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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 El Paso County District Court; The Honorable David S. Prince; and Case Number 16CR1103	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JAVARRAY CHARLES JANUARY	
Douglas K. Wilson, Colorado State Public Defender M. SHELBY DEENEY 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #46441	Case Number: 16CA1940

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 5,643 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.

M. Shelby Denney

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II. Whether irrelevant and unduly prejudicial evidence violated the Colorado Rules of Evidence and Mr. January's constitutional right to a fair trial.

III. Whether the prosecutor's improper arguments, which lowered the burden of proof and denigrated the defense, violated Mr. January's constitutional right to a fair trial.

STATEMENT OF THE CASE

The El Paso County District Attorney charged Javarray January with two counts of second degree assault, in violation of §18-3-203(1)(f.5), C.R.S., a class four felony, naming Reid Herrera as the alleged victim for count one and Amandis Zamarron as the alleged victim for count two. (Supp CF, p1-2). The jury convicted Mr. January of count one and acquitted him of count two. (CF, p28-29; TR 7/13/16, p85:7-12). The district court sentenced Mr. January to four years of supervised probation. (TR 9/26/16, p13:17-21). Mr. January now appeals.

STATEMENT OF THE FACTS

Spring Creek Youth Services Center is a juvenile detention facility in Colorado Springs. (TR 7/12/13, p136:8-13). On February 25, 2016, Javarray

January was a resident there. (*Id.*, p136-37). Reid Herrera was the corrections officer who was supervising the residential pod where January lived. (*Id.*, p138:10-25). Around 6 pm that day, January flipped over a desk in anger. (*Id.*, p139:20). The events leading up to that point were contested.

According to January, he requested a phone call, and because Herrera would not let him have one, he moved the desk in anger. (TR 7/13/16, p63-64). Another corrections officer, Drake Castro, reported that he heard Herrera tell January that "you are not going to make a f'ing phone call." (TR 7/12/16, p155-56). Herrera denied cursing at January but agreed that he would not give January access to the phone. (*Id.*, p141:5-15).

According to Herrera, a female intern was nearby, and January was whistling and making inappropriate comments at her. (*Id.*, p139:7-16). When Herrera instructed January to stop, January then demanded a phone call and was cursing at Herrera. (*Id.*, p140:15-20). Herrera then decided to give January a "staff time-out" since January was cursing and demanding a phone call. (*Id.*, p141:21-24). Herrera explained that a "staff time-out" requires moving the juvenile from the residential area to a holding cell, where the juvenile is left alone to "self-regulate." (*Id.*, p141-42). Herrera claimed that once he instructed January to have a "staff time-out," January moved the desk. (*Id.*, p142-43).

After January moved the desk, he approached Herrera. (*Id.*, p143:2-3). January did not use any physical force against Herrera. (*Id.*, p156:18-24). Instead, Herrera initiated the physical force against January. (*Id.*, p143-44, p157-58, p164:10-11). The Colorado Department of Human Services Division of Youth Services ("DYS") policies and procedures only allow corrections officers to use physical force as a last resort and officers must use all lesser means of de-escalation before resorting to physical force. (*Id.*, p159-60, p171:2-7). However, Herrera testified that he felt physical force was necessary because January had entered his "reactionary gap." (*Id.*, p157-58). Herrera explained that the "reactionary gap" is a six-foot space surrounding the corrections officer, and if a juvenile enters that gap, an officer can initiate physical force even though it was not used by the juvenile. (*Id.*, p158:2-16).

Herrera called for staff backup and used physical force to restrain January. (*Id.*, p142-43). Staff members struggled to restrain January, and they tried to immobilize him by conducting a "takedown," striking a nerve near his knee, and applying pressure to his hypoglossal nerve point, which is located by the jawline. (*Id.*, p144, p177, p177-78). When other staff members arrived to assist, they agreed that it would help if Herrera left, and one corrections officer, Sabrina Padilla, even told Herrera to leave. (*Id.*, p144:14-15, p146:10-13, p148-49, p196:3-11). Officers

described January as angry at Herrera, and Amandis Zamarron, the shift supervisor, claimed that January called Herrera "a bitch" and used threatening language. (TR 7/13/16, p12:3-6).

