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Adams District Court Honorable Patrick T. Murphy Case Number 14CR3348	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Angelita Sue Ramos Defendant-Appellant	▲ COURT USE ONLY ▲
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REPLY BRIEF OF ANGELITA SUE RAMOS

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CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

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s/ Todd E. Mair_____
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ARGUMENT

I. Count 5 required proof of multiple thefts.

The prosecution made the deliberate choice to proceed under a unique statutory provision that gave the prosecution the opportunity to turn several smaller alleged thefts into a more serious offense. Having chosen to proceed under CRS § 18-4-401(4)(a), the prosecution was required to prove multiple thefts as all pertinent authorities agree the language of the statute requires. The State argues that CRS § 18-4-401(4)(a) is ambiguous but it is not, and even if it was, the legislative history relied on by the State does not support its argument and the applicable principles of statutory construction would dictate the interpretation favoring Ms. Ramos.

A. The plain language of CRS § 18-4-401(4)(a) controls; the State may not attempt to argue to the contrary based on legislative history.

In attempting to save the trial court's erroneous interpretation of CRS § 18-4-401(4)(a), the State resorts immediately to a lengthy discussion of the legislative history of the theft statute. (AB at 7-23). But the Court may "look beyond the express statutory language for other evidence of legislative intent and purpose, such as legislative history," only if the statutory language is ambiguous. *Crandall v. City of Denver*, 238 P.3d 659, 662 (Colo. 2010) (citation omitted). The plain

language of CRS § 18-4-401 directly contradicts the State's interpretation. Subsection 401(4)(a) expressly applies only "[w]hen a person commits theft twice or more within a period of six months" and gives the prosecution the discretion to charge the multiple thefts as a "single offense." Having done so, the prosecution must prove the multiple thefts that are "aggregated and charged in a single count." CRS § 18-4-401(4)(a). The fact that subsection 4(a) accompanies other theft provisions in CRS § 18-4-401 does not mean that the prosecution may obtain a conviction under CRS § 18-4-401(1), (2) based on the value of a "thing" stolen when the prosecution has charged, but failed to prove, multiple aggregated thefts under CRS § 18-4-401(4)(a).

The Supreme Court, this Court, and the drafters of the pattern jury instructions have all looked at the language of CRS § 18-4-401(4)(a) and reached the same conclusion. This Court has stated that the jury must unanimously find "two or more thefts committed within the same six month period," *People v. Lewis*, 710 P.2d 1110, 1115 (Colo. App. 1985), and the COLJI committee similarly read the statute to require "proof of all thefts aggregated in the same count." COLJI Crim. 4-4:14, cmt. 4 (2014).

Perhaps even more noteworthy, because it is cited in Ms. Ramos' Opening Brief but completely ignored by the State in its Answer Brief, is the Supreme

Court's reasoning in *People v. Simon*, 266 P.3d 1099 (Colo. 2011). The *Simon* court held that the "pattern of abuse" provisions of the child sex assault statute merely established a sentence enhancer rather than "a distinct 'overall course of conduct' offense" that constitutes a "discrete unit of prosecution." *Id.* at 1108. In so holding, the Court explicitly contrasted the "pattern" sentence enhancing provision with a provision setting out a discrete offense – "the consolidated theft statute." *Id.* The Court noted that, while CRS § 18-4-401(4)(a) had recently been amended to make "aggregation of thefts permissive, not mandatory . . . the consolidated theft statute expressly provides that when the theft charges <u>are</u> aggregated, all such charges 'shall constitute a single offense.'" *Id.* (quoting CRS § 18-4-401(4)(a), (b)) (emphasis in original). The Supreme Court's interpretation of the plain language of CRS § 18-4-401(4)(a) is correct and controlling. No ambiguity exists so the State's attempt to rely on legislative history fails.

B. Even if CRS § 18-4-401(4)(a) could be deemed ambiguous, the State's legislative history argument does not support the conviction.

