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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Arapahoe District Court; Honorable Ben L. Leutwyler, III; Case Number 16CR267	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant CHARLES JAMES LINNEBUR	
Douglas K. Wilson, Colorado State Public Defender MEREDITH K. ROSE 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #45304	Case Number: 16CA2133

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains 9,302 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-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 and C.A.R. 32.

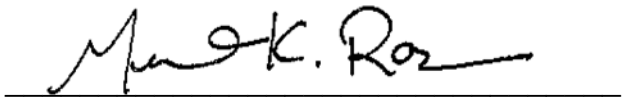

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court violated Mr. Linnebur's constitutional rights to a jury trial and to due process when it held that in a prosecution for felony DUI the State must only prove a defendant's prior convictions to the court by a preponderance of the evidence.

II. Whether the State produced insufficient evidence identifying Mr. Linnebur as the person previously convicted of three drinking-and-driving-related offenses.

III. Whether admission of other act evidence unfairly prejudiced Mr. Linnebur's defense.

IV. Whether persistent prosecutorial misconduct violated Mr. Linnebur's constitutional right to a trial by an impartial jury.

STATEMENT OF THE CASE

The State tried Charles Linnebur on count 1: driving under the influence—fourth or subsequent offense,[1] with a lesser-included offense of driving while ability impaired[2]; and count 2: driving under the influence per se—fourth or subsequent offense.[3] (R. CF pp. 27, 100) The prosecution alleged that Mr.

[1] § 42-4-1301(1)(a), C.R.S. (F4)
[2] § 42-4-1301(1)(b), C.R.S. (F4)
[3] § 42-4-1301(2)(a), C.R.S. (F4)

Linnebur had five prior convictions for either driving under the influence ("DUI") or driving while abilities impaired ("DWAI"). (Id. p. 28)

A jury returned verdicts of guilty of DWAI on count 1 and guilty of DUI per se on count 2. (Id. p. 100) The trial court found that Mr. Linnebur had three prior convictions for DUI or DWAI and, consequently, that he stood convicted of felony DWAI and felony DUI per se. (R. Tr. 8-24-16 pp. 142-44) The trial court sentenced Mr. Linnebur to four years in community corrections. (R. Tr. 10-24-16 p. 10)

STATEMENT OF THE FACTS

Strasburg, Colorado experienced a big snowstorm on February 2, 2016. (R. Tr. 8-23-16 p. 139) Around five o'clock that evening, Meredith Korb drove through the mobile home park that she owned and managed, checking to make sure that her son had plowed the neighborhood. (Id. pp. 139-140) Ms. Korb noticed that a power pole, fence, and propane tank were damaged, and she saw tire tracks leading back to Charles Linnebur's residence. (Id. pp. 140-41) Ms. Korb called 911 to report the crash and told the operator that Mr. Linnebur may be driving drunk. (R. CF p. 1) Police contacted Mr. Linnebur in his truck a few miles from the park and arrested him for suspicion of driving under the influence of alcohol. (R. Tr. 8-23-16 pp.149-150; 207-08)

SUMMARY OF THE ARGUMENTS

Proof of Prior Convictions. The legislature has the power to enact criminal statutes, and in so doing it may decide whether a fact is an element of a crime or merely a sentencing factor. In drafting the felony DUI provisions in section 42-4-1301, C.R.S. (2016), the legislature made the fact of prior convictions an element of the offense. By treating Mr. Linnebur's prior convictions as a sentence enhancer that may be tried to the court instead of an element that must be proved to a jury beyond a reasonable doubt, the trial court violated Mr. Linnebur's constitutional rights to due process and to a trial by jury.

Sufficiency. The State failed to produce sufficient evidence linking the prior convictions to Mr. Linnebur and therefore failed to prove his identity as the person previously convicted of three DUIs or DWAIs as required for felony DUI.

Other Act Evidence. Res gestae evidence is admissible only where it is an integral part of a criminal transaction, and it must be excluded if its relevance is substantially outweighed by the danger of unfair prejudice. The trial court erred by admitting Mr. Linnebur's statement that he had been drinking during the week prior to his arrest as res gestae evidence.

Prosecutorial Misconduct. An accused has the constitutional right to a trial by a fair and impartial jury. A prosecutor commits misconduct by making

improper or misleading arguments that tend to bias the jury. The prosecution committed misconduct and violated Mr. Linnebur's right to an impartial jury by misrepresenting its burden of proof; by shifting the burden of proof onto the defense; and by improperly vouching for its key witness.

ARGUMENTS

I. THE TRIAL COURT VIOLATED MR. LINNEBUR'S CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND TO DUE PROCESS BY HOLDING THAT IN A PROSECUTION FOR FELONY D.U.I. THE STATE NEED ONLY PROVE A DEFENDANT'S PRIOR CONVICTIONS TO THE COURT BY A PREPONDERANCE OF THE EVIDENCE.

A. Preservation.

This issue is preserved. Mr. Linnebur filed a motion in limine, arguing that a defendant's prior convictions are elements of the offense of felony DUI, felony DWAI, or felony DUI per se (collectively, "felony DUI") and therefore must be proved to a jury beyond a reasonable doubt. (R. CF p. 62)

The morning of the first day of trial, the court ruled on Mr. Linnebur's motion. (R. Tr. 8-23-16 p. 4) The court found that prior convictions are not elements of felony DUI, concluding that they are merely sentence enhancers or aggravating factors. The court held that the prior convictions may be proved to the court by a preponderance of the evidence.

Following the jury's verdicts, the prosecution presented evidence of prior convictions to the court. (R. Tr. 8-24-16 p. 135; R. Exh. Env p. 19) Mr. Linnebur

renewed his previous objection and objected to admission of these documents in particular. (R. Tr. 8-24-16 p. 136) The trial court overruled his objections. The prosecution asked the trial court to make a finding by a preponderance of the evidence that the present conviction was at least Mr. Linnebur's fourth drinking-and-driving-related offense and to make a record whether the court would find these convictions beyond a reasonable doubt. (Id. p. 139) The court stated that it found all three prior convictions proved beyond a reasonable doubt and adjudged Mr. Linnebur convicted of a class 4 felony. (Id. pp. 142-44)

B. Standard Of Review.

Appellate courts review de novo whether a statutory provision is a sentence enhancer or a substantive element of the offense. People v. Riley, 2016 COA 76, ¶ 39. Courts also review a constitutional challenge to sentencing de novo. People v. Mountjoy, 2016 COA 86, ¶ 10 (citing Lopez v. People, 113 P.3d 713, 720 (Colo. 2005)). When a sentencing court commits constitutional error, a reviewing court must reverse unless the error is harmless beyond a reasonable doubt. Id.

