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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
La Plata County District Court Honorable Jeffrey R. Wilson, Judge Case No. 10CR71, 10CR518	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. CHARLES TROGDON, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 12CA2045
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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).

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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/ Victoria M. Cisneros

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STATEMENT OF THE CASE

The defendant, Charles Trogdon, was charged with multiple counts of burglary, theft, attempted theft, and trespass. (PR. Vol. V, pp. 276-282). He was convicted by a jury of six misdemeanor counts of theft, four felony counts of theft, four counts of second degree burglary, one count of attempted theft, and one count of first degree trespass. (PR. Vol. II, pp. 427-436; Vol. V, pp. 327-343). He was sentenced to twenty-one years in prison. (PR. Vol. II, p. 574).

STATEMENT OF THE FACTS

The defendant was an exterminator with many clients in La Plata and Archuleta counties. Police began investigating him after one of his clients, the Millers, called police to report a theft. (R. Tr. 1/10/12, p. 325). Ms. Miller told police that she suspected the defendant because she saw him arrive at her house one day without an appointment, come into the house, go to her bedroom, and open her nightstand drawer which is where she had previously kept cash. (R. Tr. 1/13/12, pp. 1225-1228). When Ms. Miller confronted the defendant, he told her he was

looking for a piece of paper to leave her a note. (*Id.*, p. 1228). Based on this information, the police sought an arrest warrant. (R. Tr. 1/10/12, pp. 327-328).

On November 30, 2010, the police executed a search warrant on the defendant's property. (*Id.*, p. 349). During the search, the officers found one stolen rifle that was listed in the warrant, along with a number of other firearms. (*Id.*, p. 353). After finding the stolen rifle, the defendant was placed under arrest. (*Id.*, p. 362). Over the next three months, the police executed eight more search warrants on the defendant's property and retrieved numerous additional weapons and stolen items. (PR. Env. 4).

After a jury trial, the defendant was convicted of:

1) Second degree burglary relating to the Millers' residence;
2) Theft of a Henry Big Boy Rifle from Thomas Jones;
3) Theft of a Ruger .22 caliber pistol from John Thomas Llewellyn;
4) Theft of a Rossi .38 caliber revolver from Janice Roberts;
5) Attempted theft relating to the Sowers;
6) Two counts of second degree burglary relating to William Neder's residence;
7) Two counts of theft relating to multiple firearms, a gun safe, currency and flashlights belonging to William Neder;
8) Theft of two shotguns, two compound bows, bags and climbing gear from Todd Shelton;

9) First degree criminal trespass relating to Paul Day's residence;
10) Theft of a drill bit set from Arthur Combs;
11) Second degree burglary relating to Elaine Hyde's residence;
12) Theft of jewelry and a gold coin from Elaine Hyde;
13) Theft of a Norinco AK-47 from Bill Dawson; and
14) Theft of a limited edition Marlin Rifle from Pam Lynd.

(PR. Vol. II, pp. 427-436; Vol. V, pp. 327-343).

SUMMARY OF THE ARGUMENT

The trial court properly denied the defendant's motion to suppress because the officers validly recorded the serial numbers of the weapons and photographed the jewelry they found, which led to the subsequent seizure of stolen weapons and other stolen items. In addition, the evidence was sufficient to support the jury's verdicts finding the defendant guilty of burglary and theft counts.

ARGUMENT

I. The trial court properly denied the defendant's motion to suppress.

A. Standard of Review and Preservation

The People agree a trial court's ruling on a motion to suppress is a mixed question of fact and law. *People v. Pitts*, 13 P.3d 1218, 1222 (Colo. 2000). An appellate court should defer to the trial court's

findings of fact if they are supported in the record, but review the trial court's conclusions of law de novo. *Id.* The defendant preserved his arguments by moving for suppression below. (PR. Vol. I, pp. 164-186).

B. Factual Background

The trial court held a hearing at which Investigator Dan Patterson testified. Investigator Patterson testified that he suspected every person that had used the defendant as an exterminator was a potential victim. (R. Tr. 9/7/11, p. 46). He had sent out a teletype to the surrounding jurisdictions asking about residential burglaries and received a response from Archuleta County about eight cases, possibly more. (*Id.*). He also spoke with individuals who had used the defendant as an exterminator and were missing guns and jewelry. (*Id.*, p. 59).

Based on this information, the investigator sought and obtained a search warrant. The warrant authorized the police to search for two gold bracelets, one Mauser rifle, one Winchester rifle, two silver goblets, one white gold ring with a ruby, one Henry Big Boy Rifle, diamond earrings, two gold necklaces, large amounts of cash, one watch with

diamonds, computers, safes, and business records for a professional exterminator. (PR. Env. 4, Def. Ex. 1, pp. 5-6).