Again, the State's argument depends on CRS § 18-4-401 being ambiguous in a way that it is not. The State's argument is further self-defeating because, even assuming *arguendo* the ambiguity the State's position requires, "both [the Colorado Supreme Court] and the United States Supreme Court have required that ambiguity concerning the creation of multiple offenses in a single statute be

ultimately resolved in favor of lenity." *People v. Abiodun*, 111 P.3d 462, 468 (Colo. 2005) (citations omitted). By premising its argument on a purported ambiguity that justifies consideration of the legislative history, the State runs smack into the rule that such ambiguity must be resolved in the defendant's favor unless the legislative history "definitively determine[s]" the issue in favor of the State. *People v. Summers*, 208 P.3d 251, 258 (Colo. 2009). The legislative history relied on by the State comes nowhere close to meeting that standard.

The State's 16-page legislative history discussion appears to have three objectives. First, the State asserts that the General Assembly's various revisions consolidating different specific types of theft into one general theft statute, CRS § 18-4-401, evidences a "spirit of consolidation." (AB at 17). According to the State, this overarching "spirit" demonstrates the General Assembly's "overall philosophy" to create a single offense covering all "theft-related behavior." (AB at 15, 17). But the inclusion and modifications of provisions dealing with pawnbrokers, mortgage theft, "fuel piracy," and theft from the elderly, (AB at 10, 15-17), tell us nothing about how CRS § 18-4-401(4)(a) should be interpreted. And regardless of whether the "spirit" of CRS § 18-4-401 would treat aggregated theft as a wholly "distinct" crime from a single theft, (AB at 18), the specific language of CRS § 18-4-401(4)(a) creates a distinct way of charging the crime as a

"single offense." When the prosecution elects to proceed in that fashion, it must prove the offense charged.

Second, misreading *Abiodun,* the state argues that aggregated theft is not a "separate offense" because it is contained "within a subsection of the general theft statute." (AB at 17). The *Abiodun* Court interpreted the statute creating Colorado's controlled substances offense, CRS § 18-18-405, as establishing a single crime rather than multiple offenses for double jeopardy purposes. 111 P.3d at 469-70. In so holding, the Court focused on the fact that CRS § 18-18-405(1)(a) includes "a number of acts . . . joined as a disjunctive series, in a single sentence, without any attempt to differentiate them by name or other organizational device . . . ." *Id.* at 466 (emphasis added). While the State seizes on the *Abiodun* Court's statement that the General Assembly can make its intent to create multiple offenses clear when it "proscribes conduct in different provisions of the penal code and identifies each provision with a different title," (AB at 17) (citing *Abiodun*, 111 P.3d at 465), the *Abiodun* Court also relied on the fact that, in CRS § 18-18-405(1)(a), "t[t]he entire range of conduct is criminalized in a single subsection" of the statute. 111 P.3d at 466 (emphasis added).

The aggregated thefts provision of CRS 18-4-401(4)(a) is a distinct subsection of the theft statute. It therefore occupies middle ground between the

clear creation of "different crimes by naming each and segregating them within the criminal code," and the creation of a unitary offense by "joining alternatives disjunctively in a single provision of the criminal code." *Abiodun*, 111 P.3d at 468-69 (citations omitted). In such a situation, at most, "the indicators of legislative intent remain inconclusive" and any ambiguity must "be resolved in favor of lenity." *Id.* at 469 (citations omitted).

The third purpose for which the State invokes legislative history is to note that the 2009 revisions to CRS § 18-4-401 in response to *Roberts v. People*, 203 P.3d 513 (Colo. 2009), were meant to "restore the pre-*Roberts* interpretation" under which prosecutors had the discretion charge thefts in the aggregate (contrary to the *Roberts* Court's interpretation that aggregation was mandatory whenever the prosecution alleged two or more thefts in a six month period). (AB 18-22). According to the State, the General Assembly intended only to restore the Pre-*Roberts* "status quo" and "did not say that it intended to create a separate offense." (AB 19-20) (emphasis in original). From there, the State cites legislative history expressing the desire to give prosecutors "flexibility to determine the appropriate charge" and leaps to the completely unsupported conclusion that the General Assembly did not "intend to force prosecutors to choose between 'theft' and 'aggravated theft' when charging." (AB at 20).