C. The Plain Language Of The Felony Dui Provisions Demonstrates The Legislature's Intent That Prior Convictions Are Substantive Elements, Which Must Be Proved To A Jury Beyond A Reasonable Doubt.

1. Principles Of Statutory Construction.

When interpreting statutory language, courts follow familiar principles of statutory construction. The primary purpose is to give effect to the legislature's intent. Montes-Rodriguez v. People, 241 P.3d 924, 927 (Colo. 2010). To this end, courts examine statutory provisions in the context of the statute as a whole and give words their plain and ordinary meaning. Catholic Health Initiatives Colo. v. City of Pueblo, 207 P.3d 812, 821 (Colo. 2009). If the legislative intent is clear on the face of the statute, the analysis is complete and courts must not resort to other rules of statutory interpretation. Jefferson Cty. Bd. of Equalization v. Gerganoff, 241 P.3d 932, 935 (Colo. 2010).

2. The Felony DUI Provisions Are Unambiguous And Prior Convictions Are Elements Of The Offense.

The legislature has the power to designate prior convictions as sentence enhancers or elements. See U.S. v. O'Brien, 560 U.S. 218, 225 (2010). "Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." Jones v. U.S., 526 U.S. 227, 232 (1999); accord Alleyne v. U.S., 133 S. Ct. 2151,

2158 (2013) ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense.").

The Colorado General Assembly amended section 42-4-1301, C.R.S., in 2015 to create a felony-level drinking-and-driving-related offense for defendants convicted of their fourth or subsequent DUI or DWAI. Ch. 262, sec. 1, § 42-4-1301, 2015 Colo. Sess. Laws 990, 990-91. To that end, the legislature spoke clearly in drafting the felony DUI provisions, making prior convictions for DUI or DWAI an element of the substantive offense.

To begin, section 42-4-1301, C.R.S. (2016), has three provisions describing the offenses of DUI, DWAI, and DUI per se. Each provision creates two offenses, a misdemeanor and a felony:

> (1)(a) A person who drives a motor vehicle or vehicle under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, commits driving under the influence. Driving under the influence is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI; vehicular homicide . . . vehicular assault . . . or any combination thereof.
>
> (b) A person who drives a motor vehicle or vehicle while impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, commits driving while ability impaired. Driving while ability impaired is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions . . . .

> (2)(a) A person who drives a motor vehicle or vehicle when the person's BAC is 0.08 or more at the time of driving or within two hours after driving commits DUI per se. . . . DUI per se is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions . . . .

§ 42-4-1301 (emphases added). In this statute, the reclassification of a misdemeanor offense to a felony is part of the elemental description of the crime—it is not found in a different section or subsection. By presenting both the definition of the substantive offense and the classification in the same subsection, the legislature indicated that it intends for prior convictions to be treated as elements of the crime. See O'Brien, 560 U.S. at 225 ("[C]ourts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor.").

A second significant indication of the legislature's intent is that the felony DUI provisions require the prosecution to provide the accused notice of the prior convictions upon which the felony is predicated by mandating that the prior convictions be pleaded: "The prosecution shall set forth such prior convictions in the indictment or information." § 42-4-1301(1)(j). It is axiomatic that elements of a crime must be pleaded in the indictment, information, or complaint—but mere sentencing factors need not be. Jones, 526 U.S. at 232; Cervantes v. People, 715 P.2d 783, 786 (Colo. 1986). By requiring that prior convictions be set forth in the

charging document, the legislature established the convictions as more than mere sentencing factors: they are elements subject to due process and the right to a jury trial.

Third, elevating a drinking-and-driving-related offense from a misdemeanor to a felony changes the substantive nature of the crime. "It is evident that the framers treated felonies as significantly different from misdemeanors"—felonies are associated with stigma, disgrace, and reproach, as opposed to "less serious crimes such as misdemeanors." People v. Rodriguez, 112 P.3d 693, 708, 709 (Colo. 2005). Because felonies are the only crimes "serious enough to warrant incarceration in the state penitentiary," they require increased constitutional protections, like grand jury indictments and a jury of twelve. Id. at 709; see also Brooks v. People, 24 P. 553, 553 (Colo. 1890) ("And by statute the consequences resulting from a conviction of a felony are made much more serious than those arising from a conviction of a misdemeanor.").

One substantial difference between misdemeanors and felonies is that a felony conviction involves serious collateral consequences that misdemeanor convictions do not. People v. Schreiber, 226 P.3d 1221, 1225-26 (Colo. App. 2009) (Bernard, J., dissenting). These include loss of the right to vote; curtailment

of the right to possess a gun or other weapon; and the evidentiary consequence of a felony conviction used as impeachment in court. See id. at 1226-27.

Prior convictions for the purposes of felony DUI significantly increase the sentence length, which also cuts in favor of treating them as elements instead of sentence enhancers. O'Brien, 560 U.S. at 230 ("[T]he substantial increase in the minimum sentence provided by the statute support[s] the conclusion that this prohibition is an element of the crime, not a sentencing factor."). A misdemeanor DUI conviction subjects an offender to a maximum sentence of 12 months in the county jail, § 42-4-1307(6)(a)(I), C.R.S. (2016), whereas a person convicted of felony DUI is subject to a presumptive range of two to six years in the Department of Corrections, § 18-1.3-401(1)(a)(V)(A), C.R.S. (2016).

Where a statutory provision increases the penalty range so dramatically, courts presume that the legislature did not intend to do so without the due process safeguards of indictment and jury trial. O'Brien, 560 U.S. at 230-31 ("[T]he severity of the increase in this case counsels in favor of finding that the prohibition is an element, at least absent some clear congressional indication to the contrary."); Jones, 526 U.S. at 233.

The presumption that prior convictions are elements can be rebutted only with clear statutory language to the contrary. For instance, the habitual offender

sentencing scheme, §§ 18-1.3-801 to -803, C.R.S. (2016), provides that a person with two or three prior felony convictions may be adjudged an habitual offender, subject to heightened sentencing ranges. Section 18-1.3-803(4)(b) specifically states that that the court, not the jury, will try the issue of whether the defendant has previous convictions. This stands in contrast to felony DUI, which does not establish a procedure for the court to find the prior convictions.

The plain language of the felony DUI provisions demonstrates that the legislature intended for a defendant's prior convictions to operate as elements of the substantive offense. The prosecution must therefore prove them to a jury beyond a reasonable doubt.

