewing the prosecutor's closing argument, in which she argued that Ms. Dalton had made a decision to go off her medications and reminded the jury that "we talked about that in jury selection. We talked about the person who has a seizure disorder who decides to go off their medications…*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*." (R. Tr. 9/19/12, pp.148-50, emphasis added) (See also Op. Br. p.25) The Attorney General's assertion to the contrary is amply refuted by the prosecutor's own words.

Finally, the Attorney General argues that the cases cited in the Opening Brief are "inapposite because those cases generally address the propriety of

inquiring about juror's views on the death penalty." (Ans. Br. p.21) However, the Answer Brief offers no additional explanation as to *why* that difference is significant, such that the reasoning of those cases is inapplicable in this case. (Id.) In point of fact, the distinction between capital cases and other types of criminal prosecutions is immaterial in this context. A defendant has no more right to constitutional due process simply because he or she faces a graver penalty. Before the state may take a defendant's liberty, it must provide him or her with a fair trial before an impartial jury.

B. Misrepresenting the Law and the State of the Evidence

The Attorney General's response to this contention can best be summarized by the statement that "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." (Ans. Br. p.25) This argument is entirely circular because the prosecutor's argument to the jury was that the relevant knowing and voluntary act was Ms. Dalton's decision to stop taking her psychiatric medication. Thus, the prosecutor's intent was precisely what the Attorney General says it was not: to tell the jury that Ms. Dalton was guilty because she knowingly and voluntarily stopped taking her medications.

As discussed at length in the Opening Brief, and unrebutted in the Answer Brief, the person described in the prosecution's hypothetical is *not* similarly situated to Ms. Dalton—Ms. Dalton had no idea she would suffer a

psychotic episode when she stopped taking her medication. (Op. Br. pp.28-32) (Whether she even had the ability to take the medication is a separate question, also discussed in the Opening Brief. (Op. Br. pp.32-34)) The prosecution's argument only makes sense if it is understood to offer a theory of guilt. However, a person is not guilty under the circumstances described where the illness in question is mental, and where the person did not know, in advance, that she would have the type of symptoms she ultimately suffered. The Attorney General's assertion, that the argument was a proper response to Ms. Dalton's testimony that she could not afford her medication, and that she was "forced off" of it also begs the question because Ms. Dalton's testimony could not open the door to a *misstatement of the law*.

The Attorney General also asserts that in making the analogy the prosecutor did not attempt to assert Ms. Dalton should be held *criminally* responsible. (Ans. Br. p.24) Again, this argument appears to ignore entirely the context in which the prosecutor made these statements. The prosecutor made these statements as a part of her *closing argument*, during which she was urging the jurors to *convict* Ms. Dalton of a *crime*. (R. Tr. 9/19/12, p.150) Apparently in the alternative, the Attorney General argues that these statements were proper rebuttal to the defense theory that Ms. Dalton's mental state had not been proven. (Ans. Br. p.24) It is not clear why these statements would

rebut that contention, except to the extent that they urged the jury to apply the wrong law.

The Attorney General also argues that Ms. Dalton did, in fact, know that she would suffer symptoms if she stopped taking her medication. (Ans. Br. p.25) As discussed above, however, Ms. Dalton testified that the sensation of withdrawal from her medication was similar to "walking around and all of a sudden it just felt like there was no sound and that kind of thing. It was kinda [sic.] weird." (R. Tr. 9/18/12, p.124) She stated that such effect lasted only about two weeks, and it was undisputed that she ran out of her medication approximately three months before this event. (Id.) Thus, the prosecution offered no evidence that Ms. Dalton knew she would continue to suffer side-effects after so much time had passed.[2]

With regard to the prosecutor's misstatement of the evidence, the Attorney General argues that the prosecutor's incorrect assertion regarding the cost of medication was merely a lapse of memory. (Ans. Br. p.25) This may be true, but this comment must be read in the context of all of the other statements made by the prosecutor in this case. The prosecutor's statement was, at a minimum, a convenient mistake that happened to strengthen her

[2] The prosecution did not prove that Ms. Dalton's symptoms were actually side-effects of stopping her medication—it is equally plausible that Ms. Dalton's symptoms were the manifestation of a new imbalance, unrelated to her earlier depression.

argument. The prosecutor's declarations, about Ms. Dalton's "decision" not to borrow money from her siblings, ignore Ms. Dalton's testimony that her family had no money to lend her. The statement that Ms. Dalton "chose" not to save is an argument that the Attorney General justifies with reference to Ms. Dalton's cigarette use. (Ans. Br. p.26) Again, however, the prosecutor made this statement without having ever asked Ms. Dalton about any efforts she made to save, and without actually determining if it was even Ms. Dalton who paid for the cigarettes she smoked. When considered with the other misconduct committed by the prosecutor in this case, the misstatements of the evidence appear both deliberate and prejudicial to Ms. Dalton.