The State reads far too much into the meager statements of legislative intent regarding the post-*Roberts* revisions to CRS § 18-18-401. As the State notes, the primary purpose of the revisions was to supersede the *Roberts* decision by clarifying that multiple thefts "may be aggregated," CRS § 18-18-401(4)(a), but they are not required to be. To the extent the General Assembly sought to restore the pre-*Roberts* "status quo" and provide prosecutors "flexibility," it was on that point. And in fact, the "status quo" prior to *Roberts* required prosecutors to prove "two or more thefts within the same six month period" to obtain a conviction on a charge alleging aggravated thefts. *Lewis*, 710 P.2d at 1115. The amendment did nothing to change that. *See Vaughn v. McMinn*, 945 P.2d 404, 409 (Colo. 1997) ("The legislature is presumed to be aware of the judicial precedent in an area of law when it legislates in that area.") (citations omitted). To the contrary, the amendment clarified that "thefts so aggregated and charged shall constitute a single offense." CRS § 18-18-401(4)(a).

Indeed, the State's lengthy discussion of legislative history begs an obvious question: Why would prosecutors have cared whether *Roberts* required them to aggregate all thefts within a single count if they only had to prove one of the thefts to obtain a conviction? The downside of *Roberts* to prosecutors was that, by requiring multiple thefts to be aggregated, prosecutors lacked "flexibility" in cases

in which the evidence of one theft was more compelling than others, but the prosecutor wanted to place all the alleged thefts before the jury. In such cases, prosecutors would have been obligated to combine a weaker theft allegation with a stronger one, and if the proof failed on the weaker allegation, they would not obtain a conviction. The General Assembly addressed that perceived problem by making aggregation discretionary – prosecutors can now choose to aggregate a series of thefts alleged to occur within six months in an effort to obtain a greater punishment, or they can charge them separately. But having chosen to proceed on an aggregated thefts theory, the prosecution must prove that "single offense" as charged.[1]

The language of CRS § 18-18-401(4)(a) is clear, and even if the statute is ambiguous as the State claims, nothing in the legislative history cited by the State supports the State's interpretation. Because the legislative history does not "definitively determine" the issue in the State's favor, any "ambiguity in the meaning of [the] criminal statute must be interpreted in favor of the defendant." *Summers*, 208 P.3d at 258.

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[1] In this regard, the State places too much reliance on the "single offense"/"multiple offense" distinction. Whether or not a statute such as the theft statute may be viewed as setting out multiple ways of committing a "single offense," the prosecution must always prove the version of an offense it chooses to charge.

C. The pertinent authorities support Ms. Ramos' reading of CRS § 18-4-401.

As noted above and discussed in Ms. Ramos' opening brief, the Supreme Court's decision *Simon,* this Court's decision in *Lewis*, and the COLJI committee's instruction and comments all demonstrate that a prosecutor charging aggregated thefts must prove more than one theft. The State completely fails to discuss *Simon*, and its attempts to explain away *Lewis* and the COLJI instruction fail.

After spending 16 pages tracing the history of theft statutes and claiming the current version of CRS § 18-4-401 made no changes to the "status quo," the State makes the contrary assertion that the *Lewis* holding should be ignored because "*Lewis* precedes the 2009 amendment by more than twenty years." (AB at 21). If, as the States argues at length, the requirements of an aggregated theft charge have not changed over the years, the *Lewis* court's interpretation of the statute as requiring proof of "two or more" thefts is fully applicable.

The State is also incorrect in arguing that the *Lewis* holding that the jury was required to find "two or more" thefts was merely dictated by the evidence of that particular case. According to the State, the phrase "two or more thefts" did not set forth "an element," but was "required by the facts of the case" because, given the amounts of the various thefts alleged, multiple thefts were necessary to get over the

$10,000 aggregated value of which the defendants were convicted. (AB at 21). The State's interpretation is wrong for at least two reasons.