Once January was restrained, correction officers led him to the intake area where they kept him isolated in a holding cell. (TR 7/12/16, p174-75, p197-98). The cell was only about the size of a handicapped bathroom stall, and the water was turned off. (TR 7/13/16, p28:10-23). DYS policies and procedures require that juvenile residents be kept isolated for only one hour maximum. (TR 7/12/16, p142:6-10; TR 7/13/16, p13:24-35). However, January was kept in solitary confinement for at least 5 hours. (TR 7/12/16, p198:15-20).

Around 11 pm that night, two officers, Joseph Stokes and Ronaldo Lassiter, went to the holding cell where January was located. (*Id.*, p207:9-25, p221:3-9). The officers testified that when they went there, January seemed irritated, agitated, and upset that he had been in the intake area for such a long period of time. (*Id.*, p208:8-17, p221:10-16). The officers tried to calm down January by speaking to him through the closed door. (*Id.*, p208-09, p221-22). When the officers opened the door to give January his bedding, January rushed past them. (*Id.*, p210:2-8, p222:9-16). The officers then called for backup and engaged in physical force to restrain January. (*Id.*, p210-11, p222-23).

Eventually, the officers handcuffed January and stood him up. (*Id.*, p231-32). Herrera and Zamarron were standing nearby. (*Id.*, 151-52). Both claimed that January yelled obscenities in anger and spit a mixture of blood and saliva at them. (TR 7/12/16, p152:2-21; TR 7/13/16, p16:19-22).

There were no photos of Herrera and Zamarron after the incident. (TR 7/12/16, p161-62). However, Colorado Springs police arrived after the incident and took photos of the injuries that January had sustained. (TR 7/13/16, p44-46; D. EX. D. EX#1-9). The prosecution also admitted surveillance video of the two incidents. (TR 7/13/16, p18-19; P. EX#1; P. EX#2). Sound was not available for either video. (*Id.*, p32:3-5).

Mr. January's theory of defense was that he did not intentionally spit on Herrera or Zamarron. (TR 7/13/16, p72:16-17). He claimed that if there were any spit, it was because he was speaking loudly and any spray was incidental. (*Id.*). He also claimed that these charges were brought in an attempt to cover up the policy and procedure violations and to cover up the excessive force that the corrections officers used against him. (*Id.*, p62-63, p70-71). The jury acquitted Mr. January of the charge alleging Zamarron as a victim but convicted him of the charge relating to Herrera. (CF, p28-29; TR 7/13/16, p85:7-12).

SUMMARY OF THE ARGUMENT

I. Every defendant has the constitutional right to be present during all critical stages of trial. This is a personal right that cannot be waived by counsel. Here, Mr. January's right to be present was violated when the court conducted a pre-trial evidentiary hearing in his absence.

II. Every defendant has the constitutional right to a fair trial by an impartial jury, untainted by inadmissible evidence. Here, highly prejudicial, irrelevant evidence violated Mr. January's right to a fair trial.

III. Prosecutorial misconduct may violate a defendant's right to a fair trial. The prosecution may discuss facts in evidence and reasonable inferences drawn therefrom but may not lower its burden of proof or denigrate the defense. Here, the prosecution violated Mr. January's right to a fair trial by engaging in misconduct.

ARGUMENT

I. The District Court Violated Mr. January's Constitutional Right to Be Present When It Conducted a Pre-trial, Evidentiary Hearing in his Absence.

A. Standard of Review

Whether a trial court violated a defendant's right to be present is a constitutional question that this Court reviews de novo. *People v. Janis*, 2016 COA 69, ¶10, *cert granted by* 16SC515 (Feb. 21, 2017).

