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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Moffat County District Court Honorable Michael O'Hara, Judge Case No. 14CR95	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellant, v. BRIAN J. GOOD, Defendant-Appellee.	▲ **COURT USE ONLY** ▲ Case No. 14CA2434
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PEOPLE'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains **2891** words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Jacob R. Lofgren
Signature of attorney or party

In response to the matters raised in the defendant's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, the People submit the following Reply Brief.

ARGUMENT

A defendant is not entitled to immunity from prosecution where he reports his own drug use but he is not reporting that he is suffering from "an emergency drug or alcohol overdose event."

The district court dismissed the charges against the defendant after finding that section 18-1-711, C.R.S. (2015), applied under the circumstances presented here. The court erred.

A. Standard of Review and Issue Preservation

The defendant contends that the People did not preserve this issue because he asserts the People argued the issue differently below than it is argued on appeal. Consequently, the defendant urges this Court to apply a plain error standard of reversal (AB, pp.9-13).

Despite the defendant's contention, the People argued both below and on appeal that the defendant was not reporting an actual medical emergency when he contacted police (*compare* R. CF, pp.20-29; R. Tr.

12/8/2014, pp.75-83 *with* OB, pp.8-9, 16-23). Therefore, the People did properly preserve the argument raised on appeal.

To the extent the People's appellate argument also observes that no reasonable person would have perceived an apparent emergency, that argument is a reasonable extension of the arguments raised in the district court. At the hearing on the defendant's motion to dismiss, the prosecution demonstrated that the defendant was not reporting such an emergency by questioning witnesses about their perceptions of whether the defendant was suffering a medical emergency when he approached them.

Moreover, to the extent the arguments differ, the district court's order addressed both aspects of the People's argument; thus, this Court should consider it preserved. Indeed, the district court concluded that (1) the defendant was reporting an "overdose event" and (2) the officers actually believed that the defendant was reporting an overdose event (R.Tr.12/9/2014, pp.2-10; R. CF, pp.31-33).

Accordingly, the record demonstrates that the People preserved this issue and its arguments for appeal.

The defendant next asserts that, if preserved, this Court should review for an abuse of discretion. However, in applying section 18-1-711, the district court was first required to make factual findings about the circumstances surrounding the defendant's encounter with police officers, and then to determine as a matter of law whether, under those facts, the defendant was entitled to statutory immunity. The first step (the court's factual findings) should be reviewed for clear error. *See People v. Sotelo*, 336 P.3d 188, 191 (Colo. 2014). The second step (the court's legal conclusions) should be reviewed de novo. *See id.*

If this Court agrees with the defendant that the only question here is whether the defendant had proved by a preponderance of the evidence that he was entitled to immunity, it appears that review for an abuse of discretion may be appropriate. *See People v. Eckert*, 919 P.2d 962, 965 (Colo. App. 1996).

Even if this Court reviews for an abuse of discretion, however, a district court necessarily abuses its discretion where it misconstrues or misapplies the law. *See People v. Lacallo*, 338 P.3d 442, 451 (Colo. App. 2014).

B. Law and Analysis

1. The defendant was not entitled to immunity under the plain language of section 18-1-711.

The parties agree that this Court should apply the plain language of section 18-1-711 to resolve the question presented—namely, whether the defendant was reporting an "emergency drug or alcohol overdose event" under section 18-1-711(1)(a), C.R.S. (2015) as that term is defined in section 18-1-711(5), C.R.S. (2015) (*see* OB, pp.16-18; AB, pp.13-15).

The defendant contends that the district court's factual findings and the record support the conclusion that he was reporting a medical emergency or "overdose event" when he rode his bicycle across town and approached police officers outside of the Moffat County Public Safety Center (AB, pp.15-16). However, at the outset of its findings, the court observed that the defendant "was probably more concerned about having the police protect him from the Mafia and his wife at that moment than he might have been about getting assistance for a perceived emergency concerning his ingestion of methamphetamine"

(R.Tr.12/9/2014, p.3, l.21—p.4, l.2). Thus, the court initially observed that the defendant was not approaching officers because he required immediate medical attention, but rather to report a crime in an effort to obtain police protection "from the Mafia and his wife."