First, the *Lewis* jury had the option to convict the defendant of aggregated thefts in excess of $10,000, or aggregated thefts totaling between $200 and $10,000. Either way, the jury was instructed that it must find "two or more thefts within a six month period." *Lewis*, 710 P.2d at 1115. The various thefts were alleged to be of between $1,800 and $2,350, so one such theft would have sufficed to reach the $200 threshold. But it would not have supported a conviction under the instructions the Court deemed proper because there would not have been "two or more thefts." *Id.*

Similarly, due to the alleged amounts of each individual theft, no two alleged thefts could have surpassed the $10,000 threshold (at least five such thefts were required). Thus, when the Court held that, to ensure a unanimous verdict, the jurors only had to "all agree that two or more had been proven," the "two or more" language can only be read as a reference to the statutory requirement of multiple thefts, not a mere reference to the "facts of the case" as the State suggests. (AB at 21-22).

The State's attempt to diminish the import of the COLJI committee's reading of the statute is similarly unpersuasive. The State argues only that model

jury instructions "are not law" and the committee's interpretation therefore should not "prevail over the General Assembly's shown intent." (AB 22-23). While it is true that COLJI pattern instructions and the comments thereto are not "law," they do represent the collective understanding of the numerous judges tasked with interpreting the statutes. For that reason, courts routinely look to model instructions and comments for guidance. *See e.g., Painter v. Inland/Riggle Oil Co.*, 911 P.2d 716, 720 (Colo. App. 1995) ("these comments to the pattern instruction applicable here reflect a correct interpretation of the intent of the General Assembly . . . ."); *Goshon v. I.C. System, Inc.*, 2016WL742873, *2 (D. Kan. 2016) ("This interpretation is supported by the Kansas Pattern Jury Instructions . . . ."); *Washington v. United States*, 17 F. Supp. 3d 1154, 1159 (S.D. Ala. 2014) ("This interpretation is reinforced by Alabama's Pattern Jury Instructions . . . ."); *United States v. Wecht*, 2008WL199465, *2 (W.D. Pa. 2008) (looking to "how the Third Circuit Committee on Model Criminal Jury Instructions interprets" elements of offenses).

The members of the COLJI committee read the language of CRS § 18-4-401(4)(a) to require proof of multiple thefts.[2] By arguing for the opposite interpretation, the State again places itself in the position of asserting that the statute is ambiguous. It is not and, as discussed above, even if it was, the legislative history relied on by the State does not demonstrate a "shown intent" favoring the State's interpretation, let alone establishing the State's position "definitively" as is required to resolve any ambiguity in the State's favor. *Summers*, 208 P.3d at 258.

D. CRS § 18-4-101(4)(a) is not a mere "sentence enhancer."

The State discusses cases involving different statutes, in which certain facts were deemed to be a "sentence enhancers" rather than elements of the offense. (AB at 24-25). But again the prosecution completely ignores *Simon*, in which the Supreme Court used CRS 18-4-401(4)(a) as an example to distinguish a statutory provision creating a substantive offense (aggregated thefts) from a provision that sets forth a mere sentence enhancer ("pattern" sex assault). *Simon,* 266 P.3d at 1107-08. *Simon* controls and is fatal to the State's argument.

[2] Providing no explanation, the State argues that Ms. Ramos' proposed verdict form "conflicted" with the approach adopted by the model instruction. (AB at 23). It did not. Both Ms. Ramos' verdict form and the model instruction would have required the jury to find more than one theft to convict Ms. Ramos.