The constitutional right to be present is a personal right that cannot be waived by counsel. *Janis*, ¶11. Mr. January's absence made it impossible for him to object to the parties proceeding without him; thus, this error should be reviewed for constitutional harmless error. *Luu v. People*, 841 P.2d 271, 275 (Colo. 1992) (constitutional harmless error review); *People v. Cardenas*, 2015 COA 94M, ¶23 (same); *but see Janis*, ¶10 (plain error review); *People v. Garcia*, 251 P.3d 1152, 1156 (Colo. App. 2010) (same).

B. Relevant Facts

On July 11, 2016, the day before trial, this case was called to the attention of the court. (TR 7/11/16, p2:3-6). Defense counsel asked whether the court would like to continue, and the court responded that it would defer to counsel. (*Id.*, p2:9-10). The prosecutor then said, "Let's just finish January. It won't take long." (*Id.*,

p2:11-12). The court noted, "And we should be clear for our record. Mr. January is not present." (*Id.*, p2:14-15). Defense counsel also acknowledged Mr. January's absence. (*Id.*, p2:17).

The main focus of the hearing was to determine whether evidence of the 6pm incident in the residential pod was admissible or not. (*Id.*, p2-7). Defense counsel argued that it was inadmissible under CRE 404(b), but the prosecutor argued that it was admissible as res gestae. (*Id.*, p2-6). The court ultimately ruled that this evidence was admissible as res gestae. (*Id.*, p7:21-23).

During argument, defense counsel learned for the first time that there was video of the charged incident that occurred in the intake area. (*Id.*, p3:2-11). Defense counsel alerted the court that this could be a potential issue. (*Id.*, p7-8). He explained that he just now saw video of the charged incident, and that Mr. January had announced ready for trial believing that video of the charged incident did not exist. (*Id.*, p8-9). Defense counsel explained that he needed to watch the video with Mr. January to determine whether it would impact his decision to go to trial. (*Id.*, p8-10). The next morning, defense counsel said that there was nothing to report regarding the video. (TR 7/12/16, p2:10-12).

C. Law and Analysis

The Sixth Amendment guarantees defendants the right to be present at every stage of trial. U.S. Const. amends. VI, XIV; *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Janis*, ¶13. The Due Process Clause further guarantees the right for a defendant to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); U.S. Const. amends. V; XIV. The Colorado Constitution guarantees the same. Colo. Const. art. II, §§ 16, 25. In addition to the constitutional right, Crim. P. 43(a) gives a defendant the right to be present "at every stage of the trial," with few exceptions. *Janis*, ¶15. This Court has noted that the right to be present under Crim. P. 43(a) "appears to be broader than the constitutional right." *Id.* (citing *United States v. Gagnon*, 470 U.S. 522, 527-28 (1985)).

A critical stage of criminal proceedings is one where there exists more than a minimal risk that the absence of the defendant might impair his or her right to a fair trial. *Cardenas*, ¶ 22. However, due process does not require the defendant's presence when it would be useless or only slightly beneficial. *Id.*, ¶21.

A defendant can waive his right to be present, but the right to be present at all critical stages is of such constitutional magnitude that it cannot be waived for a

criminal defendant by his or her attorney. *Taylor v. Illinois*, 484 U.S. 400, 417-18, 418 n.24 (1988); *Janis*, ¶16. The right to be present is one of those rights "so inherently personal and basic that fundamental fairness of a criminal trial is called into question if they are surrendered by anyone other than the accused …" *People v. Curtis*, 681 P.2d 504, 511 (Colo. 1984); *Janis*, ¶¶16-17.