3. The Legislature's Choice Not To Alter The Misdemeanor DUI Sentencing Scheme When It Enacted The Felony DUI Provisions Supports The Conclusion That Prior Convictions Are Elements Of Felony DUI.

Before the legislature created felony DUI, Article 4 of Title 42 already provided for enhanced penalties upon a second or subsequent misdemeanor conviction for DUI, DWAI, or DUI per se, and these provisions have not changed. § 42-4-1307(3)-(6), C.R.S. (2016). Subsections 1307(3) and (4) lay out sentencing requirements for a first misdemeanor drinking-and-driving-related conviction; subsection (5) describes penalties for second offenses; and subsection (6) covers "third and subsequent offenses." In 2015, the legislature amended subsection (6)

to clarify that this provision does not apply to convictions for felony DUI. Ch. 262, sec. 2, § 42-4-1307, 2015 Colo. Sess. Laws. 992, 993; see also § 42-4-1307(6)(a) ("Except as provided in section 42-4-1301(1)(a), (1)(b), and (2)(a) . . . .").

Most relevant here, section 42-4-1307(9)(b)(II) describes how previous convictions must be proved for the enhanced penalties of subsections (3) through (6) to apply. It states that "[t]he prosecuting attorney shall not be required to plead or prove any previous convictions at trial." Id.

Thus, the legislature, through clear statutory language, provided that when charging a second or subsequent misdemeanor DUI, DWAI, or DUI per se, the prosecution need not plead the priors, but when charging a felony offense, the prosecution must plead them in the charging document.

For misdemeanors, section 42-4-1307 creates a sentencing scheme wherein prior convictions are mere sentence enhancers. This is so because the provisions that enhance penalties for second and subsequent misdemeanor violations are located in a completely different statutory section than the provisions describing the elements of the offense. See §§ 42-4-1307, 42-4-1301. Further, the misdemeanor sentencing provisions expressly mandate that the trial court make the

relevant findings. § 42-4-1307(9)(b)(II). Accordingly, prior convictions are sentence enhancers if the charge is a misdemeanor.

In contrast to this misdemeanor sentencing scheme, prior convictions are elements in felony DUI because the penalty enhancement provision elevating a violation from a misdemeanor to a felony is laid out in the same statutory subsection as the substantive offense. § 42-4-1301(1)(a), (b), (2)(a). Had the legislature intended for prior convictions to operate as sentence enhancers for felony DUI, it could have simply amended section 42-4-1307(9) to make this subsection's procedural rules apply to felony DUI convictions as well.

The Colorado legislature chose to treat prior convictions differently for felony DUI than for misdemeanor violations. In so doing, it indicated that, for the purposes of felony DUI offenses, prior convictions are elements of the crime.

4. The Felony DUI Provisions Are Similar To Those Proscribing Possession Of Weapons By A Previous Offender, Which Treat Prior Conviction As An Element Of The Substantive Offense.

The felony DUI offense is analogous to the crime of possession of weapons by a previous offender ("POWPO"). The POWPO statute includes the fact of a previous conviction in the description of the substantive offense:

> A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm . . . or any other weapon that is subject to the

> provisions of this article subsequent to the person's conviction for a felony . . . .

§ 18-12-108(1), C.R.S. (2016) (emphasis added). In a POWPO trial, the prior conviction is a substantive element that must be found by a jury beyond a reasonable doubt. People v. Fullerton, 525 P.2d 1166, 1167 (Colo. 1974). Like the POWPO statute, prior convictions are included in the elemental description of felony DUI and accordingly must be treated as substantive elements of the crime.

5. The Felony DUI Provisions Are Distinguishable From Other Statutes That Elevate A Misdemeanor Offense To A Felony Based On Prior Convictions.

Three other statutory schemes in Colorado elevate a misdemeanor offense to a felony based on a defendant's prior convictions: indecent exposure, child abuse, and habitual domestic violence. Each of these statutes is structured so that the prior convictions are sentence enhancers, not substantive elements. In this way, they are distinguishable from felony DUI.

a. Indecent Exposure.

The indecent exposure statute, § 18-7-302(1), C.R.S. (2016), lays out the elements of the crime in a separate subsection than both the classification of the offense and the sentence enhancer for prior convictions.

Subsection (1) provides that a person commits indecent exposure if he knowingly exposes his genitals for the purposes of sexual gratification, or performs

an act of masturbation, in a manner likely to cause affront or alarm. Subsection (2)(b) states that indecent exposure is a class 1 misdemeanor, while subsection (4) states that indecent exposure is a class 6 felony where it is committed subsequent to two prior convictions for comparable offenses. The indecent exposure statute does not contain a requirement that the prior convictions be pleaded in the charging documents.

This construction communicates that prior convictions are not substantive elements of the crime of felony indecent exposure. See Schreiber, 226 P.3d at 1223 (concluding that section 18-7-302(4) establishes a sentence enhancer, not a substantive offense).

Subsection (4), elevating a misdemeanor to a felony, has been in effect since 2003. Ch. 199, sec. 31, § 18-7-302, 2003 Colo. Sess. Laws, 1423, 1435. "Courts presume the legislature is aware of its own enactments and existing case law precedent" when passing new legislation. LaFond v. Sweeney, 343 P.3d 939, 943 (Colo. 2015). Therefore, we can assume that the legislature chose not to structure felony DUI in the same way as felony indecent exposure because it intended that prior convictions for felony DUI be elements of the offense.

b. Child Abuse.

Similar to indecent exposure, the child abuse statute describes the elements of the crime in one subsection while it lays out the classifications and felony provisions in another. § 18-6-401, C.R.S. (2016).

Subsection (1)—the elemental subsection—provides that a person commits child abuse if she or he injures a child in certain enumerated ways. Subsection (7)(a) provides the classifications of the offense where death or injury to the child results. Most relevant here, subsections (7)(a)(V) and (VI) allow for misdemeanor offenses to become class 5 felonies if they are committed under the circumstances of subsection (7)(e). Similarly, subsections (7)(b)(I) and (II) provide the classifications of the offense where no death or injury occurs and classify these offenses as misdemeanors unless they are committed under the circumstances of subsection (7)(e). Subsection (7)(e), then, provides that a person who has previously been convicted of child abuse "as provided in subparagraph (V) or (VI) of paragraph (a) of this subsection (7) or as provided in subparagraph (I) or (II) of paragraph (b) of this subsection (7)" commits a class 5 felony if the trier of fact finds that the new offense involved certain enumerated circumstances.

This Court held in People v. Becker, 347 P.3d 1168, 1172 (Colo. App. 2014), that section 18-6-401(7)(e) creates a sentence enhancer for prior convictions and not an element of the substantive crime.

