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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	
Morgan County District Court Honorable Douglas R. Vannoy Case Number 2012CR98	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. KEITH FLETCHER Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson Colorado State Public Defender JULIA CHAMBERLIN, #47181 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 2013CA544

OPENING 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 8,600 words.

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

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

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.

Julia Chambers

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

Defendant-Appellant was the defendant in the trial court and will be referred to as Mr. Fletcher. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution. Citations to transcripts will use the format (date and page number).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the trial court reversibly erred when it denied Mr. Fletcher's entrapment instruction when there was sufficient evidence to raise the affirmative defense, and when it required Mr. Fletcher to admit each element of the offense before warranting the entrapment defense.
2. Whether the prosecutor's improper remarks during opening statement, closing argument, and the evidentiary stage of trial violated Mr. Fletcher's rights to due process and a fair trial.

STATEMENT OF THE CASE

On April 23, 2012, a grand jury indicted Mr. Fletcher for unlawful distribution of a schedule two substance pursuant to § 18-18-405(1),(2)(a)(I)(A), C.R.S. (2011) (Count 1); possession of a weapon by a previous offender under § 18-12-108(1), C.R.S. (2011) (Count 2); two counts of unlawful possession of a controlled substance in violation of § 18-18-403.5(1),(2)(b)(I), C.R.S. (2011) (Counts 3 and 4); and a special offender enhancement pursuant to § 18-18-407(1)(f)(II), C.R.S. (2011). (v.1,p.1). After

trial on December 17-19, 2012, the jury returned a guilty verdict for Counts 1 through 4. (Tr.12/19/12pp.65-66). The trial court sentenced Mr. Fletcher to eight years in the Department of Corrections in Count 1, two years in Count 2, concurrent with all other counts, and 18 months in Count 3 and 4, concurrent with all other counts. (v.1,pp.184-186).

STATEMENT OF THE FACTS

On January 6, 2012, Investigator Holt conducted surveillance on Chad Baluska's vehicle because Baluska's license was suspended and he parked outside of a known drug home. (Tr.12/18/12pp.53-54). Holt then observed Baluska drive through a stop sign. *Id.* at 54. Holt initiated a traffic stop, confirmed that Baluska drove with a suspended license, placed him under arrest, and inventoried the contents of his vehicle before impounding it. *Id.* During the inventory of Baluska's vehicle, Holt discovered a plastic bag containing methamphetamine. *Id.* at 55. Baluska agreed to work as a confidential informant in exchange for the reinstatement of his license, and to avoid a drug possession charge. *Id.* at 57-59;(Tr.12/17/12p.230). Moreover, the police paid Baluska one-hundred dollars per drug transaction, which totaled four-hundred dollars overall. (Tr.12/18/12pp.52-53). Baluska testified that he was desperate for money and he recently received an eviction notice. (Tr.12/17/12p.126).

He stated that his family "was struggling" and he could not afford to reinstate his license. (Tr.12/18/12p.19).

Baluska had an extensive criminal record prior to his confidential informant work, including conspiracy to commit theft, two larceny offenses, violation of a restraining order, and three escape convictions. (Tr.12/18/12pp.15-18). Moreover, Baluska testified that he worked as a confidential informant because he was "burnt out on using," but he contradictorily smoked methamphetamine on February 7, 2012, the day before the surveillance operation on Mr. Fletcher. (Tr.12/17/12p.231;12/18/12p.20). Additionally, before this trial police arrested him for driving while ability impaired on July 8, 2012. (Tr.12/18/12p.23). The court sentenced Baluska to one year in jail, but suspended his sentence pending successful completion of probation. *Id.* at 23. Again, prior to trial Baluska's probation officer filed a complaint against him for absconding and failing to take urinary analysis tests. The prosecution then visited Baluska in jail on November 6, 2012, about his testimony in Mr. Fletcher's case, and afterwards the court again placed him on probation. *Id.* at 23-25.

Before February 8, 2012, Baluska contacted Holt with information that Mr. Fletcher was selling a gun and he arranged for its purchase. *Id.* at 60. On February 8, 2012, the Fort Morgan Police Department set up a surveillance operation with

undercover vehicles to observe the gun transaction. *Id.* at 62. Holt provided Baluska with a remote transmitting and recording device to enable the officers to listen to audio surveillance and track him with a GPS system. *Id.* at 62. Investigator Killcoyne of the Eastern Colorado Drug Plains Task Force provided Baluska with money to purchase the gun and drugs. *Id.* at 62-63. While the initial transaction only involved the purchase of a firearm, Holt asked Baluska to also buy methamphetamine. *Id.* at 66.

Holt transported Baluska to McDaniel's Trailer Park to meet Mr. Fletcher at 3:30 p.m. *Id.* at 66,106. However, upon reaching the trailer park home, Mr. Fletcher did not respond to knocks on the door. *Id.* at 68. Baluska called Mr. Fletcher, who informed him that he placed the gun in a tree stump and he should leave the money there. *Id.* Holt prohibited Baluska from leaving money in the tree stump, so Baluska called Mr. Fletcher again and received instructions to walk to Jaycee Park. *Id.* at 69. Holt testified that he observed Mr. Fletcher drive a red car with an unidentified male and female passenger to Jaycee Park, and Baluska entered the car. *Id.* at 70. However, Baluska testified that only one other passenger was in the vehicle. (Tr.12/17/12p.238).

Holt testified that while he recognized voices on the audio recording, he does not have expert certification in distinguishing voices. (Tr.12/18/12p.111). Defense counsel asked, "So I mean you listening to the voices is really not that different than

any of us listening to the voices?" *Id.* Holt responded, "Correct." *Id.* Further, Holt failed to digitalize or perform voice analysis on any voices heard on the audio recording. *Id.* While Baluska was in the car with Mr. Fletcher, Holt overheard Baluska ask the price of the gun, and Mr. Fletcher responded "that's not here. That's at the house." *Id.* at 71. Yet, Baluska testified that "[i]t's a rule of the street any way is that you don't talk about weapons or guns in – in anybody else's ear any way." (Tr.12/17/12p.268). Holt also heard Mr. Fletcher state "[t]hat's a 30"[1] and Baluska asked for ten dollars in change. (Tr.12/18/12p.71). However, Baluska testified that he bought the '30' only after the other passengers left the car. (Tr.12/17/12p.269).