Trial courts are responsible for ascertaining whether the defendant intended to waive his right to be present, and "[f]undamental constitutional rights like the right to be present at trial require procedural safeguards." *Janis*, ¶17. In furtherance of that responsibility, trial courts must determine on the record whether there has been a voluntary, knowing, and intelligent waiver of the right to be present. *Id.*; *see also Curtis*, 681 P.2d at 514 (regarding the right to testify). They may not presume that a defendant has acquiesced to the loss of a fundamental constitutional right, and must indulge every reasonable presumption against waiver. *Id.*

The July 11 hearing was a critical stage of trial, and Mr. January was not present for any of it. (TR 7/11/16, p2:14-17). This hearing was a critical stage because the parties addressed a very fact-specific argument to determine whether the incident in the residential area was impermissible CRE 404(b) evidence or admissible as res gestae evidence. (*Id.*, p2-7). Mr. January could have helped defend and respond to the prosecution's allegations regarding the facts of the

incident. Additionally, it was during this hearing that defense counsel learned that there was surveillance video of the charged incident. (*Id.*, p7-10). Mr. January should have been present to witness how this was discovered. Instead, defense counsel alerted the court that he needed to discuss this with Mr. January to determine how this video could affect his decision to go to trial. (*Id.*, p8-10). Thus, there was more than a minimal risk that Mr. January's absence impaired his right to a fair trial. *Cardenas*, ¶ 22.

Here, there are no circumstances that would indicate that Mr. January waived his right to be present. First, the trial court did not determine whether Mr. January knowingly, intelligently, and voluntarily waived his right to be present. (*see generally* TR 7/11/16); *Janis*, ¶¶16-18. Second, the other circumstances in which a defendant can waive his right to be present do not apply here. *Janis*, ¶¶19-20 (a defendant can waive his right to be present either by not attending a hearing while not in custody or by persisting in disruptive behavior after being warned by the court). Mr. January was in custody, and there is no evidence that he engaged in any disruptive behavior. (CF, p3; *see generally* TR 7/11/16). Indeed, there is no evidence on why Mr. January was not present. (*See generally* TR 7/11/16). Therefore, by conducting the July 11 hearing in Mr. January's absence without a knowing, intelligent, and voluntary waiver, the trial court violated Mr. January's

right to be present. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25; Crim. P. 43(a); *Janis, supra.*

Because the right to be present is a personal right that cannot be waived by counsel, and because Mr. January's absence made it impossible for him to object, this error should be reviewed for constitutional harmless error. *Luu*, 841 P.2d at 274-75; *Cardenas*, ¶23. Under this standard, reversal is required unless the State proves the error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012).

Binding Colorado Supreme Court precedent has explicitly held that constitutional harmless error review applies even when defense counsel does not object to proceeding in defendant's absence. *Luu*, 841 P.2d at 274-75. Accordingly, this Court should review this error for constitutional harmless error. *Id.*; *see also Cardenas*, ¶¶23-24 (reviewing defendant's absence for constitutional harmless error when there is no objection); *but see Janis*, ¶10; *Garcia*, 251 P.3d at 1156.

Here, the State cannot prove this error harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *Hagos*, 288 P.3d at 119. The July 11 hearing focused around a very fact-specific argument on whether evidence should be admitted or excluded. If Mr. January had been present, he could have assisted his counsel in

rebutting and responding the prosecution's allegations regarding what happened and what was said. Additionally, it was during this hearing that defense counsel learned for the first time that there was video surveillance of the charged incident. Mr. January should have been present to learn about the video as well. As defense counsel noted, the late discovery of the video could have affected Mr. January's decision to go to trial. Therefore, under these circumstances, this Court must reverse.

II. Repeated Improper Evidence Violated Due Process and the Rules of Evidence.

A. Standard of Review

Courts review de novo a due process violation. *United States v. Nickl*, 427 F.3d 1286, 1296 (10th Cir. 2005); *Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008) (applying a totality of the circumstances test to a due process violation). Alternatively, this Court reviews evidentiary issues for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). Mr. January did not object so review is for plain error.

B. Law and Analysis

Every defendant has the constitutional right to a fair trial by an impartial jury, untainted by inadmissible evidence. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 25; *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Bloom*, 185

P.3d at 805. Relevant evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable. CRE 401. Irrelevant evidence is not admissible. CRE 402. Even if evidence is relevant, it should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. CRE 403. In this case, repeated, irrelevant and unduly prejudicial evidence violated Mr. January's right to a fair trial.

