DATE FILED: October 8, 2015 9:03 AM

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Morgan District Court; Honorable Douglas Vannoy; and Case Number 2012CR98	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant KEITH FLETCHER	
Douglas K. Wilson, Colorado State Public Defender JULIA CHAMBERLIN 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #47181	Case Number: 2013CA544

REPLY BRIEF OF DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

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

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

It contains 4,437 words.

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

Julia Chambers

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

OTHER AUTHORITIES

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

The Attorney General's contention that Mr. Fletcher argues a different issue on appeal than at trial is incorrect and belied by the record. AB, p. 11. *See* (R.Tr.12/18/12pp.9-10). Mr. Fletcher endorsed entrapment as an affirmative defense, tendered an entrapment instruction before trial, and advocated for instructing the jury on entrapment during the jury instruction conference. On appeal, Mr. Fletcher also argues that he was entitled to entrapment as an affirmative defense, and the trial court erred when it failed to instruct the jury accordingly.

The Attorney General also admits that this issue is preserved under controlling precedent. *See* AB, pp. 11-12. To the extent that the Attorney General asserts that "[t]his case illustrates the problems with this [preservation] approach because the trial judge had no opportunity to consider or develop a record addressing the claims Defendant now presents on appeal[,]" this argument is without merit and should be disregarded. AB, p. 12 n.6. Mr. Fletcher argued he was entitled to entrapment as a defense, and the trial court had ample opportunity to rule on it. *See People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006) ("The purpose of the contemporaneous objection

rule is to conserve judicial resources by alerting the trial court to a particular issue in order to give the court an opportunity to correct any error that could otherwise jeopardize a defendant's right to a fair trial.")

Mr. Fletcher further refutes the Attorney General's assertion that "[l]ater that day, during the jury instruction conference, Defense counsel raised entrapment again, admitting that its availability would depend on whether Fletcher testified." AB, p. 10 (citing (R.Tr.12/18/12pp.151-52)). The record actually reflects that defense counsel, when discussing jury instructions, merely acknowledged the trial court's previous ruling that Mr. Fletcher could only instruct the jury on entrapment if he testified and admitted to the elements. He stated: "The second one, I believe, I can already anticipate the court's position -- well, I guess we won't know for sure until we know whether or not Mr. Fletcher testifies. But it's the entrapment instruction for the affirmative defense." (R.Tr.12/18/12p.151). There was no further discussion on the matter. *Id.*

Next, Mr. Fletcher disagrees with the Attorney General's assertion that this Court must review the evidence to determine whether it is "substantial and sufficient in both quantity and quality to support the statutory defense." AB, p. 13 (citing *People v. Brante*, 232 P.3d 204, 209 (Colo. App. 2009)).[1] Instead, the Colorado Supreme Court more recently found: "if the trial court determines as a matter of law that *no evidence*

[1] The Attorney General mistakenly cites this case as a Colorado Supreme Court case.

exists in the record to support an affirmative defense, then the instruction need not be presented to the jury because there is no issue of fact for the jury to resolve." *O'Shaughnessy v. People*, 269 P.3d 1233, 1236 (Colo. 2012) (emphasis added) (citing *People v. Hill*, 934 P.2d 821, 826 (Colo. 1997)). Thus, like the plain language of the affirmative defense statute, § 18-1-407, C.R.S. (2015), which requires only "some credible evidence," a defendant's burden of production is exceedingly low.

Lastly, Mr. Fletcher disagrees with the Attorney General's assertion that the general harmless error standard of review applies. AB, pp. 13-14. Instead, the Colorado Supreme Court has repeatedly found that a prosecutor's burden of proof is unfairly lessened when the trial court wrongly denies an affirmative defense, and thus the error cannot be harmless. *See People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005) ("If the trial court errs in disallowing an affirmative defense, then it improperly lowers the prosecution's burden of proof . . . 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."); *Lybarger v. People*, 807 P.2d 570, 582-83 (Colo. 1991) (finding that an improper affirmative defense instruction could not be considered harmless where it effectively prevented the jury from considering the defendant's affirmative defense and thus made the prosecutor's burden of proof unclear).