Mr. Fletcher then dropped off the other passengers before driving to his home, where Holt overheard "what we believed was an exchange of the gun." (Tr.12/17/12pp.71-73). Baluska asked to purchase bullets for the gun, but Mr. Fletcher did not have any. (Tr.12/18/12pp.14,116). Additionally, Baluska asked Mr. Fletcher for a "teener,"[2] and Mr. Fletcher responded that he would have to get it. *Id.* at 74. After Mr. Fletcher left the home, Baluska became impatient because he had an appointment, so he called Holt and left the home at approximately 4:30 p.m. *Id.* at 76-

[1] While the testimony does not specify what a "30" means, Baluska testified that he paid thirty dollars for the methamphetamine. (Tr.12/12/17p.241).

[2] Baluska testified that a teener is an amount of dope, although he could not recollect "specific weights any more [sic]." He believed that the price of a teener ranged from one-hundred and thirty to one-hundred and fifty dollars. (Tr.12/12/17p.233).

77. Holt was surprised that Baluska bought a '30' of methamphetamine because the initial transaction only involved the purchase of a gun. *Id.* at 77. Holt stated, "It was my understanding that he was going to ask for methamphetamine to purchase at the time that he purchased or got possession of the gun." *Id.* However, Holt did not believe that he would buy drugs during the initial transaction. *Id.* Baluska confessed that he secretly ordered it for his wife the night before "because his wife was still using methamphetamine." *Id.* at 78. Holt subsequently did not charge Baluska with possession of methamphetamine. *Id.*;(Tr.12/17/12p.255).

Holt met with Baluska after 5:00 p.m. in order to buy a "teener" from Mr. Fletcher. (Tr.12/17/12p.88). Mr. Fletcher allegedly told Baluska to meet at the 7-Eleven, but Mr. Fletcher experienced car difficulties and, instead, Baluska walked towards McDaniel's trailer park. *Id.* at 93. Mr. Fletcher eventually picked up Baluska, driving him to McDaniel's before heading to Auto Zone with two unidentified females in the car. *Id.* at 94. In front of the store, Mr. Fletcher and Baluska argued because "it was taking so long for this transaction to be completed." *Id.* at 96. Inside the vehicle, Holt overheard Mr. Fletcher say, "Here. See if my driver's license is in there." (Tr.12/18/12p.97). Baluska responded: "What is this?" and "Is this for me?" *Id.* at 97. Baluska asked how much, and began counting the money. *Id.* Baluska then

left Mr. Fletcher's car and walked to a secure location where he delivered a small bag of methamphetamine to Holt. *Id.* at 98.

SUMMARY OF THE ARGUMENT

The trial court erred by denying Mr. Fletcher's entrapment instruction since there was sufficient evidence to support his affirmative defense. The trial court further erred when it required Mr. Fletcher to admit to the charged offenses to warrant an entrapment instruction. Accordingly, the trial court violated Mr. Fletcher's right to present a defense, his right to remain silent, and it impermissibly lowered the prosecution's evidentiary burden, thereby requiring reversal.

Additionally, the repeated and prejudicial prosecutorial misconduct throughout the opening statement, closing argument, and evidentiary stage of trial violated Mr. Fletcher's due process right to a fair trial. During opening statements, the prosecution made repeated remarks which the trial court had previously found "unduly prejudicial" and "probably subject to 404(b) any way." Moreover, in closing arguments the prosecutor further prejudiced Mr. Fletcher by arguing facts not in evidence and she inflamed the passion of the jury. Cumulatively, the prosecution's improper statements created a reasonable possibility that Mr. Fletcher would not have been convicted but for the prosecution's misconduct.

ARGUMENT

I. The trial court reversibly erred when it denied Mr. Fletcher's entrapment instruction since there was sufficient evidence to warrant the affirmative defense.

a. Standard of Review

Appellate courts review the record as a whole to determine whether it holds "any evidence tending to establish the [affirmative] defense." *Idrogo v. People*, 818 P.2d 752, 754 (Colo. 1991). Further, appellate courts review the sufficiency of the evidence de novo. *People v. Garcia*, 113 P.3d 775, 783-84 (Colo. 2005). A trial court's erroneous refusal to instruct the jury on an affirmative defense improperly lowers the prosecutor's burden of proof. *Id.* at 784. "Because a defendant's constitutional right to due process is violated by an improper lessening of the prosecution's burden of proof, such error cannot be deemed harmless." *Id.* (citing *Lybarger v. People*, 807 P.2d 570, 582-83 (Colo. 1991)) (finding that an improper affirmative defense instruction effectively removed the affirmative defense from the jury's consideration and was not harmless).

Here, the trial court's erroneous denial of Mr. Fletcher's entrapment instruction violated his constitutional rights, including his right to present a defense and his right to due process of law. U.S. Const. amends. V, XIV; Colo. Const. art. II, §§ 16, 25;

Crane v. Kentucky, 476 U.S. 683, 690 (1986); *People v. Salazar*, 272 P.3d 1067, 1071 (Colo. 2012).

b. Relevant Facts

On August 7, 2012, Mr. Fletcher endorsed entrapment as a defense. (Tr.12/18/12p.9;v1,p41). During trial, Mr. Fletcher waived his right to testify and did not call any witnesses in his defense. (Tr.12/18/12p.252). On the second day of trial, defense counsel tendered an entrapment instruction for the distribution of a controlled substance offense and the trial court denied it. (Tr.12/18/12pp.7-10). While the trial court agreed that a 'scintilla' of evidence supported an entrapment instruction, it found that since "your client will [not] be admitting to the elements because that will be required" he was precluded from instructing the jury on it. *Id.* at 10. Defense counsel argued that "the fact that there is some evidence of entrapment has already been elicited through the testimony, essentially that you know Mr. Fletcher was contacted; and there were repeated efforts to buy." *Id.* at 9.

c. Sufficient evidence was raised during trial to warrant an entrapment instruction.

The prosecutor's case-in-chief provided sufficient evidence to entitle Mr. Fletcher to an entrapment instruction on the distribution of a controlled substance offense, and the trial court reversibly erred when it denied the instruction even though it agreed that sufficient evidence supported it. (Tr.12/18/12p.10).

