DATE FILED: June 19, 2018 2:45 PM
FILING ID: 37424DD6A4A70
CASE NUMBER: 2016CA2133

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; and Case Number 2016CR267	
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: 2016CA2133

REPLY 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 and formatting requirements set forth in C.A.R. 28(g).

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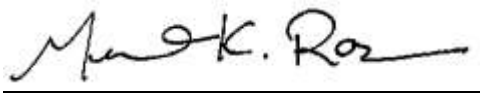

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In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Mr. Charles Linnebur submits this Reply Brief.

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 People must only prove a defendant's prior convictions to the court by a preponderance of the evidence.

II. Whether the People 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.

ARGUMENT

I. Mr. Linnebur's Constitutional Rights To A Jury Trial And To Due Process Require That The Prosecution Prove Prior DUI Offenses To A Jury Beyond A Reasonable Doubt.

In the Answer Brief, the People do not meet Mr. Linnebur's argument that the plain language of the felony DUI provisions, §§ 42-4-1301(1)(a), (1)(b), and

(2)(a), C.R.S. (2017), demonstrates the legislature's intent that prior convictions are substantive elements of the offenses of felony DUI, felony DWAI, and felony DUI per se (collectively, "felony DUI"). (See OB pp 6-19) Instead, the People contend that this Court should look past the plain language and statutory structure and apply the test that another division used in People v. Schreiber, 226 P.3d 1221, 1223 (Colo. App. 2009). (AB pp 10-13) The Schreiber court reasoned that the prior conviction requirement for felony indecent exposure was a sentence enhancer, not a substantive element, because a defendant may be convicted of indecent exposure without proof of prior convictions and because the prior conviction only increases the potential punishment. Id. The People urge this Court to reach the same conclusion for felony DUI.

But Schreiber expanded a rule that the Colorado Supreme Court announced in People v. Leske, 957 P.2d 1030, 1039 (Colo. 1998). There, the supreme court addressed a statutory provision—section 18-3-405.3(2)'s prerequisite that the victim be under fifteen years of age—which raised the felony level of sexual assault by one in a position of trust from a class 4 to a class 3 felony. Leske, 957 P.2d at 1039. Leske held that this provision was a sentence enhancer rather than an element because proof that the victim was under fifteen raised the felony level, but

proof was not necessary to convict a defendant of sexual assault by one in a position of trust. Id.

In relying on Leske for the proposition that whether a statutory provision is an element or a sentence enhancer depends on "whether 'its proof, while raising the felony level of an offense, is not necessarily required to secure a conviction,'" the Schreiber court disregarded the fact that proof of a prior indecent exposure conviction elevated the offense from a misdemeanor to a felony. Schreiber, 226 P.3d at 1223 (quoting Leske, 957 P.2d at 1039). Whether the Leske test would apply where the underlying offense is a misdemeanor and proof of the additional provision raises that offense to a felony was not at issue in Leske, and the Schreiber court improperly expanded this test, as explained by Judge Bernard, writing separately. See Schreiber, 226 P.3d at 1225 (Bernard, J., concurring in part and dissenting in part).

Next, the People assert that the felony DUI provisions do not create a right to a jury trial simply because they raise the offense level to a felony. (AB p 13) The People disregard the numerous and serious collateral consequences attendant on a felony conviction (see OB pp 9-11, 21-23) and how converting a misdemeanor to a felony changes the substantive nature of the offense, see U.S. v. Rodriguez-Gonzales, 358 F.3d 1156, 1160 (9th Cir. 2004). As noted in the

Opening Brief, page 23, it is an open question whether prior convictions that operate to elevate a misdemeanor to a felony may be treated as mere sentence enhancers because no United States or Colorado Supreme Court case has taken up that issue. This Court should therefore adopt 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 are elements that a jury must find beyond a reasonable doubt.

II. The Prosecution Produced Insufficient Evidence Identifying Mr. Linnebur As The Person Previously Convicted Of Three Drinking-And-Driving-Related Offenses.

A. Standard of Review.

The People do not agree that Mr. Linnebur preserved his sufficiency argument. (AB p 17) Mr. Linnebur objected to the prosecution's proffered exhibits on the bases of lack of foundation, hearsay, confrontation, and due process, and he argued that without a witness, the prosecution could not connect the documents to Mr. Linnebur. (TR 8/24/16 p 136:10-18) This preserved his argument for appeal, but, in any event, Colorado law has no preservation requirement for sufficiency claims. People v. McCoy, 2015 COA 76M, ¶ 22, cert. granted McCoy v. People, Case No. 15SC1095 (Colo. Dec. 3, 2015); People v. Johnson, 2017 COA 11, ¶ 11; but see People v. Lacallo, 338 P.3d 442, 444 (Colo.