b. Relevant Facts

The Attorney General disagrees that the trial court found Mr. Fletcher raised sufficient evidence to warrant an entrapment instruction. AB, p. 10 n. 5. *See* (R.Tr.12/18/12pp.9-10). However, after defense counsel explained how the prosecutor's case-in-chief raised the requisite scintilla of evidence to raise entrapment, the trial court remarked: "Well, I don't disagree with you." *Id.* at 10. The trial court only rejected Mr. Fletcher's entrapment instruction because he would not admit to the elements of the charged offense. *Id.*

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

The Attorney General disagrees that the prosecutor's case-in-chief raised some evidence of entrapment because: (1) Mr. Fletcher had a previous conviction for delivery of a controlled substance; and (2) Mr. Fletcher "did not show any reluctance to sell drugs." AB, pp. 24-26. The Attorney General's argument merely demonstrates the necessity for the jury to resolve this factual dispute after being properly instructed on the entrapment defense.

The entrapment statute is governed by a subjective test that focuses on a defendant's state of mind. *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999). Under this test, the court must look at the existence of any predisposition on the part of the defendant. *Id.* However, "[i]nducement does not become irrelevant to the entrapment

inquiry, to be sure, because the stronger the inducement, the more likely that any resulting criminal conduct by the defendant occurred as the result of the inducement rather than of the defendant's own predisposition." *Id.* (citing *United States v. Watson*, 489 F.2d 504, 511 (3d Cir. 1973)). The Colorado Supreme Court listed a few examples of relevant evidence that shows a defendant's subjective state of mind:

> the defendant's conduct in response to the government inducement, particularly whether he or she evidenced reluctance to commit the offense; the amount of persuasion the government was required to employ in order to overcome any reluctance; the nature of the defendant's ability to perform the illegal acts; the defendant's prior acts, including his or her criminal record; hearsay evidence of reputation; and the defendant's conduct during negotiations with the government agent.

Id.

The Colorado Supreme Court cautioned that the jury should resolve whether the defendant was indeed entrapped, and the trial court must only determine if some evidence raised the issue. *Id.* Thus, "resolution of the entrapment defense is properly reserved for the jury, as predisposition frequently depends upon a fact-intensive credibility determination." *Id.*

The Attorney General asserts that Mr. Fletcher's previous delivery of a controlled substance conviction from Texas in 1990 shows his predisposition to commit the charged offense. AB, pp.24-25 (citing PR. Vol. 4 pp. 4-5). However, this

previous conviction was not relevant to the trial court's assessment of facts because it was not admitted into evidence at trial.[2] PR. Vol. 1, p. 134. Nonetheless, if this Court chooses to address the Attorney General's argument, then Mr. Fletcher's delivery of a controlled substance conviction occurred *22 years* before Mr. Fletcher allegedly sold Baluska drugs here. AB, pp. 24-25 (citing PR. Vol. 4 pp. 4-5). Mr. Fletcher has had absolutely no drug-related convictions—either misdemeanor or felony—since 1990. PR. Vol. 4 p. 5.

While the Attorney General asserts that "Fletcher did not show any reluctance to sell drugs or a weapon to the CI beyond an apparent fear of detection and the police tactics merely provided Fletcher with an opportunity to commit these crimes[,]" the record belies this assertion. AB, p. 25. For instance, Baluska admitted that Mr. Fletcher "seemed like he didn't" want to sell him drugs, Baluska had to ask Mr. Fletcher "tw[o] or three times" to buy drugs, Baluska initially approached Mr. Fletcher in order to buy a '30' and a firearm, Baluska felt like Mr. Fletcher "gave [him] the run-around all day already," Mr. Fletcher provided Baluska with false locations to buy drugs, and Mr. Fletcher never had drugs or firearms on his person when Baluska asked to purchase these items. (R.Tr.12/17/12pp.233,265;12/18/12pp.13,66,68-

[2] Contrary to the Attorney General's assertion that Mr. Fletcher's prior conviction was "excluded from trial specifically because Fletcher did not testify as to his supposed inducement[,]" the trial court actually found it inadmissible because the prosecution failed to "present competent evidence of other acts or transactions at trial." AB, pp. 24-25. *See* PR. Vol. 1, p. 134.