Section 18-1-709, C.R.S. (2015) governs the entrapment defense in Colorado:

> The commission of acts which would otherwise constitute an offense is not criminal if the defendant engaged in the proscribed conduct because he was induced to do so by a law enforcement official or other person acting under his direction, seeking to obtain evidence for the purpose of prosecution, and the methods used to obtain that evidence were such as to create a substantial risk that the acts would be committed by a person who, but for such inducement, would not have conceived of or engaged in conduct of the sort induced. Merely affording a person an opportunity to commit an offense is not entrapment even though representations or inducements calculated to overcome the offender's fear of detection are used.

In Colorado, entrapment constitutes an affirmative defense. *People v. Sprouse*, 983 P.2d 771, 775 (Colo. 1999). Once a defendant or the prosecutor raises a "scintilla of evidence" to support an affirmative defense instruction, then the prosecution must prove beyond a reasonable doubt that the defendant was not entrapped. *Id.* at 775. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 16; *People v. Houser*, 337 P.3d 1238, 1244 (Colo. App. 2013) (quoting *People v. Platt*, 170 P.3d 802, 806 (Colo.App.2007)) ("The burden to produce sufficient evidence is 'exceedingly low,' making preclusion of an affirmative defense appropriate only when there is 'simply no evidence ... in th[e] record'"). Under Colorado statutory authority and case law, evidence of an affirmative defense can derive directly from the prosecutor's case-in-chief. *See People v. Whatley*, 10 P.3d 668, 670 (Colo. App. 2000); *People v. Reed*, 932 P.2d 842, 844 (Colo.

App. 1996) ("If the prosecution or the defendant presents any credible evidence that an affirmative defense might apply, the prosecution has the burden of proving the non-existence of that affirmative defense beyond a reasonable doubt"). Further, the court must view the facts in a light most favorable to the defendant when determining whether he is entitled to a defense instruction. *Cassels v. People*, 92 P.3d 951, 955 (Colo. 2004).

Colorado employs a subjective test to analyze an entrapment defense, which focuses primarily on the defendant's predisposition to commit the crime rather than on the police's conduct. *Sprouse*, 983 P.2d at 776. "This does not mean that police conduct should be ignored, but rather that the existence of any predisposition on the part of the defendant must be determined first, then the extent of any such predisposition must be considered in relation to the character of the inducements." *Id.* Additionally, relevant to the court's entrapment inquiry is the strength of the police's inducement and the defendant's reluctance to the initial police inducement. *Id.* As predisposition constitutes a question of fact, the question of entrapment is exclusively in the province of the jury. *Id.*

Here, Mr. Fletcher elicited sufficient evidence to warrant an entrapment instruction. Baluska initially approached Mr. Fletcher, asking to buy a '30' and a firearm. (Tr.12/17/12p.233). Baluska testified that he asked Mr. Fletcher at least two

or three times to purchase drugs. *Id.* at 265. Moreover, Mr. Fletcher repeatedly told Baluska to meet at specific locations to purchase drugs, but he never appeared at these places such as McDaniel's, a tree stump, and 7-Eleven. (Tr.12/18/12p.66,69,93). Thus, Baluska repeatedly contacted Mr. Fletcher to purchase drugs. On cross-examination defense counsel asked Baluska, "Do you remember telling the police that he didn't even want to give you the drugs?" (Tr.12/18/12p.13). Baluska responded, "He acted like it seemed like he didn't, no." *Id.* Every time Baluska inquired about purchasing drugs, Mr. Fletcher either said he did not have any drugs or he would have to get it later. (Tr.12/17/12p.265;12/18/12p.74).

Furthermore, Baluska testified extensively about how unusually long it took to purchase drugs. When Mr. Fletcher would not sell him the 'teener' during the evening transaction, Baluska "told him – I got tired of it honestly. And I said: Just drop me off. You know I ain't going to play this game. You gave me run-around all day already. I don't want to do this no more. And then before he dropped me off, he handed a canister – a cigarette tin, cigarette thing, back to me." *Id.* at 248. Thus, Baluska threatened to leave the vehicle before Mr. Fletcher sold him drugs. Baluska testified that he grew increasingly "frustrated" with the drug transaction because "he is running me around to Auto Zone and all this other crap." *Id.* at 279. In total, the

second drug transaction took "at least an hour." *Id.* at 249. Lastly, Baluska described the evening transaction as follows:

> I said that they was giving me a run-around for real? You know you ain't got it? In other words, then referring -- because I asked Mr. Fletcher a few times, You got it? No, he says or whatever. And then so like, For real? You know. I remember stating for real at least once. You know. And then just before he dropped me off is when he handed me the tin with the drugs in it. And I put the currency in there. And handed it back after I took the drugs.

Id. at 280.

The record reflects that the government initiated the transactions, Baluska made repeated requests for drugs, Mr. Fletcher appeared reticent to sell drugs, Mr. Fletcher never had drugs on-hand, Mr. Fletcher repeatedly failed to appear for the drug transactions, and Baluska pressured Mr. Fletcher to sell him drugs. Significantly, after Mr. Fletcher argued that he presented a 'scintilla of evidence' to instruct the jury on entrapment, the trial court stated: "Well, I don't disagree with you." (Tr.12/18/12pp.9-10). When viewing the evidence in a light most favorable to Mr. Fletcher, the evidence presented during the prosecution's case clearly established sufficient evidence to warrant an entrapment instruction and the trial court reversibly erred by not instructing the jury accordingly.

d. Mr. Fletcher should not be required to admit to the commission of the charged offense to warrant an entrapment defense.

The trial court erroneously rejected Mr. Fletcher's entrapment instruction when it found sufficient evidence was raised to warrant an affirmative defense, but nonetheless still required him to admit all elements of the charged offense. (Tr.12/18/12p.10). The trial court's ruling rejecting Mr. Fletcher's entrapment instruction violated his statutory and constitutional rights, including his right to present a defense, his right to remain silent, and his right to have the prosecutor prove each element of each offense beyond a reasonable doubt. U.S. Const. amends. V, XIV; Colo. Const. art. II, §§ 16, 18, 25; *In re Winship*, 397 U.S. 358, 364 (1970); *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); § 18-1-407(1), C.R.S. (2015).