On November 30, 2010, Investigator Patterson and other officers executed the search warrant on the defendant's property. Investigator Patterson testified that when he executed the search warrant, the defendant told him he "was welcome to look for whatever [he] needed" and that most of the guns were kept in the garage. (*Id.*, p. 47). According to the investigator, the defendant accompanied him and a crime analyst to the garage and the defendant pointed out all of the weapons, most of which were in cases. (*Id.*, p. 48). The officers began opening the cases to see if any of the weapons matched the ones specified in the warrant. (*Id.*, p. 49). As they did so, the crime analyst recorded the serial numbers on the guns. (*Id.*, p. 57). Some rifles had to be rolled over to check the serial numbers, but for others the serial numbers were immediately visible upon opening the case. (*Id.*, p. 67). Investigator Patterson testified that he recorded the serial numbers because he suspected that most of the guns might be stolen. (*Id.*, p. 69).

The investigator noted that the defendant pointed out the attic, unlocked it for the officers, and was generally very cooperative. (*Id.*, p. 50). The officers asked the defendant about a shed that had a hazardous material sign on it, and he told them there were pistols inside the shed. (*Id.*, p. 51). The defendant unlocked the door and pointed out a rack with pistols on it. (*Id.*). The officers went in, retrieved the rack, and recorded the serial numbers from the pistols. (*Id.*). The investigator stated that he was able to see the serial numbers without moving the pistols. (*Id.*, pp. 63-64). He also testified that he picked up the guns and turned them on their side to make sure the serial number was recorded properly. (*Id.*, p. 65).

About halfway through the search, the officers found the Henry Big Boy rifle that was listed in the search warrant, and had been stolen from Thomas Jones. (*Id.*, pp. 52, 66). When the investigator asked the defendant about the rifle, he stated that he had bought it, along with two other rifles, from a swap meet. (*Id.*). He told the investigator that he was welcome to take the two other rifles, since they might be stolen as well. (*Id.*). The investigator did not take the other two rifles because

he only wanted the ones he knew were stolen. (*Id.*). At this time, the defendant also told the investigator that he could take all the guns, but the investigator did not do so. (*Id.*, p. 56).

While the officers were searching for the jewelry, they laid all the jewelry they found onto a bed. Detective Barter testified that the bed was covered with jewelry and that he took pictures of all the jewelry that was laid out. (*Id.*, p. 30). Investigator Patterson testified that the defendant himself laid out some of the jewelry on the bed. (*Id.*, p. 77). The investigator also noted that the pictures were taken in order to show victims so they could identify if any of the jewelry belonged to them. (*Id.*, p. 78).

At the end of the search, the officer had found the Henry Big Boy rifle that was listed in the warrant. The officers did not find any jewelry that was listed in the warrant. (PR. Env. 4, Def. Ex. 1, p. 7).

The defendant was placed under arrest by Investigator Patterson after the Henry Big Boy rifle was found. (R. Tr. 9/7/11, p. 54). After the defendant was arrested, he spoke to the investigator about the Henry Big Boy Rifle. (*Id.*, p. 53). He told the investigator he bought that rifle

and two others from the same individual at a flea market, but could not provide a name or description of that individual. (*Id.*, p. 54). The defendant wanted the investigator to take the other two rifles because he thought all three were probably stolen. (*Id.*). Investigator Patterson agreed to pick up the rifles after the defendant was bonded out of jail. (*Id.*). During this time, the crime analyst checked with ATF and received information that more of the weapons found at the defendant's residence were stolen. (*Id.*). The investigator took the list of weapons that were confirmed stolen and went back to the defendant's property. (*Id.*).

The defendant met the officers at the gate of his property and informed them that his lawyer had told him not to talk to the officers and not to give them any guns. (*Id.*, p. 55). The investigator asked the defendant if he could take the guns the investigator knew were stolen and the defendant agreed. (*Id.*). The defendant allowed the officers onto his property, took them to the garage and offered to help find the weapons they were looking for. (*Id.*). The defendant also told the

investigator that he could take all the guns[1], and again the investigator declined. (*Id.*). The defendant voluntarily gave the investigator nine firearms that were stolen and the investigator included those weapons on his inventory for the search.[2] (*Id.*, pp. 93, 95).

Following the November 30 search, police obtained and executed eight more search warrants over the course of the following months. (PR. Env. 4). Each warrant contained reference to the November 30 search. (*Id.*).

The December 6, 2010 warrant discussed many of the same victims and missing items but also listed additional victims who had used the defendant's exterminator services and were missing items. On December 2, 2010, Ms. Jane Amundson told detectives she was missing a man's ring with a large diamond. Mr. Lee Straughn notified police

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[1] A total of forty-two guns were found on the defendant's property. (R. Tr. 9/7/11, p. 62).