69,74,93,248). The record contains evidence raising that Mr. Fletcher was entrapped, and the question should have been submitted to the jury to resolve.

Because the record provides evidence that Mr. Fletcher was entrapped and the trial court actually agreed that there was some evidence to warrant an entrapment instruction, the trial court erred when it failed to instruct 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's denial of Mr. Fletcher's affirmative defense violated Colorado Supreme Court precedent, United States Supreme Court precedent, Colorado statutory law, and Mr. Fletcher's constitutional rights. Mr. Fletcher was entitled to raise an entrapment affirmative defense because evidence at trial warranted it, and he did not testify under oath inconsistently with this defense. Thus, the prosecutor's case-in-chief raised some evidence of entrapment, and the trial court reversibly denied instructing the jury accordingly.

Initially, the Attorney General mischaracterizes Mr. Fletcher's argument as: "*Hendrickson* and its progeny are wrong, Colorado should instead follow the United States Supreme Court's reasoning in *Mathews*[.]" AB, p. 16. However, Mr. Fletcher argued that a rule requiring a defendant to admit to the elements of the charged offense is contrary to United States Supreme Court *and* Colorado Supreme Court precedent, and Colorado statutory authority. OB, p. 15. By focusing only on *Mathews*

v. U.S., 485 U.S. 58, 63 (1988), the Attorney General fails to respond to Mr. Fletcher's argument that the trial court's ruling contradicted the holding in *People v. Penson*, 520 P.2d 110 (Colo. 1974).

In *Penson*, the court held that "where defendant's testimony was a complete denial that he had any connection with the arrangement made by undercover officer and prostitute and showed that the officer's conduct did not contribute to any of his actions, defendant was not entitled to an instruction on entrapment." *Id.* at 111. There, the defendant was shining an undercover officer's shoes when two females entered the store and went into the back room. *Id.* The undercover officer testified that the defendant remarked, "You can have a good time with either of the two girls if you pay for it." *Id.* The undercover officer left to get money, returned and handed the money to the defendant, and went into the back room where one of the girls propositioned him for sex. *Id.* At trial, the defendant testified and denied "receiving any money from the officer or even speaking to the girl on the officer's behalf." *Id.* As the defendant completely denied committing the crime under sworn testimony, the trial court refused to instruct the jury on entrapment. *Id.*

The Colorado Supreme Court reaffirmed the trial court's ruling, finding:

> In every respect the appellant'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. *Thus, while appellant should not be required to admit guilt to obtain such an instruction, his theory of entrapment must be supported by some evidence of instigation of the offense by the officer. Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969). There was no such evidence in this case, and no error was committed by the trial court's refusal to submit the instruction.

Id. (emphasis added). *Penson* found that while a defendant need not admit to the charged offense, the record must contain some evidence to warrant an entrapment instruction. Thus, *Penson* recognized that a defendant could raise entrapment without admitting guilt.

Similarly, in *Mathews*, 485 U.S. 58, the United States Supreme Court also held, "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. While the Attorney General correctly states that *Mathews* addresses federal statute rather than Colorado statute, *Bailey v. People*, 630 P.2d 1062 (Colo. 1981), it reaches the same conclusion as binding Colorado Supreme Court authority. AB, p. 17.

Next, the Attorney General dismisses Mr. Fletcher's argument that the trial court's ruling contradicts the affirmative defense statute's plain language, asserting that this "adds nothing to the analysis." AB, p. 18, n. 9. *See* § 18-1-407(a), (2015) ("'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.") However, entrapment constitutes an affirmative defense and is, therefore, governed by the affirmative defense statute. *People v. Sprouse*, 983 P.2d 771, 775 (Colo. 1999); *Bailey v. People*, 630 P.2d 1062, 1065 (Colo. 1981) ("Once the defendant has presented credible evidence on the issue, the prosecution must prove beyond a reasonable doubt that no entrapment has occurred.").