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. U.S.*, 485 U.S. 58, 63 (1988). The Colorado Supreme Court cautioned that the jury—and not the trial court—must determine the credibility of a defendant's theory. *People v. Nunez*, 841 P.2d 261, 265 (Colo. 1992).

A defendant should be entitled to raise an entrapment affirmative defense when evidence at trial warrants it and when the defendant does not testify inconsistently with this defense. *See Com v. Clapps*, 512 A.2d 1219, 1224 (Pa. Super.

1986). Significantly, the United States Supreme Court, the Colorado Supreme Court, and Colorado statutory authority permit a defendant to raise an affirmative entrapment defense even if he does not admit to committing the underlying offense. For instance, in *Mathews v. U.S.*, the United States Supreme Court held that a defendant could raise entrapment while simultaneously denying commission of the offense. 485 U.S. at 65. In *Mathews*, the prosecutor charged the defendant with accepting a bribe in exchange for an official act. *Id.* at 60. During trial, the defendant denied having the requisite mental state to commit the offense. *Id.* The trial judge rejected his entrapment defense, finding the defendant's defenses inconsistent per se and saw "no reason to allow or any defendant to plead these defenses simultaneously." *Id.* at 59. However, the United States Supreme Court disagreed: "[w]e hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Id.* at 62.

Prior to *Mathews*, the Colorado Supreme Court similarly found, "while appellant should not be required to admit guilt to obtain such an [entrapment] instruction, his theory of entrapment must be supported by some evidence of instigation of the offense by the officer." *People v. Penson*, 520 P.2d 110, 111 (Colo. 1974) (citing *Gonzales v. People*, 452 P.2d 46 (Colo. 1969)). Moreover, Colorado's affirmative defense statute

also permits evidence of an affirmative defense to come directly from the prosecutor's case, and it does not require a defendant to admit to the elements of the charged offense before raising it. Section 18-1-407(1), C.R.S. (2015) provides: "'Affirmative defense' means that *unless the state's evidence raises the issue involving the alleged defense*, the defendant, to raise the issue, shall present some credible evidence on that issue." (emphasis added).

Here, the trial court's holding is unclear as to whether it required the defendant to personally admit to the elements of the charged offense or if defense counsel could admit the elements through argument. (Tr.12/18/12p.10). Regardless, this Court should not force a defendant to admit commission of the charged offense personally or through defense counsel to warrant an entrapment instruction because it implicates serious policy and constitutional questions, and it violates § 18-1-407(1), C.R.S. (2015). In *Mathews*, the court rejected the government's contention that an inconsistent defense would encourage perjury, create jury confusion, and undermine the jury's finding of truth. 485 U.S. at 65. Instead, the court observed:

> When he takes the stand, the defendant forfeits his right to remain silent, subjects himself to all the rigors of cross-examination, including impeachment, and exposes himself to prosecution for perjury. Inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility. While we hold that a defendant may both deny the acts and other elements necessary to constitute the crime charged and at the same time claim entrapment, the

> high risks to him make it unlikely as a strategic matter that he will choose to do so.

Id. at 65-66 (quoting *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975)).

Moreover, by requiring defense counsel or Mr. Fletcher to admit the elements of the charged offense, it lowered the prosecutor's burden to convict Mr. Fletcher of unlawful distribution of methamphetamine beyond a reasonable doubt. U.S. Const., amends. V, XIV; Colo. Const., art. II, § 25; *Santana*, 255 P.3d 1126; *In re Winship*, 397 U.S. at 364. Additionally, the trial court's ruling violated Mr. Fletcher's constitutional right to present a defense under the Due Process Clauses and the Confrontation Clauses of the Sixth Amendment. *Crane*, 476 U.S. at 690 ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense" (quotations omitted)); *Salazar*, 272 P.3d at 1071; Colo. Const., art. II, § 16. Lastly, a rule that required Mr. Fletcher to personally admit committing the charged offense violated his right to remain silent: "[n]o person shall be compelled to testify against himself in a criminal case . . ." U.S. Const., amend. V, XIV; Colo. Const., art. II, § 18.

Other jurisdictions have also found that a rule that forces a defendant to admit committing the offense before warranting an entrapment instruction raises serious Fifth Amendment concerns. *See U.S. v. Annese*, 631 F.2d 1041, 1047 (1st Cir. 1980)

("While the success of a defendant in convincing a jury that he was entrapped may be reduced by his failure to testify, that is a choice that he has a right to make free of any compulsion whatsoever. To hold otherwise would raise a serious fifth amendment question"); *Com. v. Tracey*, 624 N.E.2d 84, 88 (Mass. 1993) ("the ultimate effect of requiring the defendant to admit to the crime in order to raise the defense of entrapment would be to relieve the Commonwealth of its burden of proving all elements of the crime beyond a reasonable doubt"); *United States v. Henry*, 749 F.2d 203, 211 (5th Cir. 1984) ("In no other area of law does the defendant lose the right to put the government to its proof solely because he wishes the jury to determine whether he should be acquitted based on relevant evidence in the record").

Further, a rule that requires a defendant to admit to the elements of the charged offense in order to warrant an entrapment defense violates Colorado statutory and case law. Section 18-1-407(1), C.R.S. (2015) permits evidence of an affirmative defense to derive from any source during trial: "'[a]ffirmative defense' means that unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue." Accordingly, the affirmative defense statute plainly permits evidence supporting entrapment to emanate directly from the prosecutor's case. *See Culver v. Samuels*, 37 P.3d 535, 536 (Colo. App. 2001) ("If the language of a statute is plain and the

meaning is clear, we need not resort to interpretive rules of statutory construction, but we simply apply the statute as written"). Further, in *People v. Whatley*, this Court reaffirmed that evidence in support of an affirmative defense may come from any source—even from the prosecution's case. 10 P.3d at 670.

Consequently, a rule requiring Mr. Fletcher to admit the charged offense impermissibly violates his right to remain silent, his right to present a defense, his right to be found guilty beyond a reasonable doubt, and § 18-1-407, C.R.S. (2015).

i. *Hendrickson* does not apply here because Mr. Fletcher did not testify during trial.