[2] These weapons included: a Sig Sauer pistol, a Walther pistol, a Browning pistol, a Mossberg 12 gauge shotgun, a Norinco rifle, a Colt pistol, a Smith & Wesson Revolver, a Ruger pistol, and a Mauser rifle. The investigator also seized $10,000 in cash which was included on the Return and Inventory. (PR. Env. 4, Def. Ex. 1, p. 7).

that he was missing silver coins. Mr. Charles Rea informed police that he was missing a Smith & Wesson .357 revolver. On December 3, Ms. Dee Abbott told detectives she was missing at least four rings. On December 4, Undersheriff Weiss informed officers that he was missing an antique silverware set, coin collection, a ring, and a silver digital camera. On December 5, Ms. Cathy Rosenbaum stated she was missing a pair of diamond earrings. All of these people had used the defendant's exterminator services and discovered things missing after he had been at their property. (PR. Env. 4, Def. Ex. 2).

Another search warrant was issued on December 7, 2010, that allowed officers to search the defendant's boat for all the items listed in both of the previous warrants. (PR. Env. 4, Def. Ex. 3).

On December 9, 2010, officers sought another search warrant. As with the previous warrants, this affidavit contained references to the November 30 search. It also included new information from Todd Shelton who indicated he was missing two compound bows and two guns and he had used the defendant's exterminator services. Kenny Weinmeister also confirmed he was missing a rifle that had been found

in the defendant's possession, but that he never used the defendant's extermination services. (PR. Env. 4, Def. Ex. 4).

On December 15, two warrants were issued that included information from John Popp about a missing Craftsman toolbox, along with other tools. The warrants contained more information from Todd Shelton about items he was missing. These included a concrete roto hammer, a cordless drill, a pearl necklace, gold coins, a gold bracelet, and climbing gear. (PR. Env. 4, Def. Ex. 5; Def. Ex. 6). One warrant allowed officers to search the defendant's property and the other allowed them to search a storage space. (*Id.*).

On December 29, 2010, the officers sought another warrant based on information they received from Art Combs about a missing drill bit set. Todd Shelton also identified more climbing gear, including a pair of shoes, a rope bag, and climbing rope. (PR. Env. 4, Def. Ex. 7).

On January 21, 2011, the officers sought a warrant after speaking with Elaine Hyde. Ms. Hyde relayed that she was missing a ring with a two carat stone, a necklace with a 3/4 carat stone, and a gold coin. Ms. Hyde identified her ring from one of the pictures that had been taken

during the November 30 search. The officers also spoke with Jerry Matousek, who stated he was missing a receiver winch from the front of his truck. (PR. Env. 4, Def. Ex. 8).

The final search warrant was sought on February 17, 2011, for a silver bracelet with turquoise stones, a gold coin, and a gold chain. After the January 21 search, the police confirmed a ring found during that search belonged to Ms. Hyde. Ms. Hyde also identified a silver bracelet with turquoise stones and a gold chain from the pictures taken during the November 30 search. (PR. Env. 4, Def. Ex. 9).

While these warrants all contained reference to the November 30 search, each warrant had its own independent probable cause that allowed the officers to search the defendant's property.[3]

Prior to trial, the defendant filed a motion to suppress all evidence seized from his residence during the November 30, 2010 search, arguing that the officers exceeded the scope of the search warrant when they

[3] Any items seized during the searches after November 30, 2010 were not discussed during the suppression hearing and therefore were not subject to suppression based on the defendant's appellate arguments.

recorded serial numbers from all the guns found on the property. (PR. Vol. I, pp. 164-170).

After hearing the evidence and the arguments of counsel, the court issued a written ruling denying the motion to suppress. (PR. Vol. I, pp. 225-232). The court found that the defendant did not contest the legality of the November 30 search, but only that the deputies exceeded the scope of the search warrant by photographing all the jewelry they observed and recording the serial numbers of the firearms. (*Id.*, p, 226). Although, the court agreed with the defendant and held that photographing the jewelry and recording the serial numbers of all the guns on the property was a search that was not authorized by the initial search warrant, the court found the search was justified based on independent probable cause. (*Id.*, pp. 226-27).

The trial court further held that exigent circumstances allowed the investigator to conduct the limited search to "memorialize the property found during the search" because there was no way to know that the property would not be disposed of or hidden after the officers completed the original search. (*Id.*). The trial court specifically noted

that the items were not seized, but simply photographed and serial numbers were written down. (*Id.*, pp. 227-28).

Finally, the trial court found that during the search, the defendant told the officers multiple times that they could take "all the guns" and Investigator Patterson declined. (*Id.*, p. 228). The trial court stated that when the investigator returned to the defendant's residence later that same day, the defendant voluntarily turned over the other nine guns[4]. (*Id.*, p. 228). Thus, these guns were not obtained by means of an illegal search but pursuant to consent. (*Id.*, p. 229). For all these reasons, the trial court denied the defendant's motion to suppress.