Like felony indecent exposure, the felony child abuse provisions were enacted long before the felony DUI provisions were created, so presumably the legislature was aware of section 18-6-401 and the court of appeals' interpretation of the prior conviction requirement. LaFond, 343 P.3d at 943. The legislature's choice to structure the felony DUI provisions differently indicates that the prior convictions are elements of felony DUI.

c. Habitual Domestic Violence.

Section 18-6-801, C.R.S. (2016), which creates elevated sentencing penalties for habitual domestic violence offenders, bears some similarities to these other statutory schemes, although the differences between them are significant.

First, "domestic violence" itself is not a substantive crime, People v. Disher, 224 P.3d 254, 256 (Colo. 2010), but is defined as "an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship." § 18-6-800.3(1), C.R.S. (2016). If any offense involves domestic violence, sentencing must be in accordance with section 18-6-801. In People v. Jaso, 347 P.3d 1174, 1178 (Colo. App. 2014), this Court held that whether a case

involves domestic violence is a Blakely-compliant fact that must be found by a jury, not the court.

After conviction for a new domestic-violence-related offense, if a defendant has three or more prior convictions involving domestic violence, he may be adjudged an habitual domestic violence offender and convicted of a class 5 felony. § 18-6-801(7)(a). This Court has said that a previous version of this provision created a sentence enhancer, not a substantive offense, in part based on language that directed the prosecution to "petition the court to adjudge the person an habitual domestic violence offender." People v. Garcia, 176 P.3d 872, 873-74 (Colo. App. 2007); accord People v. Vigil, 328 P.3d 1066, 1071 (Colo. App. 2013).

The legislature amended section 18-6-801(7) in 2016, however, and significantly restructured the felony provisions. Ch. 106, sec. 1, 2016 Colo. Sess. Laws, 306, 306-07. The amendment increases procedural protections for defendants, requiring the prosecution to plead the prior convictions in the indictment or information and requiring the trier of fact to determine whether an offense involved an act of domestic violence. § 18-6-801(7)(b), (c). The manner of proving the prior convictions changed as well—now, if the previous domestic violence finding was determined by a jury or admitted by the defendant, the court may find the fact of the prior conviction. § 18-6-801(7)(d)(I). But if the previous

domestic violence finding was made by a court, the prosecution must prove the prior conviction to the trier of fact beyond a reasonable doubt. § 18-6-801(7)(d)(II).

No appellate court has reviewed this revised subsection, and whether the felony provisions remain mere sentence enhancers rather than elements is an open question. While section 18-6-801(7)(b) now requires the State to plead the priors in the charging documents—which weighs in favor of treating the priors as elements—the definition of "domestic violence" remains in a different statutory section altogether. These differences make habitual domestic violence offenses distinguishable from felony DUI, where the priors must be construed as elements of the substantive offense.

D. If This Court Concludes That The Felony Dui Provisions Are Ambiguous, The Rule Of Lenity Still Requires Prior Convictions To Be Considered Elements Of The Offense.

As argued above, the language and structure of the felony DUI statute evinces a clear and unambiguous legislative intent for the prior convictions to be elements of the crime. However, if this Court concludes that the statutory language is ambiguous, it must, according to the rule of lenity, construe the ambiguity in favor of Mr. Linnebur. See Faulkner v. Dist. Ct., 826 P.2d 1277, 1278 (Colo. 1992) ("We are also guided by the rule of lenity which requires us to

construe any ambiguities in a penal statute in a manner favoring the person whose liberty interests are affected by the statute."). Moreover, habitual criminality statutes are in derogation of the common law and must be strictly construed against the right of the State to demand increased punishment. Smalley v. People, 304 P.2d 902, 906 (Colo. 1956); accord Winter v. People, 126 P.3d 192, 194 (Colo. 2006).

E. If This Court Determines That The Legislature Unambiguously Intended The Prior Convictions To Be Sentence Enhancers, This Construction Would Violate Mr. Linnebur's Sixth Amendment Rights Under Apprendi And Blakely.

The Sixth Amendment to the United States Constitution requires any fact that increases the penalty for a crime beyond the statutory maximum to be found by a jury beyond a reasonable doubt. U.S. Const. amend. VI; Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). It would therefore follow that for felony DUI, prior convictions, which increase the penalty, would be subject to this constitutional safeguard. In briefing to the trial court below, however, the prosecution relied on the "Blakely exemption," which allows prior convictions to be proved to the trial court instead of the jury, even where a prior conviction increases the sentencing penalty. Blakely v. Washington, 542 U.S. 296, 301 (2004); Apprendi, 530 U.S. at 490; Lopez v. People, 113 P.3d 713, 723 (Colo. 2005) ("[F]acts admitted by the defendant, found by the jury, or found by a judge

when the defendant has consented to judicial fact-finding for sentencing purposes we call 'Blakely-compliant,' and prior conviction facts we call 'Blakely-exempt.'"). Apprendi, Blakely, and Lopez all held that the fact of a prior conviction is an exception to the general constitutional rule that proof of any fact that increases the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt.

The Blakely exemption should not apply to felony DUI because the felony DUI provisions are substantively different from the statutes at issue in Apprendi, Blakely, and Lopez. Each of these cases addressed statutes that increased the sentencing range for a conviction—but in none of these cases did the statute at issue allow a misdemeanor offense to be elevated to a felony. See Blakely, 542 U.S. at 299 (state statute allowed judge to impose sentence above standard range based on aggravating factors); Apprendi, 530 U.S. at 468-69 (state hate crime statute provided longer sentence if judge found that the crime was committed with a purpose to intimidate based on minority status); Lopez, 113 P.3d at 716 (under Blakely, trial court could make finding of prior conviction for purpose of statute authorizing extended sentencing range).

The felony DUI provisions are critically distinguishable: not only does section 42-4-1301 allow for greater punishment upon a fourth or subsequent

drinking-and-driving-related conviction, the felony DUI provisions convert what would otherwise be a misdemeanor offense to a felony.

Transforming a misdemeanor to a felony changes the very nature of the offense. U.S. v. Rodriguez-Gonzales, 358 F.3d 1156, 1160 (9th Cir. 2004). The legislature and courts treat felonies as significantly different and far more serious than misdemeanors. People v. Rodriguez, 112 P.3d 693, 708-09 (Colo. 2005); Brooks v. People, 24 P. 553, 553 (Colo. 1890). Conviction for a felony not only permits a significantly longer sentence, it brings with it a host of collateral consequences not attendant to misdemeanors: incarceration in prison instead of jail, loss of voting rights, loss of the right to own a gun, loss of housing opportunities, restrictions in educational funding, and exposure to more severe immigration consequences, inter alia. See, e.g., Schreiber, 226 P.3d at 1226-27 (Bernard, J., dissenting).