App. 2014) (holding that under "narrow circumstances" where trial counsel "conceded that the evidence was sufficient . . . and appellate review of the evidence depends on a legal interpretation of a statutory element raised for the first time by appellate counsel"—in this "limited context" a sufficiency claim is unpreserved and subject to plain error review).

B. Analysis.

Mr. Linnebur maintains that because prior convictions are elements of felony DUI, proof of the priors should have been to the jury beyond a reasonable doubt. (OB pp 6-27) Therefore, the trial court erred by granting the prosecution's request to find the prior convictions by a preponderance standard. But under either standard, the prosecution produced insufficient evidence to link Mr. Linnebur to the prior convictions. (OB pp 28-31)

The People claim that Mr. Linnebur's reliance on Colorado cases including People v. Mascarenas, 666 P.2d 101, 110 (Colo. 1983); De Gesualdo v. People, 364 P.2d 374, 379 (Colo. 1961); and People v. Poindexter, 338 P.3d 352, 362 (Colo. App. 2013), is misplaced because these cases addressed proof of priors in the context of habitual criminal proceedings, which by statute require proof beyond a reasonable doubt. (AB p 23) While these cases did arise in habitual criminal proceedings, these three opinions provide what crucial guidance is available to

inform what constitutes sufficient proof of prior convictions, and these cases demonstrate that, without more, the documentary evidence submitted here did not suffice. (See OB pp 28-31)

In a turnaround, the People cite section 18-1.3-802, C.R.S. (2017), for the proposition that authenticated conviction records with photographs constitute prima facie proof of prior convictions. (AB p 24) By its plain terms, section 18-1.3-802 applies only to habitual criminal proceedings. ("On any trial under the provisions of this section and sections 18-1.3-801 and 18-1.3-803, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the party indicted or informed against shall be prima facie evidence of such convictions . . . .").

As our supreme court has recognized, "no judicial obligation is more imperative than the accomplishment of justice in any particular case where the trial record, as here, does not reflect as an absolute that every evidentiary requirement for sustaining a guilty verdict was fulfilled." People v. Emeson, 500 P.2d 368, 370 (Colo. 1972). To accomplish justice here, this Court should hold that the proof of Mr. Linnebur's prior convictions was not sufficient.

III. Evidence Of Mr. Linnebur's Statement To Law Enforcement Was Inadmissible And Unfairly Prejudiced His Defense.

The People contend that Mr. Linnebur's statement to law enforcement that he had been drinking heavily the week preceding his arrest was relevant, constituted res gestae evidence, and, if it was error to admit it, was harmless. (AB p 25) But Mr. Linnebur's statements were not admissible and significantly prejudiced his defense.

As discussed in the Opening Brief, pages 32-34, while Mr. Linnebur's statement to the police officer occurred during the incident at issue in the case, the underlying event—Mr. Linnebur's consumption of a 750ml bottle of alcohol every day for the past week—was not res gestae because it occurred "remote in time from the charged offense" and was not "inextricably intertwined" with the charged acts, People v. Gee, 371 P.3d 714, 721 (Colo. App. 2015), so was not an integral part of the crime. It was not relevant because it did not make it more likely that he was intoxicated on the evening in question, and it fails the CRE 403 balancing test as the unfair prejudice substantially outweighs any probative value.

The error in admitting Mr. Linnebur's statement was not harmless. (See OB pp 35-36) Throughout the short trial, the prosecution repeated Mr. Linnebur's admission to drinking heavily during the previous week, highlighting this one piece of inadmissible evidence. This occurred duirng opening statements,

testimony, and closing argument—in fact, the prosecution emphasized Mr. Linnebur's prior drinking four times during closing. (See TR 8/24/16 pp 89:17-21, 90:15-19, 97:9-12, 110:6-8) These constant reminders that Mr. Linnebur was an habitual drunk told the jurors that they could assume Mr. Linnebur acted in conformity with his bad character on the night he was pulled over. Because this error infected Mr. Linnebur's whole trial, it casts doubt on the reliability of the verdicts, and his convictions must be reversed.