The Attorney General asserts that Mr. Fletcher's argument fails because he did not look at the plain language of the entrapment statute, and Mr. "Fletcher instead makes policy arguments in favor of *Mathews*, cites cases from other jurisdictions that chose to follow *Mathews*, and points to the general affirmative defense statute." AB, p. 18, n. 9. Again, the Attorney General's argument is misleading because it omits any discussion of *Penson*. OB, pp. 15-16. The issue before this Court is whether the trial court erroneously denied Mr. Fletcher's entrapment instruction and prevented the jury from evaluating his affirmative defense. The jury—not this Court—must ultimately determine whether the facts support Mr. Fletcher's entrapment defense. *People v. Nunez*, 841 P.2d 261, 264-65 (Colo. 1992) ("That is an issue for the jury to decide, not this Court. The rationale underlying the general rule is the belief that it is for the jury and not the court to determine the truth of the defendant's theory.")

Lastly, the Attorney General wholly fails to address Mr. Fletcher's constitutional argument, and it does not discuss the significant constitutional problems implicated by the trial court's ruling. AB, p. 18 n. 9. A strict rule requiring Mr. Fletcher to testify and admit to the elements of drug distribution in order to warrant an entrapment defense would lower the prosecutor's burden of proof, violate Mr. Fletcher's constitutional right to present a defense, and abrogate his right to remain silent. OB, p. 17. The Colorado Supreme Court has recognized a defendant's constitutional right to present a defense if the evidence supports it:

> In a criminal case the defendant can assert as many defenses *as can be supported by the evidence*. If affirmative defenses such as self-defense or alibi are presented the issues thereon are tried as part of the criminal case, and if any such defense raises in the mind of a jury a reasonable doubt as to the defendant's guilt he should be acquitted.

People v. Hill, 934 P.2d 821 (Colo. 1997) (emphasis in original) (quoting *People ex rel. Juhan v. District Court,* 165 Colo. 253, 259, 439 P.2d 741, 745 (1968)). Mr. Fletcher raised some evidence to support entrapment, and Mr. Fletcher should not have to choose between his constitutional right to remain silent and his constitutional right to present a defense during trial.

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

This Court's holdings 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), do not apply to Mr. Fletcher's case because he did not testify under oath and deny commission of the charged offense.

To the extent the Attorney General argues that "[t]he key requirement in Section 18-1-709 is not whether a defendant testifies, but whether 'defendant denies committing the crime[,]'" this assertion is incorrect. AB, p. 18. As discussed above, *Penson* held that a defendant could not raise entrapment if he testified under oath and denied commission of the offense because the record showed absolutely no evidence that the defendant had been entrapped. 520 P.2d 110. However, the court recognized, "while appellant should not be required to admit guilt to obtain such an instruction, his theory of entrapment must be *supported by some evidence of instigation of the offense by the officer*." *Id.* at 111 (emphasis added). *Penson* mirrors the language in the affirmative defense statute, which provides that if the prosecutor's case-in-chief does not already raise the affirmative defense, then the defendant "shall present some credible evidence on that issue." § 18-1-407, C.R.S. (2015).

Significantly, in *Hendrickson*, 45 P.3d 786, *Grizzle*, 140 P.3d 224, and *Taylor*, 296 P.3d 317, divisions of this court—consistent with *Penson*—held that the defendants were not entitled to raise an entrapment defense where they testified and denied

committing the charged offenses. *See* OB, pp. 19-20. Thus, as in *Penson*, 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. The Attorney General asserts that *Hendrickson* held that "where a defendant strategically chooses to pursue a different theory of defense, courts can properly refuse to instruct on an inconsistent affirmative defense or justification." AB, pp. 18-19. However, in *Hendrickson* "the defendant [] denied and all witnesses who [] testified on her behalf [] denied that she committed any offense." 45 P.3d at 791. This Court has never gone as far as the Attorney General suggests, precluding a defendant from raising entrapment when the prosecutor's case-in-chief raises the issue and when the defendant does not deny committing the charged offense under oath. *See Hill*, 934 P.2d at 820-30 (a defendant can assert "as many defenses *as can be supported by the evidence*.")

Here, 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.