After Herrera and Zamarron both testified that Mr. January spit blood and saliva at them, they both suggested that Mr. January attempted to infect them with his blood. The prosecutor asked Mr. Herrera:

> Q. Did -- after you were escorted out of the unit, after you were spit on with both blood and saliva, did you have any particular concern about the fact that it hit your mouth?
>
> A. Yes. Because I -- during the original scuffle, the physical response confrontation, I had minor cuts upon my lip or in my mouth. *Once I identified that it was blood, that's when it became a concern. And I scheduled appointments with the comp doctor to see if I could get any HIV testing*, things such as that.

(TR 7/12/16, p154:11-18) (emphasis added).

Zamarron testified:

> And when they stood Mr. Javarray up, he saw Herrera, who was standing right next to me, and said, "You're a fucking bitch, I'm gonna fuck you up," and spit on us

> intentionally. I had blood spat into my eyes. *And now I am on blood-borne pathogenic –*

(TR 7/13/16, p16:19-23) (emphasis added).

This testimony was irrelevant and unduly prejudicial. CRE 401-403. It was irrelevant because it did not relate to any fact of consequence. CRE 401-402. The applicable second degree assault statute proscribes exposing a correctional facility employee to blood or saliva when the defendant has the "intent to infect, injure, harm, harass, annoy, threaten, or alarm." §18-3-203(1)(f.5), C.R.S. While the statute does prohibit the intent to infect, the prosecutor alleged that Mr. January spit out of anger and did this to "harm, harass, [or] annoy." (TR 7/13/16, p57, 59-60). At trial, the prosecutor never suggested that Mr. January spit in order to infect. In fact, before trial, the prosecutor conceded that there was no allegation Mr. January was trying to infect the corrections officers with his bodily fluid. (TR 6/13/16, p2:20-24). Therefore, this evidence was irrelevant. CRE 401-402.

This evidence was also unfairly prejudicial. CRE 403. Unfair prejudice occurs under CRE 403 if the evidence has "an undue tendency to suggest a decision [made] on an improper basis commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror." *People v. District Court*, 785 P.2d 141, 147 (Colo. 1990). In a civil rights lawsuit, an Alabama District Court recounted the history of HIV and AIDS in the United States as well

as the social stigma surrounding those diseases. *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1276-78 (M.D. Ala. 2012). It explained that:

> [A] relentless stigma adheres to HIV….HIV is most frequently found among historically marginalized populations….Because HIV is also more common among minorities and the poor, the stigma attached to HIV deeply implicates race and class prejudice, as well as homophobia.

Id. at 1278. Here, Herrera testified that he needed to get "HIV testing," and Zamarron explained that she is on a "blood-borne pathogenic." (TR 7/12/16, p154:11-18; TR 7/13/16, p16:19-23). Because HIV carries such a significant social stigma, the unduly prejudicial effect of this testimony outweighed any marginal probative value. CRE 403.

This testimony amounts to reversible plain error. Plain error is obvious and substantial, and reversal is required if the error so undermined the fundamental fairness of trial so as to cast serious doubt on the reliability of the judgment of conviction. *Hagos*, 288 P.3d at 120. This error was obvious because before trial, the court clarified and the prosecution agreed that there was not any allegation that Mr. January intended to infect anyone. (TR 6/13/16, p2:20-24). This error was substantial because it affected Mr. January's constitutional right to a fair trial by an impartial jury, untainted by inadmissible evidence. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 25; *Payne*, 501 U.S. at 825; *Bloom*, 185 P.3d at

805. Finally, this error undermined fundamental fairness and casts serious doubt on the jury's conviction. This type of evidence was extremely prejudicial. Given the prevalent and "relentless stigma" associated with HIV, *Henderson*, 913 F.Supp.2d at 1277, the jury likely misused this evidence to convict. Thus, this Court must reverse.