The trial court erroneously denied Mr. Fletcher's affirmative defense. Mr. Fletcher did not testify and deny the commission of the offense and there was sufficient evidence to warrant an entrapment instruction. In *People v. Hendrickson*, 45 P.3d 786 (Colo. App. 2001), *People v. Grizzle*, 140 P.3d 224 (Colo. App. 2006), and *People v. Taylor*, 296 P.3d 317 (Colo. App. 2012), divisions of this court held that the defendants were not entitled to raise an entrapment defense where they denied committing the charged offenses. However, in each of these cases, the defendants testified under oath and maintained their innocence. *See Grizzl*e, 140 P.3d at 225 (finding that as the defendant testified and "denied any wrongdoing" he could not instruct the jury on entrapment); *Taylor*, 296 P.3d at 326,328 (finding "because defendant denied committing the crime, he could not plead the affirmative defense of

entrapment." The court further stated, "accepting defendant's statement that the police contacted him first as true, the officers' two or possibly three questions on where to buy drugs are not such 'persistent inducements' that they would make *anybody* act in a criminal manner"); *Hendrickson*, 45 P.3d at 791 ("the defendant has denied and all witnesses who have testified on her behalf have denied that she committed any offense"). Significantly, the defendants in *Hendrickson*, *Grizzle*, and *Taylor*, did not provide sufficient evidence to warrant an entrapment instruction because they denied commission of the offense under oath.

Here, Mr. Fletcher's case fundamentally differs from *Taylor*, *Hendrickson*, and *Grizzle* because Mr. Fletcher waived his right to testify, he did not deny committing the charged offense under oath, and sufficient evidence supported his entrapment instruction. Thus, Mr. Fletcher's case contains no inconsistency such as *Taylor*, *Hendrickson*, and *Grizzle* where the defendants denied under oath any wrong doing, but then requested an entrapment defense that presupposed the commission of the underlying offense.

In *Hendrickson*, this Court found the following analysis in *Penson* dictum: "'while [a defendant] should not be required to admit guilt to obtain [an entrapment] instruction, his theory of entrapment must be supported by some evidence of instigation of the offense by the officer." 45 P.3d at 792 (quoting *Penson*, 520 P.2d at

111). *Hendrickson* found that "the question of inconsistent defense was not an issue in [*Penson*]," however *Penson* directly involved an inconsistent defense and therefore the phrase was crucial to the court's holding. *Id.* In *Penson*, the trial court denied the defendant's entrapment affirmative defense instruction because "[i]n every respect the [defendant]'s testimony was a complete denial that he had any connection with the arrangement made by the officer with the girl and further showed that the officer's conduct did not contribute to any of his actions." 520 P.2d at 111. Thus, the Colorado Supreme Court found that, while a defendant should not have to admit his guilt to raise entrapment, the defendant in *Penson* provided no evidence to support the affirmative defense because he completely denied the commission of the offense.

Moreover, in *People v. Huckleberry*, 768 P.2d 1235, 1238-39 (Colo. 1989), the Colorado Supreme Court discussed the legal nature of an alibi defense and whether it constituted an affirmative defense. The court found that "the essence of an affirmative defense is the admission of the conduct giving rise to the charged offense." *Id.* at 1238. In determining the legal significance of an alibi defense, the court reasoned that it essentially denies the commission of the charged act while an affirmative defense "basically admits the doing of the act charged but seeks to justify, excuse or mitigate it." *Id.* However, the court did not hold that an affirmative defense explicitly required the defendant to admit to the charged offense as a factual predicate

to receiving an entrapment instruction. *Hendrickson*, in relying upon *Huckleberry*, erroneously misconstrued a purely legal discussion about the nature of an affirmative defense and turned it into a factual precondition before a defendant can raise an affirmative defense. Thus, it erroneously found: "[a]n affirmative defense instruction is one in which the defendant admits the doing of the act charged but seeks to justify, excuse, or mitigate it." 45 P.3d at 790.

The holding in *Hendrickson* directly conflicts with United States Supreme Court and Colorado Supreme Court precedent, and Colorado statutory authority. *See Penson*, 520 P.2d 110; *Mathews*, 485 U.S. 58; § 18-1-407(1), C.R.S. (2015). For instance, *Hendrickson* contradicts § 18-1-407(1), C.R.S. (2015) because it requires "a defendant to admit committing acts that would otherwise constitute an offense before being entitled to assert an affirmative defense of entrapment." *Id.* at 791. However, § 18-1-407(1), C.R.S. (2015) allows evidence supporting an affirmative defense to come from the prosecutor's case-in-chief, and it does not require the defendant to admit to *anything* before raising an affirmative defense. Further, *Hendrickson* also lowers the prosecutor's burden of proof and imposes an impermissible burden of proof on the defendant because it forces the defendant to admit to the commission of the offense before warranting an entrapment instruction. *See* § 18-1-407, C.R.S. (2015); *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (once an affirmative defense is sufficiently

raised, it becomes another element of the offense and, thus, the prosecutor must disprove the affirmative defense beyond a reasonable doubt); *In re Winship*, 397 U.S. at 364.

Accordingly, Mr. Fletcher's case fundamentally differs from *Hendrickson*, *Grizzle*, and *Taylor* because he did not testify under oath and deny committing the charged offense. Unlike in *Hendrickson*, *Grizzle*, and *Taylor*, where the defendants denied committing the offense and therefore presented no evidence of government entrapment, here some evidence supported Mr. Fletcher's affirmative defense and the trial court erred when it denied his instruction.

ii. The recent holding in *Brown v. People* again demonstrates that Colorado precedent allows defendants to raise inconsistent defenses.