C. Discussion

The defendant now argues that the trial court erred in denying his motion to suppress because the police exceeded the scope of the warrant, and the exigent circumstance, plain view, and inevitable

[4] The trial court refers to eight guns, however upon reviewing the Return and Inventory, it appears ten guns were listed as seized on November 30, 2010.

discovery exceptions do not apply in this case.[5] The defendant contends the trial court should have suppressed cash, firearms, and jewelry that were seized from his property.

1. The search was not outside the scope of the warrant.

"Once a lawful search warrant is issued, the scope of the search is defined by the scope of the warrant rather than an individual's expectation of privacy in any particular area or item." *People v. Webb*, 2014 CO 36, ¶2. The places that may be searched and items that may be seized pursuant to a search warrant are limited by the warrant, but police officers are not required to close their eyes to incriminating evidence that is plainly visible while they conduct a valid search. *People v. Koehn*, 178 P.3d 536, 537 (Colo. 2008).

Here, the search warrant authorized the police officers to search the defendant's property, including out-buildings and vehicles, for

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[5] The defendant also argues that any cash found should have been suppressed as well. However, the trial court's order did not address the suppression of any cash. This Court should not address issues the trial court was not asked to make, and did not make, any findings on. *People v. Syrie*, 101 P.3d 219, 223 (Colo. 2004).

jewelry, three rifles, goblets, and large amounts of cash. (PR. Env. 4, Def. Ex. 1, pp. 5-6). This warrant allowed police to search any place that these items might reasonably be found.

During the search, the officers found a significant number of firearms, both rifles and pistols. The defendant argues that by recording the serial numbers from the firearms not specifically listed in the warrant, the police exceeded the scope of the warrant.

Here, the search warrant authorized the officers to look for rifles. Thus, the recording of the serial numbers from all the rifles was related to their search and did not constitute an additional search. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (finding that when an officer moves an item not within the scope of the lawful search, the intrusion is a separate search). In addition, checking the serial numbers was necessary because the search warrant included the serial number for the Henry Big Boy rifle and the officers needed to determine whether any item they were looking at was an item listed in the warrant. Contrary to the defendant's assertion that no property listed in the

warrant was found, the Henry Big Boy rifle was found on the defendant's premises.

"When a police officer moves an object not within the scope of consent or lawful search, the intrusion becomes a separate search and departs from the plain view doctrine." *People v. Bostic*, 148 P.3d 250, 255 (Colo. App. 2006). Here, to the contrary, the recording of the rifles' serial numbers were within the scope of the lawful search.

The officers also recorded the serial numbers from all the pistols they found. The pistols were not included in the search warrant. However, the pistols, and their serial numbers, were in plain view while the search was ongoing. Under the plain view doctrine, the police may seize an item that is plainly visible without a proper search warrant, so long as: (1) the initial intrusion is legitimate; (2) the police have a lawful right of access to the object seized; and (3) the police have a reasonable belief that the evidence seized was incriminating. *People v. Jauch*, 2013 COA 127, ¶28.

Here, the initial intrusion was valid because the police were on the premises executing a valid search warrant and the police also had a

lawful right of access to the defendant's home and could lawfully search any location in the home or outbuildings that might contain the items they were searching for. *Id.*, ¶31.

An officer has a reasonable belief that evidence is incriminating if the incriminating nature is immediately apparent, meaning that the officer has probable cause to associate the item with criminal activity without conducting a further search. *Id.*, ¶34; *People v. Campbell*, 94 P.3d 1186, 1188 (Colo. App. 2004). Probable cause means the facts available to the officers would cause a person of reasonable caution to believe that certain items are connected to the criminal activity being investigated. *Jauch*, ¶34. An officer's belief that an item is incriminating may be based on the item's intrinsic nature or on the officer's knowledge and experience as they relate to the facts presented in the particular case. *Id.*; *People v. Waits*, 196 Colo. 35, 40, 580 P.2d 391, 394 (1978).

In this case, Investigator Patterson testified that he had spoken with different victims who told him that they had used the defendant as an exterminator and were missing guns and jewelry. (R. Tr. 9/7/11, p.

59). The investigator further testified that he had a "reasonable suspicion" that most of the guns were stolen because he suspected everyone who had used the defendant as an exterminator was a potential victim. (*Id.*, pp. 46, 69). Investigator Patterson testified that as a general rule he always checked serial numbers on firearms to determine if they are stolen, which is why he recorded the serial numbers. (*Id.* p. 57). He further stated that when the investigation has nothing to do with stolen weapons, he would not record serial numbers but in this case, there were stolen weapons so he wanted to be sure he recorded the serial numbers. (*Id.*, p. 76). During the search, the officers recovered the Henry Big Boy rifle, which was described in the search warrant. Finding one rifle known to be stolen gave the officers probable cause that more of the firearms found on the property were stolen and therefore connected to the criminal activity the officers were investigating, specifically burglary and theft.