III. The Prosecutor's Repeated Impermissible Comments Violated Due Process.

A. Standard of Review

Courts review de novo whether prosecutorial misconduct violates an accused's due process rights. *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974) (reviewing whether the prosecutor's "remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights."); *Fero v. Kerby*, 39 F.3d 1462, 1473 (10th Cir. 1994). Because Mr. January did not object, review is for plain error. *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010).

B. Law and Analysis

A prosecutor, while free to strike "hard blows," is not at liberty to strike "foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935); *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). "The prosecutor's duty to advocate for justice within permissible means has constitutional underpinnings." *Domingo-Gomez*, 125 P.3d at 1048 (explaining this duty stems from the "right to a trial by a

fair and impartial jury under the Sixth Amendment to the United States Constitution and Article II, sections 16 and 23 of the Colorado Constitution."); *see also DeChristoforo*, 416 U.S. at 643. "A jury that has been misled by improper argument cannot be considered impartial." *Domingo-Gomez*, 125 P.3d at 1048.

"Prosecutors have a higher ethical responsibility than other lawyers because of their dual role as both the sovereign's representative in the courtroom and as advocates for justice." *Domingo-Gomez*, 125 P.3d at 1049. "Because the prosecutor represents the State and the People of Colorado, their 'argument is likely to have significant persuasive force with the jury."' *Id.* (quoting ABA Standards § 3-5.8, cmt. at § 3.88 (2d ed. 1980)). In closing argument, a prosecutor may discuss facts in evidence and reasonable inferences drawn therefrom but may not misstate the law, lower the burden of proof or denigrate the defense. *Id.* When a prosecutor's improper arguments mislead the jury and undermine the defendant's right to a fair trial, reversal is required. *Domingo-Gomez*, 125 P.3d at 1048; *Wend*, 235 P.3d at 1097-98.

1. Improper Burden of Proof Analogy

An accused is presumed innocent, and due process of law requires the prosecution to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amends. V, XIV; Colo. Const. art. II §25; *Jackson v. Virginia*,

443 U.S. 307, 316 (1979); *People v. Hardin*, 607 P.2d 1291, 1294 (Colo. 1980). Proof beyond a reasonable doubt has a technical definition, and the United States Supreme Court has disapproved attempts to explain it. COLJI-Crim. E:03 (2008, 2014-2017) (definition of proof beyond a reasonable doubt); *Holland v. United States*, 348 U.S. 121, 140 (1954) (‘“Attempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury….’”) (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880)).

During voir dire, the prosecutor told the jury that she wanted to speak with them about her burden of proof. (TR 7/12/16, p71:17-19). She explained that her burden is not beyond all doubt but only proof beyond a reasonable doubt. (*Id.*, p72:1-2). She then compared her burden of proof with buying a home. (*Id.*, p72-73). She picked out a juror who was a Denver Broncos fan and asked him what factors he considered when buying a new home. (*Id.*). The prosecutor then asked the juror whether he would care if the home was owned by a Raiders fan, and he answered that he would. (*Id.*, p73:4-6). The prosecutor then asked whether he would care if the inspection revealed a crack in the foundation, and he answered that he would. (*Id.*, p73:7-11). The prosecutor then analogized these circumstances to proof beyond a reasonable doubt:

> Okay. And that's kind of how reasonable doubt is. You know, something like a Raiders' fan owning your house, as much as you may not want to buy from a Raiders' fan …
>
> That doesn't cause you to hesitate, the former ownership, but what does is a crack in the foundation, and that's how that works. If there's a crack in the case that's presented to you, then you have a reasonable doubt; but if it's something as superfluous as, you know, a former owner, then that's not reasonable doubt.

(*Id.*, p73:12-22).

This analogy was improper because it was a misstatement of law that lowered the prosecution's burden of proof. *People v. Krueger*, 296 P.3d 294, 305 (Colo. App. 2012) (a prosecutor commits misconduct in voir dire when she misstates the law).