The Colorado Supreme Court's recent holding in *Brown v. People*, 239 P.3d 764 (2010) demonstrates that defendants may raise inconsistent defenses in the entrapment context. In *Brown*, the prosecutor charged the defendant with attempted first degree murder. *Id.* at 765. At trial, the defendant "steadfastly maintained his innocence" by testifying that he did not go to the victim's apartment on the morning of the incident. *Id.* Before jury deliberations, defense counsel requested jury instructions on the lesser included offense of attempted second degree murder and intoxication, and the trial court rejected the instructions because it conflicted with his

theory of innocence. *Id.* In Colorado, intoxication constitutes a partial defense. *Id.* at 769. The Colorado Supreme Court overruled the trial court's decision, finding that "[w]here the evidence supports an intoxication defense, it is appropriate for a trial court to instruct on that defense." *Id.* (citing *People v. Mattas*, 645 P.2d 254, 259 (Colo. 1982)). However, the Colorado Supreme Court in *Brown*, as it did in *Penson*, found that although the defendant could be entitled to raise an inconsistent defense, the record contained insufficient evidence to support the instruction.

While *Brown* only addressed a partial defense, it heavily relied on *Mathews*. In *Mathews*, the court held that under federal law a defendant may raise an entrapment defense if the evidence raised it, although the defendant may have presented inconsistent theories of defense. 485 U.S. 58. *Brown* relied on *Mathews*, stating "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." 239 P.3d at 769 (quoting 485 U.S. at 63). Accordingly, *Brown* held that a criminal defendant who maintains his innocence during trial nonetheless may receive an inconsistent jury instruction provided that the record contains a rational basis for it. *Id.* at 770.

In *Taylor*, this Court found that the holding in *Brown* did not extend to an affirmative defense such as entrapment "because it only addressed lesser included

offenses." 296 P.3d at 327. However, *Taylor* failed to recognize that *Brown* addressed not only the lesser included offense of attempted second degree murder, but also the partial defense of intoxication which "negates the specific intent necessary to carry out certain offenses." *Brown*, 239 P.3d at 769. Moreover, *Taylor* further found that *Brown* acknowledged *Grizzle* and *Hendrickson* in its opinion, *Mathews* was not binding precedent because it only addressed federal criminal law grounded in state statutory authority, and *Taylor* indicated "that the principle that one may not plead the affirmative defense of entrapment while maintaining innocence is still viable." 296 P.3d at 327. Yet, *Taylor* failed to take into account Colorado statutory authority, which plainly permits "some evidence" supporting an affirmative defense to come directly from the prosecutor's case. Further, *Taylor* also failed to acknowledge the Colorado Supreme Court's ruling in *Penson*, which clearly stated that a defendant does not have to admit guilt in order to raise an entrapment instruction.

As *Brown* relied heavily upon *Mathews* in holding that a defendant could raise an inconsistent theory of defense, it demonstrates that Colorado law permits a defendant to raise an entrapment defense even where the defendant did not admit to committing the offense. Such a holding would be in accord in with *Penson*, *Mathews*, and § 18-1-407(1), C.R.S. (2015), as argued above in subsection (d). To the extent *Taylor* finds to the contrary, Mr. Fletcher asserts that the holding in *Taylor* was incorrect and one

division of the court of appeals is not bound by another division's decision. *People v. Zubiate*, 2013 COA 69 ¶ 48.

Furthermore, even in jurisdictions that prohibit inconsistent defenses, "the defendant must be allowed to raise the defense of entrapment without admitting the crime whenever the circumstances are such that there is no inherent inconsistency between claiming entrapment and yet not admitting commission of the criminal acts." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (5TH ED. 2009). Here, the prosecutor's case-in-chief introduced sufficient evidence of the government's inducement and Mr. Fletcher did not testify under oath and deny the commission of the distribution of methamphetamine offense. Thus, Mr. Fletcher was entitled to raise an entrapment instruction.

Other jurisdictions that prohibit inconsistent defense theories nonetheless permit an entrapment instruction where the government's evidence raises it:

> In that situation a defendant may assert his or her own defense and still ask that the jury consider the possibility of entrapment as raised by the government itself. The availability of both defenses does not result from inconsistent statements made by the defendant and does not unduly burden the government, because the prosecution brings the issue into the case.

United States v. Smith, 757 F.2d 1161, 1168 (11th Cir. 1985). *See also Clapps*, 512 A.2d at 1224 ("an accused, who fails to testify in his own defense and does not otherwise

offer testimony inconsistent with his assertion of entrapment, is entitled to raise the defense of entrapment, provided, of course, there is some valid basis for the assertion of entrapment"); *United States v. Groessel*, 440 F.2d 602, 605 (5th Cir. 1971)(finding that the defendant chose not to testify and, thus, did not present inconsistent evidence with the defense of entrapment); *United States v. Haimowitz*, 725 F.2d 1561 (11th Cir.1984); *Sears v. United States*, 343 F.2d 139 (5th Cir.1965). Accordingly, Mr. Fletcher did not present inconsistent defenses at trial because the government's evidence raised his theory of entrapment and he did not testify under oath and refute his commission of the charged offense.

Consequently, the trial court reversibly erred when it denied Mr. Fletcher's entrapment instruction because it violated his constitutional rights, including his right to present a defense, his right to have the prosecutor prove his guilt beyond a reasonable doubt, and his right to remain silent. As such, the trial court's error cannot be deemed harmless.

II. Mr. Fletcher's due process right to a fair trial was violated by repeated prosecutorial misconduct throughout the opening statement, closing argument, and evidence stage of trial.

a. Standard of Review

Defense counsel objected to all but one of the alleged improper remarks during opening statement, closing argument, and the evidentiary stage of trial.

(Tr.12/17/12pp.204,206;12/18/12p.31;12/19/12pp.16,45). Appellate courts review a trial court's decision on the propriety of prosecutorial argument for abuse of discretion. *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010). If a defendant makes contemporaneous objections to prosecutorial misconduct during trial, the appellate court applies the harmless error standard of review. *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010). If an error rises to a constitutional dimension "a reviewing court must be convinced beyond a reasonable doubt of its lack of prejudicial impact." *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008). However, if the defendant did not object to prosecutorial misconduct, then the appellate court reviews for plain error. *Wilson v. People*, 743 P.2d 415, 419 (Colo. 1987).

b. Argument

The Due Process Clause guarantees every criminal defendant the right to a fair trial with a fair and impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *People v. Harlan*, 8 P.3d 448, 459 (Colo. 2000) *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005). The United States Supreme Court has recognized that prosecutorial misconduct in closing arguments may require reversal of a criminal conviction. *See Berger v. United States*, 295 U.S. 78 (1935). "A prosecutor, while free to strike hard blows, is not at liberty to strike foul ones." *Id.* at 88. Moreover, prosecutorial misconduct raises increased concern because of the district

attorney's prestige and fact-finding ability. *People v. Trujillo*, 624 P.2d 924, 925 (Colo. App. 1980).