Officers are "not required to close their eyes to any evidence that they plainly see." *Pitts*, 13 P.3d at 1222. If an article is in plain view,

neither its observation nor its seizure invokes any invasion of privacy. *Horton v. California*, 496 U.S. 128, 133 (1990).

In the instant case, (1) the initial intrusion was justified by the search warrant, (2) the officer knew that the evidence was incriminating, and (3) because the officers were in the house and shed looking for other items listed in the search warrant, the officer had a right of access to the evidence. Accordingly, the plain view doctrine justified the officer's recording of the serial numbers from the firearms. *See, e.g., People v. Glick*, 250 P.3d 578, 586 (Colo. 2011) (plain view doctrine applied when police were (1) lawfully on the premises for a legitimate investigative purpose -- to investigate, (2), from their legitimate vantage point, the incriminating nature of the evidence was immediately apparent to the officers, and (3) the officers had a lawful right to access the evidence).

As to the photographing of the jewelry, the trial court found that the jewelry was not seized, only recorded, and therefore, not subject to suppression. Unlike *Hicks*, the photographing of the jewelry was

related to the initial purpose of the search, which was to look for, inter alia, stolen jewelry and therefore was not a separate search.

Even though the trial court found that the photographing of the jewelry and the recording of the serial numbers to be beyond the scope of the warrant, this Court has discretion to affirm the district court on different grounds. *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007); *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006).

2. The defendant consented to allow the officers to search any place in his residence.

Voluntary consent to a search is an exception to the warrant requirement. *People v. Prescott*, 205 P.3d 416, 419 (Colo. App. 2008). The prosecution has the burden of proving that consent was obtained before a search was initiated and that the defendant, by his conduct, words, or both, gave permission to search. *Id.* Consent to a warrantless search may be expressed or implied from the totality of the circumstances. *Id.* A warrantless search conducted on the basis of consent is limited to the terms limited to the terms given by the consenting party. *People v. Najjar*, 984 P.2d 592, 595 (Colo. 1999).

Consent must be voluntarily given. *People v. Berdahl*, 2012 COA 179, ¶32. Voluntariness is assessed by the totality of the circumstances and the prosecution bears the burden of proving this by clear and convincing evidence. *Id.* To find that consent was voluntary, the court must find no objective evidence of coercion, duress, deception, promises, threats, intrusive conduct, or other undue influence by police. *Id.*, ¶33 (citing *People v. Magallanes-Aragon*, 948 P.2d 528, 531 (Colo. 1997)). The trial court should also consider the defendant's age, education, and knowledge, as well as the circumstances of the search. *Id.*

The defendant consented to the search of his property for weapons multiple times. When Investigator Patterson first arrived at the defendant's property, the gate was closed and the defendant met the officers at the gate. (R. Tr. 9/7/11, p. 48). The investigator presented the search warrant and the defendant told him that he was welcome to look for whatever he needed. (*Id.*, pp. 47, 48). The investigator told the defendant he was looking for guns and the defendant informed him that most of the guns were kept in the garage. (*Id.*). The defendant offered to help the officers find whatever they were looking for and

accompanied the investigator to the garage where he pointed out all the weapons. (*Id.*, pp. 48-49). He watched as the officers took all the weapons down from the wall and overhead, and informed the officers that there was a pistol in the safe, which he unlocked for them. (*Id.*, pp. 49, 63).

The defendant also pointed out an attic that was padlocked, that the officers had not noticed, unlocked it and provided a ladder in order for the officers to access it. (*Id.*, p. 50). The defendant had a pesticide shed on his property that had a hazardous materials sign on it, the officers asked about the shed, and the defendant told them he had a few pistols in there and the officers could look at those. (*Id.*, p. 51). The defendant's truck was parked in front of the shed and he offered to move it to give the officers better access. (*Id.*, p.100). After moving the truck, defendant unlocked the shed for them and pointed the pistols out. (*Id.*, p. 51). The officers carried out the rack of pistols and recorded their serial numbers. (*Id.*).

Investigator Patterson noted that while the defendant was distraught about the officers coming into his home, he was very

cooperative and volunteered information they did not ask of him. (*Id.*, p. 65). The investigator stated there was never any need to exert authority over the defendant to gain his cooperation. (*Id.*).

The defendant expressly told the officers they were welcome to look for whatever they needed and offered his assistance on multiple occasions. There is no indication in the record that the police coerced or threatened the defendant in any way. Investigatory Patterson specifically stated there was never any need to exert authority to get the defendant to cooperate.

The defendant led the officers to the rifles and watched while they opened the cases and recorded the serial numbers. He also told them the pistols were inside the pesticide shed, moved his truck, unlocked the door, and pointed out the rack of pistols. He watched as officers retrieved them and recorded the serial numbers. He did not object to the retrieval of the firearms or the recording of the serial numbers. The defendant's consent allowed the officers to record the serial numbers because the defendant told them they could look for whatever they needed.