Having no answer for *Simon*, the State once again grasps at thin reeds of legislative history, (AB at 26-27), which (1) cannot be considered given the plain language of the statute as interpreted by the *Simon* Court, and (2) provide feeble support the State's position in any event. The gist of the State's argument seems to be that, because the dollar amounts setting the offense classification for violations of subsection (4)(a) are "explicitly linked" to the "general classification system in subsection two," the General Assembly necessarily intended that subsection (4)(a) merely sets out "penalties for the offense of theft." (AB at 26-27). If anything the contrary is true – the fact that the General Assembly deemed it necessary to reference subsection (2) in setting forth the penalties for a violation of subsection (4) evidences awareness that the different subsections prohibit different acts. Regardless, the unambiguous language of the statute as interpreted in *Simon* controls and the Court need not resort to guessing the General Assembly's intent based on off-topic snippets of legislative history.

E. The trial court's interpretation of CRS § 18-4-401(4)(a) made Count 5 duplicitous and constituted a constructive amendment that prejudiced Ms. Ramos.

The trial court's failure to require proof of multiple thefts as required by CRS § 18-18-401(4)(a) requires reversal, and this Court's analysis need go no further. However, as discussed in Ms. Ramos' Opening Brief, in addition to being

contrary to the statute itself, the trial court's instructions and verdict form, by allowing one charge of aggregated theft to be decided by the jury as if it was three separate thefts, rendered Count 5 unconstitutionally duplicitous.

In response, the State argues that "the charging document itself was not duplicitous," (AB at 28), and, concededly, this case did create an unusual situation. Duplicity is generally apparent in the charging document and the remedy is to require the prosecution to elect a single charge on which to proceed. *See* (OB at 20-22). Here in contrast, the charge would not have been duplicitous if the verdict form had properly required the jury to find aggregated thefts as the statute requires. But breaking the single charge into three separate thefts at trial meant at least two of those thefts were not charged separately in the information.

The government responds to this reality by arguing that Count 5 could not be duplicitous because both the charge in the Information and the verdict form were captioned "theft" and the Information referred to CRS 18-4-401(1)(a). (AB at 29). Obviously, the captions on various pleadings do nothing to ensure that a charge as decided by the jury is not duplicitous. *See e.g., Hill v. Allstate Inc. Co.*, 2006WL173693, *8 (D. Colo. 2006) (captions to jury instructions "do not carry the force of law" where "instructions themselves" are to the contrary). Also the State has not claimed that the prosecution was proceeding under subsection (1) instead

of subsection (4)(a). To the contrary, the charge in Count 5 explicitly parroted the language of subsection (4)(a) ("twice or more within a period of six months"), (R. CF. 173), and the State acknowledges that, in using that language, the prosecution was exercising its "option to aggregate thefts" under subsection (4)(a). (AB at 29).

The State makes no effort to argue that the instructions and verdict forms did not constructively amend the Information by turning Count 5 into three separate individual theft charges, nor does the State address the authorities establishing that constructive amendments are per se reversible error. *See* (OB at 22-23). The State instead merely asserts that Ms. Ramos was not prejudiced because she "had notice she was required to defend her conduct during the Believe fundraiser" and the trial court's ruling resulting in the amendment to Count 5 occurred "before Defendant's case-in-chief." (AB at 29).

The bulk of a defendant's preparation, strategic decisions and trial presentation occur before her "case-in-chief" commences. By the time the court ruled, the prosecution's evidence had been admitted and Ms. Ramos had conducted her defense through cross-examination – thoroughly debunking Count 5's allegation that she committed theft "twice or more" but without notice that any single alleged theft was still a "material issue in the case." *People v. Jefferson*, 934 P.2d 870, 872 (Colo. App. 1996) (constructive amendment created by jury

instructions prejudiced defendant's substantial rights because he was "deprived of the opportunity to present evidence through cross-examination or by expert testimony").