The district court's analysis should have ended there. If the court concluded, as it stated, that the defendant's goal was to obtain police protection from the Mafia and his wife, the plain language of section 18-1-711 does not provide him with immunity from prosecution.

The defendant argues that "[u]nder the State's logic, an underage girl who goes to the police station and states that her boyfriend put drugs in her cocktail causing her to feel unwell and fear permanent injury, would receive no protection under the statute because her report also encompasses a criminal accusation" (AB, p.16). The defendant's analogy fails.

When the "underage girl" in the defendant's hypothetical contacts police officers and/or medical services, she is seeking immediate medical assistance and, in the process of doing so, also happens to report an *actual* crime—namely, that she has been drugged with an unknown

substance in an unknown quantity placed in her drink by an unknown person; thus, she is requesting immediate medical assistance.[1]

Unlike the unaware "underage girl," the defendant here knew exactly what he had ingested, how much he had ingested, and from where he had obtained his drugs. When the defendant rode his bicycle across town and walked up to police officers, his intent was to report that his wife and the Mafia had "poisoned" the illicit drugs that he voluntarily ingested, not to request medical attention for a drug overdose. And, to the extent the defendant accepted medical attention during his encounter with police officers, he did so because he irrationally believed that his methamphetamines had been "poisoned" by the Mafia.

Thus, unlike the "underage girl," the defendant contacted police to report an imagined "crime" and to provide officers with his personal drug paraphernalia as evidence of that "crime." While reporting that crime, he happened to accept an offer for medical assistance.

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[1] Assuming the "underage girl" reports a crime, but does not request or even rejects medical assistance, it is possible (albeit unlikely) that she could be prosecuted for her consumption of alcohol as a minor.

Put simply, the defendant did not ride his bicycle across town to a hospital or an urgent care center to obtain medical attention or report that he was suffering from a medical emergency or an "emergency overdoes event;" instead, he rode his bicycle across town to a police facility because he wanted to report the "crime" committed by the Mafia and his wife. The fact that the highly intoxicated defendant ultimately accepted, but did not request, medical treatment does not transform his encounter with officers into an "emergency overdose event." Thus, the defendant was not entitled to immunity under section 18-1-711.

Next, the defendant contends that "[s]ection 18-1-711 does not require talismanic language, such as a request for an ambulance or for medical attention. It requires only that the suffering individual report the 'event' to a law enforcement officer, the 911 system, or to a medical provider." Even if talismanic language is not required, the statute provides immunity only where a defendant is actually reporting an "emergency overdose event."

Here, the intoxicated defendant irrationally reported that his wife and the Mafia were trying to kill him. These facts demonstrate that the

defendant was not in medical distress but rather wanted his wife and the Mafia to be held accountable for their "criminal" actions. Thus, the defendant's language—talismanic or not—did not alert police officers that he was reporting an "emergency overdose event" requiring immediate medical attention. Indeed, the defendant never asked for medical care; instead, he only accepted such care after it was offered. Accordingly, the record demonstrates that the defendant's purpose for approaching officers was not to report that he was suffering from a medical emergency but rather to report a crime.

Finally, the defendant asserts this Court should reject the People's observation that the police did not subjectively believe the defendant was overdosing because that argument contradicts the district court's findings of fact (AB, pp.18-19). However, as argued in the Opening Brief, this Court should conclude that the trial court clearly erred when it concluded that the officers subjectively believed the defendant was actually suffering from an overdose (OB, pp.21-23).

The record reflects that an ambulance was offered primarily as a precautionary measure, and to ensure the defendant was medically

cleared for the county jail (R. Tr. 12/8/2014, pp.14-15, 20, 27-29, 34-36, 42-46, 49-55, 59-62). The ambulance was not offered to treat a medical emergency, let alone any medical condition reported by the defendant.