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

While the Attorney General argues that Mr. Fletcher's reliance on *Brown v. People*, 239 P.3d 764 (Colo. 2010) is "misplaced because that case was limited to lesser included offenses and no subsequent case has expanded its reasoning to affirmative defense," this argument is incorrect. AB, p. 21. In *Brown*, despite the fact that the defendant "steadfastly" denied committing the crime during his testimony, the Colorado Supreme Court permitted the defendant to instruct the jury on intoxication. 239 P.3d at 765. Although the Attorney General categorizes intoxication as a lesser included offense, under Colorado authority it constitutes a partial defense which "negates the specific intent necessary." *Id.* at 769; AB, p. 21.

Contrary to the Attorney General's assertion that *Brown* "said nothing about changing Colorado law to permit inconsistent defenses in the context of entrapment," *Brown* was not presented with an entrapment issue. AB, p. 21. However, *Brown*, similarly to *Mathews*, 485 U.S. at 63, held that a criminal defendant who maintains innocence during trial nonetheless may receive an inconsistent jury instruction provided that the record contains a rational basis for it. As such, *Brown* did not "chang[e] Colorado law to permit inconsistent defenses in the context of entrapment"

as the Attorney General suggests, but the *Brown* rational is consistent with *Penson*. AB, p. 22. In addition, *Brown* acknowledged the general reasoning in *Mathews*.

The Attorney General also erroneously relies on this Court's decision in *People v. Brown*, 218 P.3d 733, 737 (Colo. App. 2009), to support its assertion that "where a defendant strategically chooses to pursue a different theory of defense, courts can properly refuse to instruct on an inconsistent affirmative defense or justification." AB, pp. 18-19. However, the Colorado Supreme Court affirmed *Brown*, 218 P.3d 733, on other grounds. *See Brown*, 239 P.3d at 768. The Colorado Supreme Court—in evaluating a lesser included offense and a partial defense instruction—found that a defendant could not instruct the jury on a defense that was both inconsistent with his sworn testimony and when he "failed to produce any other evidence in support of the instruction." *Id.*

Moreover, contrary to the Attorney General's assertion, nothing in *Brown*, 218 P.3d 733 or *People v. Garcia*, 826 P.2d 1259 (Colo. 1992), warrants a different conclusion. AB, pp. 18-19. In *Garcia*, the defendant, who was convicted of murder, challenged his conviction based on the trial court's refusal to instruct the jury on a lesser non-included manslaughter offense. 826 P.2d at 1261-62. There, the defendant testified that an intruder killed the victim and "the only evidence (the defendant's own confession) suggesting the defendant had acted in the heat of passion when he killed

the victim was 'a lie.'" *Brown*, 218 P.3d at 736 (quoting *Garcia*, 826 P.2d at 1261-62). *Garcia* rejected the defendant's non-included offense because of the "judicial admission" doctrine, where "the defendant could not seek an instruction based on evidence that he testified was 'a lie.'" *Id.* (quoting *Garcia*, 826 P.2d at 1262-63). Here, neither defense counsel nor Mr. Fletcher made a judicial admission; rather, defense counsel argued that the evidence did not support a finding of drug distribution beyond a reasonable doubt. *See e.g. Gordon v. Benson*, 925 P.2d 775, 781 (Colo. 1996) ("a statement regarding the facts that were in dispute and how the evidence concerning those facts could be interpreted by a jury" is not a judicial admission).

Second, *Garcia* denied the non-included offense instruction because of the "deemed election" doctrine, which it summarized as "a 'defendant [who] testified that he did not kill the victim and asserted that another person was responsible' had 'render[ed] every theory of defense unavailable save one, [and] will be deemed to have elected that one.'" 218 P.3d at 736-37 (citing *Garcia*, 826 P.2d at 1263) (quoting *Spuehler v. State*, 709 P.2d 202, 204 (Colo. 1985)). The Attorney General's reliance on *Brown*, 218 P.3d 733, and *Garcia*, 826 P.2d 1259, only strengthens Mr. Fletcher's position because he did not testify and, thus, he did not similarly make a judicial admission or a deemed election.