Counsel's arguments must be restricted to the evidence and reasonable inferences therefrom. *People v. DeHerrera*, 697 P.2d 734, 743 (Colo. 1985). Moreover, a prosecutor's opening statements must be limited to facts that he believes will be proved in good faith, and are relevant and admissible during trial. *People v. Wallace*, 97 P.3d 262, 269 (Colo. App. 2004). The prosecutor cannot refer to facts not in evidence, express his personal opinion, nor inflame or appeal to the passions of the jury. *People v. Walters*, 148 P.3d 331, 334 (Colo. App. 2006); ABA Standard, Standard 3-5.8.

Here, the prosecutor violated Mr. Fletcher's rights when she improperly bolstered Holt's and the confidential informants' credibility, when she repeatedly introduced evidence that the court deemed "unduly prejudicial" and "subject to 404(b)," and when she argued facts not introduced into evidence and inflamed the passions of the jury.

i. The prosecutor improperly bolstered witnesses' credibility during opening statements.

The prosecutor began her opening statement by improperly bolstering confidential informants' and Holt's roles in narcotic investigations. She argued, "Investigator Jon Holt has been in law enforcement for about 13 years. And for those 13 years he's used confidential informants in many cases. As a matter of fact

confidential informants have been *critical* in investigator Holt's investigations regarding narcotics." (Tr.12/17/12p.204)(emphasis added). Defense counsel objected to the prosecution's characterization of confidential informants as "critical" and the court agreed "that's probably not something that would be relevant." *Id.* at 204-05. However, the court did not sustain the objection or admonish the jury to disregard the prosecutor's argument. *Id.* at 205-06. By classifying confidential informants as "critical," the prosecutor improperly bolstered Baluska's and Holt's testimony. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1056 (Colo. 2005) (a prosecutor cannot communicate her opinion on the truth or falsity of witnesses); *Wilson*, 743 P.2d at 418 ("Since the truthfulness of testimony and the credibility of witnesses are matters to be determined by the trier of fact, and not by the advocates, it bears repeating again that it is improper for counsel to express his or her personal belief in the truth or falsity of testimony during argument").

In *United States v. Cheska*, 202 F.3d 947 (7th Cir. 2000), the court found that the prosecutor engaged in misconduct when he argued that a witness "had convicted 23 other people" although evidence of the witness's prior cooperation in cases had not been admitted into evidence. The court found that the jury could have made improper inferences from the prosecutor's remark: the witness convicted 23 people; the witness's testimony was "decisive" in 23 cases; 23 juries convicted the defendant

based on the witness's testimony; the witness's testimony forced pleas in 23 cases; or the witness's credibility was "decisively established in 23 other cases." *Id.* at 951. The court found the prosecutor's remarks improper because it focused on the witness's number of convictions, the extent of the witness's contribution, and the effect of the witness's contribution. *Id.* Moreover, it permitted the jury to make impermissible and factually inaccurate inferences. *Id.*

As in *Cheska*, here the prosecutor's remark was improper because it invited the jury to similarly draw impermissible inferences regarding Holt's and confidential informants' credibility, such as their contributions to numerous convictions, their effectiveness in convicting criminals, and the extent of their contribution in criminal cases. Moreover, the prosecutor did not introduce any evidence about Holt's or confidential informants' cooperation in previous cases. Accordingly, the prosecutor's argument conveyed to the jury that since Holt's and the confidential informants' credibility had been decisively established throughout 13 years, they similarly told the truth here.

ii. The prosecutor improperly introduced evidence of Mr. Fletcher's prior drug use, despite the court characterizing this evidence as "unduly prejudicial" and "subject to 404(b)."

In the opening statement and the evidentiary stage of trial, the prosecutor introduced evidence that the trial court previously characterized as "unduly

prejudicial" and "subject to 404(b)." Prior to trial, defense counsel moved to preclude testimony that Mr. Fletcher previously worked as a confidential informant, he had prior interactions with law enforcement, and that he was a known methamphetamine distributor. (Tr.12/17/12pp.6-7). The trial court acknowledged this evidence "sounds unduly prejudicial and probably subject to 404(b) any way." *Id.* The prosecutor did not disagree with the court's statements, but requested to introduce this information to rebut evidence "regarding any prior knowledge or any prior acts" with "evidence that [Mr. Fletcher] was known or was a prior confidential informant." *Id.* The court stated that if the situation arose where the prosecutor needed to rebut Mr. Fletcher's statements, then the parties should first approach the bench outside the presence of the jury. *Id.*

Despite this exchange, during opening statements the prosecutor stated "[a]nd Chad had information and Investigator Holt also had information that the defendant had been selling methamphetamine. Chad also --." *Id.* at 206. Defense counsel objected, arguing that the prosecution's statement violated the trial court's ruling prohibiting evidence of the police's prior knowledge of Mr. Fletcher's distribution of drugs. *Id.* The prosecutor disputed defense counsel's objection, asserting "[a]ll we talked about was prior convictions." *Id.* The trial court also expressed confusion over defense counsel's objection, stating "It has to be investigated, the defendant. He just

didn't walk down the street and pick a house . . . I don't think that violated the rule. I don't want to get beyond this case." *Id.* at 207. However, the court had characterized this evidence as "unduly prejudicial" and "subject to 404(b)" during a bench conference earlier that day. *See People v. Kliner*, 705 N.E.2d 850, 874 (Ill. 1998) (finding the prosecutor's remark in opening statements about defendant's prior possession or purchase of handguns improper because the evidence regarding the guns was inadmissible during trial based on the trial court's ruling); ABA Standard, Standard 3-5.5 ("prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible").