Numerous jurisdictions have held that a court commits reversible error by analogizing the reasonable doubt standard to everyday decision-making. In doing so, they have explained that the level of attention given to everyday decisions is fundamentally different than that required in criminal cases. *People v. Johnson*, 9 Cal. Rptr. 3d 781, 783 (Cal. Ct. App. 2004) (reversing because court's comparison of reasonable doubt to taking vacations or getting on airplanes lowered the prosecution's burden of proof). Equating the beyond a reasonable doubt standard to everyday decisions tends to "trivialize the awesome duty of the jury to

determine whether the defendant's guilt was proved beyond a reasonable doubt." *Commonwealth v. Ferreira*, 364 N.E.2d 1264, 1272 (Mass. 1977) (reversing because the court's comparison of jury's function with "important" decisions, such as getting married, buying a house, or moving, lowered the prosecution's burden of proof). Such analogies require reversal because: "The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so." *Id.* at 1273.

Similarly, prosecutors are also prohibited from analogizing proof beyond a reasonable doubt to everyday decisions for the same reasons. *See, e.g.*, *State v. Lindsey*, 326 P.3d 125, 132 (Wash. 2014) ("When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role.") (internal quotation omitted). In *People v. Doubleday*, this Court held that the prosecutor's comparison of reasonable doubt to buying a house was a misstatement of law, although not reversible plain error under the circumstances. 2012COA141, ¶¶61-62, *rev'd on other grounds by Doubleday v. People*, 364 P.3d 193 (Colo. 2016).

Other jurisdictions have also prohibited prosecutors from analogizing the reasonable doubt standard to everyday decision making. *Lindsey*, 326 P.3d at 132

(Wash. 2014) (prosecutor's comparison of using a crosswalk at an intersection to reasonable doubt was improper); *People v. Nguyen*, 40 Cal. App. 4th 28, 36 (Cal. Ct. App. 1995) ("We strongly disapprove of arguments suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry."); *Holmes v. State*, 972 P.2d 337, 343 (Nev. 1998) ("prosecutorial commentary analogizing reasonable doubt with major life decisions such as buying a house or changing jobs is improper because these decisions involve elements of uncertainty and risk-taking and are wholly unlike the kinds of decisions that jurors must make in criminal trials."). Therefore, the prosecutor's comparison of reasonable doubt to buying a home was improper.

2. Denigrating Defense

During rebuttal argument, the prosecutor repeatedly denigrated the defense and improperly responded to Mr. January's closing argument by claiming:

> These are mere distractions. You have children, many of you. Many of you work with children. Children don't want you to see what their wrongs are, so they distract you. That's what's going on. Defense is trying to distract you from what happened in that second video.

(TR 7/13/16, p74:18-22). The prosecution then dismissed Mr. January's claim that the corrections officers used excessive force against him:

> Defense wants you to talk about the injuries that were sustained to the defendant. Guess whose fault that is. The

> defendant's. You saw him in that video. He could have complied just like all those other residents and inmates, facing the wall sitting down. What did he do? He flipped a table and charged. Defense rolls you have to get one sucker punch in before you can reasonably react. That's not the law. It's a mere distraction. It's a cloud of smoke they're trying to sell you.

(*Id.*, p75:7-14).

These comments improperly denigrated the defense. *People v. Garcia*, 296 P.3d 285, 288 (Colo. App. 2012) ("A trial is not a referendum on the conduct of the attorneys, and disparagement of opposing counsel is improper."). The prosecutor infantilized the defense by comparing it to a child's diversionary tactics. (TR 7/13/16, p74:18-22). Further, the prosecutor used inflammatory language to discredit the defense by calling it a "mere distraction" and a "cloud of smoke that they're trying to sell you." (*Id.*, p74-75). These comments were not a fair response to Mr. January's closing argument. *People v. Serra*, 2015 COA 130, ¶ 89 ("References to a defendant's or defense counsel's diversionary tactics … are improper when used as a means to denigrate the defendant or defense counsel; they are not improper if, viewed in context, they are attempts to draw the jury's focus to relevant evidence."). Mr. January's closing argument never suggested what the prosecutor claimed. Instead, defense counsel even acknowledged that Mr. January should not have flipped the desk. (TR 7/13/16, p64-65).