Judge Bernard dissented in Schreiber to argue that the "substantial differences between misdemeanors and felonies" require prior misdemeanor convictions to be treated as elements of felony indecent exposure, not sentence enhancers, and that proof of this element should go to the jury for a finding beyond a reasonable doubt. Id. at 1225.

Similarly, in Rodriguez-Gonzales, the Ninth Circuit Court of Appeals held that because the statute at issue "substantively transform[ed]" a misdemeanor to a felony, proof of the prior conviction was more than a mere sentencing factor, and the prior conviction must be charged in the indictment and found by the jury. 358 F.3d at 1160-61.

No United States or Colorado Supreme Court case directly addresses whether prior convictions elevating a misdemeanor to a felony may be treated as mere sentence enhancers tried to the court, and this Court is not bound by the court of appeals' prior decisions, see Valentine v. Mountain States Mut. Cas. Co., 252 P.3d 1182, 1195 (Colo. App. 2011). This Court should follow Rodriguez-Gonzales and Judge Bernard's dissent in Schreiber and hold that because the felony DUI provisions transform a misdemeanor to a felony, prior convictions in this context cannot be considered Blakely-exempt facts that may be tried to the court instead of a jury.

F. The Blakely Exemption For Proof Of Prior Convictions Is Analytically Unsound And This Court Should Decline To Apply It Here.

Even if this Court decides that prior convictions are Blakely-exempt facts for felony DUI, it should not apply the prior conviction exception here because it is widely criticized and on uncertain footing.

Although the statutes at issue in Apprendi and Blakely did not involve proof of prior convictions, the United States Supreme Court nevertheless held that prior convictions were exempt from the general rule that facts that increase criminal penalties must be found by a jury. As authority, the Court relied on Almendarez-Torres v. U.S., 523 U.S. 224 (1998). There, the Court held that Congress intended 8 U.S.C. § 1326(b)(2)—which substantially increased the penalties for a conviction for illegally reentering the United States upon proof that the defendant had previously been convicted of an aggravated felony—to operate as merely a sentencing factor that did not require the Government to charge the prior conviction in the indictment. Id. at 226, 235.

Justice Scalia, joined by three other justices, vigorously dissented from this holding. He argued that there was no rational basis to make recidivism an exception to the requirement of proof of facts to a jury beyond a reasonable doubt, simply because this fact goes only to the punishment. Id. at 258 (Scalia, J., dissenting).

Almendarez-Torres has been roundly criticized ever since. Two years later in Apprendi, the Court acknowledged that "it is arguable that Almendarez-Torres was incorrectly decided" and that the opinion represented "at best an exceptional departure from the historic practice" of requiring each fact to be proved to the jury.

530 U.S. at 487, 489-90. Justice Thomas wrote separately to explain why, in his view, the Constitution requires a broader rule that does not exclude the fact of prior convictions because "[t]he aggravating fact is an element of the aggravated crime." Id. at 499, 501 (Thomas, J., concurring).

In Shepard v. U.S., 544 U.S. 13, 27 (2005) (Thomas, J., concurring), Justice Thomas again wrote separately to argue that subsequent Sixth Amendment jurisprudence had "eroded" the holding in Almendarez-Torres. He urged the court to reconsider that holding because "a majority of the Court now recognizes that Almendarez-Torres was wrongly decided." Id. at 27-28.

When the Ninth Circuit held in Rodriguez-Gonzales that a fact that converts a misdemeanor to a felony cannot be a mere sentencing factor, it declined to "expand Almendarez-Torres, which the Supreme Court has cautioned us to treat as a 'narrow exception' to Apprendi's general rule." 358 F.3d at 1161.

The Colorado Supreme Court has also recognized the questionable foundation of the Blakely exemption, see Lopez, 113 P.3d at 723 & n.9, as have many academic commentators, see, e.g., Nancy J. King, Sentencing and Prior Convictions: The Past, the Future, and the End of Prior Conviction Exception to Apprendi, 97 Marq. L. Rev. 523, 562 (2014) (criticizing the rationale for the

exception and noting that some Supreme Court justices have already voiced their opposition to the exception).

G. The Trial Court's Error Was Not Constitutionally Harmless.

The trial court violated Mr. Linnebur's constitutional rights to due process and to a jury trial when it found the facts of Mr. Linnebur's prior convictions instead of submitting this element of the offense to the jury. See U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25.

An Apprendi/Blakely sentencing error is subject to constitutional harmless error analysis. Washington v. Recuenco, 548 U.S. 212, 222 (2006). Here, the documentary evidence submitted by the prosecution to prove the prior convictions contained substantial problems—specifically, the prosecution did not clearly establish Mr. Linnebur's identity as the person previously convicted. See Section II, infra (arguing that evidence of prior convictions was insufficient as a matter of law).

Under constitutional harmless error review, the State must prove that the error was harmless beyond a reasonable doubt, and reviewing courts must reverse if there is a reasonable possibility that the error may have contributed to the conviction. Hagos v. People, 288 P.3d 116, 119 (Colo. 2012) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). The error in this case directly caused Mr.

Linnebur's conviction for felony DUI instead of a misdemeanor. This was not harmless, and accordingly this Court must vacate and remand Mr. Linnebur's conviction for felony DUI.

II. THE STATE PRODUCED INSUFFICIENT EVIDENCE IDENTIFYING MR. LINNEBUR AS THE PERSON PREVIOUSLY CONVICTED OF THREE DRINKING-AND-DRIVING-RELATED OFFENSES.

A. Preservation.

This issue is preserved. After the trial court dismissed the jury, the prosecution presented evidence of prior convictions to the court. (R. Tr.8-24-16 p. 135; R. Exh. Env. p. 19 (Exs. 10, 11, 12, 13)) The prosecutor explained that Exhibits 10, 11, and 12 were certified public records of three prior convictions for drinking-and-driving-related offenses while Exhibit 13 was a certified DMV dossier for Mr. Linnebur. (R. Tr. 8-24-16 pp. 138-39) The prosecutor asked the trial court to find by a preponderance of the evidence that Mr. Linnebur's present conviction was at least a fourth offense and also requested that the court make a record whether it would find the prior convictions proven beyond a reasonable doubt. (Id. p. 139)

Defense counsel objected on the basis of lack of foundation, hearsay, confrontation, and due process, and argued that without a witness, there was no way to connect the documents to Mr. Linnebur. (Id. pp. 136-37) Counsel also

objected to the court making a ruling beyond a reasonable doubt, as the prosecution specifically argued for a preponderance of the evidence standard. (Id. p. 141)

The trial court found that the records of convictions were self-authenticating and overruled defense counsel's objection. (Id. p. 138) Without explanation, the court then stated that it found the three convictions beyond a reasonable doubt. (Id. pp. 142-44)

B. Standard Of Review.

Appellate courts review the record de novo to determine whether the evidence at trial was sufficient to sustain a defendant's conviction. Clark v. People, 232 P.3d 1287, 1291 (Colo. 2010).