Moreover, the evidence in this case was unorganized and confusing and, unlike law enforcement, Ms. Ramos' defense team made an actual effort to digest and understand it. The evidence was voluminous however, and trial counsel undoubtedly had to prioritize certain facts and controversies over others in its preparation and trial presentation. These decisions were naturally informed by the knowledge that the government had to prove more than one theft to obtain a conviction on Count 5. Hiding multiple offenses in a single charge in an effort to throw prosecutorial mud at the wall to see what sticks is a form of trial by ambush. *See Dodd Ins. Services, Inc. v. Royal Ins. Co. of* America, 935 F.2d 1152, 1158 (10th Cir. 1991) (approving sanctions for burdening adversary with "mud-against-the-wall" pleading). The State cannot seriously claim that the defense's preparation and trial presentation were not hindered as a result.

II. Ms. Kenney's testimony went beyond "subtraction."

The State claims that Brenda Kenney's testimony regarding her "audit" of the PTSA funds and accounts did not constitute improper expert testimony because Ms. Kenney only engaged in "subtraction." As to the Believe fundraiser, the State

asserts that Ms. Kenney merely calculated "the difference between what Defendant said the fundraiser made and how much of that amount Defendant deposited, which was apparent from exhibits." (AB at 37-38). The State greatly oversimplifies the nature and import of Ms. Kenney's testimony.

The prosecution began Ms. Kenney's direct examination by establishing her qualifications, much as they would do with an expert. Ms. Kenney testified that she ran a business as a "consultant in construction and development," and that her work involved organizing multi-million dollar projects, "reconcil[ing] the billings and invoice against the budget line items," and "tracking everything and making sure it doesn't go over budget." (R. Tr. 10/8/16, p. 16). She then testified at length regarding her "audit" of the PTSA accounts and records. Regarding the Believe fundraiser specifically, Ms. Kenney testified that she created a "flowchart" of money related to the fundraiser and the flowchart was admitted into evidence over defense objection.

The flowchart referred to the deposit amount as "verified," and concluded in bold-red type that $3,287.74 was "missing." (R. Ex. 10). But on the same day that Mr. Ramos texted Ms. Kenney regarding the $19,760.95 Believe fundraiser deposit, she sent her another text stating she was on her way "to make" deposits and also to "purchase gift cards." (R. Tr. 10/8/15, p. 36-37). Gift cards were

purchased as gifts for dozens of teachers and, as PTSA President Kisting testified, they were purchased with cash made in various fundraisers with no concern for whether the funds were accounted for or deposited. (R. Tr. 10/6/15, p. 24-26, 125).

Ms. Ramos later presented Ms. Kenney with "bags" containing "a lot of receipts," *Id.* at 40, which Ms. Kenney did not inventory or apparently even review. *Id.* Ms. Kenney further conceded that she "made decisions about" what documents to use and did not provide investigators with the documents she did not think were "important." (R. Tr. 10/8/15, p. 100-104). Yet Ms. Kenney described her flowchart as follows:

> It reflects the amount of money that is documented that we should have made and is backed up by the meeting minutes or an invoice or – and an invoice. And then it shows the defendant – what the defendant deposited for that. It shows whether there was any cash in that deposit or not. And it shows that it was verified by the bank statements. Then at the very bottom, it shows the difference between what was – should have been deposited and was deposited.

Id. at 60-61.

In short, the State is incorrect when it claims that "all that Ms. Kenney did was testify to the difference between what Defendant said the fundraiser made and how much of that amount Defendant deposited, which was apparent from the

exhibits." (AB at 39).[3] The prosecution presented Ms. Kenney with a gloss of expertise, and she testified regarding an analysis in which she relied on certain documents while ignoring others that may have established how fundraiser cash was spent. She then presented the jury with a professional looking flowchart and testified to conclusions about how much money "should have been" deposited after the Believe fundraiser and how much was "missing." In light of the full body of evidence, those conclusions were opinions. Ms. Kenney's analysis and conclusions were not "simply a matter or arithmetic," *United States v. Madison*, 226 Fed. Appx. 535, 544 (6th Cir. 2007), but constituted "expert testimony . . . improperly admitted under the guise of lay opinion." *People v. Stewart*, 55 P.3d 107, 123 (Colo. 2002) (citations omitted).