During the evidentiary stage of trial, the prosecutor further introduced evidence that the court had characterized as "unduly prejudicial" and "subject to 404(b)." On cross-examination, defense counsel questioned Baluska about an inconsistent statement and Baluska responded, "Keith always had – he'd always had drugs. I mean it didn't matter. If he didn't have it on him, he would get it. So I had no –" (Tr12/17/12p.263). Defense counsel objected to Baluska's answer as nonresponsive, and the trial court sustained the objection and admonished the jury to disregard it. *Id.* at 264-65. Despite the trial court's admonishment, the prosecution persisted in this line of questioning and Baluska said "it was sometimes hit and miss with Keith. You

know it was sometimes he would get it [drugs]." (Tr12/18/12pp.30-31). Defense counsel objected, and the trial court agreed but nonetheless failed to admonish the jury to disregard the unduly prejudicial information. *Id.* at 30-31. Lastly, during direct examination the prosecution asked Holt: "Did you know Mr. Fletcher from previously?" (Tr12/18/12p.70). Defense counsel again objected, and the trial court sustained it. Consequently, the prosecution introduced—and attempted to introduce—evidence of Mr. Fletcher's prior drug sales and interaction with law enforcement.

In sum, the prosecutor repeatedly introduced evidence of Mr. Fletcher's previous drug sales and interactions with law enforcement, even though the trial court had characterized this evidence as unduly prejudicial, subject to CRE 404(b), and necessitated a bench conference prior to its introduction.

iii. The prosecutor impermissibly argued facts not introduced into evidence.

A prosecutor must not intentionally refer to or argue facts outside of the record. ABA Standards, Standard 3-5.9. *See People v. Walters*, 148 P.3d 331, 336 (Colo. App. 2006) (finding it improper for the prosecutor to argue anecdotal information that was outside the record and beyond the juror's personal observations because it "injected" the prosecutor's own knowledge and credibility on the issue).

Here, during closing argument the prosecutor improperly bolstered Baluska's credibility by arguing facts not admitted into evidence. In Mr. Fletcher's theory of the case, he attacked Baluska's credibility by eliciting information about the money and legal aid he received in exchange for buying narcotics. To rebut defense counsel's theory, the prosecutor impermissibly argued:

> And let's talk about what he got in exchange. $400. Is that a whole lot of money? 400 bucks. That's not enough to pay rent. That's not an exorbitant amount. And it's certainly not so much money that *he would be willing to throw his life under the bus* by taking the stand and becoming known to everybody as a confidential informant. *He put his life at risk by testifying.*

(Tr.12/19/12p.16)(emphasis added).

Defense counsel objected to the prosecution's statements, asserting that "[t]here's no evidence of anything." *Id.* Consequently, the trial court sustained the objection, admonishing the jury to disregard it. *Id.* During trial, defense counsel elicited testimony about how Baluska desperately needed money, how his family struggled financially, how his car had been impounded, and how his landlord evicted him. Additionally, the prosecution failed to present evidence regarding the cost of Baluska's rent or whether Baluska viewed $400 as "an exorbitant amount." Baluska also never stated that he "put his life at risk by testifying" or that he threw his life "under the bus." On the contrary, Baluska testified that he received significant

benefits as a result of the agreement, including money, probation, and his driver's license.

Moreover, the prosecution impermissibly inflamed the passion of the jury when she made an unsupported claim that Baluska risked his life by testifying. *See State v. Monroe*, 236 N.W.2d 24, 30 (Iowa 1975) (finding misconduct when the prosecutor stated during rebuttal argument that the special agent put his life in danger to testify when the record did not show "any indication" tending to show his life was at risk). The prosecutor's comments further suggested that she knew evidence not presented during trial which "supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *U.S. v. Young*, 470 U.S. 1, 18 (1985). *See also Domingo-Gomez*, 125 P.3d at 1057 (prosecutor's argument that defendant's case had to pass a "screening process" created the impression that the prosecutor knew additional inculpatory evidence).

Next, the prosecutor further argued facts outside of evidence when she rebutted Mr. Fletcher's theory that an unidentified person sold Baluska methamphetamine:

> If those women had really sold the meth to him, he'd give – he still did a drug buy. He'd still get his $100. And they'd still get busted. What's the loss to Chad Baluska whether Keith sells it or those women sold it? It's still a drug deal. And that's all he needs. He needs a drug buy. He didn't work with Keith Fletcher, oh, well but, hey, look, these

> women sold me meth. We didn't even know. You can bust them. No loss to Chad whatsoever.

(Tr.12/19/12p.45). Again, the prosecutor's argument exceeded the scope of evidence because Baluska never testified that he could fulfill his confidential informant agreement by buying drugs from *anyone*. On the contrary, Holt specifically targeted Mr. Fletcher during the undercover operation. (Tr.12/18/12pp.112-13).

Accordingly, the prosecutor relied on facts not contained in the record, injected her own knowledge and credibility into the case, and created the impression that she knew additional inculpatory evidence.

c. Conclusion

The prosecution depended on Baluska's credibility to convict Mr. Fletcher, and the prosecutor unduly prejudiced Mr. Fletcher when she repeatedly introduced evidence of Holt's and Baluska's prior knowledge of Mr. Fletcher's drug distribution, when she bolstered Holt's and confidential informants' credibility, and when she introduced evidence outside of the record.

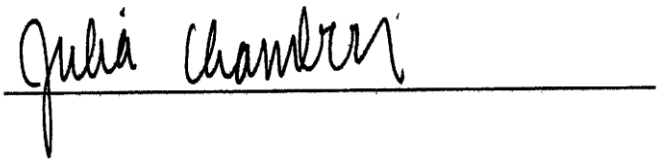
Consequently, this is not a case of a single, isolated improper remark by the prosecutor. Rather, the prosecution repeatedly argued facts throughout trial which the trial court found "unduly prejudicial" and "subject to 404(b)," she made statements meant to evoke the passion of the jury, and she asserted facts not in evidence. Accordingly, the prosecutor's improper statements, both in isolation and cumulatively,

permeated the entire trial and deprived Mr. Fletcher of his right to a fair trial by an impartial jury.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Mr. Fletcher respectfully request that this Court reverse the decision of the trial court and, in the alternative, order Mr. Fletcher's case remanded for an evidentiary hearing.

DOUGLAS K. WILSON
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on February 27, 2015, a copy of this Opening Brief of Defendant-Appellant was electronically served through ICCES on Catherine P. Adkisson of the Attorney General's office through their AG Criminal Appeals account.