C. The Prosecution Failed To Produce Sufficient Evidence Of Mr. Linnebur's Identity As The Person Convicted Of The Three Prior Felonies.

Before an exhibit is admitted into evidence, it must be authenticated. C.R.E. 901(a). Extrinsic evidence of authenticity is not required for certified copies of public records . C.R.E. 902(4).

Authentication does not equal identity, however, and our supreme court has held that in any habitual criminal action, the prosecution bears the burden of proving beyond a reasonable doubt that the accused is the person named in the prior convictions. People v. Mascarenas, 666 P.2d 101, 110 (Colo. 1983).

In Mascarenas, the supreme court held that photographs of the defendant that listed his prison number, combined with his name, fingerprints, and a description including his age, height, weight, nationality, race, build, complexion, and identifying marks, sufficed to prove his identity: the trier of fact "was able to compare the abundance of documentary evidence with the evidence of the defendant's name, age, and appearance adduced at trial." Id.; accord People v. Poindexter, 338 P.3d 352, 362 (Colo. App. 2013) (pen pack containing photographs, fingerprint identification cards, and mittimuses had sufficient information to link prior convictions to defendant through a combination of his name, date of birth, and inmate number); see also § 18-1.3-802, C.R.S. (2016) (for the habitual offender sentencing scheme, "[i]dentification photographs and fingerprints that are part of the record of such former convictions and judgments . . . shall be prima facie evidence of the identity of such party and may be used in evidence against him or her.").

Absent a means of connecting the documentary evidence of prior convictions to the accused, the prosecution cannot bear its burden of proving identity. De Gesualdo v. People, 364 P.2d 374, 379 (Colo. 1961). In De Gesualdo, the prosecution submitted authenticated copies of the record of prior convictions to prove an habitual criminal charge. Id. at 378. The supreme court held that the

evidence offered to prove the defendant's identity was legally insufficient because it failed to link these convictions to the defendant. Id. at 378, 379 (reversing conviction because "no effort was made to prove by personal identity that the accused was the same person who had been previously convicted of the offenses evidenced by the records introduced"). The court also held that proof that a defendant has the same name is not enough to satisfy the identity requirement:

> The prosecution's theory, no doubt, was that the name being unusual and coinciding with that of the previous convictions it was open for the jury to determine that De Gesualdo was the identical person previously convicted. However, assumptions cannot be indulged in this sensitive area of the law. Our decisions have consistently required strict proof.

Id. (emphasis added); accord People v. Cooper, 104 P.3d 307, 312 (Colo. App. 2004).

Here, the prosecution needed to provide evidence linking each of the prior convictions to Mr. Linnebur. But the records of the three prior convictions did not include fingerprints or photographs identifying the defendant in those cases—only his name and date of birth. See Cooper, 104 P.3d at 312 (concluding that the fact that defendant had the same name and date of birth as the person previously convicted was insufficient to prove identity). The DMV dossier's cover page contained Mr. Linnebur's name, photograph, date of birth, and description, as well as a single fingerprint (the only print in any of the documents). It also had a list of

traffic citations with corresponding conviction dates and jurisdictions. Although some of these dates match the dates of the records of the three convictions, these DMV notations do not include case numbers.

While the documentary evidence submitted by the prosecution may have contained common elements, it ultimately failed to connect Mr. Linnebur to the three prior convictions by "strict proof," and courts cannot indulge assumptions in this sensitive area of the law, De Gesualdo, 364 P.2d at 378.

The trial court erred by concluding that the prosecution had proved Mr. Linnebur's three prior convictions under any burden of proof. Where the evidence is insufficient to support a judgment of conviction, the judgment and sentence must be reversed. Stevenson v. People, 367 P.2d 339, 340 (Colo. 1961). Such is the case for Mr. Linnebur, who respectfully requests that this court reverse his convictions for felony DUI.

III. ADMISSION OF OTHER ACT EVIDENCE UNFAIRLY PREJUDICED MR. LINNEBUR'S DEFENSE.

A. Preservation.

This issue is preserved. Defense counsel filed a pretrial Motion for Notice Pursuant to C.R.E. 404(b), asking the trial court to order the prosecution to give notice of its intent to admit any other act evidence. (R. CF p. 49) The prosecution did not give such notice.

At trial, defense counsel objected when the prosecution started to question Deputy Vinson about statements that Mr. Linnebur made while waiting for a blood draw. (R. Tr. 8-23-16 p. 214) Counsel wanted to exclude Mr. Linnebur's statement to the deputy that he had been drinking a 750ml bottle of alcohol every day for the past week, arguing that this constituted irrelevant, prejudicial evidence that had not been pleaded in the case. (Id. pp. 214-15) The prosecutor countered that Mr. Linnebur's statement was probative of the reliability of the blood test result, which was high. The trial court overruled the objection, concluding that the statement was relevant and probative res gestae evidence. (Id. p. 215)

B. Standard Of Review.

Appellate courts review a trial court's evidentiary determinations for an abuse of discretion. People v. Ibarra, 849 P.2d 33, 38 (Colo. 1993).

C. The Trial Court Erred By Allowing The Prosecution To Elicit Testimony That Mr. Linnebur Said He Had Been Drinking During The Week Before His Arrest.

The trial court held that Mr. Linnebur's statement was admissible as res gestae evidence, but because Mr. Linnebur's past drinking was not an integral part of his conduct on the day in question and because this testimony was irrelevant and unfairly prejudicial, this ruling was error.

If evidence is not relevant, it is not admissible. C.R.E. 402. Where evidence is relevant to the charges, a trial court should nevertheless exclude it if its probative value is substantially outweighed by the danger of unfair prejudice. C.R.E. 403. Evidence of other crimes, wrongs, or bad acts is generally not admissible to prove the character of a person as it may unfairly prejudice a defendant by implying that he has a propensity to engage in misconduct. C.R.E. 404(b).