The State's argument that the erroneous admission of Ms. Kenney's opinion testimony was harmless is essentially the same as its argument that the testimony was admissible – she "merely repeated . . . values" from exhibits and the jury could have conducted the subtraction itself. (AB at 40). Ms. Keeney's direct

[3] The State points to language from the sufficiency of the evidence portion of Ms. Ramos' Opening Brief, which the State contends supports its contention that Ms. Kenney only compared Ms. Ramos' text to the deposit amount. (AB at 39). It does not. The same section of the Opening Brief that notes the "substance" of Ms. Kenney's "audit" also discusses the inadequacy of the evidentiary basis and analysis underlying the "audit" and questions the "correctness of Ms. Kenney's accounting." (OB at 39-40).

examination regarding her "audit" would have been short indeed if the prosecution had merely presented her with two exhibits and asked her for the difference between the amounts shown. But again, Ms. Kenney's testimony went far beyond arithmetic. She testified to her selective review and analysis and also claimed to have given Ms. Ramos the "benefit of the doubt" in her audit – thereby effectively opining that Ms. Ramos was guilty. (R. Tr. 10/8/15, p. 110). The import of her testimony and purported expertise was not lost on the prosecution, who urged the jury in closing to consider Ms. Kenney's "audit" and rely on her flowcharts. (R. Tr. 10/9/15, p. 34-36, 38, 75-76). Aside from her testimony, there was little basis for a jury finding that Ms. Ramos had committed theft from the Believe fundraiser. The erroneous admission of Ms. Kenney's testimony requires reversal.

III. The erroneous exclusion of the defense expert's testimony requires reversal.

The State does not dispute that the trial court incorrectly interpreted a defendant's discovery obligations and erroneously excluded the defense expert's testimony on that basis. The State instead attempts to excuse the court's error by presenting a highly misleading version of the proffered expert testimony and the court's ruling.

Ms. Ramos sought to have former IRS Special Agent Jacque Riordan testify regarding how she would have approached an investigation like this case, and that

she "went through all the evidence and looked for all the documents that they had and looked at the documents that they didn't have and started making attempts to contact these witnesses and asking them do you have these documents." (R. Tr. 10/8/15, p. 5). Ms. Riordan would have then offered the opinion that "Ms. Kenney could not form the requisite opinion that she did or come up with that analysis because there were never enough documents provided to do that." *Id.* at 6.

The trial court conceded "I'm sure it's a valid opinion" but ruled, based on the (nonexistent) discovery violation, "there's no prior notice. You can't do it." *Id.* Defense counsel then reiterated "I really wanted to be able to explore and get Ms. Riordan to explain to the jury that there's not records present to do the analysis that Ms. Kenney did – based on the court's ruling, I believe that we're not going to call Ms. Riordan." *Id.* at 8. It was at that point that the trial court, in the State's words, "refined its ruling." (AB at 42). The court stated it was going to allow the defense to ask Ms. Riodran two questions:

> have you had the opportunity to review the evidence presented, yes. Have you been able to determine the amount of money by examining all the evidence and listening to evidence, were you able to determine the amount of money that's lost? I have not.

(R. Tr. 10/9/15, p. 9). But the court reiterated that it was not going to allow Ms. Riordan to give "an opinion about the way she could have done it or the method she used was incorrect. I'm sure the method used by the Bennett PTA would not

be approved by the IRS. Trust me." *Id.* Based on that ruling, defense counsel stated that the court's approach would "limit her ability to respond to the testimony" and the defense therefore would not be calling Ms. Riordan. *Id.*[4] At that point, the trial court referenced the discovery rules and reaffirmed its ruling excluding the testimony, stating "she had to be endorsed." *Id.* at 10.