Moreover, the record reflects that, when the officer radioed his dispatcher, he called this a "possible methamphetamine overdose" only to alert his dispatcher that this encountered involved drugs (R. Tr. 12/8/2014, pp.44, 49-50, 53-55). This passing reference was not based upon any of the defendant's own words or actions when he told the officer's about his drug use in an attempt to report his wife's "crime" (*see* R. Tr. 12/8/2014, pp.27-28, 50-52, 59-62). In any event, the overdose immunity statute only applies to an individual's reported "emergency overdose event," not to another person's belief or precautionary actions.

Consequently, the competent evidence in the record shows that the defendant never reported that he was suffering from "an emergency overdose event," he did not request any immediate medical attention, and he did not exhibit any signs or symptoms that he was suffering from a medical emergency. Thus, the court erred in its interpretation and application of section 18-1-711 in this case.

2. Even if section 18-1-711 is ambiguous, that statute was not intended to provide immunity from prosecution under the circumstances presented here.

The defendant appears to accurately summarize the legislative history leading to the adoption of section 18-1-711 (AB, pp.20-27). In doing so, the defendant does not dispute that the legislative intent behind the overdose immunity statute was to save lives by providing immunity from prosecution where an individual reports an actual emergency medical situation—i.e., that he or someone he is with has consumed a toxic or lethal dose of drugs or alcohol (*see* OB, pp.24-27). And, nothing in the legislative history supports the conclusion that the legislature intended to provide sweeping immunity from prosecution to an individual who reports that he has used drugs while attempting to report some other person's crime. None of the discussions surrounding this bill condoned the idea that an accused should be granted statutory immunity were he walks up to a police officer, admits to using drugs, but never requests assistance for a medical emergency.

The defendant also specifically disagrees with the idea that the Attorney General's Office and the Colorado District Attorney's Council

feared that this bill could be misapplied to provide blank immunity from felony prosecution where an individual reports his or her own drug use to escape prosecution (AB, pp.19, 27-28). Even if it was not expressly stated, the concerns expressed by the Attorney General's Office and the District Attorney's Council at least implicitly show that both organizations were urging the legislature to craft a law which provided immunity only under the narrowest circumstances—namely, when an individual was actually suffering from a drug overdose that necessitated immediate medical intervention to prevent the loss of life.

Interpreting section 18-1-711 to provide blanket immunity to an intoxicated individual who is not suffering an "overdose event," but still irrationally self-reports his own drug use runs contrary to the narrow purposes for which this bill was passed. *See* § 18-1-102, C.R.S. (2015) (the criminal code should be generally construed to promote acceptance of responsibility and accountability by offenders); *see also* § 2-4-212, C.R.S. (2015) ("All general provisions, terms, phrases, and expressions, used in any statute, shall be liberally construed, in order that the true intent and meaning of the general assembly may be fully carried out.").

Given the legislature's intent, the district court erred here when it found the defendant was entitled to immunity from prosecution. The defendant, while high on methamphetamines, rode his bicycle across town to a police facility (rather than to a hospital or urgent care center) and told officers that the drugs that he had just ingested had been poisoned by the Mafia. When he reported this "crime," the defendant did not tell the officers that he was suffering from a drug overdose, he did not request medical attention of his own accord, and he did not exhibit any indicia that he was suffering from a medical emergency. The overdose immunity statute was not intended to shield the defendant from prosecution under these circumstances.

Even assuming, as the defendant suggests, that the General Assembly contemplated that "emergency overdose events" could occur simultaneously with another crime committed by the person suffering from a drug overdose or the person reporting an overdose event, the General Assembly did not contemplate that these "other crimes" would be the fictional musings of a highly intoxicated individual. Put another way, the legislature never envisioned that the overdose immunity

statute would be used to provide immunity to an intoxicated individual reporting a completely fictional "crime."