3. The defendant voluntarily turned over the other nine guns collected on November 30, 2011.

On the search warrant, three different rifles were listed. The officers only found one of the rifles that was described, the Henry Big Boy rifle. When Investigator Patterson asked the defendant about this rifle, the defendant stated he bought it at a swap meet in town, along with two other rifles. (R. Tr. 9/7/11, p. 52). The defendant told the investigator he could take those two rifles as well since they might be stolen, but the investigator declined. (*Id.*).

The defendant was arrested on November 30 for the theft of the Henry Big Boy Rifle. He spoke with Investigator Patterson again at the jail. He again stated he would like the investigator to take the two guns he bought at the same time as the Henry Big Boy rife because he was certain they were stolen. (*Id.*, p. 53-54). The investigator agreed to go pick up the guns once the defendant was released from jail. During this time, the crime analyst was checking serial numbers with ATF to determine if any of the other firearms found at the defendant's property were stolen and confirmed that eight were. (*Id.*, p. 54).

Investigator Patterson took that list and returned to the defendant's property to retrieve the two guns the defendant wanted to give him and see if he would also turn over the eight confirmed stolen guns. (*Id.*). The defendant met the officers at the gate and informed them that his lawyer instructed him not to speak with the police and not give them any guns. (*Id.*, p. 55). However, after the investigator informed the defendant that he would like to at least pick up the eight guns that were confirmed stolen, the defendant agreed. (*Id.*). The defendant unlocked his gate, took the officers to the garage, and helped them locate the firearms they were looking for. (*Id.*). He also told Investigator Patterson that the investigator could take all the guns if he wanted to, and again the investigator declined. Investigator Patterson took the two guns that the defendant initially wanted to give him and the others that he had confirmed were stolen. (*Id.*).

Investigator Patterson included these guns, along with the Henry Big Boy Rifle, on his Return and Inventory. (PR. Env. 4, Def. Ex. 1, p. 7). These nine guns listed on the Return and Inventory were not listed in the search warrant, however no unlawful search or seizure was

conducted in order for the officers to retrieve these weapons. Rather, the defendant specifically asked the investigator to pick up two of the guns because he was certain they were stolen and he voluntarily allowed the officers on the property to find the other firearms they had confirmed stolen.

Because the recording of the serial numbers and photographing of the jewelry was not outside the scope of the initial search warrant, the motion to suppress was correctly denied. In addition, the defendant consented to both the search and seizure of the firearms that were not listed in the warrant.[6]

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[6] To the extent that the defendant argues the trial court improperly relied on exigent circumstances, the trial court order only makes a passing reference to exigent circumstances. There are no factual findings or conclusions of law to support the trial court's reference. Therefore, the record is inadequate for this Court to resolve the question of whether there were exigent circumstances and the case should be remanded for further factual findings. *People v. Cruse*, 58 P.3d 1114, 1118 (Colo. App. 2002).

II. The evidence was sufficient to support the jury's verdict finding the defendant guilty.

A. Standard of Review

The People agree that this Court reviews "the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the defendant's conviction." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). This issue was preserved by the defendant's motion for judgment of acquittal. (R. Tr. 1/13/12, pp. 1248-1272)

B. Discussion

To determine if the evidence presented to the jury was sufficient to sustain a defendant's conviction, a reviewing court employs a substantial evidence test. *Clark*, 232 P.3d at 1291. The substantial evidence test considers whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, was substantial and sufficient to support a conclusion by a reasonable mind that the defendant was guilty of the charge beyond a reasonable doubt. *Id.* The People must be given the benefit of every reasonable inference which might be fairly drawn from

the evidence. *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999); *People v. Poe*, 2012 COA 166, ¶14.

It is the fact finder's function to weigh the credibility of witnesses, to determine what weight should be given to all parts of the evidence, and to resolve conflicts, inconsistencies, and disputes in the evidence. *Poe*, ¶14. An appellate court is not permitted to sit as a thirteenth juror and set aside a verdict because it might have drawn a different conclusion from the same evidence. *Sprouse*, 983 P.2d at 778. Where reasonable minds could differ, the evidence is sufficient to sustain a conviction. *People v. Bondurant*, 2012 COA 50, ¶58.

The defendant argues that the evidence was insufficient to support his convictions specifically for the Miller burglary, as well as the Neder burglary and theft, the Hyde burglary and theft, the Lynd theft, and the Combs theft because there is no link between the item stolen and any criminal conduct on the part of the defendant.[7]

[7] To the extent that the defendant challenges the sufficiency of the evidence to support his other convictions, he has not made any argument beyond a conclusory statement that the convictions were based on "conjecture and impermissible inferences." (Opening Brief, p.