Evidence that is part of the res gestae of the criminal episode may be admissible if it is relevant and its probative value is not "substantially outweighed by the probability of unfair prejudice to the accused." People v. Czemerynski, 786 P.2d 1100, 1109 (Colo. 1990); accord People v. Rollins, 892 P.2d 866, 873 (Colo. 1995); People v. Jackson, 627 P.2d 741, 744 (Colo. 1981). It must be "explanatory" of the charged offense and "constitute a part of the transaction . . . without knowledge of which the main fact might not be properly understood." Rollins, 892 P.2d at 872-73.

Where the proposed res gestae conduct occurred "somewhat remote in time" from the charged offense, it may be admissible only if the two are "part and parcel" of the same event—i.e., "inextricably intertwined," People v. Gee, 371 P.3d 714, 721 (Colo. App. 2015), as to form an integral part of the account of the crime, Czemerynski, 786 P.2d at 1109. "Evidence that is not contemporaneous

with the crime charged and does not illustrate its character is not part of the res gestae." People v. Medina, 51 P.3d 1006, 1012 (Colo. App. 2001).

Evidence that Mr. Linnebur had been drinking during the week preceding his arrest does not meet the test for res gestae admission. Most importantly, it was not relevant to the crime—Mr. Linnebur's previous drinking did not tend to make it any more likely that he was intoxicated on the evening in question. Moreover, his behavior during the preceding week was remote in time and not "inextricably intertwined" with the charged offense: his prior drinking was not necessary for the jury to understand the context of the night in question. Finally, because evidence of Mr. Linnebur's prior drinking was not probative of any material fact, it fails the C.R.E. 403 balancing test due to the unfair prejudice to Mr. Linnebur.

Nor was the evidence admissible as C.R.E. 404(b) character evidence. The prosecution did not provide notice of its intent to use Mr. Linnebur's statement, as Rule 404(b) requires upon defense counsel's request. And in any event, the evidence was not admissible for any permissible purpose independent of the prohibited inference of propensity and bad character. See C.R.E. 404(b).

"A defendant should be tried only for the offense with which he stands charged." Stull v. People, 344 P.2d 455, 458 (Colo. 1959). Consequently, admission of Mr. Linnebur's statement was an abuse of the trial court's discretion.

D. The Trial Court's Error Was Not Harmless And Requires Reversal.

Appellate courts review preserved, nonconstitutional trial errors for harmless error. Hagos v. People, 288 P.3d 116, 119 (Colo. 2012). Where the error affected the fairness of the trial proceedings or substantially influenced the verdict, this Court must reverse. Id.

The error in admitting Deputy Vinson's testimony was not harmless because the prosecution relied extensively on Mr. Linnebur's statement about his previous drinking—from opening remarks to closing argument.

During its opening statement, the prosecution forecast Deputy Vinson's testimony by telling the jury that Mr. Linnebur had been drinking every day: "he admits he drank whiskey that day; [and] that after some period of sobriety in his life, he had, essentially, fallen off the wagon and had been drinking daily, about a 750-milliliter bottle of alcohol." (R. Tr. 8-23-16 p. 133) Then during his testimony, Deputy Vinson recounted that Mr. Linnebur had told him that he'd been sober for a long time but had recently been drinking a 750ml bottle of alcohol every day. (Id. p. 216) Finally, the prosecution emphasized the fact of Mr. Linnebur's prior drinking four times in closing argument:

> [Mr. Linnebur] smells like alcohol. He admits to Deputy Vinson that he's actually been drinking about a 750 milliliter of alcohol every day for the past week, and that's consistent with the other evidence.
> . . .

> [Mr. Linnebur's BAC is] three times—four times the legal limit, and that's consistent with somebody who has been drinking a 750 milliliter bottle of alcohol every day for a week.
> . . .
> First, he denies drinking that day, and then he gets Deputy Vinson's attention and says, I'm sorry, I lied, I was drinking. I drank whiskey today, and I've been drinking every day all week.
> . . .
> But Mr. Linnebur tells Deputy Vinson, I've been drinking a 750 milliliter bottle of alcohol every day for a week, I drank whiskey today. That's absolutely consistent with the test result.

(R. Tr. 8-24-16 pp. 89, 90, 97, 110)

By repeatedly highlighting Mr. Linnebur's prior drinking, the prosecution gave the jury permission to view Mr. Linnebur as an habitual drunk who acted in conformity with his bad character on the evening in question, in violation of C.R.E. 404(b). The pervasive nature of the prosecution's use of this evidence affected the fairness of Mr. Linnebur's trial and casts doubt on the reliability of the verdict. For these reasons, Mr. Linnebur's convictions must be reversed.

IV. PERSISTENT PROSECUTORIAL MISCONDUCT VIOLATED MR. LINNEBUR'S CONSTITUTIONAL RIGHT TO A TRIAL BY AN IMPARTIAL JURY.

A. Preservation And Standard Of Review.

Defense counsel preserved this issue by objecting during voir dire when the prosecutor used analogies comparing the burden of proof beyond a reasonable doubt to everyday decision-making. (R. Tr. 8-23-16 p. 58) Preserved trial errors are reviewed for harmlessness. Hagos v. People, 288 P.3d 116, 119 (Colo. 2012).

Defense counsel did not object during the prosecution's closing argument, so these statements are subject to plain error review. Wend v. People, 235 P.3d 1089, 1098 (Colo. 2010).

Appellate courts use a two-part standard when reviewing claims of prosecutorial misconduct. Id. at 1096. The first consideration is whether the prosecutor's arguments were improper based on the totality of the circumstances, and if so, whether by admitting the misconduct, the trial court abused its discretion. Id.; People v. Carter, 2015 COA 24M, ¶ 63. Second, courts review the "combined prejudicial impact" of the misconduct to determine whether reversal is required. Carter, ¶ 63 (quoting Domingo-Gomez v. People, 125 P.3d 1043, 1053 (Colo. 2005)).

B. The Prosecution Committed Repeated Instances Of Misconduct.

An accused has the right to a trial by a fair and impartial jury, which includes the right to determination of the accused's guilt or innocence based only on the proper evidence introduced at trial. Domingo-Gomez, 125 P.3d at 1048; Oaks v. People, 371 P.2d 443, 446-47 (Colo. 1962); see also U.S. Const. amend. VI; Colo. Const. art. II, §§ 16, 23.

"Prosecutors have a higher ethical responsibility than other lawyers" and must "scrupulously avoid comments that could mislead or prejudice the jury."

Domingo-Gomez, 125 P.3d at 1049. Because the prosecution represents the State and the People of Colorado, jurors may give greater weight to the prosecution's argument, and improper suggestions can have an outsized affect when they come from the State's representative. Id. Prosecutorial misconduct that misleads a jury requires reversal of a conviction. Harris v. People, 888 P.2d 259, 264 (Colo. 1995).