Next, the defendant asserts that "the legislature contemplated that drug events could occur simultaneously with other non-drug crimes [and] [t]he legislative history demonstrates that one does not negate the other" (AB, p.28-29). The defendant's argument oversimplifies the facts and misinterprets the People's position.

When the defendant approached police officers, he was not, as he contends on appeal, reporting an "overdose event" that happened to also "include a criminal accusation." Instead, the defendant's purpose was to report a crime. He told officers that his wife and the Mafia poisoned his meth and provided them with "evidence" of this "crime" by turning over his drug paraphernalia. Nothing about the defendant's behavior, actions, or statements when he approached officers suggested that he was actually reporting an "overdose event" and also, by chance, reported "a criminal accusation." To the contrary, the defendant was reporting a crime and, by happenstance, accepted medical care.

Finally, the defendant's reliance on the rule of lenity is misplaced (AB, p.29). The rule of lenity "is a corollary of the rule of statutory construction that requires penal statutes to be construed against the government." *People v. Lowe*, 660 P.2d 1261, 1267 (Colo. 1983). The existence of a statutory ambiguity is insufficient by itself to justify application of the rule of lenity because most statutes are to some degree ambiguous. *See Caron v. United States*, 534 U.S. 308, 316 (1998) ("the rule of lenity is not invoked by a grammatical possibility"); *United States v. Graham*, 169 F.3d 787, 790 (3rd Cir. 1999) ("the rule of lenity does not apply simply because a statute requires interpretation").

Rather, the rule of lenity applies only when, "after reviewing everything from which aid can be derived," a court can "no more than guess at what [a legislature] intended." *Muscarello v. United States*, 524 U.S. 125, 138 (1998). Courts properly apply the rule of lenity "only to resolve an unyielding ambiguity in statutory language," S*chubert v. People*, 698 P.2d 788, 794 n.12 (Colo. 1985); where there is a "grievous ambiguity or uncertainty in the language and structure of the statute," *Chapman v. United States*, 500 U.S. 453, 463 (1991); or when "a

reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990). Therefore, the rule of lenity "is a doctrine of last resort, to be used only after the traditional means of interpreting authoritative text have failed to dispel any ambiguities." *Mahn v. Gunter*, 978 F.2d 599, 601 (10th Cir. 1992).

Under the circumstances presented in this case, this Court need not rely upon the rule of lenity as other more traditional means of interpreting any ambiguity in section 18-1-711 should be sufficient.

Finally, the rule of lenity does not consist of "an overriding consideration of being lenient to wrongdoers." *N.O.W. v. Scheidler*, 510 U.S. 249, 262 (1994); *see also People v. Jones*, 990 P.2d 1098, 1103 (Colo. App. 1999) ("the rule of lenity does not stand for the proposition that a court must show 'leniency.' "). Moreover, the rule of lenity should not be used "to defeat the evident intention of the legislature." *People v. Wiedemer*, 852 P.2d 424, 431 (Colo. 1993); *see also People v. Swain*, 959 P.2d 426, 431 (Colo. 1998).

Thus, even if this Court does apply the rule of lenity, the intent of the legislature in section 18-1-711 was to provide immunity only where a person was suffering from a life-threatening overdose or a person was reporting a situation where someone else was suffering from a life-threatening overdose. Thus, even under the rule of lenity, immunity should not be provided where, as here, the defendant was not reporting a life-threatening emergency medical situation because such an interpretation would defeat the evident intent of the legislature.

CONCLUSION

For the foregoing reasons and authorities, this Court should reverse the district court's order dismissing this case, and remand with instructions to reinstate the charges against the defendant.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY BRIEF** upon **BENJAMIN C. CARRAY, LISA MARIE WEISZ, BRET D. BARKEY, AND KATHRYN L. BROWN**, via Integrated Colorado Courts E-filing System (ICCES) on November 9, 2015.

/s/ Cortney Jones

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