1. Burglary of the Miller House

For second degree burglary, the prosecution must prove that the defendant:

> "knowingly br[oke] an entrance into, enter[ed] unlawfully in, or remain[ed] unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property."

§ 18-4-203, C.R.S. (2013).

A person "enters unlawfully" or remains "unlawfully" in or upon the premises when he is not invited, licensed, or otherwise privileged to do so. *Bondurant*, ¶62.

The defendant argues that for the Miller burglary, there was no evidence that the victim asked him to leave and therefore, the evidence was insufficient to support the second degree burglary conviction.

Contrary to the defendant's argument, the evidence showed that the defendant entered the Miller residence without invitation, license, or permission. Ms. Miller testified that she did not give the defendant

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37). This Court should decline to address an issue that has not been adequately presented. *People v. Allman*, 2012 COA 212, ¶10; *People v. Hill*, 228 P.3d 171, 176 (Colo. App. 2009).

permission to enter her house while she was not there. (R. Tr. 1/13/12, p. 1217). She also testified that on October 27, 2010, the defendant arrived at her house without an appointment. (*Id.*, p. 1225). On that day, the victim was suspicious of the defendant and did not want him to know she was home. (*Id.*, p. 1224). After she went to the back of the house, the defendant knocked on the door twice. (*Id.*, p. 1226). When no one answered, the defendant opened the door and called out to see if anyone was there. (*Id.*). Hearing no response, the defendant entered the house and proceeded to go to the master bedroom. (*Id.*, p. 1227). The victim watched the defendant go directly to a nightstand in the master bedroom, which was where the victim previously kept large amounts of cash. (*Id.*, pp. 1218, 1227). She confronted the defendant and asked him what he was doing. (*Id.*, p. 1228). The victim noted the defendant removed vinyl gloves as he was talking to her and put them in his pocket. (*Id.*, 1228). She further testified that the defendant seemed panicked and scared when she confronted him. (*Id.*, p. 1236).

The defendant argues that since the victim did not ask him to leave, he was not unlawfully on the premises. However, when the

defendant entered the house without permission or an invitation, he entered the house unlawfully. The victim unequivocally testified that the defendant did not have permission to be in her home when she was not there and on the day of the offense, he did not have an appointment with her.

From this evidence the jury could have reasonably concluded the defendant committed second degree burglary when he entered the house without permission and intended to commit a crime therein. Contrary to the defendant's argument, the prosecution did not have to prove that the defendant actually committed a crime in the Millers' house, but only that he intended to.

Because direct proof of the defendant's state of mind is rarely available, evidence of intent is generally proved by circumstantial or indirect evidence. *People v. Destro*, 215 P.3d 1147, 1154 (Colo. App. 2008); *People v. Chastain*, 733 P.2d 1206, 1212 (Colo. App. 1987). The defendant's demeanor and removal of latex gloves allowed the jury to reasonably infer that the defendant intended to commit a crime (i.e.,

theft), in addition to the fact that the defendant went directly to the place where Ms. Miller had formerly kept cash.

2. Neder Burglaries and Thefts

The defendant was convicted of two counts of burglary and two counts of theft with respect to Mr. Neder. He contends that the prosecution failed to link the items stolen with any criminal activity on his part.

Mr. Neder testified that he hired the defendant one time to exterminate his house in 2007 or 2008, but never hired him again. (R. Tr. 1/12/12, p. 1039). He also testified that in April 2008, he discovered he was missing two firearms. (*Id.*, p. 1040). In June 2009, Mr. Neder returned home and found a safe where he stored additional firearms missing. (*Id.*, pp. 1043, 1045). The safe contained eight firearms of various values. (*Id.*, pp. 1048-1050). Mr. Neder reported both of these thefts to the police. (*Id.*, pp. 1040, 1042, 1045).

Mr. Neder testified that after the first theft, he installed electronic locks on the front door and the master bedroom door. (*Id.*, p. 1043). He stated only he, his wife, his parents, and one other person had the codes

for the locks. (*Id.*, pp. 1043-44). He further testified that after the second theft, he noticed the lock on the master bedroom was looser than it had been but there were no signs of forced entry. (*Id.*, p. 1046).

Mr. Neder's mother testified that she used the defendant to exterminate her property, which was next door to her son's, twice a year for twenty years. (R. Tr. 1/12/12, pp. 1063-1064). She testified that she would leave her house unlocked if she was not going to be home when the defendant came to exterminate. (*Id.*, p. 1065). Ms. Neder also testified that she had a key to her son's house along with the code to his electronic locks, labeled as such, hanging in her laundry room. (*Id.*, p. 1067). She noted that she never saw the key missing or disturbed, but also that she did not look at the key unless she was going to use it. (*Id.*, p. 1068). Police recovered five firearms that belonged to Mr. Neder in the defendant's residence. (R. Tr. 1/10/12, pp. 372, 499, 500). Mr. Neder positively identified these weapons at trial. (R. Tr. 1/12/12, pp. 1051-1053).