During voir dire and in closing argument, the prosecution made repeated statements that qualify as misconduct by comparing its burden of proof to common decision-making; by shifting the burden of proof to the defense; and by vouching for the credibility of its key witness.

1. Reasonable Doubt Analogies.

This Court has repeatedly disapproved analogies that compare the prosecution's burden of proving each element beyond a reasonable doubt to common, everyday occurrences. People v. Marko, 2015 COA 139, ¶¶ 208-211, cert. granted on other grounds, 15SC977 (Colo. Oct. 24, 2016) (comparing reasonable doubt to "everyday decisions [jurors] make every day," like driving a car); Carter, ¶ 58 (comparing reasonable doubt to a puzzle with missing pieces); People v. Doubleday, 369 P.3d 595, 609 (Colo. App. 2012), rev'd on other grounds, 364 P.3d 193 (Colo. 2016) (using analogy of buying a house to explain

reasonable doubt); People v. Cevallos-Acosta, 140 P.3d 116, 123-24 (Colo. App. 2005) (comparing reasonable doubt to buying a house).

Analogies like these are dangerous because they may lower the prosecution's burden of proof. "The degree of certainty required to convict is unique to the criminal law. . . . Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable." Com. v. Ferreira, 364 N.E.2d 1264, 1273 (Mass. 1977); see also People v. Johnson, 14 Cal. Rptr. 3d 780, 782-86 (Cal. App. 5th Dist. 2004) (instruction equating beyond-a-reasonable-doubt standard to everyday decision-making lowered the prosecution's burden of proof below the due process requirement of proof beyond a reasonable doubt).

During voir dire, the prosecutor used two analogies, first comparing reasonable doubt to buying a car (R. Tr. 8-23-16 pp. 55-56), then comparing the burden of proof to deciding to get married (id. pp. 57-61). Defense counsel objected, arguing that these examples would confuse the jury about reasonable doubt. (Id. p. 58) The trial court overruled the objection but agreed to re-read the definition of "beyond a reasonable doubt" after the prosecutor finished his analogy.

The prosecution impermissibly lowered its burden of proof by comparing reasonable doubt to buying a car or choosing a spouse, violating Mr. Linnebur's constitutional right to due process. U.S. Const. amends. V, XIV; Colo. Const. art.

II, § 25; Faretta v. California, 422 U.S. 806, 819 n.15 (1975) (recognizing that an accused has a due process right to be convicted only if his guilt is proved beyond a reasonable doubt).

2. Burden Shifting.

Due process also protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. In re Winship, 397 U.S. 358, 364 (1970). The prosecution bears the burden of establishing a prima facie case that the defendant is guilty, and the burden of disproving his guilt must never move to the defendant. People v. Santana, 255 P.3d 1126, 1130 (Colo. 2011). A prosecutor is not permitted to shift the burden of proof through improper argument or comment. Id.

During closing argument, the prosecution stated three times that "no evidence" supported Mr. Linnebur's theory of the case:

- "[W]hat if Mr. Linnebur is that one in a million person who had contamination that went unnoticed and amplified the BAC results? We don't have any evidence of that. There is no evidence that the blood sample was contaminated. No evidence at all."

- "So, again, there is no evidence that anything inappropriate took place when Mr. Linnebur's blood was drawn. That is pure speculation. All of the evidence that you have is to the contrary."

- "[Defense counsel] says you should believe that test result is artificially lying due to contamination. We don't have any evidence of contamination, again, but that's what he argues you should believe."

(R. Tr. 8-24-16 pp. 91-92, 93, 109 (emphases added)) The prosecutor's closing statements implied to the jury that it was Mr. Linnebur's burden to have some evidence to support his theory that his blood draw was contaminated. By stressing to the jury that there was "no evidence," the prosecution shifted the burden of producing evidence to the defense in violation of Mr. Linnebur's right to due process.

3. Vouching.

"Expressions of personal opinion as to the veracity of witnesses are particularly inappropriate when made by prosecutors in criminal trials." Wilson v. People, 743 P.2d 415, 418 (Colo. 1987). The truthfulness and credibility of witnesses are for the jury to determine, and it is improper for a prosecutor to express personal belief in the truth of a witness's testimony during closing argument. Id.; Domingo-Gomez, 125 P.3d at 1049.

This Court held in People v. Nardine, 2016 COA 85, that the prosecution committed misconduct and reversal was required based in part on the prosecutor's statement that "all the witnesses I present to you, I presume they're telling the truth." ¶¶ 54, 69.

Similar to Nardine, the prosecution here referred to its key witness, Deputy Vinson, as "an honest person" in closing argument. (R. Tr. 8-24-16 pp. 94)

During the deputy's testimony, he had insisted on telling the jury that he misspoke during the preliminary hearing when he stated under oath that he observed certain clues when performing a roadside test on Mr. Linnebur. (R. Tr. 8-23-16 pp. 204-05) Deputy Vinson clarified that in fact he had not been able to perform the horizontal gaze nystagmus test at all.

While the prosecution could remind the jury that Deputy Vinson wanted to clarify his earlier testimony, the prosecutor crossed the line into misconduct when he argued that the deputy "is an honest person" who "took this opportunity to make sure that you all got the truth" and that "Deputy Vinson is honest." (R. Tr. 8-24-16 pp. 94, 95) In so doing, the prosecutor expressed his personal belief in his own witness's truthfulness, "throw[ing] onto the scales of credibility the weight of his own personal opinion," Wilson, 743 P.2d at 418.

C. The Persistent Prosecutorial Misconduct Requires Reversal.

"On appeal, a reviewing court may conduct its own review of the record and, if necessary to prevent injustice, order a new trial." Wend, 235 P.3d at 1097. Appellate courts must evaluate prosecutorial misconduct in light of the totality of the circumstances, focusing on the cumulative effect of the improper statements. Id. at 1098.

Here, the prosecution infused the trial with misleading and erroneous arguments, from mischaracterizing the burden of proof during voir dire to shifting the burden and vouching for its witness during closing. "Although plain error review affords considerable deference," reviewing courts "will not blindly cling to such deference in order to uphold an unjust conviction where prosecutorial misconduct has contaminated the jury's impartiality." Id. at 1099. Under the circumstances present here, the repeated prosecutorial misconduct requires reversal of Mr. Linnebur's convictions.

CONCLUSION

For the foregoing reasons, Mr. Linnebur respectfully asks this court to reverse the judgments of conviction.

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CERTIFICATE OF SERVICE

I certify that, on June 22, 2017, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.