C. Urging Conviction on Improper Bases

The Attorney General attempts to defend the prosecutor's statements regarding Ms. Dalton's poverty by saying that they were made only after Ms. Dalton had injected the issue of socioeconomic status into the trial. (Ans. Br. p.27) The Answer Brief argues that the prosecutor was merely attempting to "rebut the theory of defense" by attacking Ms. Dalton's status as a poor person. (Ans. Br. p.28)

It is important to remember that Ms. Dalton never attempted to argue that this incident happened because she was poor. Rather, her theory of defense was that she was essentially unconscious, and believed herself to be dreaming, when the events at issue took place. Furthermore, the prosecutor's

attempt to exploit the juror bias against people of a lower socioeconomic class cannot be dismissed as merely proper comments on the evidence. The prosecutor could have commented on the evidence without disparaging Ms. Dalton by suggesting she was irresponsible, that she *chose* not to save, that she *decided* to spend money on frivolous things like cigarettes instead of medication, that she *never tried* to find employment—at a minimum, those statements were exaggerations of the evidence and they had the effect of urging the jury to convict Ms. Dalton on an improper basis.

Furthermore, the Attorney General asserts that, even assuming the comments were improper, they were not plainly so. (Ans. Br. p.28) However, as discussed at length in the Opening Brief, the law is quite clear—it is improper to attack a defendant based on their status as a member of a disadvantaged group. Such arguments have been repeatedly held to be improper—so much so that it should be second nature to those involved in the justice system that such attacks are inappropriate. *See Harris v. People*, 888 P.2d 259, 263 (Colo. 1995); *see also, e.g. U.S. ex rel. Haynes v. McKendrick*, 481 F.2d 152, 159 (2d Cir. 1973); *U.S. ex rel. Mertz v. State*, 423 F.2d 537, 541 (3d Cir. 1970); *U.S. v. Mitchell*, 172 F.3d 1104, 1107-10 (9th Cir. 1999); *Vitek v. State*, 453 A.2d 514, 516 (Md. 1982); *People v. Andrews*, 276 N.W.2d 867, 868-69 (Mich. App. 1979).

Even if this principle weren't so firmly established in the caselaw, "novelty does not provide a safe harbor for flagrantly improper arguments." *People v. McBride*, 228 P.3d 216, 222 (Colo. App. 2009). Where, as here, all involved should recognize that the specific argument made falls within the broader class of plainly improper arguments, the fact that no person has made that *specific* argument before does not save the prosecutor from the consequence of the misconduct. *See id.* In this case, in order to vindicate Ms. Dalton's rights to a fair trial and to be treated equally in the criminal justice system, her conviction must be reversed.

CONCLUSION

For the reasons and authorities set forth in Section I of this Reply Brief and the Opening Brief, Ms. Dalton requests that this Court vacate her conviction for criminal mischief. In addition, and in the alternative, for the reasons discussed in Section II of this brief and of the Opening Brief, she requests that this Court reverse her conviction and remand her case for a new trial.

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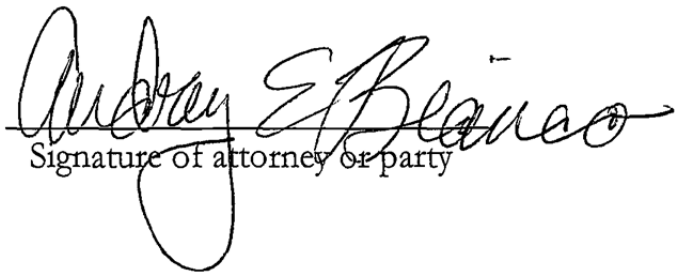
CERTIFICATE OF SERVICE

I certify that, on June 23, 2015, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Carmen Moraleda of the Attorney General's office.



Signature of attorney or party