So contrary to the State's creative treatment of the trial court's ruling, the court in fact excluded opinion testimony it knew was otherwise admissible based on a nonexistent discovery violation, and the defense did not acquiesce in that ruling. The court "refined" its ruling only to state that it would allow Ms. Riordan to answer two questions regarding her own review of the evidence and whether she could determine how much money was missing. That truncated examination would not have been an expert opinion and would not have addressed the crux of what the defense sought to prove. What mattered was not whether Ms. Riordan

[4] Reversing the order of some of defense counsel's comments, the State attempts to imply that defense counsel acknowledged Ms. Riordan's testimony was not necessary when counsel stated "I think there's enough to argue to the jury about this anyway." (AB at 42). That statement by defense counsel, however, was not about Ms. Riordan's expert opinion testimony, but was in response to the court asking whether the defense wanted Ms. Riordan to impeach certain witnesses with prior inconsistent statements. (R. Tr. 10/9/15, p. 9-10) ("You don't want to call her to say when I talked to somebody, they said something different to me than what was testified to?"). Defense counsel stated those matters could be argued in closing but reiterated "[t]he real reason we wanted to call her was to specifically address the comments by Ms. Kenney." *Id.*

was able to reach a conclusion regarding whether money was "missing" and how much, but rather her expert analysis of the investigation and evidence as a whole and her resulting opinion that the documentation was insufficient for any careful investigator to reach such conclusions.

The State's only argument against the admissibility of Ms. Ramos' proffered expert testimony is that would have been tantamount to challenging the "propriety of bringing charges." (AB at 44). That is not true (except in the sense that any defense evidence challenging the prosecution's proof is a challenge to the charges). Ms. Riordan's testimony would have been an "opinion that Defendant was not guilty," (AB 44), only to the same extent that Ms. Kenney opined that Ms. Ramos was guilty. Ms. Kenney testified that she conducted an "audit" by relying on certain documents and not others. Investigator Riordan would have testified to how a proper investigation and "accounting" would have been conducted, what information was required, and would have offered the opinion that the documents relied on by Ms. Kenney and law enforcement were not adequate to determine whether funds were "missing."

Expert testimony challenging the adequacy of law enforcement's investigation and the factual basis for charges is admissible and this Court has held it reversible error to improperly deny a defendant such expert testimony. *People v.*

Orozco, 210 P.3d 472, 476-77 (Colo. App. 2010). The trial court's ruling excluding Ms. Riordan's testimony, premised on a nonexistent discovery obligation, was "based on an erroneous understanding or application of the law" and therefore constituted an abuse of discretion. *Id.* at 475.

Finally, the trial court's error was not harmless as the State argues. The evidence against Ms. Ramos was weak. Ms. Kenney's "audit" was critical to the prosecution's case and, as discussed above, was not mere "subtracting" as the State claims. (AB at 46-47). Regardless, a fulsome expert examination regarding what sort of investigation and documentation would have been required to reach the conclusions Ms. Kenney and law enforcement reached "would have provided an independent evidentiary basis bolstering defendant's theory of defense," *Orozco*, 210 P.3d at 476, and been fatal to the prosecution's claims. Defense counsel never "told the trial court that the expert's testimony was not critical" as the State claims, (AB at 46); *see supra* n. 4, nor is the trial court's error excused because the defense "attacked Ms. Kenney's testimony in closing argument." (AB at 47). The defense consistently maintained that Ms. Riordan's testimony was necessary to challenge Ms. Kenney's flawed and prejudicial "audit," and the ability to cross-examine Ms. Kenney and argue in closing was no substitute for credible expert testimony directly contradicting her analysis. *Orozco*, 210 P.3d at 476 ("admissions from

prosecution witnesses of facts key to defendant's defense theory" that "allowed some ground for defendant to argue his case" did not make denial of expert harmless). The improper exclusion of the defense expert requires reversal.

CONCLUSION

WHEREFORE, based on the foregoing argument and authorities, and those set forth in Defendant-Appellant's Opening Brief, Angelita Sue Ramos respectfully requests that this Court reverse her conviction.

Respectfully submitted this 16th day of December 2016.

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CERTIFICATE OF SERVICE

I certify that, on December 16, 2016, a copy of this Reply Brief of Angelita Sue Ramos was served via ICCES to the following:

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