Other jurisdictions have also found that a defendant may instruct a jury on entrapment if he does not testify and deny committing the charged offense during trial. *See e.g. Hubbard v. State*, 770 S.W.2d 31, 38-39 (Tex. Crim. App. 1989) ("We note that although the defense of entrapment is not available to a defendant who denies the commission of the offense, it is available to a defendant who pleads not guilty and who does not take the stand or offer any testimony inconsistent with the commission of the crime."); *Cosmo v. State*, 739 S.E.2d 828 (Ga. Ct. App. 2013) *rev'd in part on other grounds*, 757 S.E.2d 819 (Ga. 2014) *and vacated on other grounds*, 759 S.E.2d 622 (Ga. Ct. App. 2014) ("when the State's case shows evidence of entrapment and the defendant offers no evidence of entrapment inconsistent with his defense that he did not commit the crime, the defendant is not required to admit the commission of the crime in order to be entitled to a charge on entrapment."); *United States v. Smith*, 757 F.2d 1161, 1168 (11th Cir. 1985); *Com. v. Clapps*, 512 A.2d 1219, 1223-24 (Pa. Super. Ct. 1986). In fact, it is uncommon for states to adhere to a view "that the entrapment defense can only be raised by admission by the defendant, affirmatively, of the commission of the offense" because this rule raises serious policy and constitutional questions. PAUL MARCUS, THE ENTRAPMENT DEFENSE 6-45 (4th ed. 2009) (citing *State v. Soule*, 811 P.2d 1071, 1074 (Ariz. 1983)).

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.

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

To the extent that the Attorney General asserts that this Court should "disregard Fletcher's attempt to analogize this remark to the misconduct in *United States v. Cheska*, 202 F.3d 947 (7th Cir. 2002)," Mr. Fletcher reiterates that *Cheska* is similar to the prosecutor's misconduct here and constitutes persuasive authority. In *Cheska*, the prosecutor improperly argued that a witness ("Burns") "had convicted 23 other people" even though this evidence had not been admitted during trial. *Id.* at 950. There, the prosecutor's improper remarks, some based on the record, bolstered Burns' credibility by allowing the jury to make the following inferences:

> 1) that there had been 23 convictions; 2) that Burns' contribution was decisive in 23 cases, and that but for Burns' cooperation, those individuals would not have been convicted; 3) 23 juries convicted defendants based on Burns' testimony; 4) a jury or juries convicted 23 individuals on the basis of Burns' testimony; 5) Burns' testimony forced pleas in 23 cases; or 6) Burns' credibility was decisively established in 23 other cases. Some of these inferences are factually incorrect; others have some basis in the record. In any case, the remark is vulnerable in three key respects: the number of convictions, the extent of Burns' contribution and the effect of Burns' contribution.

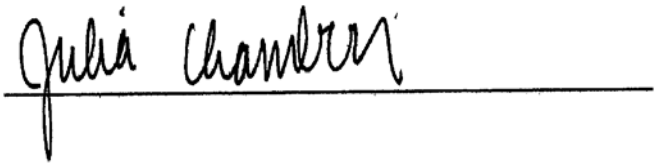
Id. at 951.

Similarly, here the prosecutor argued that "Investigator Holt had 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." (R.Tr.12/17/12p.204). The prosecutor's characterization of the confidential informant's testimony as "critical" improperly bolstered Investigator Holt's and Baluska's testimony. *See* OB, p. 31. As in *Cheska*, here the jury could also make improper inferences about the number of convictions confidential informants participated in over 13 years, the extent of confidential informant's role in prior convictions, and the effect of confidential informant's testimony in those cases. Contrary to the Attorney General's assertion that the prosecutor's argument was "innocuous," here the prosecutor improperly bolstered Baluska's credibility which was highly disputed during trial. *See* OB, pp. 2-4.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Mr. Fletcher respectfully requests that this Court reverse the decision of the trial court and remand this case for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender



JULIA CHAMBERLIN, #47181
Deputy State Public Defender
Attorneys for Keith Fletcher
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on October 8, 2015, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Kevin E. McReynolds of the Attorney General's office.