This testimony, when viewed in the light most favorable to the prosecution, allowed the jury to infer that the defendant unlawfully

entered the victim's house and stole several firearms. Because a significant amount of time had passed since the firearms were stolen, the jury could reasonably infer the defendant intended to permanently deprive Mr. Neder of the firearms.

3. Hyde Burglary and Theft

The defendant was convicted of one count of burglary and one count of theft with respect to Ms. Hyde. He contends that the prosecution failed to link the items stolen with any criminal activity on his part.

Ms. Hyde testified that she hired the defendant as her exterminator for many years. (R. Tr. 1/12/12, p. 1014). She stated that she was not always present when the defendant was scheduled, so she would leave the door unlocked, but on at least one occasion, the door was locked and the defendant crawled through a window. (*Id.*, p. 1015). In December 2009, Ms. Hyde filed a police report when she discovered she was missing a two carat diamond ring, a gold necklace with a diamond pendant, and a gold coin. (*Id.*, p. 1018). She testified that the last time she had worn the jewelry was in August 2009. (*Id.*, p. 1019).

She further testified the defendant exterminated her house in September 2009. (*Id.*, p. 1020). The police showed Ms. Hyde the photographs taken during the November 30 search and she identified her ring. (*Id.*, p. 515).

Investigator Cowing testified during the January 21, 2011, execution of a search warrant on the defendant's home, he heard the defendant made a phone call and state that the police were at his home "for the Hyde's ring." (R. Tr. 1/10/12, pp. 478-479). Ms. Hyde's ring was recovered from the defendant's home. (*Id.*, p. 564).

This testimony, when viewed in the light most favorable to the prosecution, allowed the jury to infer that the defendant unlawfully entered the victim's house and stole jewelry. Because a significant amount of time had passed since the ring was stolen, the jury could reasonably infer the defendant intended to permanently deprive Ms. Hyde of the ring.

4. Lynd Theft

The defendant was convicted of one count of theft with respect to Ms. Lynd. He argues that the prosecution failed to link the items stolen with any criminal activity on his part.

Ms. Lynd testified that she hired the defendant as her exterminator for many years and he came once or twice a year. (R. Tr. 1/12/12, p. 950). She further testified that she received a call that one of her rifles had been recovered and that it was a limited edition Rocky Mountain Elk Foundation Marlin rifle. (*Id.*, pp. 955, 958, 969). She stated that the last time she saw the rifle was in November 2008, and the defendant had exterminated her house on November 19, 2008. (*Id.*, p. 969).

Detective Valdez testified that a Rocky Mountain Elk Foundation rifle was recovered from the defendant's residence and that this was the same weapon Ms. Lynd had reported stolen. (R. Tr. 1/10/12, p. 543).

The victim's testimony that she had last seen the rifle around the time that the defendant was in her house and that the rifle was recovered from the defendant allowed the jury to reasonably infer that

the defendant stole the rifle and intended to permanently deprive the victim of her rifle.

5. Combs Theft

The defendant was convicted of one count of theft with respect to Mr. Combs. He contends that the prosecution failed to link the items stolen with any criminal activity on his part.

Mr. Combs testified that the defendant exterminated his property once per year around September. (R. Tr. 1/13/12, p. 1181). He further testified that the defendant had a key to his property so he could exterminate when Mr. Combs was not there. (*Id.*, p. 1182). He testified that he reported to the police he was missing a drill bit set that was in a gray box with 150 or 200 drill bits in it. (*Id.*, p. 1186). He was able to identify the drill set recovered from the defendant's home because it was a complete set except one drill bit was missing. (*Id.*, p. 1191). Mr. Combs stated that the last time he saw the drill set was in September 2009. (*Id.*, p. 1194). Detective Valdez recalled seeing a drill box at the defendant's residence and he emailed a picture of that drill box to Mr.

Combs for identification. (*Id.*, p. 533). He further testified that the drill bit set was recovered from the defendant's residence. (*Id.*, p. 548).

The combination of the victim's and the detective's testimony allowed the jury to reasonably infer that the drill bit set belonged to the victim and that the defendant intended to permanently deprive the victim of the drill bit set. Thus, the evidence was sufficient to support the jury's verdict.

For these foregoing reasons, this Court should find that the evidence presented for each victim described was sufficient to support the jury's verdict.

CONCLUSION

Based on the foregoing arguments and authorities, the People respectfully request that this Court affirm the defendant's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PEOPLE'S ANSWER BRIEF upon DAVID C. JAPHA via Integrated Colorado Courts E-filing System (ICCES) on June 30, 2014.

/s/ C. D. Moretti