In *People v. Jones*, 832 P.2d 1036, 1038 (Colo. App. 1991), this Court held that the prosecutor's remarks which were directed toward defense counsel and implied that the defense was not asserted in good faith were "most improper." The prosecutor referred to the theory of defense as "insulting" and called the defense's credibility challenge of a prosecution witness "cheap innuendos." *Id.* This Court held that "[t]hese remarks were made for the obvious purpose of denigrating defense counsel and, as such, constitute professional misconduct." *Id.*

Similarly here, the prosecutor suggested that the defense was not asserted in good faith, and her comments were made to denigrate the defense. *People v. Coria*, 937 P.2d 386, 391 (Colo. 1997) (prosecutor's closing argument referring to "Theatrics 101," "smoke and mirrors," and "diversionary tactics" were improper); *Serra*, ¶89 (prosecutor's arguments that suggested that defendant and defense counsel were trying to distract the jury were improper); *People v. Manier*, 197 P.3d 254, 258 (Colo. App. 2008) (prosecutor's comments referring to "common defense tactics" were improper). These comments denigrated the defense and improperly commented on Mr. January's right to present a defense, which violated those rights and his right to a fair trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 23, 25.

3. These errors require reversal.

Each instance of prosecutorial misconduct warrants reversal alone because each was obvious, substantial, and undermined fundamental fairness so as to cast serious doubt on the jury's convictions. *Wend*, 235 P.3d at 1097. The prosecutor's arguments were all obvious in violation of well-settled principles of law. *Doubleday*; *Jones; Coria; Serra, supra.* Further, the misconduct was substantial because it directly offended Mr. January's constitutional rights to proof beyond a reasonable doubt, to present a defense, and to a fair trial by an impartial jury. U.S. Const. amends. V, XIV; Colo. Const. art. II §25; *Jackson*, 443 U.S. at 316; *Hardin*, 607 P.2d at 1294; *Holmes*, 547 U.S. at 324; *Krutsinger v. People*, 219 P.3d 1054, 1061 (Colo. 2009); *DeChristoforo*, 416 U.S. at 643; *Domingo-Gomez*, 125 P.3d at 1048. These comments diverted the jury's attention from the evidence in the case, which was not overwhelming. There was no photo of Herrera after the alleged spitting, and the video does not clearly show that there was any spit. The video also does not show that Herrera or Zamarron reacted in a way that would suggest they were spit on. Even though the jury acquitted Mr. January of one charge, this does not foreclose the possibility that the prosecutorial misconduct played a role in its conviction. *People v. Robinson*, 2017 COA 128M, ¶31 (even though the jury acquitted of several charges, prosecutorial misconduct still required reversal

because it may have influenced the verdict when the evidence was not overwhelming).

The timing of the prosecutor's misconduct exacerbated the harm. The prosecutor's improper analogy on the burden of proof was on the first day of trial. *Robinson*, ¶36 ("principles of primacy may cause statements and arguments made early in a trial to have a disproportionately influential weight."). Additionally, the prosecutor injected the improper remarks denigrating the defense during rebuttal argument, which is the last thing that a juror hears before deliberating. *Domingo-Gomez*, 125 P.3d at 788. Prosecutorial misconduct during rebuttal is particularly troubling because the improper remarks are "foremost" in jurors' thoughts when they deliberate. *Id.* Finally, the cumulative effect of the prosecutorial misconduct warrants reversal. *Harris v. People*, 888 P.2d 259, 268 (Colo. 1995); *Wend*, 743 P.2d at 1098.

CONCLUSION

Based on the foregoing reasons and authorities, Mr. January respectfully requests that this Court reverse and remand for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender

M. SHELBY DEENEY, #46441
Deputy State Public Defender
Attorneys for Javarray Charles January
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on February 15, 2018, 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.