IV. Persistent Prosecutorial Misconduct Violated Mr. Linnebur's Constitutional Right To A Trial By An Impartial Jury.

A. Prosecutor's analogies during voir dire.

The prosecution used two analogies that compared its burden of proof beyond a reasonable doubt to everyday decision-making: buying a car and getting married. (TR 8/23/16 pp 55-56, 57-61) The People argue that while the analogies may have been "inartful," they were not misleading, the trial court cured any error, and argument and instruction further ensured that the jury was not misled. (AB pp 36, 38) But as described in the Opening Brief, pages 38-40, these reasonable doubt analogies unconstitutionally lowered the prosecution's burden of proof and violated Mr. Linnbur's right to due process.

B. Burden shifting.

During closing argument, the prosecution shifted its burden of proof by telling the jury three times that "no evidence" supported Mr. Linnebur's theory of the case. (TR 8/24/16 pp 91-92, 93:4-8, 109:19-22) The People claim that under factors announced in People v. Santana, 255 P.3d 1126, 1131-32 (Colo. 2011), these persistent statements do not qualify as reversible prosecutorial misconduct.[1]

The first Santana factor—whether the prosecutor specifically argued that the defendant carried the burden of proof—cuts in favor of Mr. Linnebur. The prosecution repeatedly asserted that Mr. Linnebur had produced no evidence, directly implying that it was incumbent upon Mr. Linnebur to do so in order to prevail against the DUI charges. The prosecutor said:

- "[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."

[1] The People cite People v. Czemerynski, 786 P.2d 1100, 1107 (Colo. 1990), for the proposition that this Court should not consider Mr. Linnebur's arguments discussing how the Santana factors support his burden-shifting argument. (AB p 41 n.6) Czemerynski is inapposite; there, the supreme court faulted a defendant for failing to raise at trial or in his Opening Brief a new argument that if a witness's statement satisfied a hearsay exception, the statement was nevertheless inadmissible as violating the defendant's right to confrontation. Id. Mr. Linnebur raises no new arguments in his Reply Brief, and if an appellant cannot use a Reply Brief to meet the arguments of opposing counsel, filing one would be a meaningless endeavor for counsel and for the courts.

- "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."

(TR 8/24/16 pp 91-92, 93:4-8, 109:19-22 (emphases added)) The prosecutor intended to communicate to the jurors that Mr. Linnebur had to produce some evidence if they were to believe his side of the story.

As to the second factor, the People argue that there was nothing improper in using closing argument to respond to the defense's alternative explanations for the evidence showing Mr. Linnebur was intoxicated when he was pulled over. (AB p 42) But the prosecutor's comments came during the first part of his closing argument—not during rebuttal closing, after defense counsel argued that the blood sample may have been contaminated.

Third, although the court and counsel did instruct the jury as to the prosecution's burden of proof, the prosecutor's repeated comments suggested to the jury that Mr. Linnebur should have presented some evidence, and by emphasizing that there was "no evidence" of his theory of defense, the burden was unconstitutionally shifted.

C. Improper vouching.

Finally, the People claim that the prosecutor's assertions that Deputy Vinson "is an honest person" who "took this opportunity to make sure that you all got the truth" and that "Deputy Vinson is honest" (TR 8/24/16 pp 94:12, 94:18-22, 95:2-3), were not improper because they related back to the credibility instructions and the jury's role to decide who to believe. (AB p 43) While this may be true, it is not an argument that improper vouching did not happen here.

The People argue in the alternative that even if these statements were misconduct, they do not constitute plain error. (AB p 47) But this is not the case. The prosecution could properly remind the jury that the deputy wanted to explain the discrepancy in his earlier testimony, but the prosecutor committed misconduct when he told the jury that his witness was "an honest person" who wanted to make sure the jury got the truth. This expressed the prosecutor's personal belief in the deputy's truthfulness, which was improper and constitutes plain error.

The cumulative effect of the prosecutor's misconduct, in light of the totality of the circumstances, was to violate Mr. Linnebur's right to an impartial jury. See Wend v. People, 235 P.3d 1089, 1098 (Colo. 2010). The repeated and pervasive prosecutorial misconduct requires reversal.

CONCLUSION

Mr. Linnebur respectfully asks this court to reverse the judgments of conviction.

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CERTIFICATE OF SERVICE

I certify that, on June 19, 2018, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on L. Kevin McReynolds of the Attorney General's Office.

K. Root